DURGA DAS BASU

THE LAW OF TORTS

KAMAL LAW HOUSE
CALCUTTA

THE LAW OF TORTS

(INCLUDING CARRIERS AND RAILWAYS ACTS)

NUB Library
Northern University, Bangladesh

Accession No.	A	27714
Accessing Date.		
Call No.		

DR. DURGA DAS BASU

Saraswati, Vidyavaridhi, M.A., LL.D., D.Litt.
Honorary Professor, Banaras Hindu University,
Retired Judge, High Court, Calcutta
Formerly Member, Law Commission of India,
Tagore Law Professor, Asutosh Lecturer
Dean, Faculty of Law, Calcutta University

24 SEP 2004

KAMAL LAW HOUSE
8/2, K.S. Roy Road
Calcutta 700 001
Phone : 220 8941

© KAMAL KUMAR LODHA

Rs. 110.00

Eleventh Edition, 1995
***Reprinted* 2004**

Published by
Kamal Kumar Lodha
Kamal Law House
8/2, K.S. Roy Road
Calcutta 700 001

Printed by
Print Pack Offset
15, Swinhoe Lane
Calcutta 700 042

REF
346.03
B3271
1995

Preface to the Tenth Edition

Since the publication of the previous Edition, the Bar Council of India has included in the LL.B. Syllabus the Carriers Act, 1865 and the Railways Act, 1890. Since these Indian enactments have replaced the English common law relating to these subjects with substantial amendments, pages 171 to 183 have been entirely rewritten, with reference to the leading Privy Council and Supreme Court decisions. Amendments to the Railways Act in 1961 have further revolutionised the law, and the Supreme Court cases referred to at pp. 176 and 177 will be of special importance to the students.

Chapter 17, relating to The Borderland of Tort, has also been revised, with the addition of a section on 'Emergent and Doubtful Torts' (pp. 212–213), including Invasion of Privacy, Abuse of statutory administrative power and Breach of confidence upon which judicial attention has of late been focussed in all lands, so that the Indian student can hardly afford to be oblivious of these developments.

It is hoped that this work will continue to receive welcome from teachers of law, throughout India, because it is so lucid and labour-saving in its presentation of a rather unsystematic and undefined branch of law.

THE AUTHOR

238, Dum Dum Park
Calcutta–700055
India.
July, 1982

Preface to the Ninth Edition

Thanks are due to my readers for the running out of the 8th edition in such a short compass of time.

This book aims at presenting a systematic exposition of the salient principles underlying the law of torts.

As in previous editions the method adopted is primarily inductive. Scrupulous attention has been paid towards a fuller exposition of the general rules deduced from particular groups of cases, so that the reader may have a connected and comprehensive view of the whole subject, and the cases themselves have been used only as illustrations of the rules deduced. In this treatment, it is hoped, much of the apparent conflict between one case and another of the same group will disappear. Further, while I have determinedly avoided an indiscriminate reference to cases, I have attempted to give a complete treatment of those important decisions of the highest authority which are indispensable for the purpose in view.

In the present edition, the leading decisions in England and India have been incorporated as will be illustrated by the House of Lords decision in *Anns* vs. *London Borough*, (1977) 2 All E.R. 492 (H.L.), at pp. 153, 175 and 178; the Privy Council decision in *Bhoomi Das* vs. *Port of Singapore*, (1978) 1 All E.R. 956 (P.C.), at p. 29; and the Supreme Court cases in *Pushpa Bai* vs. *Ranjit G. & P. Co.*, AIR 1977 S.C. 1735, at pp. 25 and 26; the *State Bank of India* vs. *Shyama*, AIR 1978 S.C. 1263, at p. 33 of the book.

238, Dum Dum Park
Calcutta-700055
India
January, 1979

THE AUTHOR

Contents

		PAGE
Table of Cases		IX
	BOOK I	
	GENERAL PRINCIPLES	
1.	Nature of Torts	3
2.	General Principles of Liability	9
3.	Vicarious Liability	23
4.	Personal Disabilities	41
5.	General Exceptions to Liability	51
6.	Remedies	62
	BOOK II	
	SPECIFIC TORTS	
7.	Wrongs Affecting Personal Safety and Freedom	75
8.	Wrongs Affecting Domestic Relations	86
9.	Defamation	89
10.	Wrongs of Malice and Fraud	111
11.	Wrongs to Immovable Property	128
12.	Wrongs to Movable Property	134
13.	Nuisance	141
14.	Negligence	152
15.	Breaches of Statutory Duty	184
16.	Breaches of Duties of Insuring Safety	189
	CONCLUSION	
17.	The Borderland of Tort	209
Index		214

Table of Cases

A.G. v. *Cory Bros.*, 192
A.G. for N.S.W. v. *Perpetual Trustee Co.*, 86
Abrath v. *N.E. Ry. Co.*, 114
Achal Ram v. *Kazim Hosain*, 117
Acton v. *Blundell*, 11
Adam v. *Ward*, 100
Adamson v. *Jarvis*, 68, 69
Addie & Sons v. *Dumbreck*, 206
Adler v. *Dickson*, 210, 211
Admiralty Commissioner v. *North of Scotland*, 161
Admiralty Commissioner v. *Volute*, 161
Admiralty Commissioners v. *Amerika*, 86
Advocate Co. v. *Leslie*, 94
Akerhielm v. *De Mare*, 125
Akkuliya v. *Venkataswamy*, 112
Alexander v. *N.E. Ry. Co.*, 96
Alford v. *National Coal Bd.*, 187
Allen v. *Flood*, 13, 119, 120, 121
Amin v. *Jogendra*, 111, 112, 113
Anderson v. *Gorrie*, 53
Andrews v. *Mitchell*, 54
Anns v. *London Borough*, 153, 185, 188
Anowar Hossain v. *Ajoy Kumar*, 53
Argyll v. *Argyll*, 211
Armory v. *Delamirie*, 135
Ashby v. *White*, 11
Asher v. *Whitlock*, 130
Assam Roadways v. *National Ins. Co.*, 172
Austin v. *Dowling*, 116
Austin v. *G.W. Ry. Co.*, 180
Australian Consolidated Press v. *Uren*, 109

B

Bagram v. *Khettranath*, 147
Bainbridge v. *Postmaster General*, 29, 47,
Bajrang v. *Sitaram*, 140
Balbhaddar v. *Badri Shah*, 112, 115
Ballard v. *North Br. Ry. Co.*, 167
Ballett v. *Mingay*, 48
Bank Voor Handel v. *Administrator*, 44
Barkway v. *S.W. Transport*, 167, 180
Barwick v. *English Joint Stock Bank*, 32
Basanta v. *Ram*, 69
Bayley v. *Manchester Ry. Co.*, 27, 31
Beard v. *L.G. Omnibus Co.*, 31
Behrens v. *Bertram Mills Circus*, 77
Bellamy v. *Wells*, 148
Benham v. *Gambling*, 79, 80
Benjamin v. *Storr*, 142
Bernstein v. *Skyways*, 212
Best v. *Samuel Fox*, 88
Betts v. *Gibbins*, 68
Bhagwat v. *Debi Dayal*, 117
Bhoomidas v. *Port of Singapore*, 29
Bhupendra v. *Chandramani*, 70
Bird v. *Holbrook*, 207
Black v. *Christchurch Finance Co.*, 199
Black v. *Fife Coal Co.*, 185
Blyth v. *Birmingham Waterworks Co.*, 14, 154
Bolton v. *Stone*, 15, 157
Bonnan v. *Imperial Tobacco Co.*, 113
Bonnington Castings v. *Wardlaw*, 187
Bonsor v. *Musicians' Union*, 54
Bourhill v. *Young*, 15, 78
Bowater v. *Rowley Borough*, 60, 170
Bower v. *Peate*, 34
Boy Andrews v. *St. Rognvald*, 161
Braddock v. *Bevins*, 102
Bradlaugh v. *Newdegate*, 117
Brajasundar v. *Bamdeb*, 116
Briess v. *Woolley*, 126
British Airways v. *Taylor*, 127
British Columbia Electric Ry. Co. v. *Loach*, 160
British Ry. Board v. *Harrington*, 206
British Transport Commr. v. *Gourley*, 65
Brocklebank v. *Noor Ahmode*, 37
Broom v. *Morgan*, 36, 42
Broome v. *Cassell*, 109
Brown v. *Hawkes*, 115
Brown v. *Robins*, 145
Browm v. *Rolls Royce Ltd.*, 165
Bryanston v. *de Vries*, 95
Bucke v. *Holmes*, 197
Burgess v. *Gray*, 34
Burmah Oil Co. v. *Lord Advocate*, 55
Burnard v. *Haggis*, 48
Buron v. *Denman*, 51
Burroughes v. *Bayne*, 137

Butterfield v. *Forrester*, 158
Bux v. *Slough Metals*, 188
Byrne v. *Boadle*, 166

C

Canadian Pacific Ry. v. *Lockhort*, 26, 30
Canadian Pacific Ry. v. *Parke*, 56
Candler v. *Crane*, 210
Capital & Counties Bank v. *Henty*, 92, 93
Carmarthenshire C.C. v. *Lewis*, 157
Carroll v. *Andrew Barclay & Sons*, 186
Carstairs v. *Taylor*, 193
Cassidy v. *Daily Mirror*, 89
Cassidy v. *Minister of Health*, 28, 33, 170
Caswell v. *Powell*, 155, 187
Cavanagh v. *Ulster Weaving Co.*, 167
Century Insurance Co. v. *N.I. Road Board*, 30
Chasemore v. *Richards*, 10
Chesworth v. *Farrar*, 210
Chic Fashions v. *Jones*, 133
Chin Keow v. *Govt. of Malaysia*, 156
Christie v. *Davies*, 148
Christie v. *Leachinsky*, 84
Church of Scientology v. *Johnson-Smith*, 103
Citizens' Life Assurance v. *Brown*, 49
City of London Brewery Co. v. *Tenant*, 147
Cleary v. *Booth*, 54
Cockle v. *S.E. Ry. Co.*, 165
Cole v. *Turner*, 76
Collingwood v. *Home & Colonial Stores*, 199
Collins v. *Hertfordshire C.C.*, 28
Colls v. *Home & Colonial Stores*, 145, 146
Commr. for Rys. v. *Cardy.*, 208
Consolidated Co. v. *Curtis*, 57
Constantine v. *Imperial Hotels*, 210
Conway v. *George Wimpey*, 31
Coak v. *Alexander*, 103
Cooke v. *Midland G W. Ry. of Ireland*, 204, 206
Cooper v. *Railway Executive*, 186, 187
Corea v. *Peiris*, 114
Cox v. *Burbidge*, 194, 195
Creed v. *John*, 207
Cresswell v. *Sirl*, 61
Crofter v. *Veitch*, 121, 123
Cutler v. *Wandsworth Stadium*, 185

D

D. & L. Caterers v. *D'Anjou*, 43. 107
Dakhyl v. *Labouchere*, 98
Dalton v. *Angus*, 144
David v. *Abdul Cader*, 213
Davies v. *Davies*, 196
Davies v. *Mann*, 159, 160, 161
Davies v. *New Merton Board Mills*, 168, 170. 209
Davies v. *Powell*, 80
Dawkins v. *Antrobus*, 54
Dehra Dun M.E.T. Co v. *Hansra*, 70
Derry v. *Derek*, 57, 124
Devi Dial v. *Crown*, 107
Dharni v. *Chandra*, 69
Dinbai v. *Farukh*, 81
Dingle v. *Associated Newspapers*, 103
Dixon v. *Bell*, 199
Dixon v. *Holden*, 89
Dominion Natural Gas Co. v. *Collins*, 198
Donoghue v. *Stevenson*, 14, 152, 154, 198, 200, 210
Donovon v. *Union Cartage Co.*, 19, 155
Doughty v. *Turner Manufacturing Co.*, 18
Dulieu v. *White*, 77
Dunlop Co. v. *Dunlop*, 212
Dutton v. *Bognor Building Co.*, 201
Dymond v. *Pearce*, 141

E

I. & B. Steamship Co. v. *Mishrimal*, 125
E.I. Co. v. *Syed Ally*, 52
E.I. Ry. v. *Kalidas*, 181
Eisson v. *London & N.E. Ry.*, 166
East Suffolk Catchment Bd. v. *Kent*, 184
Eastwood v. *Holmes*, 94
Edwards v. *Mallan*, 209
Edwards v. *Railway Executive*, 207
Elias v. *Pasmore*, 133
Elliot v. *Joicey*, 42,
Ellis v. *Fullham Borough Council*, 204
Ellis v. *Loftus Iron Co*, 128, 194, 195
Emerald Construction v. *Lowthiar*, 119
Emmens v. *Pottle*, 95
Englehart v. *Farrant & Co.*, 30
Entick v. *Carrington*, 52, 129
Ex. parte Wright, 54

F

Fairline Shipping Corp. v. *Adamson*, 211
Fairman v. *Perpetual Investment Building Society*, 204
Fardon v. *Harcourt-Rivington*, 56, 154, 157
Farrant v. *Barnes*, 199
Feather v. *The Queen*, 43
Finnerty v. *Tipper*, 107
Fish v. *Kapur*, 210
Fisher v. *Ruislip U.D.C.*, 188
Fletcher v. *Rylands*, 34, 190
Fouldes v. *Willoughby*, 137
Fowler v. *Lanning*, 75

Francis v. *Cockrell*, 203
Fraser v. *Evans*, 213
Froom v. *Butcher*, 158, 163

G

G.S.N. Co. v. *Joykristo*, 173
G.T. Ry. Co. v. *Robinson*, 181
Gautret v. *Egerton*, 204
Gaya Prasad v. *Bhagat Singh*, 112
Geddis v. *Proprietors*, 55
Gee v. *Metropolitan Co.*, 166
General Cleaning Contractors v. *Christmas*, 159, 168, 169, 170
George v. *Skivington*, 200
Gilbert v. *Trinity House*, 46
Gill v. *Donald*, 188
Girish Chandra v. *Jatadhari*, 91
Glasgow Corpn. v. *Muir*, 157
Glasgow Corpn. v. *Taylor*, 155, 163, 205
Glinski v. *McIver*, 57, 114
Gobald Motor Service Co. v. *Veluswami*, 82
Gold v. *Essex County Council*, 33
Goldman v. *Hargrave*, 151, 199
Graham v. *Peat*, 130
Grand Trunk Ry. Co. v. *Barnett*, 202
Grant v. *Australian Knitting Mills*, 14, 200, 209, 210
Grant v. *National Coal Bd.*, 186, 187
Great Central Ry. v *Hewlett*, 185
Greaves v. *Baynham*, 156
Greenock Corporation v. *Caledonian Ry. Co.*, 192, 193
Gregory v. *Piper*, 30

H

Hadley v. *Baxendale*, 20
Hale v. *Jennings*, 190
Haley v. *London Electricity Bd.*, 155
Hall v. *Booklands Auto Racing Club*, 58
Hambrook v. *Stokes*, 77, 78
Hammersmith Ry. Co. v. *Brand*, 55
Hammond v. *Howell*, 52
Hamps v. *Darby*, 61
Harnett v. *Bond*, 19
Harris v. *Brisco*, 117
Harrison v. *National Coal Board*, 187
Harrison v. *Rutland*, 129
Hay v. *Young*, 154, 157
Haynes v. *Harwood*, 19
Haynes v. *Qualcast*, 188
Heaven v. *Pender*, 152
Hedley v. *Heller*, 9, 153
Heranger v. *Diamond Co.*, 159
Herniman v. *Smith*, 57, 114
Hickman v. *Maisey*, 129, 131
Hicks v. *Falkner*, 114
Hobbs v. *Tinling*, 107
Hogan v. *Hartly Collieries Ltd.*, 18
Hollins v. *Fowler*, 136, 138
Holmes v. *Mather*, 56, 75
Home Office v. *Dorset Yacht Co.*, 185, 201
Horrocks v. *Lowe*, 104
Horsfall v. *Thomas*, 126
Houlden v. *Smith*, 53
Hubbard v. *Pitt*, 212
Hughes v. *Lord Advocate*, 18, 20, 157
Hulton & Co. v. *Jones*, 89, 93
Hunt v. *Star Newspaper Co.*, 97
Hurst v. *Picture Theatres Ltd.*, 131

I

I.C.I. v. *Shatwell*, 27, 60
I.G.N.R. Co. v. *Dekhari Tea Co.*, 173
Ibrahim v. *Ahmed*, 87
Imperial Tobacco Co. v. *Bonnan*, 127
In re Madhava Singh, 52
Indermaur v. *Dames*, 202, 203
Inland Revenue Commrs. v. *Hambrook*, 87
Irrawady Flotilla v. *Bhagwandas*, 171

J

Jacobs v. *L.C.C.*, 149, 203
Jefferson v. *Derbyshire Farmers Ltd.*, 30
Jeffries v. *G.W.R. Co.*, 130, 136
Jennings v. *Rundall*, 48
Toon Lewis v. *Tims*, 85
Johnson v. *Pye*, 48
Johnstone v. *Pedlar*, 51
Joliffe v *Willment & Co.*, 34
Jones v. *Festinog Ry. Co.*, 199
Jones v. *Powell*, 149
Jones v. *Scullard*, 29
Jordesan v. *Sutton*, 144

K

Karanjia v. *Thackersey*, 109
Kasturi Lal v. *State of M.P.*, 45
Kemsley v. *Foot*, 98
Keppel Bus Co. v. *Salad Bin Ahmad*, 27
Keshub v. *Maniruddin*, 4
Khan v. *Ahmed*, 104
Khusalrao v. *Bapurao*, 69
Khusro v. *Guzder*, 67
Kilgollan v. *Cooke & Co.*, 186, 188
Kimpton v. *Steel Co.*, 169
King v. *Phillips*, 78
Kirk v. *Gregory*, 134

Kissori v. *Harsukh*, 140
Kleniwort Sons & Co. v. *Comptoir National*, 138
Knupffer v. *London Express Newspaper*, 94
Krishna Behari v. *Corporation of Calcutta*, 70
Kruse v. *Johnson*, 212

L

Lakshminarayan v. *Govt. af Hyderabad*, 39
Langridge v. *Levy*, 125, 211
Latimer v. *A.E.C. Ltd.*, 154
Leach & Co. v. *Skinner*, 138
Le Lievre v *Gould*, 14
Lee v. *Riley*, 195
Lemmon v. *Webb*, 71
Lennards, Carrying Co. v. *Asiatic Petroleum Co.*, 49
Leslie v. *Sheill* 49
Letang v. *Cooper*, 75
Letang v. *Ottawa Electric Co.*, 60
Lewis v. *Daily Telegraph*, 93, 106, 109
Ley v. *Hamilton*, 106
Liesbosch v. *Edison*, 19
Limpus v. *London General Omnibus Co.*, 32
Lindsey County Council v. *Marshall*, 34
Lister v. *Romford Ice Co.*, 24, 209
Lloyd v. *Grace Smith*, 30, 32
Lochgelly Iron Co. v. *M'Mullan*, 24, 187
London Association v. *Greenlands Ltd.*, 100
London County Council v. *Cattermoles*, 32
London Graving Co. v. *Horton*, 168, 202
London Passengers Transport Board v. *Upson*, 184
Loudon v. *Ryder*, 80
Ludditt v. *Ginger Airways Ltd.*, 181
Lumley v. *Gye*, 118
Lynch v. *Knight*, 77, 108
Lynch v. *Nurdin*, 163

M

Macintosh v. *Dun*, 100
Madhoosoodan v. *Bissonath*, 147
Madras Ry. Co. v. *Zemindar of Carvatenagarum*, 193
Maisel v. *Financial Times*, 97
Malcolm v. *Broad Hurst*, 77
Malfroot v. *Noxal*, 200
Manchester Corpn. v. *Farnworth*, 150
May v. *Burdett*, 196
Mayor of Bradford v. *Pickles*, 11, 13
Mayor of Manchester v. *Williams*, 106
McElroy v. *Cowper-Smith*, 109
McQuaker v. *Goddard*, 197
McWilliams v. *William*, 186
Merivale v. *Carson*, 98
Merryweather v. *Nixan*, 68, 69
Mersey Docks Board v. *Coggins*, 28, 29, 33
Metropolitan Asylum Dt. Board v. *Hill*, 55
Mitchell v. *Crasweller*, 31
Moghul Steamship Co. v. *McGregor*, 11, 13, 58, 122
Moore v. *Fox*, 167
Morgan v *Odhams Press*, 93, 108
Morgans v. *Launchbury*, 25, 28
Morris v. *Marsden*, 49
Morris v. *Martin & Sons*, 33
Morris v. *Perrott*, 106
Morris v. *Sandess Products*, 93
Mors v. *Slew*, 170
Motilal v. *Harnarayan*, 70
Motion v. *Mills*, 148
Mourton v. *Poulter*, 207
Murray v. *Harringay*, 58
Mutual Life Assce. v. *Evatt*, 153

N

Nagappa v. *Trojan & Co.*, 116
Nagendra Nath Roy v. *Basanta Das Bairagya*, 113
Nance v. *Br. Columbia Electric Ry. Co.*, 81, 161, 162
Narayanan v. *Mahendra*, 96
National Coal Board v. *Evans*, 15, 135
National Union v. *Gillan*, 43
Nawal Kishore v. *Rameshwar*, 67
Neville v. *Fine Arts Ins.*, 89
Newton v. *Hardy*, 87
Nicholls v. *Austin (Leyton) Ltd.*, 186
Nichols v. *Marsland*, 192
Nocton v. *Ashburton*, 153
Northwestern Utilities v. *London Guarantee Co.*, 24, 191, 193
Nugent v. *Smith*, 192

O

O'Connor v. *British Transport Commission*, 181
O'Connor v. *Waldron*, 54
Oliver v. *Birmingham & Midland Omnibus Co.*, 164
Osborn v. *Thomas*, 95
Overseas Tankship v. *Miller Steamship Co.*, 18, 150
Overseas Tankship Ltd. v. *Morts Dock & Engineering Co.*, 18, 19
Owens v. *Brimmell*, 159

P

P. & O. Steam Navigation Co. v. *Secy. of State*, 45
Paris v. *Stepney B.C.*, 156
Parkinson v. *Liverpool Corpn.*, 181
Parnell v. *Walter*, 107
Partridge v. *Scott*, 144
Pasmore v. *O.U.D.C.*, 185
Paul v. *Robson*, 146
Peek v. *Gurney*, 126
Peek v. *N. Staffordshire Ry. Co.*, 171
Penruddock's case, 71
Perkowski v. *Willington Corpn.*, 204
Place v. *Searle*, 87
Popplewell v. *Hodkinson*, 144
Poulton v. *L. & S.W. Ry.*, 32, 50
Prentice v. *Assets Co.*, 207
Prince v. *Gregory*, 156
Prov. of Bombay v. *Khusaldas*, 46
Punjab Singh v. *Ramautar*, 70
Pushpabai v. *Ranjit Co.*, 25

Q

Qualcast v. *Haynes*, 169
Quarman v. *Burnett*, 29
Quarty Hill Co. v. *Eyre*, 111
Quebec Ry. v. *Vandry*, 55.
Queen v. *Shankara*, 101
Quinn v. *Leathem*, 118, 121

R

R. v. *Adams*, 110
R. v. *Jackson*, 76
R.S.N. Co. v. *Choutmull*, 174, 179
R.S.N. Co. v. *S.S. Tea Co.*, 172
Radcliffe v. *Ribble*, 36
Radha Kishen v. *Bates*, 107
Radley v. *London & N.W. Ry. Co.*, 160
Raja Pedda v. *Araovala*, 85
Ram Coomur v. *Chandra Canto*, 117
Ram Ghulam v. *Govt. of U.P.*, 46
Ramalingam v. *Daily Thanthi*, 108
Rambarran v. *Gurucharan*, 24
Ramlal v. *Lill Dhary*, 193
Ramratan v. *Aswini*, 69
Rapier v. *London Tramways Co.*, 149
Read v. *Lyons*, 12, 22, 149, 189, 190, 193, 198
Rickards v. *Lothian*, 193
Ridge v. *English Illustrated Magazine*, 92
Riverstone v. *Lancashire*, 34, 35
Roberts v. *Daniel*, 106
Robinson v. *Post Office*, 156
Romesh v. *Romesh*, 102
Rookes v. *Barnard*, 9, 64, 109, 120
Rose v. *Ford*, 70, 80
Rose v. *Plenty*, 32
Ross v. *Portland Cement Ltd.*, 186
Royal Aquarium Society v. *Parkinson*, 99
Royal Baking Powder Co. v. *Wright*, 127
Rushton v. *Turner*, 161
Rustomji v. *Nurse*, 70
Ruth v. *Huth*, 95
Rylands v. *Fletcher*, 12, 57, 151, 190, 191, 193, 194, 199

S

S. v. *Distillers Co.*, 42
S.C.N. v. *Whittall*, 201
S.W. Miner's Federation v. *Glamorgan Coal Co.*, 104
Sabhapathi v. *Huntley*, 104
Salsbury v. *Woodland*, 34, 35
Saltman v. *Campbell*, 210
Samson v. *Aitchison*. 28
Sarch v. *Blackburn*, 206
Savile v. *Roberts*, 112
Scala v. *Ratcliffe*, 122
Scott v. *London Docks Co.*, 166, 167
Scott v. *Shepherd*, 17
Scott v. *Stansfield*, 52
Seager v. *Copydex*, 213
Searle v. *Wallbank*, 195
Secy. of State v. *Cockraft*, 45
Secy. of State v. *Kamaehee Boyee Saheba*, 52
Secy. of State v. *Ram*, 45
Secy. of State v. *Rukmini*, 37
Sedleigh-Denfield v. *O'Callaghan*, 143, 151
Sharp v. *Powell*, 18
Shenoy v. *Udipi Municipality*, 188
Shibo Prosad's case, 102
Sigurdson v. *Br Columbia Electric Ry.*, 161
Sitaram v. *Santanuprasad*, 25
Slater v. *Clay Cross*, 205
Smith v. *Austin Lifts*, 170
Smith v. *Baker*, 59, 168
Smith v. *Thackerah*, 145
Sochaki v. *Sas*, 191
Sorrel v. *Smith*, 122
South Hetton Coal Co. v. *N.E. News Association*, 106
Southern Portland Cement Ltd. v. *Cooper*, 205, 206, 208
Southport Corpn. v. *Esso Petroleum*, 55
Spicer v. *Smee*, 150
Sriramulu v. *Kolandavelu*, 111
Stanley v. *Powel*, 56, 75, 129

Stapley v. *Gypsum Mines*, 60, 161
State Bank of India v. *Shyama*, 33
State of Rajasthan v. *Vidyawati*, 46
Staveley Iron Co. v. *Jones*, 23, 24
Stewart v. *Hancock*, 160
St. Helen's Smelting Co. v. *Tipping*, 149, 150
Stratford v. *Lindley*, 118
Stuart v. *Bell*, 101
Sturges v. *Bridgman*, 150
Subharam v. *Tikaram*, 87
Subhas Chandra v. *Knight*, 107
Summers v. *Frost*, 15
Sun Life Co. v. *Smith & Son*, 95
Sutcliffe v. *Thackrah*, 153
Sutherland v. *Stapes*, 105
Sutton v. *Bootle Corporation*, 205
Swadling v. *Cooper*, 160
Swan v. *Salisbury Construction Co.*, 167

T

Tamlin v. *Hannaford*, 44
Tarleton v. *McGawley*, 120
Tarry v. *Ashton*, 35
Taylor v. *O'Connor*, 81
Thaigarava v. *Krishnaswami*, 101
The Bernina Mills v. *Armstrong*, 164
The Six Carpenters' case, 133
The Wagon Mound cases, No. I, 157
Thomas v. *Bradbury Agnew & Co.*, 105
Thomas v. *Quartermaine*, 153
Thompson v. *London County Council*, 67
Thomson v. *Deakin*, 118
Thorogood v. *Bryan*, 164
Thorogood v. *Van den Berghs*, 20
Tims v. *John Lewis*, 114
Tiruveriamuthu v. *Municipal Council*, 50
Tobin v. *Queen*, 44, 47
Torquay Hotel v. *Cousins*, 119
Turner v. *M.G.M. Pictures*, 61, 101

U

Union of India v. *Brijlal*, 177
Union of India v. *S.S.H. Syndicate*, 176
Union of India v *Supriya*, 70
United Australia Ltd. v. *Barclays*, 6

V

Vacher & Sons v. *London Society of Compositors*, 50
Vaughan v. *Taff Vale Ry. Co.*, 55
Verghese v. *Poonam*, 110
Vine v. *National Dock Labour Bd.*, 54
Virendra Singh v. *State of U.P.*, 52
Vizetelly v. *Mudie's Select Library*, 95

W

Waghela v. *Mashedin*, 8
Waite v. *N.E. Ry.*, 164
Wakelin v. *L. & S.W. Ry. Co.*, 165
Walker v. *G.N. Ry.*, 42
Walker v. *Olding*, 140
Walter v. *Alltools Ltd.*, 85
Ward v. *Hopkins*, 168
Ware & De Freville v. *Motor Association*, 120
Worren v. *Henleys*, 33
Wason v. *Walter*, 103
Watson v. *Ramchandra*, 8
Watt v. *Hertfordshire C.C.*, 157
Wenman v. *Ash*, 94
Wennhak v. *Morgan*, 94
Wheat v. *Lacon*, 205
Whatley v. *Patrick*, 29
Wheeler v. *New Merton Board Mills*, 187
White v. *Mellin*, 127
White v. *Warrick*, 210
Wigley v. *British Vinegares*, 186
Wilkinson v *Banking Corp.*, 53
Wilkinson v. *Downton*, 77
Williams v. *Jones*, 30
Williams v. *Linnitt*, 183
Williams v. *Owen*, 183
Williams v. *Settle*, 212
Wilson v. *United Counties Bank*, 107
Wilsons Co. v *English*, 168
Winter v. *Cardiff R.D.C.*, 169
Winterbottom v. *Derby*, 142
Winterbourne v. *Morgan*, 130
Wood v. *Leadbitter*, 131
Woods v. *Duncan*, 167
Wooldridge v. *Sumner*, 58
Wormald v. *Cole*, 195

Y

Yachuk v. *Oliver*, 163
Yegnarayana v. *Jagannadha*, 69
Youssoupoff v. *Metro-Goldwyn Mayer Ltd.*, 90, 106

BOOK I

GENERAL PRINCIPLES

1

Nature of Torts

§ 1. Definition and Analysis of Tort

A scientific definition of a tort has not yet been formulated. The difficulty of having any precise definition may be attributed to the fact that the law of torts comprises a large number of wrongs of diverse species whose historical development has been rather fragmentary and piecemeal, and that any attempt to assimilate the contents of this branch of English jurisprudence under general principles forming an independent body, has been comparatively recent. The great variety and complexity of the circumstances under which tortious liability arises still offer a serious obstacle to any comprehensive definition of a tort.

Etymologically 'tort' means a wrong; but all wrongs are not torts. *Salmond* 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."[1] This definition rather emphasises the negative aspect. Another definition which has at least the merit of simplicity is that it is "an infringement of a right *in rem* of a private individual giving a right of compensation at the suit of the injured party" (*Fraser*). None of these definitions, however, can be said to convey, by themselves, a full conception of the nature of a tort. The best way of doing that would be to analyse the main characteristics that distinguish a tort in general from analogous legal concepts.

In fact, the negative definition given by *Salmond*, just referred to, has been arrived at by excluding from the definition of torts, four classes of wrongs[1]—

(a) Wrongs exclusively criminal;

(b) Civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy exclusively;

(c) Civil wrongs which are exclusively breaches of contract;

(d) Civil wrongs which are exclusively breaches of trust or some other merely equitable obligation.

The distinction of a tort from these four classes of wrongs which stand outside the sphere of torts may now be examined.

---

1. This is the definition given by Salmond himself (see 7th Ed.). The Editor of the 15th Ed. of Salmond's *Law of Torts* has modified this definition by qualifying the word *action* by the phrase 'common law', and *damages* by the term 'unliquidated' (see 15th Ed., p. 15).

§ 2. Tort is a Civil Wrong as Distinguished from a Crime

A tort gives rise to a civil action as distinguished from criminal proceedings; it differs from a crime in essential respects:

Firstly, as to the NATURE OF THE WRONG : A tort is an injury to a private individual, but a crime is regarded as something more,—the law treats the wrongdoing as not merely an injury to an individual, but to the whole community considered as a community, in its social aggregate capacity.

Secondly, as to PROCEDURE: In tort the action is brought by the injured party himself; in crime the proceedings are conducted in the name of the Sovereign though the prosecution may be at the instance of the injured party (and none but the Sovereign can stop the proceedings or remit the penalty).

Thirdly, as to redress or REMEDY : In an action for tort the wrongdoer has to *compensate* the injured party, while the accused in a proceeding is *punished* by the State. The object in the former is to award private *reparation to the injured party* for his loss; the object in the latter is the *punishment of the wrongdoer* in the interests of society.

The same wrong may sometimes constitute BOTH A TORT AND A CRIME, e.g., assault, libel, malicious prosecution, etc. For instance, an assault is a civil wrong when looked at from the standpoint of an individual,—being a violation of the right to personal safety which every man possesses; but at the same time, since an act of violence is a menace to the safety of society in general, it will be punished by the State as a crime. It is to be noted that in such cases, the civil and criminal remedies are not alternative but concurrent. The wrongdoer will not only be liable to punishment, but may also be compelled to pay damages to the injured person.[2]

§ 3. Tort is an Infringement of a Private Common Law Right in Rem

A tort is thus a civil injury, but all civil injuries are not torts.

Firstly, a tort is the infringement of a *private* as distinguished from a *public* right. Generally speaking, every infringement of a *private* right, e.g., the right to personal safety, reputation, or possession, denotes an injury for which the injured person is entitled to compensation from the wrongdoer. The invasion of a *public* right or a right which belongs to the public in general, such as the right to a public highway, is not as a rule actionable as a tort, for, 'the remedy of the public is by indictment, and if every member of the public

---

2. In this connection we must note an old rule of common law known as the doctrine of "merger of a tort in felony". The rule may be stated thus,—when an injury gives rise to a civil action and at the same time amounts to a *felony*, the action for damages is not maintainable so long as the offender has not been prosecuted for the criminal offence, or a reasonable excuse shown for his not having been prosecuted [*Smith* v. *Selwyn*, (1914) 3 K.B. 98].

In INDIA, this artificial rule has not been accepted, and it has been held in many cases that an injured person can maintain action for damages for a wrongful act, even though it amounts to a crime, without in the first instance instituting criminal proceeding against the offender [see *Keshub* v. *Maniruddin*, (1908) 13 C.W.N. 501].

Even in *England*, the rule has been *abolished* by the Criminal Justice Act, 1967.

were allowed to bring actions in respect of such invasion, there would be no limit to the number of actions which might be brought'. It is to be noted, however, that when, in addition to the injury to the public, 'a special, peculiar and substantial damage' is occasioned to a particular individual by the infringement of a public right then such individual will have a private redress by an action for damages [see *post,* Chap. 13, § 2].

Secondly, a tort is the violation of a *common law duty.* Breach of trust or of any other equitable obligation may give rise to a civil action and yet it is not a tort. The reason is historical, viz., that the law of torts originated as a part of the Common law, while trust or similar equitable relations were creations of the Court of Chancery, and were unknown to Common law; and that inspite of the fusion of the two systems of Courts by the Judicature Act, 1873, these continue to be outside the sphere of torts.

Thirdly, a tort is the breach of a duty arising out of a 'common' right as distinguished from the breach of a duty arising out of a *personal or domestic relation.* Thus, violations of the mutual duties subsisting between parent and child, or husband and wife, by either of the parties, are not torts, for they are regarded rather as *moral* duties—for the breach of which an action for damages could afford but a poor remedy.

Fourthly, tort is the infringement of a right *in rem* (i.e., a right available against the whole world) as distinguished from a right *in personam* (i.e., a right available only against some determinate person or body). As *Pollock* puts it, a tort is the violation of that general duty which all members of a civilised community owe towards their neighbours not to do them harm without lawful cause or excuse.

§ 4. Tort must be distinguished from a Breach of Contract

(i) While a breach of contract is the violation of a duty fixed by an agreement or mutual understanding between the parties, a tort is the violation of a *duty fixed by law.* In contract, the obligation is founded on the consent of the party bound; in tort it is independent of any such consent, being imposed by the general law of the land.[3]

"If the relationship between the parties is such, that the plaintiff can maintain an action by showing the breach of a duty arising at common law out of that relationship, has action must be regarded as founded on tort. On the other hand, if his cause of

3. TORT AND QUASI-CONTRACT. The theoretical distinction between tort and contract as resting upon the distinction between duties imposed by the law and duties arising by consent of parties is however blurred in some cases which fall on the boundary line. The most important of these cases are quasi-contracts,—cases where there has been no contract at all, but an obligation has nevertheless been imposed by the law under a 'fiction' of contract. Thus, where money has been paid by one to another by mistake, a duty to refund the unjustly gained money is imposed upon the latter *by law,* but the action lies not in tort but in contract, by virtue of the fiction that the latter has agreed to refund the money. It must be pointed out, however, that notwithstanding this obvious ground of similarity, there are points of real distinction between a tort and a quasi-contract. In tort, the duty is towards persons generally, but in quasi-contract it is towards a particular person. Further, in quasi-contracts the damages are *liquidated* and not unliquidated.

(Continued on p. 6)

action is that the defendant ought to have done something, or taken some precaution, not embraced by the common law liability arising out of their relationship, then he is obliged to rely on contract, and his action is founded on contract." [*Turner* v. *Stallibrus*, (1898) 1 Q.B. 56.]

For example, an action against a Railway Co. as common carriers, for loss of goods entrusted to them for carriage, is *ex contractu*. But an action by a passenger against the Railway Co. for injuries due to negligence of servants of the Co., is tort, for the action can be maintained by anyone *lawfully* upon the premises of the railway and not merely by passengers who have paid for the journey [see Chap. 16, *post*].

(ii) For the same reason, in an action for a breach of contract, *privity* between the parties must be proved (only those who were parties to the agreement can sue for its breach); but in tort, the right of action has nothing to do with privity between the parties,—it exists simply because a right has been withheld or violated.

(iii) Generally speaking, no action for breach of contract can lie when a person gratuitously undertakes any service for another, but an action may lie in tort for negligence in the performance of it [see *post*, Chap. 17].

(iv) Damages are a remedy common to an action for breach of contract as well as to an action for tort. But in an action for breach of contract, the damages are usually 'liquidated', i.e., a definite sum predetermined by stipulation in the contract; even where there is no such stipulation, the measure of damages is what was intended or contemplated by the parties. The object is compensatory and not exemplary or punitive, except in a few rare cases, such as an action for breach of promise of marriage. In an action of tort, on the other hand, damages are always 'unliquidated', i.e., not a predetermined sum but such an amount as the Court *in its discretion* is at liberty to award in the interests of justice in each case. They may often be otherwise than compensatory and may be exemplary, nominal, or contemptuous.

The same wrong may sometimes constitute BOTH A TORT AND A BREACH OF CONTRACT. This happens when a person has undertaken by contract to perform a duty which already lies upon him *independently* of any contract. The violation of such a duty gives rise to two causes of action—(1) *ex contractu* or arising out of the contract, and (2) *ex delictu* or independent of the contract. For example, where a physician undertakes to operate a patient and injures the patient through negligence, he is no doubt liable for *breach of contract*; he is also liable in *tort*, for no one has a right to do another physical harm

---

(*Continued from p. 5*)

On the other hand, in some cases of quasi-contract, there could not have been any contract between the parties for want of contractual capacity, e.g., in the case of necessaries supplied to a minor. A quasi-contract, thus, differs from either contract or tort and forms a separate category. The reason why it is called a quasi-contract, and in so far assimilated to the law of contract, is historical, viz., the divisions of forms of action, in medieval English law. As the House of Lords observed in the case of *United Australia Ltd.* v. *Barclays*, (1941) A.C. 1.—"*These* fantastic resemblances of contracts invented in order to meet the requirements of the law which have now disappeared should not in these days be allowed to affect actual rights."

without lawful justification. The physician is under a duty to take care and have skill in the operation both under the contract, as well as under the general law.[4] [In this case, if the physician had really no skill to perform the operation but professed to have it, the wrong would also amount to a *crime*, for such an act is dangerous to the society as a whole.]

In *Donoghue* v. *Stevenson*, (1932) A.C. 609, the House of Lords explained the position thus:

> "....Negligence apart from contract gives a right of action to the party injured by that negligence—and here I use the term negligence, of course, in its technical legal sense, implying *a duty owned and neglected*. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, *independently of the contract, though arising out of the relationship* in fact *brought about by the contract*. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him."

Salmond points out that this concurrence of tort and breach of contract may happen in two ways : (i) When a person voluntarily binds himself by a contract to perform *some duty which already lies* upon him independent of any contract, the breach of such a contract is a tort. The case of the negligent physician falls within this class. Similarly, a bailee who wrongfully refuses to restore the property deposited with him is not only liable under his contract to restore in due time, but also in tort because no one has a right to detain another's property without special justification. (ii) But there is another class of cases where the defendant has taken upon himself by contract *a duty which did not precedently and independently exist*, and yet the breach of duty is a tort. The explanation is, that though he was not otherwise bound, he has by his contract put himself in such a position that he cannot now break that contract without at the same time causing damage to the person or property of another, which itself constitutes a tort. For example, if *A* lends his horse to *B* who kills it by failing to give it food, *B* is liable also in tort, though he was under no obligation to feed another's horse, except by reason of his contract with *A*.

§ 5. The Appropriate Remedy for Tort is an Action for Unliquidated Damages

It is clear from what has been said above that the essential characteristic which distinguishes a tort from other civil injuries is that the proper remedy for a tort is pecuniary compensation in the form of damages, which are 'unliquidated'. In *England*, the damages in an action for tort are usually

4. The concurrence of these two actions is, however, a somewhat difficult subject, and as it involves reference to some of the specific rules of liability in torts, it is better to defer it to a later Chapter [Chap. 17, *post*]; suffice it to say for the present that an action *ex delictu* is based upon the violation of a duty imposed by the general law of the land, whether it is also the subject-matter of an agreement between the parties or not. Thus, in the example given above, the physician could be liable in tort even if the contract was made with a third party, say, the patient's father or husband, or it was gratuitous. In this sense, it is proper to describe a tort as a 'WRONG INDEPENDENT OF CONTRACT'.

assessed by the Jury, while in *India*, they are assessed by the Judge himself. The right to recover unliquidated damages, then, is the distinctive feature of a tort. There may be other remedies, e.g., injunction, or specific restitution, which are available in certain cases of tort *in addition to* damages [Cf. Chap. 6, *post*], but in all such cases the wrongs concerned are classed as tort only because the right to damages exists. On the other hand, where the remedy of damages is not available, but some other remedy only is, the wrong, though a civil one, is not a tort, e.g., a public nuisance without special damage, for which injunction only can be sought in a civil action.

As a fitting SUMMARY to the contents of this Section we may here quote the definition given by *Winfield*: "TORTIOUS LIABILITY, (a) ARISES FROM THE BREACH OF A DUTY PRIMARILY FIXED BY THE LAW; (b) THIS DUTY IS TOWARDS PERSONS GENERALLY, AND (c) ITS BREACH IS REDRESSIBLE BY AN ACTION FOR UNLIQUIDATED DAMAGES."[5]

§ 6. The Law of Torts in India

1. The law of torts remains one of those few branches of law which have not yet been codified as a whole in India, and is *still based on the Common Law of England* which was introduced with the establishment of the British Courts in India.

2. The law in British India, as embodied in case-law, is therefore practically the *same as in England*, departing from the latter only where any particular rule has appeared unreasonable, or unsuitable to local conditions. Thus, the English rules of 'merger of torts in felony' [p. 4n., *ante*], common employment, maintenance and champerty, and the rule denying action for slander when there is no proof of special damage, have not been adopted in India. The reason is that in the absence of specific law or usage in any matter, the Indian Court has to act according to the principles of 'equity, justice and good conscience'.[6] The expression 'equity, justice and good conscience' has been interpreted to mean rules of English law, so far as they are applicable to Indian society and circumstances.[7]

3. Some parts of the law of torts have, however, been codified by statutes relating to particular branches of the law, and so far the English law relating to those subjects are inapplicable; e.g., (1) Specific Relief Act, 1963; (2) Fatal Accidents Act, 1855; (3) Carriers Act, 1865; (4) Sale of Goods Act, 1930; (5) Easements Act, 1882; (6) Patents and Designs Act, 1911; (7) Workmen's Compensation Act, 1923; (8) Employers' Liability Act, 1938.

4. On the other hand, it is to be noted that what is applicable in India are the rules of the *common law* of England, as explained above, and not the modifications thereof as have been made in England by British statutes, e.g., the Law Reform Acts, Crown Proceedings Act, etc.

---

5. Winfield, *Law of Torts*, 7th Ed., p. 5; adopted in Clerk and Lindsell, *Torts*, 9th Ed.

6. Cf. S. 37 (2), Bengal, Agra & Assam Civil Courts Act, 1887; s. 16 (c), Madras Civil Courts Act, 1873.

7. *Watson* v. *Ramchandra*, (1890) 18 Cal. 10 P.C.; *Waghela* v. *Mashedin*, (1887) 11 Bom. 551 P.C.

2

General Principles of Liability

§ 1. Applicability of General Principles

While English law has developed a system of comprehensive rules relating to contracts, it has made comparatively little effort to formulate any systematic general doctrine of liability for torts or 'wrongs independent of contract'. An account of the law of torts must, therefore, consist largely of a treatment of the principal specific torts which the law recognises.[1] The very expression 'Law of *Torts*' (not 'Law of *Tort*') is significant. Nevertheless, some common elements which are generally present in every species of tort may be discerned, and may profitably be discussed as preliminary statements subject to exceptions and modifications to be introduced later on.

§ 2. The General Conditions of Liability

Subject to important exceptions, liability for a tort may be said to be *commonly* based on the co-existence of two conditions (one *physical* and another *mental*):

(a) Damage suffered by the plaintiff from the act of the defendant; and
(b) Wrongful intent or culpable negligence on the part of the defendant.

A. DAMAGE

Damage[2] is the *physical effect* of the defendant's act. The infliction of damage on anybody is a violation of the general duty not to hurt anybody by word or deed, for which an action lies in tort. But legal damage or damage

1. *Sir John Salmond* even contended that the law of torts consists only of a number of specific rules prohibiting certain kinds of harmful activities, leaving all the residue outside the sphere of legal responsibility,—so that a person who cannot show that the wrong he complains of falls in one of the specified categories recognised by law, has no remedy. Such a static view of the law has not however found favour with many (e.g., *Sir F. Pollock*), and the view is now gaining ground that the intentional causing of harm without just cause or excuse is sufficient to constitute liability [see 15th Ed. of Salmond's *Torts*, pp. 19–21], and, in recent times, newer species of torts have been acknowledged by the House of Lords, applying the general principles discussed in the present Chapter, e.g., intimidation [*Rookes* v. *Barnard*, (1964) A.C. 1129]; a careless statement causing economic loss [*Hedley* v. *Heller*, (1964) A.C. 465].

2. *Damage* must not be confused with *damages*. 'Damage' means the loss inflicted by the wrongful act of the defendant for which the Court awards pecuniary compensation or 'damages' to the plaintiff.

that constitutes liability in tort is not identical with damage in the popular sense. *Legal damage* may generally be said to be constituted by a combination of DAMNUM and INJURIA. By (1) *damnun* is meant "damage in the substantial sense of money, loss of comfort, health, or the like", while (2) *injuria* (*lit.* contrary to law) means "an unauthorised interference, however trivial, with some general right conferred by the law on the plaintiff". No action lies for mere damage, however substantial, caused by some act which does not violate a legal right. As the Privy Council observed in *Rogers* v. *Rajendra* [(1860) 8 M.I.A. 103]—

> "It is essential to an action in tort that the act complained of should be legally wrongful as regards the party complaining, that is, must prejudicially affect him in some *legal right*; merely that it will, however directly, do him harm in his interest, is not enough."

But, as we shall see just now, the converse of this proposition is not necessarily true; for an action will lie for interference with another's *absolute* private right even where it causes no actual damage. A DAMNUM SINE INJURIA (i.e., damage without infringement of a legal right) is NOT ACTIONABLE, but AN INJURIA SINE DAMNO (i.e., infringement of a legal right without damage) is.

(I) *Damnum sine* (or *absque*) *injuria*

This maxim means that when an act or omission does not constitute infringement of a *legal* right pertaining to the plaintiff, no action will lie notwithstanding any loss or harm resulting from such act or omission. Thus, "there are many acts which though *harmful* are not *wrongful*, and give no right of action to him who suffers their effects" (*Salmond*). It is often said the law of torts is based on the maxim 'there is no wrong without a remedy' (*ubi jus ibi remedium*). But it must not be supposed that the law of torts has a remedy for every 'moral' or 'political' wrong. The term *'jus'* in maxim means a *legal* right, a right which is recognised by the law, and for the protection of which it exists. The maxim thus means that the 'violation of a legal right committed knowingly gives a cause of action unless there is some reason to the contrary' [*Salmond*, 15th Ed, p. 454; *Best* v. *Samuel*, (1952) [A.C. 716(729)]. Now, there are certain acts which, though harmful to another, are not taken cognisance of by law at all, primarily on the ground of social convenience. There is damage, but it is without 'injury' in so far as the law affords no remedy.

(i) The cases illustrative of the rule are based on various grounds, but the general principle seems to be that *the exercise of one's own common or ordinary rights within reasonable limits does not ground an action in tort merely because it causes damage to another* [see Chap. 5, § 1 (IX)].[3–6] The reason underlying is simple, viz., that "it is impossible to carry on the common affairs of life without doing various things which are more or less likely to cause loss

3. *Chasemore* v. *Richards* [(1859) 7 H.L.C. 349]. The plaintiff, a millowner, had for about 60 years enjoyed the use of a stream which was chiefly supplied by percolating underground water. The defendant, an adjoining owner, dug a well on his *own* ground as a result of which the volume of the stream was materially diminished and the plaintiff

(*Continued on p. 11*)

or inconvenience to others, or even which obviously tend that way; and this in such a manner that their tendency cannot be remedied by any means short of not acting at all" (*Pollock*).

(ii) Similarly, damage which is too trivial or indefinite for effective legal recognition, is not actionable. For example, "mental pain or anxiety the law cannot value and does not pretend to redress" (*Lynch* v. *Knight* (1861) 9 H.L.C., 577]. Hence, no action lies for mere mental suffering unaccompanied by physical harm [see Chap. 7, § 3, *post*].

(iii) Harm which is of such nature that the law considers inexpedient to provide any right of pecuniary redress, but provides some other remedy e.g., criminal prosecution, is not actionable in tort. Such, for example, is public nuisance, where an individual suffers in common with the public at large.

(II) *Injuria sine damno*

But though damage does not give a cause of action without injury, there are cases where mere injury (i.e., the infringement of a legal right) gives rise to a cause of action though it has been the cause of no damage at all.

From this point of view, rights have been classified into absolute and qualified. (a) An ABSOLUTE right is one the violation of which is actionable *per se*, i.e., without proof of damage. When an absolute right is violated the *law conclusively presumes damage*, because of the mischievous tendency of that act. Wrongs of this class are so likely to result in harm that the law prohibits them absolutely. So far as these are concerned, the statement 'the combination of *injura* and *damnum* must be found in every tort' must therefore be qualified. Damage in the sense of actual or perceptible loss is not *indispensable* as the foundation of an action in these cases. Thus, every invasion of private property, however minute, is actionable as trespass. A leading case on the point is *Ashby* v. *White*[6] [(1703) I Sm. L.C. 251], where

---

(*Continued from p. 10*)

lost the use of the stream. *Held*, no action lay. For, "the person who owns the surface may dig therein, and apply all that is there found to his own purposes, at his free will and pleasure, and that if in the exercise of such right he intercepts or drains off the water collected from underground springs in the neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria* which cannot become the ground of action." [This observation was made by the House of Lords in a former case, *Acton* v. *Blundell*, (1843) 12 M. & W. 324. In *Chasemore's* case they applied this doctrine and held further, that it made no difference that the well or watercourse of which the supply was cut off was *ancient*].

4. *Mayor of Bradford* v. *Pickles*, [(1895) A.C. 587]. In this case the House of Lords further extended the rule established in *Chasemore's* case, and *held* that there would be no legal injury even if the motive of the adjoining owner was malicious [see § 3, *below*].

5. *Moghul Steamship Co.* v. *McGregor Gow & Co.*, [(1892) A.C. 25]. This case laid down that damage caused by competition in trade for the furtherence of private interests was not actionable, even when the means adopted were 'unfair' [see Chap. 10, § 6, *post*].

6. *Ashby* v. *White*. The defendant, a returning officer, wrongly refused to register a duly tendered vote of the plaintiff who was a qualified voter. *Held* (by the House of Lords upholding the dissenting judgment of Holt, C.J.), that an action lay against the returning officer though the candidate for whom the vote was tendered was elected and no loss was suffered by the rejection of the vote.

Holt, C.J. made his famous dictum : "EVERY INJURIA IMPORTS A DAMAGE THOUGH IT DOES NOT COST THE PARTY A FARTHING; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right". (b) On the other hand, there are some private rights which are QUALIFIED in the sense that such rights are intended merely to prevent a person from suffering *loss* by the acts or omissions of other persons, and the mere violation of these rights gives rise to no cause of action unless actual or 'special' damage be proved. Thus, in *England* slander or verbal defamation is not actionable (except in a few cases) without proof of actual damage.[7]

B. MENS REA

A culpable condition of the mind (as a *mental antecedent* of the wrongful act of the defendant) is the second condition usually required for liability for a tort. The maxim is, '*Actus non facit reum, nisi mens sit rea*', the act itself creates no guilt in the absence of a guilty mind. In this context, however, the term *mens rea* must not be understood in the narrow sense in which it is used in the law of crimes. In the law of torts the maxim does not mean that the act must be done with a wicked or evil motive, but simply means that mind must *concur* in the act,—the act must be done either (a) with a wrongful INTENTION (meaning intentionally and without just cause or excuse), or (b) with culpable NEGLIGENCE on the part of the defendant (These two mental attitudes are grouped together by *Salmond* under the term *mens rea*—a term which is to some extent liable to be misunderstood. In the law of torts it means little more than that the defendant's conduct must be *voluntary*—either wilful or careless).

But here again there is an important exception, namely, cases of 'absolute' or 'strict' liability where a man is responsible even for accidental harm, and though he is not guilty either of a wrongful intent or negligence. These are cases where the defendant has a duty of 'insuring safety' to others, and the leading case is *Rylands* v. *Fletcher*, (1868) L.R. 3 H.L. 330, [see also *Read* v. *Lyons*, (1947) A.C. 156, Chap. 16, *post*]

§ 3. Intention and Malice

Thus to say that the act must be done *intentionally* does not imply that the act must necessarily be done from an improper or '*malicious motive*'.

The term MALICE is used in two senses. As Bayley, J. put it in *Bromage* v. *Prosser* [(1825) 4 B. & C. 247], "Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse". (1) In its popular sense, i.e., of improper or evil motive, the term is variously spoken of as 'express

7. From this standpoint, torts may therefore be divided into two clauses,—(i) those which are actionable *per se*, e.g., trespass, conversion, libel; and (ii) those which are actionable on proof of *special damage*: malicious prosecution, conspiracy, deceit, nuisance.

malice', 'malice in fact' or 'actual malice'. (ii) In the legal sense, i.e., of wilful and *conscious* wrongdoing, it is known as 'malice in law' or 'implied malice'.

(i) Save in some exceptional cases,[8] EXPRESS MALICE or malice in the sense of ill-will or improper motive is entirely irrelevant in the law of torts. ***A lawful act does not become unlawful because it is done with a bad motive, nor is good motive a justification for an act which is otherwise illegal.*** As Lord Watson pointed out in *Allen* v. *Flood* [(1898) A.C. 1], "Although the rule may be otherwise with regard to crime, the law of England does not take into account motive as constituting an element of civil wrong". Bowen, J. similarly observed in *Mogul Steamship* v. *McGregor & Co.* [(1885) 15 Q.B.D. 476]—"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." And Lord Watson again, in *Major of Bradford* v. *Pickles*[9] [(1895) 1 A.C. 597], "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."

(ii) On the other hand, MALICE IN LAW is *implied* in every case where a person has inflicted injury upon another in contravention of the law, without any just cause or excuse. He will not be allowed to say that he did so with an innocent mind. A man may therefore be guilty of malice in law, though in the popular sense, i.e., so far as the state of mind is concerned, he acts ignorantly or even innocently. But so stated, the use of the term malice in the law of torts seems to be superfluous. The consideration of personal motive, except in the specified cases, is irrelevant as a determining element of liability: a good motive is no justification for an act otherwise illegal and a bad motive does not make wrongful an act otherwise legal.

It follows from the above that 'intentional' simply means 'done with *knowledge* that the act is wrongful'. (Liability for torts included in Part I of Bk. II of this work generally rests on the ground that they have been done intentionally or wilfully).

---

8. Two such cases of tort where express malice forms an essential ingredient are MALICIOUS PROSECUTION and MALICIOUS DEFAMATION. (a) In the first case; a right to prosecute criminals is a right given by law to every citizen for the purpose of vindicating justice. But a prosecutor who uses his right for the purpose of ill-will or extortion will be liable for malicious prosecution. In such an action the plaintiff succeeds by proving not merely that the act was done intentionally, but that the prosecutor was inspired by an 'improper' motive—such as the law does not consider proper [*vide* Chap. 10, § 7, *post*]. (b) In the second case; the existence of 'privilege' is a defence to an action for defamation. But this defence may be answered by the plaintiff by proving that the defendant has used his privilege for some purpose other than that for which the law allows it,—e.g., to inflict injury on the sufferer solely on the ground of assumption of good faith,—existence of *express malice* destroys that protection [*vide* Chap. 9, § 7, § 11, *post*]. (c) A third case is that of CONSPIRACY [*vide* Chap. 10, § 6, *post*].

9. *Major of Bradford* v. *Pickles*. The defendant, by means of excavations on his own land, intentionally intercepted the underground water that would otherwise have flowed into the adjoining reservoir of the plaintiffs. *Held*, no action lay, though the sole motive of the defendant in doing so was to coerce the plantiffs to buy him off.

§ 4. Intention and Negligence

1. It has already been stated (p. 12, *ante*) that according to *Salmond*, "Negligence and wrongful intent are the two alternative forms of *mens rea* one or other of which is commonly required by law as a condition of liability". A man *intends* the consequences when he foresees or desires them; he is guilty of *negligence* when he does not desire the consequences and does not act in order to produce them but is nevertheless indifferent or careless whether they happen or not. Thus interpreted, negligence represents a mental attitude, "the mental attitude of undue indifference with respect to one's conduct and its consequence."

2. But the idea of negligence presupposes a duty of care. "The ideas of negligence and duty are correlative, as there is no such thing as negligence in the abstract; negligence is simply a neglect of care which we are bound to exercise towards somebody." There is no negligence unless there is in the particular case a legal *duty to take care* which the defendant owes to the plaintiff himself. Negligence in the proper sense thus denotes "a *conduct* rather than mental attitude". In *Le Lievre* v. *Gould* [(1893) 1 Q.B. 491], it was observed, "a man is entitled to be as negligent as he pleases towards the whole world, if he owes no duty to them." Similarly, in *Donoghue* v. *Stevenson* [(1932) A.C. 562], it has been said, "a man cannot be charged with negligence if he has no obligation to exercise diligence"; and, more clearly, in *Grant* v. *Australian Knitting Mills* [(1936) A.C. 86],—"the mere fact that a man is injured by another's act gives in itself no cause of action; if the act involves lack of care... —no case of actionable negligence will arise unless the duty to be careful exists."

3. In cases where there is a duty to take care, whether the defendant has been guilty of negligence or not is determined by an objective standard viz., the standard of *reasonableness*—which has been stated by Vaughan, J. in *Blyth* v. *Birmingham Waterworks Co.* [(1856) 11 Ex. 781], thus :

> Negligence is the omitting to do something that a reasonable man would do, or the doing of something which a reasonable man would not do."

But though liability would in every case be determined by the sole standard of 'reasonable conduct', the degree or amount of caution that would constitute this standard differs in accordance with the nature of the duty to take care and the magnitude of the risk involved, in each case. A reasonable man, for example, will not show the same amount of care when handling an umbrella as when handling a sword. The failure to exercise such care constitutes an actionable wrong itself.[10]

4. In later decisions, the House of Lords has improved upon the above definition by laying down that the standard of care expected of a reasonable man is the standard of 'reasonable foreseeability'.

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" [*Donoghue* v. *Stevenson*, (1932) A.C. 562 (*580*)].

---

10. The majority of text-writers thus classify Negligence as an actionable wrong rather than as a condition of liability. For the convenience of arrangement we shall follow this practice.

"The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its *reasonable and probable* consequences caused injury to others and the duty is owed to whom injury may reasonably and probably be anticipated if the duty is not observed" [*Bourhill* v. *Young*, (1942) 2 All E.R. 396 (*403*)].

"In *Bolton* v. *Stone* [(1951)] 2 All E.R. 1078 (H.L.), Lord Porter has observed that in order to hold a man guilty in an action for negligence, the following conditions must exist together—

(a) The *consequence* of the act or omission from which injury results must be such as can be reasonably foreseen; in other words, there must be a reasonable possibility of the happening of the injurious event.

(b) The further result that *injury* is likely to follow from the event must be such as a reasonable man would contemplate.

"Nor is the mere *possibility* of injury occurring enough. There must be sufficient *probability* to lead a reasonable man to anticipate it."

5. It follows from the above that in an action for tort, the defendant would not be liable if he neither *intended* to injure the plaintiff nor could he have avoided doing so by the use of reasonable care.[11]

This general rule is, however, subject to certain exceptions, where a person may be held liable in torts irrespective of his intention or negligence, e.g.—

(a) Cases of absolute liability or liability for breach of the duty 'to ensure safety'; this will be discussed under the next caption as well as in Chap. 16, *post*.

(b) Cases of breach of statutory duty, where the duty is imposed without any qualification [*Sumners* v. *Frost*, (1955) A.C. 740]; this will be discussed under Chap. 15, *post*.

§ 5. Absolute Liability

As already mentioned, the rule that *mens rea* in either of the two forms is an essential condition for liability in tort, is subject to important *exceptions*. These are cases of *absolute liability*—where liability is independent either of wrongful intent or of negligence. According to *Salmond*, liability in these cases is based on a conclusive presumption of negligence, a presumption established by the law on the ground that to require actual proof of the necessary mental attitude would in these particular cases impose too great a burden upon the plaintiff and unduly limit the efficiency and certainty of the administration of justice. These cases fall under three classes—

1. **Liability for Inevitable Accident.** Save in the exceptional case mentioned here, "inevitable accident", that is, an accident which could not have been avoided by the use of reasonable care and caution, is a general ground

11. The respondents, while employed under a contract to make excavations upon the land of a third party, damaged the appellant's electric cable which was buried beneath the land. Neither the third party nor the respondents had reason to know of the existence of the cable, and the respondents had no opportunity of discovering it before it was struck. *Held*, the respondents were not liable [*National Coal Board* v. *Evans*, (1951) 2 All E.R. 310 (C.A.)].

of exception to liability in tort [cf. Chap. 5, § 1 (VIII), *post*]. But there is a group of cases where a man is made by law an 'INSURER OF OTHERS' against the result of his activities. In these cases even proof that the utmost diligence in the way of precaution has in fact been used will not help the defendant. The most important of these casese is where damage is done by the escape of dangerous substances brought or kept by anyone upon his land [see Chap. 15, *post*].[12]

2. **Liability for Inevitable Mistake.** In this class of cases the principle of liability is not so stringent as in the previous case, and does not extend to liability for inevitable accidents. But the liability is independent of any intention or knowledge on the part of the defendant that he was violating the plaintiff's rights. He will be liable even if he acted under an *erroneous belief*, formed on *reasonable* grounds, that the act was lawful. Interference with the right of property of another is the most important species of this class. The person interfering with the property of another 'acts at his peril.' Thus, he who enters upon the land of another is liable in trespass, even though he honestly and on reasonable grounds believed the land was his own. And the same principle applies to rights which are not strictly rights of property, but are analogous to it, e.g., the right to reputation.

3. **Vicarious Liability for Wrongs committed by Others.** These are cases of absolute liability in the sense that in these cases a person is liable without any default of his own. Here the responsibility is imputed by law on grounds of social policy or expediency.

The most important species of this class is the liability of a master for the acts of his servant [This subject will be fully discussed in the next Chapter].

§ 6. Breach of Specific Legal Duties

This is another class of wrongs where liability is generally independent of intention or negligence. "The commission of an act *specifically* forbidden by law or failure to perform any duty *specifically* imposed by law, is generally equivalent to an act done with *intent* to cause wrongful injury" (*Pollock*). The mere violation of the law is sufficient to constitute liability. In the infancy of jurisprudence a distinction was made, as to the degree of culpability involved, between *mala prohibita* (i.e., wrongs which were so merely because prohibited), and *mala in se* (i.e., wrongs which were so according to the principles of natural justice). But as *Pollock* observes, "the old fashioned distinction between *mala prohibita* and *mala in se* is long since exploded. The simple omission, after notice, to perform a legal duty, may be a wilful offence within the meaning of a *penal statute*". Similar is the case of tortious liability for breach of a duty imposed by statute (see Chap. 15, *post*).

§ 7. Liability for Consequences

1. A man is not liable for all the consequences of his wrongful act or

12. This principle of strict liability is to a great extent due to the recognition by the law of the increasing risks attending the ordinary activities of modern life. It is to be pointed out, however, that liability in all the cases included in Chap. 15 is not 'strict' in an equal degree.

default. Liability must be founded on an act which is the 'DIRECT' *cause* of the harm or injury which is complained of. Where the *causal connection* between the damage and the defendant's act is not sufficiently direct, that is to say, when the two cannot be 'concatenated as cause and effect', there is no liability, for the damage is *'too remote'*. In these cases, though the damage to the plaintiff results from the wrong done by the defendant as a matter of fact, it is not in the eye of law sufficiently connected with the wrong to make the defendant to compensate the plaintiff for it. This causal relation is not however a strictly logical one, and a positive and invariable test for this purpose has not yet been settled. As *Sutton* points out, though this is a question of law, the Court in deciding it has to take into consideration all the circumstances of the case in which the question arises and is guided by practical considerations of convenience and common sense and does not profess to be acting upon principles of abstract logic.

2. What then are the *direct* consequences of an act?

Firstly,—those that have been *intended* by the actor. Here the connection between the act and the consequence is obvious, and hardly needs an explanation.

Secondly,—those that are the *'natural and probable consequences'* of his act. Those consequences are said to be *natural and probable* "which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to *foresee* as likely to follow upon such conduct". Liability for the natural consequences has been said to rest upon a presumption of intention which is expressed in the maxim 'A MAN IS PRESUMED TO INTEND THE NATURAL CONSEQUENCES OF HIS ACT.' Where this rule applies, the act itself is the chief or sole proof of the intention with which it has been done. If the wrong complained of is a consequence such as a reasonable man might foresee would follow from the defendant's act, the law infers that he either intended it, or recklessly put aside the risk of some such consequence ensuing. And having done a wrongful act, 'he can not stop the risk at the pleasure, nor confine it to the precise objects he laid out; but must abide it fully to the end.' The leading case on the point is *Scott* v. *Shepherd*[13] [(1772) 1 Sm. L.C.].

Thirdly,—those that could not be contemplated as 'natural and probable' but are nevertheless *directly traceable* to the defendant's wrongful act, and not due to the operation of 'independent causes' having no connection with that act.

3. Until the decision of the Court of Appeal in *Re Polemis and Furness, Withy & Co.*,[14] the LIMIT OF PROBABILITY OR FORESEEABILITY was generally

13. *Scott* v. *Shepherd*. The defendant threw a lighted squib into a market house full of people. It fell near a person who by an instant and natural act of self-preservation, cast it down from him. A third person did the same and the squib burst in the face of the plaintiff and destroyed one of his eyes. *Held*, the defendant was liable to the plaintiff though he did not intend to harm him; he must be presumed to have contemplated all the consequences of his wrongful act and was answerable for them [Th very act of throwing a squib in a crowded place led to an inference of *wrongful intention*].

14. Re Polemis and Furness, Withy & Co., (1921) 3 K.B. 560 (C.A.).

accepted as the final limit to liability for consequences. "A person is expected to anticipate and guard against all reasonable consequences but he is not by the law of England expected to anticipate and guard against that which no reasonable man would *expect* to occur."[15]

This view[15] of the law was OVERRIDDEN by the decision in *Polemis'* case[14], saying that a man may have to answer for consequences which he not only did not, but could not, contemplate, having no notice of the conditions that made them possible. *When an act or omission has been once decided as wrongful (either due to wrongful intent or negligence), the party may be liable for consequences outside his reasonable foresight.*[14] Liability ceases only when some new factor intervenes which is unconnected with the original act or default.

In short, the proximate act is not considered as the cause unless it may be considered as 'independent' cause. Thus, a person who injures a pedestrian by negligently driving his car, must pay for the latter's loss of limb, though the proximate cause of the loss of limb is the amputation made by the surgeon to save the man's life, *without any negligence or bad faith on the part of the surgeon.*[16]

4. But, as will be explained under the next caption, in the *Wagon Mound case*[17], the Privy Council held that the rule laid down in the *Polemis case*[14] was not so ld and that a man could not, with justice, be held responsible for all the consequences of his act, even though they were 'remote' or not 'reasonably foreseeable'. The view of the Privy Council[17] has since been accepted by the House of Lords and the Court of Appeal.[18–20]

§ 8. Remoteness of Damage

1. The *Polemis Case*[14] laid down that if the *act* was done negligently, the

---

15. *Sharp* v. *Powell*, (1872) 7 C.P. 253.

16. *Hogan* v. *Hartly Collieries Ltd.*, (1949) 1 All E.R. 588 (H.L.).

17. *Overseas Tankship Ltd.* v. *Morts Dock & Engineering Co.* (otherwise known as the "Wagon Mound case"), (1961) 1 All E.R. 404 (P.C.). The Overseas Tankship Ltd. were the charterers of an oil-burning vessel, named The Wagon Mound. Owing to the negligence of their servants, a large quantity of oil from the burning ship fell on the water and spread fire to the wharf of the Respondents Co., which was damaged. The finding of the Court, on facts, was that though the servants of the Appellant Co. were negligent and the damage was caused by such negligence, it was unforeseeable that fuel oil spread *on water* might catch fire. Upon this finding, the Privy Council held that the Appellant Co. was not liable and that the *Polemis* decision was *not good law.*

18. *Doughty* v. *Turner Manufacturing Co.*, (1964) 1 All E.R. 98 (C.A.). A workman of the Defendant Co. caused a loose compound of asbestos cement to fall into a cauldron of hot molten liquid. As a result of this fall, there was chemical change in the liquid which turned to steam and caused an eruption by which the plaintiff workman was injured. The action brought by the plaintiff against the employer Co. was dismissed, *holding* that since nobody could suspect that heat would cause the chemical change, the eruption which caused injury to the plaintiff was unforeseeable and, therefore, the defendant was not liable. [see also *Robinson* v. *Post Office*, (1974) 2 All E.R. 737 (*749*) C.A.].

19 *Hughes* v. *Lord Advocate*, (1963) 1 All E.R. 705 (H.L.).

20. The Wagon Mound (No. 2), [*Overseas Tankship* v. *Miller Steamship Co.*, (1966) 2 All E.R. 709 (*716*) P.C.].

defendant was guilty of negligence and he must then be held responsible for all the *consequences* of the act whether he could have reasonably anticipated them or not.

But later decisions explained the rule laid down in this case and engrafted exceptions, until the soundness of the rule itself has been questioned by the Privy Council in *Overseas Tankship Ltd.* v. *Morts Dock & Engineering Co.*[17] Again, though the decision in the *Polemis case* has not yet been overruled by the House of Lords, in 1963, the Court of Appeal itself[18] and the House of Lords[19] have followed the Privy Council decision[17] to the exclusion of the *Polemis* decision. The law relating to the point has, therefore, reverted to the position where it was before the *Polemis decision.*

2. The law, according to the Privy Council decision[17] is that "it is foresight of the reasonable man which alone can determine responsibility. The *Polemis* rule, by substituting 'direct' for 'reasonably foreseeable' consequence, leads to a conclusion equally *illogical and unjust*".

3. Hence, if the damage caused was not foreseeable by a reasonable man, there would be no liability even though the act which led to the damage was negligent[19–20].

4. The rule applies even to an action for nuisance[20].

5. If the damage was caused by the "conscious act of another volition", not induced by the act of the defendant, it is too remote to be recoverable, although it could not have happened but for the defendant's original wrongful act [*Harnett* v. *Bond*, (1925) A.C. 669]. Here the causal connection is severed by the intervention of a third party (*novus actus interveniens*)[21]. "The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes or consequences of consequences" [*Liesbosch* v. *Edison*, (1933) A.C. 449].

6. On the other hand, it is to be noted that the intervention of a third party, whether innocent or wrongful, is *not necessarily* the intervention of an 'independent cause' that would sever the causal link. "If what is relied upon as *novus actus interveniens* (i.e., the intervention of the act of a third party between the defendants' act and its consequences) is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in this maxim is no defence" [*Haynes* v. *Harwood*[22]

---

21. *Donovan v. Union Cartage Co.*, (1933) 2 K.B. 71. Defendants left an *unhorsed* van standing outside their *premises*. A child of seven climbed on the van and fell from it, thereby suffering injuries. *Held*, even assuming that the van was a nuisance, the accident did not happen because it was nuisance, but because the child *trespassed* upon it.

22. *Haynes* v. *Harwood*. The defendant's servant negligently left a *horse van* unattended in a *street*. A mischievous boy threw a stone at the horses, which caused them to bolt. The plaintiff, a police constable on duty at a police station, saw that a woman and some children were in danger of being injured, if nothing were done to stop the horses. He rushed out and succeeded in pulling up the horses before any mischief was done, but one of the horses fell on him and caused him personal injuries. He sued the defendant for damages. Two defences were taken—(a) that the plaintiff was a volunteer and the maxim '*volenti non fit injuria*' [see Chap. 5, § 1 (X), *post*] would apply; (b) that the injury to the

(Continued on p. 22)

(1935) 1 K.B. 146 (C.A.)]. Thus, anyone who invites or gives an opportunity to mischievous children to do a dangerous thing cannot escape liability on the ground that he did not do the wrong [*ibid*]. On the same principle, an employer who has created or permitted a *dangerous* condition to arise in a factory is reasonably expected to foresee and provide against the possibility of injury resulting therefrom and is liable for any injury caused to an employee by such dangerous condition, even though the injury results through the intermediation of an act of inadvertence by another employee and even though that act of inadvertence be of a character which cannot be precisely forecast.[23]

7. Again, the test of foreseeability of consequence does not mean that *"the precise" concatenation of circumstances* which led up to the accident should be foreseen oe foreseeable in order to make the defendant liable,[24] or that the danger actually materialising was identical with the danger reasonably foreseeable.

(*Continued from p. 19*)

plaintiff was not the direct consequence of the negligence of the defendant's servant, but was due to the intervention of the act of a third party, viz., the throwing of a stone by the mischievous boy.

Both defences were negatived by the Court of Appeal. (a) The policeman was not a volunteer. He was under a normal duty to prevent injury to people lawfully using the highway. The maxim *volenti non fit injuria* did not apply where the plaintiff, under an exigency caused by the defendant's wrongful conduct, undertook the risk to rescue another from imminent danger, even though the risk was faced consciously and deliberately. (b) As to the defence of *novus actus interveniens*, it was held that this plea was not available in as much as the defendant's servant was guilty of negligence in leaving the horses unattended in a street, and ought to have contemplated that mischief might be caused by passing boys. Greer L.J. observed,—"The whole question is whether or not, to use the words of the leading case *Hadley* v. *Baxendale* [(1854) 9 Ex. 341], the accident can be said to be the natural and probable result of the breach. If it is the very thing which ought to be anticipated by a man who was leaving his horses, or one of the things likely to arise at a consequence of his wrongful act, then it is no defence at all; it is only a step in the way of proving that the danger is the result of the wrongful act. In the present case the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that *this particular accident* and this particular damage were probable, but it is sufficient if it is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act."

23. *Thorogood* v. *Van den Berghs*, (1951) 1 All E.R. 682 (C.A.).

24. *Hughes* v. *Lord Advocate*, (1963) 1 All E.R. 705 (H.L.). Post Office employees opened a manhole for the purpose of getting access to a telephone cable. At 5 P.M., the employees left for a tea-break, leaving a tarpaulin cover over the manhole and four paraffin warning lamps burning. The plaintiff, a boy of eight, along with another boy, came there, took a paraffin lamp to see what was there and accidentally the lamp fell into the manhole, caused explosion and the plaintiff was injured. It was held that though the particular chain of events leading to the explosion was not foreseeable, it was reasonably foreseeable that an open paraffin lamp might cause an accident, and, accordingly, the plaintiff was entitled to recover damages. Lord Reid observed—

"This accident was caused by a known source of danger, but caused in a way which could not have been foreseen, and that....affords no defence".

Lord Pearce said—

"....it would be....too narrow a view to hold that those who created the risk of fire are excused from the liability for the damage by fire, because it came by way of explosive combustion."

§ 9. Summary

It would be profitable here, by way of summarising the contents of this Chapter, to reproduce the 'analytical classification of the grounds of liability in tort' given by *Sir F. Pollock*. According to him, every tort is an act or omission of some SPECIFIC LEGAL DUTY, which causes harm not intended by the person so acting or omitting [§ 6, *ante*], in one of the following ways, to a determinate person—

(a) It may be an act which, without lawful justification or excuse, is INTENDED by the agent to cause harm, and does cause the harm complained of [§ 3, *ante*].

(b) It may be an act violating an ABSOLUTE RIGHT (specially right of possession or property), and treated as wrongful without regard to the actor's intention or knowledge. In this case, damage in the sense of measurable loss is not necessary to constitute liability [§ 5 (2), *ante*].

(c) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause but might and should with DILIGENCE have foreseen and prevented [§ 4, *ante*]. [Or, the act and the consequence are directly related to each other as cause and effect].

(d) It may, in special cases, consist merely in not avoiding or preventing which the party was bound, absolutely or within limits, to avoid or prevent. In these cases a man becomes to that extent an INSURER to the public against a certain risk [§ 5 (1), *ante*].

(e) Connected in principle with these special liabilities but running through the whole subject and of constant occurrence in almost every division of it, is the rule that a master is answerable for the acts and defaults of his servants in the course of employment [§ 5 (3), *ante*].

§ 10. Classification of Torts

1. To make a systematic and comprehensive classification is just as difficult as to attempt a scientific definition of torts and no classification has yet received general recognition. *Pollock* makes his classification on the basis of the existence or absence of the 'ethical' element in the various wrongs. This classification is in harmony with his classification of the grounds of liability which has just been quoted above. *Pollock* classifies torts into 3 groups (to which correspond the three Parts in Bk. II of the present work)—

Group A. In this group there is a strong ethical or quasi-criminal element; the wrong is either wilful or wanton. Either (a) there is deliberate injury, e.g., in *assault, battery,* or *false imprisonment,* or (b) there is a reckless indifference to the rights and dignity of others, e.g., in *defamation,* (c) in some others there is positive bad faith or oppression, e.g., in *deceit, intimidation, malicious prosecution, conspiracy.*

Group B. The ethical element is absent from this group. Here the intention to violate another's rights or even the knowledge that one is violating them, is not necessary to constitute the wrong. *Trespass* to land or goods and *conversion* of goods from this group. Interference with rights analogous to property, such as *patents, copyrights and trade-marks,* are also governed

by the same principle. A man is bound to know at his peril what things are not his.[25]

Group C. The wrongs included in this group are of an intermediate character. The ethical element is present but not so manifestly as in Group A. The wrongdoer has not done the wrong wilfully or wantonly but neither can he be said to be morally indifferent. He has either failed to take order in things within his control, as in *nuisance,* or has failed to take the care and caution about his affairs which a man of commonsense in his place would have taken, as in *negligence.* In some cases there is an absolute duty to take care, for the violation of that duty is deemed to be so harmful that there is a conclusive presumption of negligence from the act itself, e.g., in breach of absolute duties imposed on the occupiers of *dangerous things or property.*

2. But, as stated at the outset, no classification of Torts can be scientifically precise or exhaustive, because of the very fact that the Law of Torts consists of a number of specific wrongs which have come to be recognised as actionable by a process of historical evolution.

Winfield gives a simpler classification according to the object of the wrong, but even then he is unable to exhaust all the Torts according to that principle. His classification is as follows:—

1. Wrongs to the person—Death assault and battery ; false imprisonment; trespass of the person; injuries affecting family relations.
2. Wrongs to reputation—defamation.
3. Wrongs to property—Trespass to land; conversion and other wrongs o chattels.
4. Wrongs to person *or* to property—Deceit, negligence, nuisance; conspiracy; breach of strict duties.
5. Wrongs to interference with freedom of conduct or of business.
6. Abuse of legal procedure—Malicious prosecution; maintenance and champerty.
7. Miscellaneous torts.[26]

25. *Read* v. *Lyons,* (1947) A.C. 156 (*166*).

26. Salmond (15th Ed., pp. 43–47) mentions this class as 'emergent torts', i.e., cases where British Courts have displayed willingness to create '*new heads* of liability', where the law is yet in a state of development or doubtful, e.g., invasion of privacy; abuse of statutory powers.

3

Vicarious Liability

§ 1. Liability for Wrongs committed by Others

In general a man is responsible for his own acts, but there are exceptional cases in which the law imposes on him *'vicarious liability'* for the acts of others, though he had no part in those acts. The most important of such cases is the liability of the master for wrongs committed by his servant. It is a species of a group of torts where the liability of a person is independent of his own wrongful intention or negligence and is, therefore, otherwise classified as *'liability without fault.'*[1]

2. In these cases liability is JOINT AS WELL AS SEVERAL [see Chap. 6, *post*]. The wrongdoer himself is liable, be he a servant or agent, because everybody must answer for his own acts,—it is no excuse that he was acting on behalf of or for the benefit of another. The principal who has authorised the wrongdoer expressly or impliedly, is *also*[2] responsible under this rule of vicarious liability. Liability for another's wrongs generally arises in two ways—

(i) Where the defendant has *authorised* or ratified that particular wrong.

(ii) Where the defendant stands to the wrongdoer in a *relation* which makes the former answerable for wrongs committed by the other, though not specifically authorised.[1] (We shall deal with three such cases,—liability of master for wrongs of servant, of partner for wrongs of other partners, of husband for wrongs of wife.) The liability of the master, thus, rests on his relationship and that is why it would extend even to a case where he had expressly prohibited the servant to do the act, provided it has been done in the course of the employment.

3. Vicarious liability is to be distinguished from absolute (or strict liability); in both cases, a person may be liable for a wrong committed by another person, irrespective of his own fault. But (a) in the case of vicarious liability, such liability arises because of the relationship of the principal with the wrongdoer, who may be his agent or servant; (b) in the case of absolute liability,

---

1. Salmond (15th Ed.), p. 39 [see p. 16, *ante*].

2. It is a case of joint and several liability of the servant as well as the master for a wrongful act of the servant subject to statutory exceptions where the law imposes a personal liability on the employer, the general rule is that a master would not be liable for an act done by a servant where the law does not hold the servant himself liable [*Staveley Iron Co.* v. *Jones*, (1956) 1 All E.R. 403 (406) H.L.].

the law imposes an absolute duty upon a person (by common law or statute), and the law would not allow him to avoid this liability by *engaging* another person,[3–4] as distinguished from a stranger whose acts could not be reasonably foreseen. In short, in a case of absolute liability, *the wrong itself is the ground of liability* and it is immaterial *how* the wrong took place, or by *whose* hands it was actually committed. These cases of absolute duty will be discussed in Chap. 15 (Breaches of Statutory Duty) and Chap. 16 (Breaches of Duties of Insuring Safety).

4. Another point to be remembered in the present context is that the vicarious liability of a master for torts committed by his servant is the liability of the master to a third party, who is injured by the servant's wrong; it has nothing to do with the relationship between the master and the servant, *inter se*, either in contract or in tort. Where a master is liable for the servant's tort, obviously, the servant is also liable individually, and the relation between the two is one of joint wrongdoers. In such a case, the master would be entitled, after meeting his liability to the third party, to contribution from his servant,—the joint wrongdoer. He can also sue him for damages for negligence in performance of his duty. In the absence of any contractual stipulation to the contrary, a servant is under contract, express or implied, to take due care in the performance of his work, and is liable to pay compensation to his master for loss caused to him by his failure to take such care.[5]

(A) SPECIFIC AUTHORITY

§ 2. Authority to commit a Tort : Principal and Agent

1. 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 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 principal is liable not only for the tort actually authorised, but also for its direct consequences.

2. The authority may be express or implied. In a number of cases of accident caused by a person (*other than a servant*[6]) while driving a car belonging to another person, the question of the vicarious liability of the owner for the injury caused by the accident to a third person has arisen, and the following propositions have been laid down:

(a) The fact that a car was being driven by a person other than the owner raises a presumption that he was either an agent or servant of the owner; but this presumption is rebuttable by the proof of the actual facts.[6–7]

(b) The fact that the driver was using the car with the owner's *permission* and that the purpose for which the car was being used was one in which the

3. *Staveley Iron Co.* v. *Jones*, (1956) 1 All E.R. 403 (*406*) H.L.

4. Cf. *Lochgelly Iron Co.* v. *M'Mullan*, (1934) A.C. 1; *Northwestern Utilities* v. *London Guarantee Co.*, (1936) A.C. 108 (*119*).

5. *Lister* v. *Romford Ice Co.*, (1957) 1 All E.R. 125 (*130–31*) H.L.

6. The case of a servant is dealt with separately, *below*.

7. *Rambarran* v. *Gurrucharan*, (1970) 1 All E.R. 749 P.C.

owner had an interest or concern, was *not* sufficient to establish vicarious liability.[7] To establish the existence of agency relationship, it is necessary to show that the driver was using the car at the owner's *request*, express or implied, or on his *instructions*, and was doing so in performance of the task or duty thereby delegated to him by the owner.[8] In short, the principal will be liable for the acts of his agent only so long as the agent acts (i) within the scope of his authority, or (ii) under the actual control of the principal.[9]

(c) A person permitted to drive another's car does not become the latter's agent if, *on his own volition*, he uses it for the owner's benefit; a son driving his father's car with permission does not become his father's agent merely because, remembering that his father has a suit at the cleaners, he uses his car to collect it.[8] On the other hand, where the owner asks someone to bring the car down to the station to meet him, then the driver is doing an act for the owner and acting as his agent.[8]

(d) The owner of a car cannot be held liable for wrong done by an unauthorised person driving the car, who is neither an agent nor a servant of the owner.[8–9a]

---

8. *Morgans* v. *Launchbury*, (1972) 2 All E.R. 606 (H.L.). A car belonging to the wife (*M*) was also used by her husband for going to his place of work. One evening, before returning home, the husband got heavily drunk, and unable to drive, handed over the ignition key to a friend (*C*) and fell asleep. *C*, instead of driving to the husband's home, went to the opposite direction to have a meal, and as a result of negligent driving, collided with a bus and injured *L*. *L* brought an action making *M* liable, as the owner of the car, for *C*'s negligence. *Held*, *C* was not liable as no agency was established between her and *C*. (i) There was no evidence to show that the husband used to drive the car to his place of work as the wife's *agent*; (ii) When the husband asked him to drive the car for, that did not suffice to make *C* the wife's agent; (iii) At any event, when the accident happened, *C* was not driving the car for the purpose of returning the car to the wife's home but away from her home for some fresh purpose of his own or of the husband; but in any case, it was no purpose of the wife.

9. *Sitaram* v. *Santanuprasad*, A. 1966 S.C. 1697. Sitaram entrusted his car to *M* who was not only the driver but in entire charge of the car, for plying it as a taxi. *M* appointed *C* as a cleaner for the taxi and also trained *C* to drive the car. *M* took *C* to the R.T.A. for obtaining for him a driver's licence. While *C* was driving the car for the test (*M* not being in the car), he took a sudden turn without giving a signal, as a result of which, he hit the plaintiff (Santanuprasad) and injured his leg. Plaintiff brought a suit against the owner (Sitaram), *inter alia*, for damages, which was decreed by the High Court. Reversing that decree, the Supreme Court *held* that—

(i) *C* was not the servant or the agent of the owner of the car, but had obtained the car for his own business not from the owner, but from a servant of the owner.

(ii) At the time of the accident, *M* was not on the car, and it could not therefore be said that he was in control of the car on behalf of the owner.

(iii) In lending the car to *C*, *M* was not acting on the master's business. The acts of *M* and *C*, therefore, viewed either separately or collectively, could not be said to be within the scope of the owner's employment.

Hence, the owner could not be held liable for the injury to the plaintiff caused by *C*.

9a. Where, however, the driver of the car who caused the accident is a *servant* of the defendant, the latter would be liable not only when the driver was acting 'in the course of his employment' but also when the driver was, with the defendant's consent, driving the car *on the defendant's business* or *for the defendant's purposes* [*Pushpabai* v. *Ranjit G. & P. Co.*, A.I.R. 1977 S.C. 1735 (para. 14)].

3. The authority may be *previous or subsequent*; in the latter case it is known as *ratification*. If one person commits a tort assuming to act on behalf of another but without its authority, and that other subsequently ratifies and assents to that act he thereby becomes responsible for it. That act becomes the act of the principal in the same way as if it were done with his previous authority, according to the maxim '*Omnis ratihabitio retrotrahitur et mandato priori aequiparatur* (every ratification of an act relates back and thereupon becomes equivalent to a previous request). But in order that subsequent ratification may make the principal responsible, two conditions must be present—(1) The wrongful act must have been done on *behalf* of the principal: no man can ratify an act which was done by another on his own account, and (2) The person ratifying must have full *knowledge* of the act ratified.

4. In general, a principal is liable only for those acts of his agent which he has actually authorised; he is not liable for *unauthorised acts* committed by the agent in the course of his agency (e.g., through negligence or mistake). *A most important exception to this rule is where the relation of master or servant exists between the principal and the agent.*[9a]

(B) AUTHORITY BY RELATION

§ 3. Master and Servant

This is the most important case of vicarious liability recognised by law. The subject may be considered under two heads: (I) Liability of master for injury caused by a servant to a *stranger*. (II) Liability of master for injury caused by a servant to his *fellow-servant*. Though we have grouped these two heads together, we shall see that they are governed by quite distinct principles.

(I) LIABILITY TO A THIRD PERSON

§ 4. The Principle of Liability

1. Where the relationship of master and servant exists between the parties, the liability of the employer is wider than that of a principal: a master is liable not only for those acts which have been committed by the servant, but also for acts done by him which are not specifically authorised, 'in the course of his employment'.

In other words, a master is liable for any tort committed by his servant WHILE ACTING IN THE 'COURSE OF HIS EMPLOYMENT', though no express command or privity of the master be proved. The principle has been thus explained by the Privy Council:[10]

> "It is clear that the master is responsible for acts *actually authorised* by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of master and servant at all.
>
> But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as *modes*—

10. *Canadian Pacific Ry.* v. *Lockhart*, (1942) 2 All E.R. 464 (P.C.)

although improper modes—of doing them. In other words, a master is responsible not merely for what he authorises his servant to do but also for the way in which he does it....

On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it."[10]

2. The basis of this rule has been variously stated: (i) The maxim *Respondeat Superior* (let the principal be liable) is usually referred to, but it does not explain the reason behind the rule. (ii) On the other hand, it is sometimes sought to be assimilated to the general principle of agency according to the maxim *Qui facit per alium facit per se* (he who does an act through another is deemed to do it himself). But, as we shall see, once the relation of master and servant is established, the master is liable not only for acts authorised by him, but also for acts done by the servant which are *not specifically authorised*, and even *forbidden*, provided only they are done by him 'in the course of employment'. (iii) Again, the principle was judicially stated thus—

"A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the 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 wrong of the person 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, but in the course of employment" [*Bayley* v. *Manchester, Ry. Co.*, (1872) 7 C.P. 415].

• The true view seems to be that the rule is founded on *social convenience and expediency* [*I.C.I.* v. *Shatwell*, (1964) 2 All E.R. 999 H.L.]; but the Privy Council relied on the doctrine of 'implied authority' in *Keppel Bus Co.* v. *Salad Bin Ahmad*.[11]

3. The conditions necessary to make the master responsible are: *firstly*, the RELATIONSHIP OF MASTER AND SERVANT must exist between him and the wrongdoer; and *secondly*, the servant must have been, while committing the wrong, acting in the COURSE OF HIS EMPLOYMENT. We have therefore to enquire—

1. Who is a servant?
2. What acts are deemed to be in the course of employment?

---

11. *Keppel Bus Co.* v. *Salad Bin Ahmad*, (1974) 2 All E.R. 700 P.C. The Respondent (*S*), a passenger in the bus of the Singapore Bus Co. (Appellant), protested against the conductor of the bus when he rudely behaved with an elderly lady passenger; subsequently, after the other passengers had left, the conductor abused *S*, and when he remonstrated, struck him in the eye with his punch, as a result of which *S* lost his eye. *S*'s action against the bus Co. was dismissed on appeal by the Privy Council, on the finding that there was no evidence of any disorder among the other passengers or any other emergency situation, from which it could be held that the conductor had the 'implied authority' of the master to maintain order by the use of force or violent action. Hence, the master could not be made vicariously liable for the servant's act of assaulting the passenger.

§ 5. Who is a Servant?

1. A SERVANT is to be distinguished from an 'independent contractor'. The relation of master and servant exists only between persons of whom the one has the order and *control* of the work done by the other.[12] A servant is a person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the *manner* in which the work is to be done.[13] An INDEPENDENT CONTRACTOR, on the other hand, is a person who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result. As a general rule, the employer is not responsible for the acts of an independent contractor save for those actually authorised. Thus, the driver of *A's* car is *A's* servant, and consequently *A* is liable for accidents caused by the negligence of the driver while driving in the street. But the cabman whom *A* engages for a particular trip is *not A's* servant; because he has made a contract with *A* that he will drive him to a certain place,—besides this, he is not bound to obey the particular directions given by *A*. Consequently, if any accident happens on the way, cabman is responsible for his negligence and not *A*.

2. Onee the TEST OF CONTROL, or right to control exists, payment of wages is not necessary, and one may *gratuitously* become the servant of another. Thus, if the owner of a car, while remaining in the car, and *retaining his right to control it*, allows it to be driven by a friend who was accompanying him, the owner is liable for the damage caused by the negligence of his friend [*Pratt* v. *Patrick*, (1924) 1 K.B. 488]; but the owner would not be liable where the owner, though remaining in the car, had no control over it because he was heavily drunk or asleep.[14] The same principle applies where the casual delegation is made to a stranger, provided only the owner retains his possession and control of the property [*Samson* v. *Aitchison*[15], (1912) A.C. 844].

---

12. Thus, it has been held that a hospital authority is liable for the negligence of doctors on its permanent staff over whose work it has control [*Cassidy* v. *Minister for Health*, (1951) 2 K.B. 343], but not for the negligence of *consulting* physicians who have been held not to be under its control [*Collins* v. *Hertfordshire C. C.*, (1947) 1 K.B. 598 (C.A.)].

13. *Mersey Docks Board* v. *Coggins* (1946) 2 All E.R. 345 H.L. A firm of stevedores had hired from the Mersey Docks Board the use of a crane together with its driver. The driver in question was a skilled workman and paid by the Board and the Board alone had the power to dismiss him. The stevedores directed what work was to be done by him, but they had no authority to direct *how* he should work the crane. Owing to the negligence of the driver, a man was injured. *Held*, that employers of the driver, i.e., the Board and not the hirers,—the stevedores,—were liable, since though the latter could tell the crane driver where to go and what to carry, they had no authority to give directions as to the *manner* in which the crane was to be operated.

14. *Morgans* v. *Launchbury*, (1972) 2 All E.R. 606 H.L. (see p. 25, *ante*).

15. *Samson* v. *Aitchison*. In order to demonstrate his car to a customer, defendant took the customer and his son in the car and, then, allowed the customer's son to drive it for trial. The latter caused an accident through his negligence. *Held*, defendant was liable for the damage for he had not given up his right to control the car. It was further observed, —"No doubt if the actual *possession* of the equipage has been given by the owner to a third person that is to say, if there has been a *bailment* by the owner to the third person—the owner has given up his control."

3. The test of control has also been applied in the case of *borrowed servants*. No man can serve two MASTERS, but a man may be in the permanent employment of one person and yet for a *particular iob* be the servant of another, so as to render that other liable for his wrongful act. A person may be the servant of another on a single occasion provided *the latter can control him, as to the 'manner of execution of the work'* [*Mersey Harbour* v. *Coggins*[15]]. Thus, where *A* borrowed of *B* a horse and a chaise and went in it accompanied by *B's* coachman *C* on an excursion of pleasure, *C* driving; and owing to *C's* mismanagement injury was done to the horse of a third person, *held*, that action would lie against *A*, and not against *B* for the injury caused by the coachman [*Wheatley* v. *Patrick* (1837), 2 M. & W. 650]. If, on the other hand, a person employs his servant to do work for another the servant remaining exclusively subject to the control and direction of his own master, the other person who does not control the work of the servant will not be responsible for the acts of the servant.[16] In order to be relieved of liability for a servant's negligence, the employer must show that 'entire and absolute' control of the servant had been transferred to the hirer.[16a]

4. It is on the same principle that a superior *servant* is not responsible for wrongs committed by inferior *servants*, though committed under his charge for the time being. Both are servants of the common master. This principle is of special application in the case of public servants, where a superior officer is not liable for any tort committed by a subordinate, unless such act has been expressly authorised or ratified by him.[17]

§ 6. Course of Employment

1. Once the relation of master and servant is established, the master is responsible not merely for what he authorises to do, but also for the *way* in which the servant does it, for a servant, as we have seen, is (as distinguished from an independent contractor) under the control of the master as to the manner of

---

16. Thus, (1) where the defendants, the owners of a carriage, habitually hired horses as well as a driver from a livery-stable keeper, and through the negligence of the driver the plaintiff was injured, it was *held* that the defendants were not liable, for the driver was not their servant, but of the livery-stable keeper [*Quarman* v. *Burnett*, (1840) 6 M & W. 499]. But (2) in a later case where the owner of a carriage also owned horses, but hired a driver only, the owner was *held* liable for negligence of the driver [*Jones* v. *Scullard*, (1898) 2 Q.B. 565]. [In the case of *Mersey Harbour* v. *Coggins*, (1946) 2 A.E.R. 345 (H.L.), the House of Lords has explained that the ground of decision in *Quarman* v. *Burnett* was that the defendant had no control over the *way* in which the horses were driven, though they could direct the driver where and when to drive. It was also laid down that in all such cases of 'double employment' the sole question of determination of liability as between the general employer and the hirer is—"Where the authority lies to direct, or to delegate to, the workman, *the manner of execution of the work*." If the general or permanent employer directs, or delegates to the workman's discretion, as to the way in which the act is to be done,—the hirer is not liable for negligence of the workman. If, on the other hand, the hirer intervenes to give directions, as to *how* the work is to be done, the hirer and not the general employer is liable for damage done to a party by negligence of the workman].

16a. *Bhoomidas* v. *Port* of Singapore, (1978) 1. All E.R. 956 (P.C.).

17. *Bainbridge* v. *Post-master General*, (1906) 1 K.B. 178 [see Chap. 4, *post*].

his work, and this control brings a corresponding responsibility. Thus, a master is liable even for acts which he has *not* authorised, provided they are *so connected* with acts which he has authorised that they may be regarded as *modes* (although improper modes) of doing them. These are acts done 'in the course of employment, service, or business' [As we shall see, the acts need not be for the *benefit* of the master (Cf. *Lloyd* v. *Grace Smith, below*)].

2. There was formerly some difference of opinion as to what constituted the 'course of employment'. Thus, in *Williams* v. *Jones*, [(1866) 3 H. & C. 602], where a carpenter employed by the defendant to make a signboard in a shed belonging to the plaintiff (who had allowed use of the shed for that purpose), lighted his pipe and set the shed on fire by negligently throwing down the lighter used by him, it was *held*, that the defendant was not liable to the plaintiff, the owner of the shed, for there was *no negligence in making the signboard* for which the carpenter was *employed*,—the negligent act was merely coincident in time with it. But in somewhat similar circumstances, the master was held liable because there the negligence was in the performance of the master's business itself [*Jefferson* v. *Derbyshire Farmers Ltd.*, (1921) 2 K.B. 281]. The decision in *Williams* v. *Jones* has later been OVERRULED by the House of Lords in *Century Insurance Co.* v. *N.I. Road Board*, [(1942) A.C. 509], where it has been held that the negligent act of a driver in lighting a cigarette and throwing away the lighted match on the floor while petrol was being discharged through pipe into a tank, was 'in the course of employment' of the driver and that the lorry-owners were liable for damage done to a customer and not the suppliers of petrol who had hired the lorry. Of course, the act of the driver (i.e., lighting a cigarette) was done for his own comfort, but it was a negligence in the discharge of his duties, or a negligent method of doing the master's work.

3. Thus it is settled that 'course of employment' comprises all acts done by servant which are so connected with the acts authorised by the master that they may be regarded as modes, including, improper modes of doing the authorised acts, but does not include acts which are not so connected with the authorised acts as to be a mode of doing them.[18]

4. Such acts of the servant for which the master is liable on the principle of vicarious liability may, therefore, be classified under the following heads:—

(I) The act may be the NATURAL CONSEQUENCE of something done by a servant with ordinary care in doing an act which has been specifically *authorised* by the master [*Gregory* v. *Piper*, (1829) 33 R.R. 268], even though the *mode* in which the servant does it is unauthorised. In this case the question of liability raises no difficulty, for it follows from the ordinary rule as to specific authority [Cf. p. 26, *ante*].

(II) The act may be due to the SERVANT'S WANT OF CARE OR NEGLIGENCE in carrying on the work or business in which he is employed. If the servant does negligently that which he was authorised to do carefully, his master will answer for that negligence [*Englehart* v. *Farrant*[19] (1897) 1 Q.B. 240].

18. *Canadian Pac. Ry.* v. *Lockhart*, (1942) 2 All E.R. 464 (P.C.).

19. *Englehart* v. *Farrant & Co.* The defendant employed a man to drive a cart with

(*Continued on p. 31*)

But if the servant, instead of doing that which he was employed to do, does something which he was *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 [*Mitchell* v. *Crasweller*[20] (1853) 13 C.B. 297]. Similarly, if instead of a mere deviation, the servant makes a total departure from the course of his master's business, so that he may be said to be '*on a frolic of his own*', the master is no longer answerable for his servant's conduct [*Storey* v. *Ashton* (1869) 4 Q.B. 476]. In short, though the master is liable for a wrong due to negligence of the servant in the mode of performing the servant's duty, he will not be liable if the wrong is committed while the servant was engaged in doing an act altogether unconnected with the subject-matter of the authority.

Thus, if a private lorry driver, instructed not to carry any passenger save the employees of the owner, takes an outsider as passenger without knowledge of the owner, and the outsider is injured owing to the negligence of the driver, the owner cannot be held liable because the act of the driver, viz., the taking of the plaintiff on the vehicle, was outside the scope of employment of the driver. "It was as much on a frolic of his own as if he had been driving somewhat on some amusement of his own quite unauthorised by his employers."[21]

(III) The act may be an EXCESSIVE OR MISTAKEN EXECUTION by the servant of a lawful authority. The master will be liable if the servant tended to do on behalf of his master something *of a kind* which he was in fact authorised to do, and which in the particular instance was wrongful only by reason of excess or mistake on the servant's part [*Bayley* v. *Manchester Ry. Co.*,[22] (1873) 8 C.P. 148].

But (a) the master is not liable for any act done by his servant even on behalf of his master and with intent to serve his interests if the act is so *foreign* to the nature of the servant's employment that it cannot be regarded as a mode

---

(*Continued from p. 30*)

instructions not to leave it, and a lad to go into the cart and deliver parcels to the customers of the defendant. The driver left the cart for a short time, forbidding the lad to drive, but the lad drove the cart and came into collision with plaintiff's carriage. *Held*, the negligence of the driver in so leaving the cart at the mercy of the boy was the effective cause of the damage, and was done in the course of his employment. His employer (the defendant) was therefore liable.

20. *Mitchell* v. *Crasweller*. The defendant's servant was engaged to drive a cart, and on returning to his employer's premises at the end of the day's work it became his duty to take the horse and cart to the stable. Instead of doing so he drove away on a new journey *for his own purposes* exclusively, and while returning, he injured the plaintiff by negligent driving. *Held*, the master was not responsible.

21. *Conway* v. *George Wimpey*, (1951) 1 All E.R. 363 (C.A.).

22. *Bayley* v. *Manchester Ry. Co.* The plaintiff was violently put out of a compartment by a porter of the defendant Ry. Co. under the *erroneous* belief that he was in the wrong train. *Held*, the Company was liable. It was one of the duties of the porter to prevent passengers from getting into wrong trains, and although the plaintiff was in fact in the right train, the act of the porter was merely a mistaken way of doing the work entrusted to him.

of performing that employment [*Beard* v. *London' General Omnibus Co.*,[23] (1900) 2 Q.B. 530].

Nor (b) is the master answerable if the servant takes on himself, though in good faith, and meaning to further the master's interest, that which *the master himself had no right to do*. In such a case there can be no possible ground for supposing that the master authorised the servant to do the act [*Poulton* v. *London & S.W. Ry.*, (1867) 2 Q.B. 534].

(IV) The act may be a WILFUL WRONG, DONE WITHIN THE SPHERE OF EMPLOYMENT. For example, if *A* sends out his driver *B* with carriage, and *B* overtakes *C*'s carriage on the road, and strikes *C*'s horse in order to let him pass, *A* will be liable to *C*. Even express *prohibition* of the wrongful act is no defence if the act is done within the sphere of employment [*Limpus* v. *London General Omnibus Co.*,[24] (1862) 1 H. & C. 526].

There are prohibitions which limit the *sphere* of employment, and prohibitions which only deal with the *conduct* within the sphere of employments. The master is not responsible for a breach of the first class, but he is responsible for a breach of the second class of prohibitions [*Canadian Pacific Ry.* v. *Lockhart*,[25] (1942) 2 All E.R. 464 (P.C.); *London County Council* v. *Cattermoles*, (1953) 2 All E.R. 582 (C.A.)].

(V) Similarly, a master is responsible for the FRAUD OF THE SERVANT committed in the course of his service: as to the employer's liability, 'no sensible distinction can be drawn between the case of fraud and the case of any other wrong' [*Barwick* v. *English Joint Stock Bank*, (1867) 2 Ex. 259]. But the observation of Wills J. in *Barwick's case* gave rise to the view that the master would be liable for a fraud committed by his servant if the act was for the master's benefit. But this view has been emphatically repudiated by the

---

23. *Beard* v. *L.G. Omnibus Co.* The conductor of an omnibus belonging to the defendant company, at the end of a journey and in the temporary absence of the driver, took upon himself to drive the omnibus for the purpose of turning it round for the return journey, and in so doing injured the plaintiff. *Held*, the Company was not liable. Driving of an omnibus cannot be said to be a mode, rightful or wrongful, of performing the duties of a conductor.

24. *Limpus* v. *L.G. Omnibus Co.* 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. *Held*, the company was liable. For "the act of driving as he (the driver) did is not inconsistent with his employment, when explained by his desire to get before other omnibus."

25. *Canadian Pacific Ry.* v. *Lockhart*. *A*, a servant of *B*, in disregard of written notice prohibiting employees from using privately owned motor cars for the purpose of *B*'s business unless adequately protected by surance, used his uninsured motor car on a journey for the purpose of, and as a means of execution of work which he was ordinarily employed to do; and by negligent driving injured *C*. *Held*, *B* was liable for the injury to *C*. For,—"the prohibition merely limited the *way* in which, or by means of which, the servant was to execute the work he was employed to do, and that breach of the prohibition did not exclude the liability of the master to third parties....But if the prohibition had absolutely forbidden the servant to drive his motor car in the course of his employment it might well have been maintained that.....the driving of a motor car was *outside* the scope of his employment." See also *Rose* v. *Plenty*, (1976) 1 All E.R. 97 (*105*) C.A.].

House of Lords in *Lloyd* v. *Grace Smith & Co.*,[26] [(1912) A.C. 716], where it has been pointed out that the phrase 'for the master's benefit' might be appropriate to the particular facts in *Barwick's* case, but Wills, J., probably did not intend it to mean that a master is not answerable for the wrong of his servant, committed in the course of the service, if it be not committed for the master's benefit.

The rule, therefore, stands thus—*A master is answerable for the fraud of his servant acting within the scope of his authority whether the fraud is committed for the benefit of the master or for the benefit of the servants.*[27–27a]

(VI) The foregoing rule would extend even to a case where the servant's act is malicious[28] or constitutes a crime.[27]

§ 7. Liability for Acts of Independent Contractors

1. The liability of the employer to third parties is dependent on the relationship of master and servant. Where the employee retains *full discretion* as to the manner or method in which the work is to be done, he is called an '*independent contractor*'. In other words, an 'independent contractor' is a person who undertakes to do a work without being under the control of the employer for whom he does it as to the *manner* of execution of the work [*Mersey Harbour Board* v. *Coggins*, (1946) 2 All E.R. 345 (H.L.) (see p. 29*n.*, *ante*)].

2. Whether a man has let out the whole of a given work to an 'independent contractor' or reserved so much power of control as to leave him answerable for the acts of the latter, is a question of fact to be determined in each particular case.[29] The general rule is that for the acts and omission of an independent

---

26. *Lloyd* v. *Grace Smith & Co.* The plaintiff, Mrs. Lloyd, went to the defendants, a firm of solicitors, to seek advice for investment and saw their managing clerk Sandes, who used to conduct this class of business without supervision of the member of the firm. The clerk advised her to sell her property for making a better investment and induced her to convey the property to himself for the purpose of the sale. The clerk then sold the property in his own name and absconded with the money. On discovering the fraud, plaintiff brought the suit against the firm of solicitors. The Court of Appeal, relying on *Barwick's case*, held that the defendants were not liable, as the fraud was committed by the agent, viz., the managing clerk, for his own benefit and not for the benefit of the firm. The House of Lords *reversed* this decision and decreed the suit on the ground that the fraud was committed by the servant 'in the course of his employment' by the defendant firm. He was authorised or *held* out as authorised to transact such business on their behalf, and he was acting within the scope of his authority. It was further observed that the reference to 'the master's benefit' in *Barwick's case* was by way of narration of facts and not as a ground for the decision. [Aso *United Africa Co.* v. *Saka*, (1955) A.C. 130 (P.C.)].

27. *Morris* v. *Martin & Sons*, (1965) 2 All E.R. 725 (*737*, *740*) C.A.

27a. But the master would *not* be liable where the act was done outside the 'course of employment' [*State Bank of India* v. *Shyama*, A.I.R. 1978 S.C. 1263 (paras 41-42)].

28. *Warren* v. *Henleys*, (1948) 2 All E.R. 935.

29. In *Gold* v. *Essex County Council*, (1942) 2 K.B. 293 (C.A.), a nice distinction was drawn between a contract *of service*, and a contract *for services*, holding, the hospital authorities are liable for the negligence of members of its staff, such as nurse, radiographer, and doctors, who act under a contract *of service*, but are not liable for the negligence of

(*Continued on p. 34*)

contractor, except those actually authorised, his employer is not liable to strangers. Nor is the employer liable for the wrongs of servants or sub-contractors 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' [*Quarman* v. *Burnett* (Cf. p. 29*n*, *ante*)].

3. To this general rule there are important EXCEPTIONS. The employer will be liable for wrongs of the independent contractor—

(i) Where the employer personally interferes in or *assumes control* over the contractor's work [*Burgess* v. *Gray*, (1846) 1 C.B. 578].

(ii) Where the thing contracted to be done is itself *unlawful*, and the employer could not himself do it.

(iii) 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 [*Bower* v. *Peate*,[30] (1876) 1 Q.B.D. 321]. This case, and the preceeding one, are technically known by the expression '*vice in the work*'. The employer is not liable for 'collateral negligence' of an independent contractor committed in the course of his employment; but where the employer has employed the latter (a) to do improper work, or (b) to do proper work which is improperly done in the sense of a bad job, he is not free from liability. Collateral negligence is not to be expected by the employer, but where there is 'vice in the work' that is to say, where the activity is particularly hazardous,[31] and damage is observable, duty lies upon the employer to avoid harm. Thus, hospital authorities cannot discharge their duty of providing proper treatment by entrusting it to competent staff.[32]

(iv) Where he was negligent in the selection of the contractor and that negligence was the cause of the tortious act.[33] If he has engaged a competent contractor, he would not be liable unless it is a case of absolute liability, e.g.,

---

(*Continued from p. 33*)

visiting surgeons and physicians, who act under a contract *for services*, and are thus in the position of independent contractors.

The authority of the above decision has been shaken by the later decision of the Court of Appeal in *Cassidy* v. *Ministry of Health*, [(1951) 1 All E.R. 574 (C.A.)] where it has been held that in both the above cases, the hospital authorities would be liable for negligence, for *they themselves were under a duty to take care in* treating the patient and that they could not get rid of that responsibility by delegating the performance of the duty to someone else, whether the latter be a servant or an independent contractor. In this case, Denning L.J. seems to have enunciated a doctrine of strict liability for the authorities of a hospital, even though they themselves may not be medical men. "Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment." The hospital authorities cannot get rid of this duty to take care by engaging others to do the treatment and even though the treatment be gratuitous.

30. Defendant employed a contractor to pull down an old house and erect a new one. The contractor expressly undertook to support plaintiff's house, and to be liable for all damages. Yet, defendant was *held* liable for the damages done [*Bower* v. *Peate*].

31. This is an application of the principle enunciated in *Fletcher* v. *Rylands*, (1866) 1 Ex. 265 (*279*) H.L.

32. *Lindsey County Council* v. *Marshall*, (1936) 2 All E.R. 1076 (H.L.).

33. *Joliffe* v. *Willmett & Co.*, (1971) 1 All E.R. 478 (*485*).

where the work is inherently dangerous, such as keeping dangerous things, or work on a highway.[34]

(v) Where special or absolute duty is imposed on the employer by *common law* or *statute*[35] to do the thing properly, and the contractor performs it negligently. Such duty arises under the common law in cases of "insuring safety', e.g., the duty of occupier of premises to an invitee, duty arising from possession of dangerous things[36] such as fire, explosives, wild animals, etc. [cf. Chap. 15, § § 6–8, *post*].

Liability of Government for torts committed by its servants.—See under Chap. 4, *post*.

(II) LIABILITY OF MASTER TO A SERVANT FOR WRONG DONE BY ANOTHER SERVANT

§ 8. The Doctrine of Common Employment

1. *England.* The rule as to liability of the master for his servant's wrongs was further complicated when the person injured was himself a servant of the same master. At common law, the master's liability extended only to harm done to strangers, not to harm inflicted by one of his servants on another fellow servant. This common law rule has however been modified and finally abrogated by statute.

(A) *At Common Law.* The doctrine is known as the doctrine of common employment. It makes a distinction between a stranger and a servant as to the liability of a master for the negligence of his servants in the course of his business. Where the person injured is himself a servant in the same business his position is not the same as that of a stranger. The rule was first applied in *Priestly* v. *Fowler*, (1837) 3 M. & W. 1].

(B) *Employer's Liability Act, 1880, and Workmen's Compensation Act, 1925.* These two Acts abrogated the doctrine of common employment in some specified cases relating to injury to a 'workman'.

(a) The Act of 1880 placed a 'workman' as against his employer in approximately the same position as an outsider inasmuch as he is entitled to compensation for any personal injury caused (i) by reason of any defect in the condition of the material instruments used in the master's business; or (ii) by reason of the negligence of another servant exercising superintendence; or (iii) by the effect of specific orders or rules issued by the master or some one representing him. But the Act applied only to particular classes of workmen,

---

34. *Salsbury* v. *Woodland*, (1969) 3 All E.R. 863 (*869, 875*) C.A.

35. *Riverstone* v. *Lancashire*, (1961) 1 All E.R. 495 (H.L.).

36. Defendant was the occupier of a house from which a large lamp was suspended over the pavement. The lamp, being out of repair, defendant engaged a contractor. Owing to bad execution of the work of repair, the lamp subsequently fell on a pedestrian and injured her. *Held*, defendant was liable, because a person, maintaining a lamp projecting on the highway was bound to maintain it in a way as not to be *dangerous* to the public, and, if it causes injury, it is no answer to say that he engaged an independent contractor to repair it [*Tarry* v. *Ashton*, (1876) 1 Q.B.D. 314].

e.g., railway servants, journeymen, handicraftsmen, etc., and outside them the common law doctrine still held good. Thus, menial or domestic servants or clerks are not included. By this Act the defence of common employment was denied to the employer but still the following defences were left—(1) contributory negligence; (2) that the workman knew of the defect or negligence which caused the injury and failed within a reasonable time to inform the employer; (3) that he expressly contracted himself out of the Act.

(b) The Act of 1925 differed in nature and extent from the Employer's Liability Act. It made an employer an insurer of his servants against accidental injuries or death. He must pay compensation to workmen to whom it applied, for *any* personal injury which had been caused by an "accident arising out of and in the course of the employment." It applied to all contracts of service except certain specified ones. The compensation was recoverable by a special procedure and not in the ordinary Courts of law. The workman who came within this Act was rather in a *more favourable* position than a stranger; the liability attached to the relation of master and servant, quite independent of any negligence on the part of the employer or fellow-servants. Three of the principal defences previously open to the employer were not available under this Act, viz.—(1) *Volenti non fit injuria.* (2) Inevitable accident. (3) Contributory Negligence.

(C) *The National Insurance (Industrial Injuries) Act, 1946.* This Act went one step further and *replaced* both the Employers' Liability Act and the Workmen's Compensation Act. It provided for a compulsory insurance of *all persons* employed under a 'contract of service', from a fund contributed by the employer and the employee in equal shares. Benefits are payable under the Act in respect of any personal injury caused by accident arising out of and in course of the employment. The administration of the Act is vested in the Ministry of National Insurance and *not* the Courts. None of the defences available under the previous legislation are available under this Act.

Furthermore, this Act does not take away the common law right of the employee to obtain damages from a court of law, but only provides that the damages recoverable in a common law action shall be reduced by half of the estimated value of the benefits to be received by the employee under the National Insurance (Personal Injuries) Act, 1946. Of course, the defence of common employment continued to exist, in a common law action, until 1948, when it was abolished by another statute, to be mentioned just now.

(D) *Exit 'Common Employment'.* 1. The doctrine of common employment was criticised by the House of Lords as a doctrine which 'there is none to praise, and very few to love' [*Radcliffe* v. *Ribble*, (1939) A.C. 215]. This led Parliament at length to ABOLISH the century-old doctrine by enacting the Law Reform (Personal Injuries) Act, 1948, which provides—

> "It shall not be a defence to an employer who is sued in respect of personal injuries caused by the negligence of a person employed by him, that person was at the time the injury was caused, in common employment with the person injured."

So, the defence that the person through whose negligence the plaintiff has been injured is a fellow workman, is no longer available to the employer.

The employer is liable even though the employee who is injured and the co-employee whose negligence caused the injury are related as husband and wife, for, the liability of the employer rests on the principle that the act of a servant is the act of the master.[37]

2. It is to be noted that the Law Reform (Personal Injuries) Act, 1948, expressly *binds the Crown*. The Crown has thus been brought to the same level as a private person under this branch of the law of torts, by the combined operation of the Crown Proceedings Act and the Law Reform (Personal Injuries) Act, 1948.

The Crown Proceedings Act, however, makes a specific exception in respect of which the defence of common employment may be said to have been maintained in favour of the Crown, even though a private employer is no longer entitled to the defence, in any case. This exception is contained in s. 10 (1) of the Act which provides that the Crown will not be liable for injury or death caused by one member of the Armed Forces to another provided— (i) the wrongdoer was *on duty* as a member of the Armed Forces; (ii) the member injured or killed was either on duty or on some land, premises, etc., for the time being used for the purposes of the Armed Forces.

II. *India.* 1. In India, there was a difference of judicial opinion amongst the High Courts as to whether the common law doctrine of 'Common Employment' applies.

The Calcutta High Court applied it in the case *Brocklebank* v. *Noor Ahmode* [(1937) C.W.N. 179] But, on appeal, the Judicial Committee [(1940) 45 C.W.N. 197 (P.C.)], though they expressed no final opinion on the point, approved of the contrary view taken by the Nagpur High Court,[38] and seriously doubted if the doctrine was applicable to India at all.

In the meantime, however, the doctrine had been rendered inapplicable in India, by the passing of the Employers' Liability Act, 1938, which abolished the defence of 'Common Employment' in suits for damages brought by *any* workman.

2. While the English Employers' Liability Act, 1880, was restricted in its scope being applicable to workmen of particular classes only (p. 35, *ante*), the Indian Act of 1938 applies to *all* employees, for, the term 'workman' is defined as—

> "any person who has entered into, or works under a contract of service or apprenticeship with an employer whether by way of *manual labour, clerical work or otherwise*, and whether the contract is *express or implied, oral or in writing*."

Where personal injury is caused to a workman—

(a) by reason of any like omission on the part of any person in the service of the employer with the duty of seeing that any way, works, machinery or plant are in good and safe condition; or

(b) by reason of the negligence of any person in the service of the employer who

37. *Broom* v. *Morgan*, (1953) 1 All E.R. 849 (C.A.)

38. *Secy. of State* v. *Rukmini*, A. 1937 Nag. 354.

has any superintendence entrusted to him, whilst in the exercise of such superintendence; or

(c) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where the injury resulted from his having so conformed; or

(d) by reason of the act of omission of any person in the service of employer done or made—

(i) in the normal performance of the duties of that person; or

(ii) in obedience to any rule or bye-law of the employer (not being a rule or bye-law which is required by or under any law for the time being in force to be approved by any authority and which has been so approved); or

(iii) in obedience to particular instructions given by any other person to whom the employer has delegated authority in that behalf;

a suit for damages by such workman or, in case of his death, by his legal representative, shall not fail by reason only of the fact that the workman was at the time of the injury a workman of the employer.

The plea of *volenti non fit injuria* is also controlled by sec. 4 which says—

"In any such suit for damages, the workman shall not be deemed to have undertaken any risk attaching to the employment unless the employer proves that the risk was fully explained to and understood by the workman and that the workman voluntarily undertook the same."

3. Apart from this, there is the Workman's Compensation Act, 1925, framed more or less on the lines of the repealed English Act (p. 35, *ante*), except that the Indian Act does not apply to all workmen but only to those who are specified in Sch. II of the Act.

4. The Employees' State Insurance Act, 1948, provides for certain benefits to employees for 'employment injury' and in other cases. An employee means a person engaged in a factory or an establishment to which this Act is extended and 'employment injury' means a personal injury to an employee caused by accident or an occupational diseases arising out of and in course of his employment in such factory or establishment. As under the English Act of 1946 (p. 36, *ante*), the benefit is to be paid out of a Fund contributed by employer as well as employee.

5. Since the doctime of 'Common Employment' has been abolished in England, it may now be safely asserted that it is not going to be applied by any Indian Court.

§ 9. Firm and Partners

(A) *England.* The relation between a firm and its partners is the relation of principal and agent. The firm is answerable for wrongs committed by one of the partners in the course of the firm's business and within the scope of his usual authority, though no benefit be derived therefrom by the other partners. The rule is now statutory. The Partnership Act, 1890, lays down—

"Where by any wrongful act or omission of any partner acting (a) in the ordinary course of the business of a firm, or (b) with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm is liable therefore to the same extent as the partner so acting or omitting to act."

And "when the firm is liable, the individual partners are *jointly* and *severally liable*".

(B) *India.* S. 26 of the Indian Partnership Act, 1932, similarly provides—

"Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partner, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefore to the same extent as the partner."

§ 10. Husband and Wife

(A) *England.* At common law, a husband was liable for all torts committed by his wife during the subsistence of marriage, in the sense that a married woman could not be sued alone for her wrongful acts during coverture, but her husband had to be joined as a co-defendant.

The position has, however, been ALTERED by the Law Reform (Married Women and Tort-Feasors) Act, 1935, as a result of which a married woman may be sued for any tort, whether pre-nuptial or post-nuptial, and the judgment may be enforced against her in all respects as if she were a *feme sole*, and her husband must not be made a party unless he is a joint tort-feasor, in the facts of a case.

The husband shall, of course, remain liable for torts committed by his wife where the ordinary principle of vicarious liability applies, e.g., where the wife is the agent or employee of the husband.

(B) *India.* In India, similarly, under the Married Women's Property Act, 1874, a married woman to whom the Act applies, may sue or be sued in tort as a *feme sole*, and her husband need not be joined. The Act does not apply to Hindus, Mahomedans, etc., who are governed by their personal law. But it does not seem that the common law rule of joinder of the husband is applicable in their case as the rule is not founded on any principle of justice, equity or good conscience.

§ 11. Summary

1. As a general rule, a man is liable only for his own wrong, but in certain cases the law imposes liability on a man for the acts and defaults of another. The most important of such cases is the liability of a master for wrongs committed by his servant : A master is responsible for the wrongful acts or omissions committed by the servant in the course of his employment, whether the wrong be committed negligently, wantonly, or even wilfully, and though no express command or privity of the master be proved. To establish such vicarious liability two things must be proved—(a) that the wrongdoer stood in the relation of a 'servant' to the party sought to be made liable, and (b) that the wrong was committed by the servant in the course of employment.

2. In certain exceptional cases, a person is liable even for the wrongs of an independent contractor employed by him.

3. The distinction between an agent, servant and independent contractor has thus been summarised[39]:

39. Halsbury's *Laws of England*, quoted in *Lakshminarayan* v. *Govt. of Hyderabad*, (1955) 1 S.C.R. 393 (*400–10*).

(i) A principal has the right to direct *what* work the agent has to do: but a master has the further right to direct *how* the work is to be done.

(ii) An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject *in its exercise* to the direct control or supervision of the principal; he is generally free to carry out those instructions according to his own discretion. A servant, on the other hand, is subject to his master's right to control the *manner* in which he carries out those instructions.

(iii) An agent, as such, is not a servant, but a servant is generally for some purposes his master's implied agent,—the extent of the agency depending upon the duties or position of the servant.

(iv) While a servant acts under the direct control and supervision of his master, an independent contractor is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result.

4

Personal Disabilities

§ 1. Incapacity to Sue and be Sued

Generally speaking, every person may sue and be sued in tort. The law of torts does not, like the law of crimes or of contract, recognise personal incapacity as a ground of general exemption. "There is no limit to personal capacity either in becoming liable for civil injuries or in the power of obtaining redress for them" (*Pollock*). In cases where some particular state] of the mind is an essential element of the wrong, the age and capacity of the person is no doubt to be considered, but in every case it is a question of fact, and no exception to the general rule. Several partial and apparent exceptions, however, exist; and these may be discussed under two heads—

I. *Incapacity to sue.*

II. *Incapacity to be sued.*

§ 2. Who cannot Sue

1. Alien Enemy

(A) *England.* An alien enemy is a person of enemy nationality, or a person residing in or carrying on business in a country at war with England. He cannot sue in his own right in any English Court without licence from the Crown. An alien friend has no such disability.

(B) *India.* Alien enemies residing in India can sue in the Courts of India as if they were Indian citizens, if permitted by the Central Government [s. 83, Civil Procedure Code].

Alien friends do not require any such permission to sue.

2. Husband and Wife

(A) *England.* Husband and wife form one person in the eye of law. Consequently, at common law, a wife could not *sue her husband* for a tort, nor a husband his wife. To this general rule, an *exception* was introduced by the Married Woman's Property Act, 1882, in favour of the wife, viz. that a wife might sue her husband in an action for the protection and security of her *separate property* as if she were unmarried. There being no such legislation in favour of the husband, a husband could not, until 1962, recover damages for any torts committed against him by the wife during the subsistence of the marriage.

The foregoing position has, however, been altered by the Law Reform (Husband and Wife) Act, 1962. This Act has *abolished* the common law prohibition of actions in tort between spouses and either spouse may now sue the other in the same manner as if they were not married, but the Court has the power to stop trivial domestic disputes.

2. As regards *third persons*, the common law rule was that a married woman could not sue or be sued without joining her husband in the suit. The Law Reform (Married Women and Tort-feasors) Act, 1935, however, enacts that she can sue and be sued (in relation to persons other than her husband), as if she were a *feme sole*.

Again if a husband, while acting as the agent of a third person, commits a tort against the wife, the wife is not debarred from suing her husband's *principal* for damages.[1]

(B) *India*. See p. 37, *ante*.

3. Child in the Womb

An infant can sue for any tort done to him, but he cannot, according to an Irish decision,[2] maintain an action for injuries sustained while *en ventre sa mere* (i.e., in the mother's womb). Where a woman who was with child was injured by a railway accident as a result of which the child was born deformed, it was *held*, that the child could not maintain an action for damages.[2] The decision was probably based on the ground that there was no duty of care to an unborn person, who was not a *legal* person.

Salmond (15th Ed., p. 582) commented upon this decision with the observation that there was no sound principle why an existing but unborn child should be deprived of the protection against wilful or negligent injuries inflicted upon it. This view of Salmond appears to have been accepted by a recent English decision,[3] which has allowed damages against manufacturers of the drug 'thalidomide', which when used by expectant mothers, produced deformed children.

In *England*, so far as the Fatal Accidents Act, 1846, is concerned, it has been held that a child *en ventre se mere* can claim under it [*Re George and Richard*, (1871) 3 A. & E. 466].

4. Corporation

A corporation being a fictitious person, it is evident that it cannot maintain an action for purely *personal injuries*, for by its very nature, such injuries cannot be inflicted on the corporation in its aggregate capacity. It is really the members who are aggrieved by any such injury and they are therefore the proper parties to sue for it. For instance, a corporation is not entitled to sue for a libel. But as an artificial person, it may sue for wrongs to its *property or*

1. *Broom* v. *Morgan*, (1953) 1 All E.R. 849 (C.A.).
2. *Walker* v. *G.N. Ry.*, (1891) 28 L.R. (Ir.) 69.
3. *S.* v. *Distillers Co.*, (1970) 1 W.L.R. 114; *Elliot* v. *Joicey*, (1935) A.C. 209 (238-41).

business, and even for libel if it affects either[4] [see Chap. 9, § 12].

5. FOREIGN STATE

Under sec. 84 of *our* Civil Procedure Code, a foreign State, which is recognised by the Government of India, may sue in an Indian Court only to enforce—(a) a private right vested in the Ruler of such State; or (b) a private right (as distinguished from a political right) vested in any officer of such State in his public capacity.

6. BANKRUPT

Since the property of an insolvent vests in the Official Assignee, under the Insolvency Acts, an insolvent cannot sue for a wrong to his property, though there is no bar to his suing for a wrong to his person or reputation.

§ 3. Who cannot be Sued

1. PERSONAL IMMUNITY OF THE HEAD OF THE STATE

(A) *England.* "The King can do no wrong" is a fundamental principle of the English Constitution. No proceeding, civil or criminal, is maintainable against the sovereign in person. In tort, even the remedy by petition of right is not available [*Feather* v. *The Queen*, (1865) 6 B. & S. 296].

(B) *India.* There is also provision for immunity of the President and a Governor under the Indian Constitution [Art. 361], but a distinction is made between acts done by them in their public and personal capacity. (a) For acts done or purported to be done by them in their *public* capacity their immunity is absolute, and no action lies against them in a Court of law. (b) For acts done by them in their *personal* capacity, i.e., as individuals, there is no such immunity but a suit would lie only if two months' notice in writing has been delivered to them, stating the nature of the proceeding, cause of action, etc.[5]

The 41st Constitution Amendment Bill, 1975, sought to extend the aforesaid immunity to the Prime Minister as well, though the Prime Minister is not a 'head of the State', in a parliamentary form of government. The Bill has, however, lapsed, with the dissolution of Parliament, in January 1977.

2. IMMUNITY OF THE STATE FOR TORTIOUS ACTS OF PUBLIC SERVANTS

(A) *England.* The English law on this point has been revolutionised by the passing of the CROWN PROCEEDINGS Act, 1947

1. *At Common Law*, the immunity of the Crown extended to wrongs committed by the servants of the Crown. Hence, neither the Crown nor

4. *D. & Caterers* v. *D'Anjou*, (1945) 1 All E.R. 563 (C.A.) [It has also been held that a registered Trade Union can sue for defamation in respect of its Trade Union activities *National Union* v. *Gillan*, (1945) 2 All E.R. 593 (C.A.)].

5. For further study, read Basu's *Commentary on the Constitution of India*, 5th Ed. Vol. V, under Art. 361.

any Department of the Government was liable for wrongful acts of public servants [*Tobin* v. *The Queen*, (1864) 16 C.B. (N.S.) 310].

II. *Under the Crown Proceedings Act, 1947*: This Act has abolished the immunity of the Crown in respect of torts committed by its servants and made the Crown liable for the torts of its officers in the same way as a private employer. Of course, this liability is of the Crown as the head of the State and not personally. The passing of this Act practically introduces in England the Continental doctrine of State liability for wrongs committed to the subject by the officers of the State. It is also to be noted that the remedy available under this Act is not by a Petition of right but by a regular action as in the case of a private wrong-doer.

The Act provides that the Crown shall be subject to all liabilities to which a private person of full age and capacity would be subject, in respect of—

(a) torts committed by its servants, (b) any breach of those duties which a person owes to his servants at common law by reason of being their employer, and (c) any breach attaching at common law to ownership, occupation or possession of property.

The Crown will also be liable in respect of a failure to comply with any statutory duty which is binding upon it as well as upon persons other than the Crown and its officers.

The *exceptions* to this liability are—No proceeding will lie in respect of (i) any act or omission by any person discharging judicial functions; (ii) death or personal injury caused by or suffered by members of the armed forces on duty and acting in the discharge of their duties; (iii) anything *properly* done or omitted in exercise of the prerogative or statutory powers of the Crown.

It is also to be noted that the liability of the Crown is confined to wrongs committed by its servants and agents and does not extend to those committed by the servants of statutory corporations[6] and other bodies which function outside ministerial control.[7]

(B) *India*. 1. Though the heads of the State are personally immune from action for their personal acts (see p. 43, *ante*). Art. 361 (3) of the Constitution provides that this personal immunity will not in any way restrict the right of any person to bring appropriate proceedings against the Government of India or the Government of a State. The cases in which a suit may lie against either Government are not enumerated in the Constitution itself but the principle is to be found in Art. 300.

2. Art. 300 of the Constitution of India provides that subject to any law that may be hereafter made by Parliament or a State Legislature, the Government of India or of a State may sue or be sued in relation of their respective affairs in like cases where the Dominion of India or a Provincial Government might sue or be sued, had not this Constitution been passed.

There was a similar provision in sec. 176 of the Government of India

6. *Tamlin* v. *Hannaford*, (1949) 2 All E.R. 327 (C.A.).
7. *Bank Voor Handel* v. *Administrator*, (1954) 1 All E.R. 969 (H.L.).

Act, 1935, as well as in the previous Government of India Acts and the combined effect of all these provisions is that, so long as the Legislature does not legislate on the subject, the Government of the Union or of a State will be liable if such a suit lay against the East India Company, had the suit been brought before 1858.[8]

3. Now, under the Government of India Acts, 1858-1919, the Secretary of State for India in Council might sue and be sued as a body corporate and every person would have the same remedies against the Secretary of State in Council as he might have had against the East India Company, if the Act of 1858 had not been passed. As to this liability, several principles have been established by judicial decisions which hold good even now—(1) A suit lay againt the Secretary of State in Council for wrongs done by servants of the Government in the course of transactions in which any private person could engage, e.g., construction of a dockyard or factory.[9] But (2) no suit would lie for acts done by the Government or its officers in the exercise of *sovereign powers* even if the wrong is due to the negligence of the Government servants in the course of their employment.[10] (3) Nor would the Secy. of State be civilly liable for tortious acts committed by officers in the performance of duties imposed upon them by the legislature.[11]

4. Thus, in various decisions *prior to the Constitution* it was laid down that—

(A) No action lies against the Government for injury done to an individual in the course of exercise of the *sovereign functions* of the Government, such as the following:

(i) Commandeering goods during war; (ii) making or repairing a military road; (iii) administration of justice; (iv) improper arrest, negligence or trespass by the Police officers; (v) wrongful refusal by officers of a Revenue Department to issue licence to the plaintiff, causing him damage; (vi) negligence of officers of the Court of Wards in the administration of an estate under its charge; (vii) wrongs committed by officers in the performance of duties imposed upon them by the Legislature,[8] unless, of course, the statute itself prescribes the limits or conditions under which the executive acts are to be performed; (viii) loss of moveables from Government custody owing to negligence of officers;[8] (ix) payment of money in custody of Government to a person other than the rightful owner, owing to negligence of officer in the exercise of statutory affairs, where Government does not derive any benefit from such transaction.

Certain ornaments were stolen from the house of the plaintiff. On a search being made by the police they were recovered from another house and produced as exhibits at the trial of those who were prosecuted in connection with the theft. Thereafter they were kept in the Collectorate Malkhana from where they were again stolen and could not be traced. Plaintiff sued the Government for recovery of the ornaments or their

8. *Kasturi Lal* v. *State of M.P.*, A. 1965 S.C. 1039 (*1044*).
9. *P. & O. Steam Navigation Co.* v. *Secy. of State*, (1851) 5 Bom. H.C. 1 P.C.
10. *Secy. of State* v. *Cockraft*, (1914) 9 Mad. 51.
11. *Secy. of State* v. *Ram*, (1933) 37 C.W.N. 957.

value. *Held*, Government was not liable as the alleged tortious act was performed in discharge of an obligation imposed by law.[12]

(B) On the other hand, a suit lies against the Government for wrongs done by public servants in the course of transactions which a trading company or a private person could engage in, such as the following:

(i) Injury due to the negligence of servants of the Government employed in a dockyard; (ii) trespass upon or damage done to private property in the course of a dispute as to a right to land between Government and the private owner, even though committed in the course of a colourable exercise of statutory powers; (iii) whenever the State has benefited by the wrongful act of its servants whether done under statutory powers or not, the State is liable to be sued for *restitution* of the profits unlawfully made, just as a private owner, e.g., where Government retains property or moneys unlawfully seized by its officers, a suit lies against the Government for its recovery, with interest; (iv) defamation contained in a resolution issued by Government.

5. It is, however, not correct to say that the Government would be liable to be sued only in respect of commercial or trading activities and that a suit can be thrown away on the ground that an *identical* action could not possibly lie against the East India Co. The true position is that a suit would lie against the Government for any unlawful act which is not done in the exercise of its 'sovereign' functions.[13]

The law, as stated above, is still good under the Constitution, in the absence of legislation to the contrary. A bold step forward has, however, been taken by the Supreme Court in the case of *State of Rajasthan* v. *Vidyawati* [A.I.R. 1962 S.C. 933], to hold that the State would be liable for damage caused by the negligent driving of a vehicle which, though owned by the Government and was being run by the driver within the course of his employment, was, at the time of the injury, not being used for any 'sovereign function' of the State, but was being driven from a workshop to the residence of the Collector for whose use the car had been assigned.

3. Public Officials

(A) *England.* The law makes a distinction between acts done by an official in his *public* capacity and those done by him in his *personal* capacity.

(a) The personal immunity of the Sovereign was extended to public officials on the ground that they are the representatives of the Crown, "delegations by the Crown of its own authority to particular individuals."[14] Hence, no action for tort lay against a public official in his *official capacity*.

This position (as regards the public officials themselves) has not been changed by the Crown Proceedings Act, 1947 (p. 44, *ante*).

(b) Public officials may be sued in their *private capacity*. The command or authority of the Crown is no defence to the ordinary rule of liability for

12. *Ram Ghulam* v. *Govt. of U.P.*, A.I.R. 1950 All. 206.
13. *Prov. of Bombay* v. *Khusaldas*, (1950) S.C.R. 621 (696), Mukherjea J.
14. *Gilbert* v. *Trinity House*, (1886) 17 Q.B.D. 795.

one's own acts,—for the maxim is, the King can do no wrong; nor can he *authorise a wrong.*

"That which the Sovereign does by command to his servants, cannot be wrong in the sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, as if there had been no command."[15]

(c) But the personal responsibility of public officials does not extend to torts committed by their subordinates in carrying out the business of the Crown, *unless expressly ratified or authorised by them.* The principle of vicarious liability does not apply to this case because the head or superior officer of a Government department is not, in fact, the master of subordinates belonging to the department,—all are fellow-servants of the Crown, serving under the same master.[16]

(B) *India.* As in *England,* a Government servant is personally liable in India for tortious acts committed by him in his official capacity even though Government itself may not be liable in such cases (p. 43, *ante*). But before bringing such a suit, notice must be given under s. 80 of the Civil Procedure Code, as amended in 1976.

The personal liability of a Government servant does not extend to torts committed by subordinate officers, for a subordinate officer is not a servant of the superior officer but of the Government.

4. FOREIGN SOVEREIGNS AND AMBASSADORS

(A) *England.* A foreign sovereign may enforce his private rights in British Courts but cannot be sued in an English Court unless he submits to its jurisdiction. An ambassador or diplomatic agent has the same protection. The principle is founded on International law which regards every sovereign State as absolutely independent and on international comity which induces a sovereign State to respect the dignity of any other sovereign State. The High Commissioners of the Commonwealth countries have similar immunity under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952.

(B) *India.* In India, a foreign Ruler, Ambassador or Envoy or the High Commissioner of a Commonwealth Country or the Ruler of a former Indian State cannot be sued except with the consent of the Central Government [ss. 86–87B].

5. INFANTS

1. Infancy[17] is *per se* no defence to an action for tort. In this respect the law of torts differs from the law of crimes or of contract where infancy is a ground of exemption to liability. In torts, an infant will be liable for trespass, assault, or nuisance in the same way as an adult.

15. *Tobin* v. *Queen,* (1864) 16 C.B. (N.S.) 310 (*354*).

16. *Bainbridge* v. *Postmaster General,* (1906) 1 K.B. 178.

17. An infant is a person below 21 years of age in England, and 18 years in India, except where a guardian has been appointed by Court or the minor is a ward under the Guardians & Wards Acts, 1890, in which case minority extends to 21 years even in India.

2. Infancy is not, however, wholly irrelevant even in an action for tort—

(i) In torts, where intention, knowledge, malice, or some other condition of the mind is an essential ingredient of liability, e.g., in deceit, extreme youth of the defendant may be used as evidence for disproving the existence of any such malice or intent.

(ii) Where the wrong committed by an infant is a tort and a breach of contract as well, some difficulty arises. The contract may not be binding upon the infant, and he cannot then be sued for breach of contract; can he be sued for the tort? The law on the point is not perfectly clear, but two propositions may be stated:

(a) The law will not permit an action grounded on contract to be changed into an action of tort nor permit an infant to be sued 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 is 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.[18] But—

(b) If the wrong be independent of the contract in the sense of not being of the kind contemplated by it, the infant will be liable.[19] In such a case the contract is merely the occasion of the wrong, and the wrong is really independent of the contract.

For the same reason, an action in tort would not be allowed if it would defeat the rule against suing a minor in contract. Thus, an action for deceit would not lie against an infant where he has procured a contract by means of fraudulent representation either as to his age or to any other matter.[20] The enforcement of liability for deceit would amount to an enforcement of the contract which is not for that reason binding on the infant. If, however, the infant has obtained property through the contract induced by fraud and the property is still in his possession, he is under an *equitable* obligation to

---

18. *Jennings* v. *Rundall*, (1799) 8 S.R. 335.

19. *Burnard* v. *Haggis*, (1863) 14 C.B. 45.

Thus, (1) where an infant hired a mare for riding and injured it by *overriding*, *held*, it was a mere *excess* of the hirer's rights under a contract by which he was not bound, and that he could not, therefore, be made liable in tort for the resulting injury to the horse. Otherwise "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 the infant" [*Jennings* v. *Rundall*]. But (2) where an infant hired a mare on the express condition that she was not to be used for *jumping*, but the infant lent it to a friend who put it to a fence and injured it, *held*, the infant was liable, for, it was a *bare trespass*, not within the object and purpose of the hiring; it was doing an act altogether forbidden by the owner'—it was just a tort as if he had taken the mare out of the plaintiff's stable without leave, and killed her [*Burnard* v. *Haggis*].

The distinction between *Jennings* v. *Rundall* and *Burnard* v. *Haggis* lies in this that in the former case it was held that the conduct of the infant was a mere *breach of the contract* under which the horse had been hired, but in *Burnard* v. *Haggis* it was held to be a trespass "*as distinct from the contract*, as if the defendant had run a knife into the mare and killed her" [see also *Ballett* v. *Mingay*, (1943) 1 All E.R. 143 (C.A.)].

20. *Johnson* v. *Pye*, (1665) 1 Keb. 913.

restore that property to the other party, the principle being that 'an infant will not be allowed to take advantage of his own fraud'.[21]

6. LUNATICS

The principles governing the liability of an infant are also applicable to a lunatic. Lunacy is not, in itself, any ground of exemption, but like infancy it may operate as evidence that the requisite mental condition was not present. There is not much direct decision on the point, but *Salmond* lays down the following rules—

(a) In wrongs based on malice or some specific intent, lunacy may be a good defence as disproving the existence of any such malice or intent.

(b) But in wrongs of wilful interference with the person or property, such as trespass, assault[22] or defamation, it is *no* defence that the defendant was under an insane delusion or could not realise that what he was doing was a wrongful act.[22] If, however, the insanity is so extreme that the act cannot be held to be a voluntary act, there cannot be any liability where intention is an ingredient of the particular test committed by him.[22]

(c) In wrongs of absolute liability, it is obvious, lunacy is no defence at all.

(d) In wrongs of negligence, where the conduct of the defendant must be judged by reference to his knowledge, or means of knowledge, lunacy may be relevant as evidence that the necessary knowledge or means of knowledge did not exist.

7. CORPORATIONS.

At one time it was thought that no action for tort would lie against a corporation; for, as an artificial person it is incapable of acting either rightfully or wrongfully. The acts of a corporation, however, are in reality the acts of its agents and servants; and it is now SETTLED that an action lies against a corporation where the act done (a) is within the powers and purposes of its incorporation, and (b) has been done in such manner that it would be actionable if done by a private individual. And the liability of a corporation for torts of its agents and servants extends to wrongs of malice or fraud no less than to wrongs of other descriptions. Thus, it may become liable for torts like libel, malicious prosecution or deceit, though it has no mind of its own and is, therefore, incapable of malice or fraud.[23] The same principles which govern the *vicarious liability* of a principal for torts of his agents or of a master for torts of his servants, govern the liability of a corporation for the torts of its agents and officials. Consequently, a corporation is liable for all torts committed by its servants in the course of their employment where a private employer would have been liable.[24] This broad statement is, however, to be qualified by two considerations—

(i) A corporation, as distinguished from a private person, is liable only for those acts of its agents or servants as are *intra vires*, i.e., within the limits

21. *Leslie* v. *Sheill*, (1914) 3 K.B. 607.
22. *Morris* v. *Marsden*, (1952) 1 All E.R. 925.
23. *Lennards' Carrying Co.* v. *Asiatic Petroleum Co.*, (1915) A.C. 705 (H.L.).
24. Cf. *Citizens' Life Assce.* v. *Brown*, (1904) A.C. 423.

allowed by law to the corporate action of that particular body.[25] For acts which are *ultra vires*, the agents or servants of the corporation who committed or authorised the wrong can only be sued.[26]

Of course, the corporation would be liable where it *ratifies* an *ultra vires* act committed by its servant or agent.[27]

(ii) Where a corporation has been created by statute, it is subject only to the liabilities which the legislature intended to impose upon it, and its liability must be determined upon a true interpretation of the statute under which it has been created. For instance, the liability of a corporation to pay compensation from its corporate funds for wrongs done by its officers may be limited by the statute of incorporation.

8. TRADE UNIONS

(A) *England.* Under the Trade Disputes Act, 1906, no action lies against a trade union or against its members or officials, in respect of any tort committed by or on behalf of the trade union. This immunity is not confined to acts done in furtherance of the trade disputes, but applies even to an action for libel.[28]

The restriction imposed upon this immunity by the Trade Disputes and Trade Unions Act, 1927, in respect of strikes declared illegal, has been removed by the repeal of that Act in 1946.

(B) *India.* In India, the provisions of the Indian Trade Unions Act, 1926, are similar to those of the English Trade Disputes Act. Thus, s. 18 of this Act provides—

"(1) No suit or other legal proceeding shall be maintainable against any registered Trade Union or any officer or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is in interference with the trade, business or employment, of some other person or with the right of some other person to dispose of his capital or of his labour as he wills.

(2) A registered Trade Union shall not be liable in any suit or other legal proceeding in respect of any tortious act done in contemplation or furtherance of a trade dispute by an agent of the Trade Union if it is proved that such person acted without the knowledge of or contrary to express instructions given by, the executive of the Trade Union."

But a workman who participates in an 'illegal strike', as defined in s. 24 of the Industrial Disputes Act, 1947, shall be punishable [s. 26, *ibid.*].

---

25. A Railway station-master arrested the plaintiff for refusing to pay the freight for carrying a horse on the railway. Under the Act of Parliament which created the Railway, the railway company had the power to arrest a person for non-payment of passenger fare but not for non-payment of freight for the carriage of goods. In a suit brought by the plaintiff against the railway company for wrongful arrest, *held*, that the company was not liable, for, the company having no power to do such an act under the law, it could not confer the power to do such act upon the station-master and, therefore, the company was not liable for such an *ultra vires* act done by its servant [*Poulton* v. *L. & S. W. Ry.*, (1867) 2 Q.B. 534].

26. Some jurists are not in agreement with this view, on principle [Salmond, 15th Ed., p. 572; Winfield, 7th Ed., p. 82].

27. *Tiruveriamuthu* v. *Municipal Council*, A. 1961 Mad. 230.

28. *Vacher & Sons* v. *London Society of Compositors*, (1913) A.C. 107.

5

General Exceptions to Liability

§ 1. General Exceptions

There are various conditions which, when present, will prevent an act from being wrongful which in their absence could be a wrong. Under such conditions the act is said to be "JUSTIFIED OR EXCUSED" (*Pollock*). Some of these justifications or conditions excluding liability are available only in the case of particular species of wrongs. These will be dealt with in their proper places. For example, the defence of '*privilege*' is available in an action for defamation [Cf. Chap. 9, § 7], or that of '*contributory negligence*' in an action for negligence [Cf. Chap. 14]. Apart from these there are other justifications which are applicable to *all* kinds of wrongs in common. If any of these be present, an act otherwise and *prima facie* wrongful ceases to be so. These may be called the 'general defences' to an action on tort, but in fact, the allegation of the existence of any of these conditions denies the very existence of any actionable wrong at all. These, therefore, are the 'general rules of immunity' which limit the general rules of liability discussed in the previous Chapters. The more important of these exceptions may be enumerated under the following heads.

I. ACT OF STATE

(A) *England.* 1. An 'Act of State' is an act injurious to the person or property of *some person who is not at the time of that act a subject of the Crown*, done by any representative of the Crown, and either previously sanctioned, or subsequently ratified,[1] by the Crown. Such an act is done not under colour of any legal title, but in the exercise of supreme power, on grounds of State policy, and *without the intention to give thereby any legal right.* Municipal Courts have no power to examine any transactions of independent States with the subjects of *other* States. No action can be brought for damages resulting from an Act of State. The foreigner who has sustained injury must seek redress by diplomatic or other means.[2]

2. 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*

1. *Buron* v. *Denman*, (1848) 2 Ex. 167.
2. *Johnstone* v. *Pedlar*, (1921) 2 A.C. 262.

subjects, there can be no such thing as an Act of State."[3] The authority of the Crown is no defence to a public official in an action for tort brought by a British subject. The rule of Act of State is only an exception to this general rule of liability in the case of acts committed against *foreigners*. But the rule does not apply to friendly aliens resident in times of peace in England, for, by reason of their residence they owe a temporary allegiance to the Crown, and have the same protection as British subjects against illegal acts of public officials.[2]

(B) *India.* 1. In *India*, the plea of *'Act of State'* was on many occasions taken to oust the jurisdiction of the courts to enquire into the dealings of the East India Co.[4] or the Government of India[5] with the Rulers of Indian States or their subjects.[6] In one of these cases,[6] it was observed—

"The transactions of independent States *between each other* are governed by other laws than those which municipal Courts administer. Nor have municipal Courts the power to examine any transactions of independent states *with the subjects of other States.*"

2. But, as the Supreme Court has now pointed out,[7] it is impossible for a Sovereign to exercise an Act of State against its own subjects.

Hence, it will not be open to the Government of India to take this plea in any action brought against it by its own subjects. Thus, in *Virendra's* case,[7] it was held that though the accession of an Indian State to the Dominion of India was an Act of State into whose competency no municipal Court could enquire, the Government of India could not take this plea to justify an unlawful revocation of a grant made by a former Indian Ruler in favour of a person who had, after the commencement of the Constitution, become a citizen of India.

Now that the Indian States have become part of the Indian territory and are governed by the same Constitution as other parts of the Union of India, the scope of the doctrine of Act of State must now be confined to dealings of the Government of India with foreign States and their subjects, which are obviously outside the jurisdiction of the municipal Courts. The remedy of the aggrieved party, if any, is by diplomatic action.

II. JUDICIAL ACTS

(A) *England.* 1. "No action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice."[8] 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. Thus, a Judge is exempt from all civil liability for acts done or words spoken by him *in the exercise of his judicial office*, not only if (a) they are *erroneous* or irregular, but even if (b) his motive is *malicious* and

3. *Entick* v. *Carrington*, (1765) 19 St.T. 1066.
4. *E.I. Co.* v. *Syed Ally*, (1827) 7 M.I.A. 555.
5. In re Madhava Singh, (1904) 32 Cal. 1 P.C.
6. *Secy. of State* v. *Kamachee Boyee Saheba*, (1859) 13 Moo. P.C. 22.
7. *Virendra Singh* v. *State of U.P.*, (1955) 1 S.C.R. 415.
8. *Hammond* v. *Howell*, (1678) 2 Mod. 218; *Scott* v. *Stansfield*, (1868) 3 Ex. 220.

the acts or words are not done in the honest exercise of his office.[9] For, "the remedy for judicial errors is some form of appeal to higher Court, and the remedy for judicial corruption is criminal prosecution, or removal of the judge, but in neither case is he called on to defend his judgment in a suit for damages in a Civil Court."

2. The above rule applies to Judges of Superior and Inferior Courts equally. But *as to acts beyond jurisdiction*, a distinction has been made in English law between Judges of Superior and Inferior Courts. There is some amount of difficulty on the point, but the true view seems to be, that (i) a Judge of the Superior Court is not liable even if the wrongful act or words were done or spoken by him while he was *acting beyond jurisdiction*. The reason is that a Superior Court has the jurisdiction to determine its own jurisdiction, so that if its conclusion on that question be wrong, that would only be an error committed within its jurisdiction.[10] (ii) A Judge of an Inferior Court, on the other hand, must prove that the matter was within his jurisdiction. There is no presumption in his favour and it may be said that 'he determines the limits of his own jurisdiction at his own peril.'[11]

(a) If on the facts as they are brought before him it would appear that he has jurisdiction, he would be excused, even though when all the facts are known it is seen that he has none.

(b) If, however, from the facts before him the judicial officer *knew or ought to have known* that he had no jurisdiction, he is not protected. If he assumes jurisdiction by shutting his eyes to the facts, or by reason of his ignorance of the law, he is liable for any tort he commits in excess of his jurisdiction.[11]

3. Though the Crown Proceedings Act, 1947, makes the Crown liable for torts committed by its servants, it specifically maintains the exception of immunity for judicial acts.

(B) *India*. The same principle of immunity has been enacted *in India* in the Judicial Officers' Protection Act, 1850, but no distinction has been maintained in the Act between superior and inferior Courts. "No judge.... or other person acting judicially shall be liable to 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."

The immunity does not extend to 'ministerial' acts done by a judicial officer. Nor is it available if the wrongful act has been done by a Magistrate in his executive capacity and not as a judicial officer,—not in exercise of his powers under the Criminal Procedure Code but under the orders of his superior.[12]

On the other hand, the Act extends this immunity to ministerial officers, e.g., a bailiff, a sheriff or other person who is bound to execute a lawful warrant or order of a 'judicial officer',—provided the order which is executed is lawful

9. *Anderson* v. *Gorrie*, (1895) 1 Q.B. 668.
10. *Wilkinson* v. *Banking Corp.*, (1948) 1 K.B. 721 (725).
11. *Houlden* v. *Smith*, (1840) 14 Q.B. 841.
12. *Anowar Hossain* v. *Ajoy Kumar*, A.I.R. 1965 S.C. 1651 (1655).

on its face, and it is executed in a *reasonable* manner, without the use of unnecessary violence.

III. QUASI-JUDICIAL ACTS

Administrative tribunals as well as various persons and bodies, such as Universities, Colleges, Committees of Societies and Clubs, Inns of Courts, etc., often exercise a sort of 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 as to these is, "that persons or bodies exercising quasi-judicial powers are protected from civil liability if they observe (a) the rules of natural justice, and also (b) the particular statutory or conventional rules, if any, which may prescribe their course of action."[13] The rules of natural justice, for this purpose, mean that (i) a man is not to be removed from office or membership, or otherwise dealt with to his disadvantage, without having fair and sufficient notice of what is alleged against him, and an opportunity of making his defence; and that (ii) the decision whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, the Court will not interfere even if the decision was wrong.[14] Otherwise the act complained of will be declared void.[15]

IV. PARENTAL AND QUASI-PARENTAL AUTHORITY

Persons exercising parental or quasi-parental authority over a child (i.e., one who has not attained majority) are not liable for the use of force or restraint for the purpose of correction or chastisement. A school-master has similar authority over his pupil arising from the delegation of authority by the latter's parent or guardian. And this delegated authority of the school-master is not confined within the walls of the school, but may extend to acts done by such pupil while on the way to and from the school.[16] But these persons are protected only if they act *in good faith* and *in a reasonable and moderate manner*.[17]

V. 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 passengers also. Such powers are based upon necessity and are limited to the preservation of necessary discipline and the safety of the ship.

The principle of 'necessity' also justifies the infliction of harm to one's

13. *Andrews* v. *Mitchell*, (1905) A.C. 78.
14. *Dawkins* v. *Antrobus*, (1881) 17 Ch. D. 615.
15. See also *Bonsor* v. *Musicians' Union*, (1956) A.C. 104; *O'Connor* v. *Waldron*, (1935) A.C. 76; *Vine* v. *National Dock Labour Bd.*, (1957) A.C. 488.
16. *Cleary* v. *Booth*, (1893) 1 Q.B. 465.
17. *Ex parte Wright*, (1929) 2 K.B. 416.

property to save harm to another's person[18] or property, e.g., to save the spread of fire, a contiguous building may be pulled down (at least where there is no fire-brigade available at call),[19] provided, of course, the measures taken are reasonable having regard to the circumstances,[18] and the danger in question was not brought about by the defendant's own negligence.[18]

VI. STATUTORY AUTHORITY

(a) *Absolute Authority.* When a statute specifically *authorises* the doing of an act (which would otherwise be a wrong), no action can be maintained for that act even if it causes injury to anyone; and the person injured is without a remedy except so far as the Legislature has provided for compensation.[20] But the powers conferred by the Legislature must be exercised with judgment and caution, and an action will lie if the acts be done *negligently*.[21]

The burden of proving such absolute authority to do acts which would otherwise be a nuisance at common law lies on the person who seeks the protection of statutory authority.

"The burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals to show that by express words or by necessary implication that intention appears."[22]

But once the statutory authority is established, the immunity will extend to all inevitable results of the act in question,[23] which cannot be avoided by the exercise of due care and skill.

(b) *Conditional Authority.* When a statute merely *permits* a thing to be done, the authority is said to be conditional. If the Legislature merely gives a discretionary power to do a thing, with choice of times and places, the discretion must be exercised *in strict conformity with private rights*, and an action

---

18. *Southport Corpn.* v. *Esso Petroleum*, (1956) A.C. 218 (*235, 242*).

19. *Burmah Oil Co.* v. *Lord Advocate*, (1965) A.C. 75 (*165*).

20. The respondent company were authorised by statute to run a railway close to the appellant's land. Sparks from an engine set fire to his woods, notwithstanding the fact that the company had taken all known care to prevent the emission of sparks. *Held*, that the respondents were not liable since they were only doing, without negligence, what they were authorised by the statute to do [*Vaughan* v. *Taff Vale Ry. Co.*, (1860) 5 H. & N. 679].

21. The running of the trains upon a railway constructed under statutory powers caused noise, vibration and smoke, which depreciated the value of the plaintiff's property. *Held*, that as the Act had authorised the running of the trains, and as the damage caused was the necessary result, no action lay [*Hammersmith Ry. Co.* v. *Brand*, (1869) 4 H.L. 171; *Geddis* v. *Proprietors*, (1878) 3 App. Cas. 430 (*455*)].

22. The Metropolitan Asylum District Board were authorised to purchase lands and erect buildings to be used as hospitals. But the Act did not imperatively order these things to be done. The Board erected a small-pox hospital which became a nuisance to the owners of neighbouring lands. *Held*, the Board could not set up the statute as a defence. The Act was constructed as meaning that a small-pox hospital might be built and maintained if it could be done *without creating a nuisance* [*Metropolitan Asylum Dt. Board* v. *Hill*, (1881) 6 A.C. 193].

23. *Quebec Ry.* v. *Vandry*, (1920) A.C. 662 (*680*).

lies if it is done in such a manner as to cause injury.[23] "When the authority given is, in the strict sense of the law, *permissive merely, and not imperative*, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others."[24] Conditional statutory authority is otherwise known as a statutory *power*.

The distinction between absolute and conditional authority, in short, is—

"Absolute authority is authority to do the act notwithstanding the fact that it necessarily causes a nuisance or other injurious consequence. Conditional authority is authority to do the act provided it can be done without causing a nuisance or other injurious consequence. This condition is sometimes expressed, but is more often left to be implied from the general provisions of the statute" (Salmond, 15th Ed., p. 681).

VII. INEVITABLE ACCIDENT

1. Inevitable accident is that WHICH COULD NOT POSSIBLY BE PREVENTED BY THE EXERCISE OF ORDINARY CARE, CAUTION, AND SKILL. It does not necessarily mean *absolutely inevitable*, but means 'not avoidable by any such precaution as a *reasonable man* doing such an act then and there could be expected to take' (*Pollock*);—it is an accident which the defendant could not have avoided by use of the kind and degree of care necessary to the exigency, and in the circumstances, in which he was placed. If in the prosecution of a *lawful act*, done with care, such an accident happens, no action lies from any injury resulting therefrom. For instance, if a man will carry firearms or drive a horse, his duty is to use 'reasonable care' not to do harm to others thereby, but if notwithstanding such care an accident happens, he cannot be held liable.

2. *In England*, until the end of the last century, the earlier view of absolute liability, viz., that a man must answer for all direct consequences of his voluntary act, in whatever manner they happened, prevailed; but the contrary rule that no action lies for injury resulting by accident from another's lawful act, has now been established.[25–26] It has now been realised that in the *interests of ordinary intercourse of life*, people must bear the incidents of acts done by others which could not have been avoided by the latter with due diligence. Thus, in *Holmes* v. *Mather*[25] it was observed, "for the affairs of life, people as they go along roads must expect or put up with such mischief as reasonable care on the part of others cannot avoid."[26]

Lord Dunedin, in the House of Lords,[27] has put it, from the defendant's standpoint, thus:

---

24. *Canadian Pacific Ry. Co.* v. *Parke*, (1899) A.C. 535.

25. *Holmes* v. *Mather*, (1875) 10 Ex. 261. The defendant's horses while being driven by his servant in the public highway ran away by 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 get them clear round a corner, and they knocked down the plaintiff who was on the highway. *Held*, the defendant was not liable, for the servant had done his best under the circumstances. The accident was not due to any wrongful act or omission of the defendant or his servant.

26. *Stanley* v. *Powel*, (1891) 1 Q. B. 86. The defendant fired at a bird, and a pellet from his gun glanced off the branch of a tree, and hit the plaintiff in the eye. *Held*, in the absence of negligence, no action lay.

27. *Fardon* v. *Harcourt-Rivington*, (1932) 146 L.T. 391 (*392*).

"People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."[27]

But negligent acts are not free from liability, and in determining whether a given act is negligent or not, regard must be had to its necessity and propriety, common usage and peculiarities of the circumstances as a whole.

3. Inevitable accident is, however, *no defence* in cases where there is a "duty of insuring safety to others."[28] [In this connection, also see the distinction between "inevitable accident" and 'act of God'; Chap. 15, § 3, *post*].

VIII. INEVITABLE MISTAKE

1. As Salmond observes (15th Ed., p. 40), inevitable mistake (see p. 16, *ante*) must be distinguished from inevitable accident.

"The plea of inevitable mistake is that, although the act and its consequences were intended, the defendant acted under an *erroneous belief*, formed on reasonable grounds, that some circumstances existed which justified him. The plea of inevitable accident is that the consequences complained of as a wrong were *not intended* by the defendant and *could not have been foreseen* and avoided by the exercise of reasonable care and skill."

2. In general, mistake is no defence against civil liability in tort,[29] and a person who does an act which may injure another person in his person or property, which includes his reputation, does it at his peril. To this general rule, some exceptions have been acknowledged in those species of torts where the liability rests on the standard of a 'reasonable man'. In such a case, if the defendant acts under a mistaken belief, formed on 'reasonable grounds', it cannot be said that he had not acted as a 'reasonable man'. Hence, inevitable mistake is a good plea in actions for deceit;[30] malicious prosecution.[31]

IX. EXERCISE OF COMMON RIGHTS

1. The exercise of ordinary rights in an ordinary manner is no wrong even if it causes damage [see p. 8, *ante*]. Men are free to seek their own advantage in the ordinary pursuit of business or uses of property, though a probable or even intended result may be to diminish the profit or convenience of others. The principle is quite clear. "Life could not go on if we did not, as the price of our free action, abide some means of inconvenience from the equal freedom of our neighbours." Thus, (i) competition in trade or business is in itself no cause of action, whatever damage it may cause [*Gloucester Grammar School case*; Cf. p. 9, *ante*]. Even selling at unremunerative prices to attract customers, or offering advantages to customers who will deal with oneself to the exclusion of a rival is no wrong. "To say that a man is to trade

28. *Rylands* v. *Fletcher*, (1868) 3 H.L. 330.
29. *Consolidated Co.* v. *Curtis*, (1892) 1 Q.B. 495.
30. *Derry* v. *Peek*, (1889) 14 App. Cas. 337 (*375*).
31. *Herniman* v. *Smith*, (1938) A.C. 305 (*315–16*); *Glinski* v. *McIver*, (1962) A.C. 726 (*761*, *767*).

freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract their business to his own shop, would be a strange and impossible counsel of perfection."[32] On the same principles, it has been established that (ii) the disturbance or removal of the soil in 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 the invasion of a legal right, and will not sustain an action. Even proof of *malice* will not improve the plaintiff's position [*Mayor of Bradford* v. *Pickles*; see p. 13, *ante*].

2. The principle is not confined to matters of trade or use of property, but extends to every exercise of lawful discretion in a man's own affairs. It is with reference to such cases that the phrase *damnum sine injuria* is used.

X. LEAVE AND LICENCE: VOLENTI NON FIT INJURIA

1. Generally speaking, harm suffered by consent grounds no cause of civil action. This is usually expressed by the maxim *'volenti non fit injuria'* which means that no man can enforce a right which he had voluntarily waived or abandoned. The defence on this ground is commonly known as 'leave and licence';—the plaintiff cannot complain of an act which he has expressly or impliedly assented to. The consent may be express or implied.

(a) It is express, for instance, where a person submits to surgical operation, or invites a person to enter his premises.

(b) It is implied where the injury complained of is incidental to the thing consented to, e.g., consent to harm incidental to manly games. The consent is implied not only on the part of the *actual participants*, but sometimes also on the part of *spectators*, according to the degree of likelihood of risk attendant upon the game or sports, provided that the participants in the game possess adequate competence and the damage is caused by an act done in course of and for the purposes of the game.[33] Thus, a person going to see a cricket or golf match must know that he may accidentally be injured by a ball, or a person going to a flying show must know that an aeroplane may fall on his head. Similarly, a spectator at a motor race takes the risk of being injured by a car going through the railing separating the spectators inspite of proper precautions having been taken by the authorities.[34] The exception is based upon an implied contract to undertake the risk which *any* reasonable spectator could foresee and the fact that the spectator is a child makes no difference,[35] unless, of course, the nature of the game calls for special care, on the part of the occupier of the premises or the conductor of the game, towards children.

2. This maxim, as *Salmond* points out, has a double application. (a) *Firstly*, it applies to *intentional* acts which would otherwise be tortious, e.g.,

32. *Moghul Steamship Co.* v. *McGregor*, (1889) 23 Q.B. 598, *per* Bowen, L.J.
33. *Wooldridge* v. *Sumner*, (1962) 2 All E.R. 978 (C.A.).
34. *Hall* v. *Booklands Auto Racing Club*, (1933) 1 K.B. 205 (C.A.).
35. *Murray* v. *Harringay*, (1951) 2 All E.R. 320 (C.A.).

consent to physical harm in a boxing match, or a surgical operation, which would otherwise be an assault. It must be noted, however, that there are LIMITS to the operation of such consent. An act *likely or intended to cause harm* would not be excused by consent alone unless some *just cause* exists. As *Pollock* puts it, "consent alone is not enough to justify what is on the face of it bodily harm. There must be some kind of just cause, as the cure or extirpation of disease in the case of surgery. Wilful hurt is not excused by consent or assent if it has no reasonable object. On this principle prize-fights and the like are unlawful even when entered into by agreement and without anger or mutual ill-will" Wilful causing of bodily harm for the mere pleasure of it can never by justified by agreement. Thus, boxing with properly padded gloves is lawful because in the usual course of things it is harmless; but fighting with the bare fist is not. Similarly, football is a lawful pastime though many kicks are given and taken in it; but a kicking match is not. The principle is equally applicable to civil as to criminal liability. (b) *Secondly*, it applies to consent to run the risk of *accidental* harm which would otherwise be actionable as due to the negligence of him who caused it. Consent in this case means the agreement of the plaintiff to exempt the defendant from the duty of care, e.g., servant's consent to risk from master's premises, tools, etc.

3. It is in the relation between employer and workman that the principle of *volenti non fit injuria*, in its second sense, has been extended to the greatest extent. The workman's consent is implied from the contract of his service, to take upon himself the risks incidental to service [Cf. p. 35, *ante*]. But the maxim, it must be noted, is *'volenti'*—and not *'scienti non fit injuria'*. Mere knowledge of a possible danger does not of itself amount to consent; it must be an express or implied *agreement* to run the particular risks which culminated in the injury to the plaintiff. Thus, a servant who knowingly works on a dangerous premises or with defective tools is not for that reason *ipso facto* debarred from suing his employer if an accident happens. It is a question of fact in every case whether there was such an agreement or not. This was established by the House of Lords in *Smith* v. *Baker*[36] [(1891) A.C. 325]. Here it was asserted, in effect, that 'a man is not bound to fly from a risk from which it is another's duty to protect him, merely because the risk is known':

> "Where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine of *volenti non fit injuria*".[36]

A defendant who relies on the defence of *volenti non fit injuria* must show

36. *Smith* v. *Baker*. The plaintiff was employed in the defendants' stone quarry, and had worked there for months with full knowledge of the fact that he was exposed to danger by reason of the negligent practice of the defendants of swinging stones over the quarrymen's heads by means of a crane. Injured by the fall of a stone, the plaintiff brought his action for damages. *Held*, that "where a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, the mere continuance in service, with knowledge of the risk does not preclude the employed, if he suffers from such negligence, from recovering in respect of the employer's breach of duty."

that the plaintiff (a) freely and voluntarily, (b) with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.[37]

4. For construing an agreement by implication, a distinction has to be made between cases where the risk is an ordinary incident of the employment by its very nature and cases where a person whose ordinary duty is not dangerous is specifically engaged for the performance of a dangerous duty. (a) Where the risk arises out of the ordinary duty of the servant which is of such a nature that danger is necessarily involved, it may be implied that he contracted to take the risk. Thus, a man in an explosives factory must take the risk of an explosion occurring in spite of the observance and provision of all statutory regulations and safeguards. Similarly, a horse-breaker must take the risk of being thrown or injured by a restive or unbroken horse. (b) But a man whose occupation is not one of a nature inherently dangerous but who is asked to undertake a risky operation is in a different position. In such a case, in order to apply the doctrine of *volenti non fit injuria*, the master must show that the workman undertook that the risk should be on him, either by proof of an express contract or that the workman was paid *extra* for doing the dangerous work. It is not enough to show that he protested but finally did the work.[38]

5. Consent cannot exonerate a person from any duty imposed on him by statute.[38] Hence, the defence of *volenti non fit injuria* is not available to an employer who is guilty of a breach of statutory obligation imposed on him, out of which the cause of action to the workman arises.[39] But it would not be denied to an employer who is himself not guilty of violating statutory regulations, but the servant has undertaken the risk in defiance of an obligation imposed by statute[40] and of instructions issued by the master.[40]

6. Where the assumption of risk by the plaintiff is justified by the exigency caused by the defendant's wrongful conduct, e.g., where a policeman exposes himself to risk to save others from danger caused by the defendant's negligence, the maxim would not apply [see *Haynes* v. *Harwood, ante*].

7. The defence of *volenti non fit injuria* must be distinguished from that of contributory negligence [Chap. 14, § 2, *post*]. "The latter presupposes that there has been in the first instance a breach of duty on the part of the defendant to the plaintiff; while the former implies that there has been no breach of duty on the part of the defendant, for, by reason of the plaintiff having accepted the risk, or been willing to encounter it and at his own expense bear

37. *Letang* v. *Ottawa Electric Co.*, (1926) A.C. 725 (*731*) P.C.

38. Plaintiff had been employed by the defendants collecting leaves and rubbish, with a horse and cart provided by the defendant. On the material occasion, plaintiff was ordered to take a certain horse which was known to be restive. Plaintiff protested against having to take the horse but eventually carried out the order. Whilst the plaintiff was so engaged, the horse ran away and the plaintiff was injured. Plaintiff sued the defendants for damages, alleging that they had failed in their duty to provide safe horses. *Held*, that the defendants had been negligent and that it was no part of the plaintiff's employment to manage unruly horses and that he had not accepted the risk [*Bowater* v. *Rowley Borough Council*, (1944) 1 K.B. 476 (C.A.)].

39. *Stapley* v. *Gypsum Mines*, (1953) 2 All E.R. 478 (H.L.).

40. *I.C.I.* v. *Shatwell*, (1964) 2 All E.R. 999 (*1005, 1010, 1013, 1016*) H.L.

the consequences, the defendant does not owe him the duty, which he might otherwise have owed him, of protecting him against it" (*Underhill*).

Salmond (15th Ed., p. 673) explains the distinction[41] thus:

"... a plaintiff may be guilty of contributory negligence if he did not know but *ought to have known* of the danger which confronted him. But he can never be held to have been *volens* unless it is shown that he had *full knowledge* of the nature and extent of the risk. Again, a plaintiff may be, and usually is, guilty of contributory negligence when he is *careless* for his own safety, but he may be truly *volens* even when he is exercising the *utmost care* for his own safety."

XI. PRIVATE DEFENCE OR SELF-DEFENCE

1. Harm inflicted in defence of one's person or property is justified if it was reasonably necessary for the purpose. Every man has a right to defend his person or property from unlawful harm done by another. But (i) the force used in defence must not be out of proportion to the apparent urgency of the occasion. One is not justified in using his sword to repel a blow. But if he is attacked with a deadly weapon, he can defend himself with any weapon.[42] Again, (ii) self-defence does not include the *active assertion* of a *disputed* right.

2. The principle of private defence extends to the killing of another's animal if that is reasonably necessary in order to save one's person or property from 'real and imminent' danger. The killing, however, would be justified only if the defendant shows that—(a) the animal was actually attacking the defendant or his animals[43] or damaging his property[44] or there was a real and imminent risk of such attack or damage[43] and (b) there was no practicable means, other than shooting, of stopping the animal committing the injury or damage; or that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for preventing the attack or renewed attack.[43]

41. This distinction is of special importance in *England* since the Law Reform (Contributory Negligence) Act, 1945, under which contributory negligence has ceased to be a complete defence and is merely a ground for apportionment of the loss, while the defence of *volenti non fit injuria* remains unaffected by legislation.

There is, however, no such legislation in *India*.

42. *Turner* v. *M.G.M. Pictures*, (1950) 1 All E.R. 449 (*471*) H.L.

43. *Cresswell* v. *Sirl*, (1947) 2 All E.R. 730 (C.A.).

44. *Hamps* v. *Darby*, (1948) 2 All E.R. 474 (C.A.).

6

Remedies

§ 1. Classes of Remedies for Torts

Remedies for torts are of two kinds—judicial and extra-judicial.

(a) The JUDICIAL remedies or remedies by an action at law, mainly, are —(1) *Damages*, (2) *Injunction*, and (3) *Specific restitution* of property. Damages were originally the only remedy for torts, and [p. 7, *ante*] are still the essential remedy which distinguishes a tort from other civil injuries which are not torts. While damages were a common law remedy, injunction was a creation of equity and was originally available only in the Court of Chancery. Though this distinction no longer exists since the amalgamation of the separate systems of Courts by the Judicature Acts, traces of their origin are still maintained in this that while the remedy of damages is available *as of right* in all cases of tort, injunction is only supplementary to the remedy of damages, and is granted at the *discretion* of the Court in cases in which damages would not afford adequate redress. Specific restitution has obvious similarities to injunction, except that it was available in the Court of common law. It is an order of the Court by which property which has been wrongfully taken from the plaintiff is restored to him.

(b) Apart from these remedies afforded by judicial proceedings, the law recognises as a relic of archaic days, a right, in certain cases, of a person to redress a private wrong by *self-help* without taking recourse to courts of justice. The more important of these EXTRA-JUDICIAL remedies or remedies by act of party are—(1) Self-defence, (2) Expulsion of trespassers, (3) Re-entry on land, (4) Recaption of chattels, (5) Distress damage feasant, (6) Abatement of nuisance.

I. JUDICIAL REMEDIES

§ 2. Damages

In the *American Restatement* of the Law of Torts (sec. 902), damages are defined as:

> "a sum of money awarded, at the discretion of the Court, to a person who has been wronged by the act of another, not exceeding the sum claimed by such person."

The primary object of awarding damages in an action of tort, it hardly needs to repeat, is to offer pecuniary compensation to the party injured. But

in awarding damages, the Court[1] is influenced by other considerations as well. From this point of view, damages obtainable in an action for tort are distinguished as ordinary, nominal and exemplary.

1. ORDINARY, REAL OR SUBSTANTIAL DAMAGES

Ordinary damages are a sum of money awarded as a compensation for the *actual loss* suffered by the plaintiff by reason of the injury complained of. Such amount is not necessarily that which it would cost to restore the plaintiff to his former condition. *Compensation* and *not restitution*, is generally the object of the remedy in tort, and in no case, therefore does the award exceed the amount claimed by the plaintiff himself.

2. NOMINAL DAMAGES

Nominal damages are a trivial sum of money, such as a shilling or a penny, awarded not by way of compensation for any actual loss, but merely as a *recognition* of the existence of some legal right vested in the plaintiff and violated by the defendant. They are a sum of so little value as compared with the cost and trouble of suing that they are said to have "no existence in point of quantity". According to *Pollock* nominal damages are awarded (when an *absolute* right has been infringed) under either of two circumstances, "according to the nature of the case it may be honourable or contumelious to the plaintiff." (i) In some cases where the action has been brought merely to establish a right,[2] no substantial harm or loss having been suffered, the award really operates as a simple declaration of rights between the parties, e.g., in actions of trespass brought to settle disputed claims to rights of way, easements, etc.; (ii) in other cases, the plaintiff has suffered a legal wrong no doubt, but he may have by his own conduct or character showed himself as unworthy of any real damages. Thus, an illusory sum such as a farthing may be awarded where in a case of defamation, the words spoken or written by the defendant cannot be fully justified, and yet the plaintiff has done so much to provoke them, or is generally of such a worthless character, that he does not deserve any substantial compensation.[3]

The DISTINCTION between nominal and ordinary damages chiefly rests on the nature of the rights infringed. (i) Nominal damages can be obtained only in the case of wrongs actionable *per se* or *absolute rights*, e.g., rights of property (which include reputation), which give rise to an action for damages without regard to the amount of the harm done, according to the principle *injuria sine damno* [Cf. p. 11, *ante*]. (ii) Ordinary damages, on the other hand, are chiefly awarded in cases where action lies only on proof of actual damage, e.g., negligence, nuisance, deceit, etc. In these cases real damage is the foundation of

1. In *England*, damages were usually assessed by a Jury. But since the Administration of Justice Act, 1933, the Judge has been empowered to dispense with a Jury in many cases. In *India*, the trial of civil actions is entirely by a Judge, without a Jury.

2. Authors like Salmond (15th Ed., p. 713) call this category, separately, as a case of '*contemptuous*' damages.

3. According to Winfield (7th Ed., p. 94) this comes under the category of 'contemptuous' damages, taking account of the moral conduct of the plaintiff.

the action and smallness of the amount of damages actually awarded will not make it nominal. On the other hand, in torts actionable *per se*, if actual loss be proved, the amount awarded for that loss is not to be deemed nominal.

3. Exemplary, Vindictive or Punitive Damages

Exemplary damages are a sum of money awarded *in excess of* any material loss actually suffered by the plaintiff. These are awarded in cases where there has been great injury by reason of aggravating circumstances accompanying the wrong; no attempt is made to measure compensation by any numerical rule, but a heavy amount is awarded as an expression of *indignation* at the conduct of the defendant whenever he has shown a conscious and contumelious disregard of the plaintiff's right and convenience. Thus, exemplary damages may be obtained in cases of wanton trespass accompanied with violent behaviour, or of seduction of a man's daughter with deliberate fraud, or of gross defamation actuated by sheer spite or jealousy. Such damages are intended at once to offer a *solatium* to the plaintiff, and to serve as a *punishment* of the defendant, taking account of the *defendant's moral conduct*. In *England*, the House of Lords has limited the award of exemplary damages to three classes of cases only:[4]

(a) Oppressive, arbitrary or unconstitutional action by servants of the Government.
(b) Defendant calculated to make profit for himself by the act complained of, which might exceed the ordinary compensation payable to the plaintiff.
(c) Statute specially permitting award of exemplary damages.

§ 3. Measure of Damages

1. The expression 'measure of damages' means the footing upon which the amount of damages to be awarded in a given case may be calculated. The law has not laid down any arithmetical standard for this purpose, nor can it possibly do so. The assessment of damages is in the discretion of the Jury *in England*[1], while it is the duty of the Judge to explain to the Jurors the footing upon which they should calculate the damages. In *India*, the whole thing is made by the Judge himself.

2. Though the fundamental principle for assessment of damages for tort is the same as in the case of breach of contract, viz., compensation for the injury and loss sustained by the plaintiff, the actual assessment is based on a consideration of various factors in different cases. Thus, 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 wrongdoer must be considered as aggravating or mitigating factors.

Again, as has been already pointed out, the nature of the right and the extent of its infringement determine whether nominal, ordinary or exemplary damages are to be awarded.

3. It must be carefully borne in mind, however, that the same principle that determines the existence of liability, determines also the measure of damages to be awarded. The wrongdoer will be liable only for *direct* con-

---

4. *Rookes* v. *Barnard*, (1964) 1 All E.R. 367 H.L.

sequences of his act, and in no case will *'remote'* factors be considered in estimating damages.

4. In every suit for damages for torts, the Court may have regard to the knowledge, intention, motive and conduct of either or both parties, and may increase or reduce the amount of its award accordingly.

§ 4. General and Special Damages

1. On this point, it is necessary to bear in mind the distinction between 'damage' and 'damages'. While 'damage' means the injury or loss caused to the plaintiff by a wrongful act done by the defendant, 'damages' means the remedy by way of monetary compensation which the plaintiff claims to recover, in an action for tort, on account of the damage caused by that act. Now, when the damage caused is 'general', the claim of the plaintiff is for general damages; when the damage is 'special', the claim is for special damages.

2. It is, therefore, necessary to know the distinction between general and special *damage*. As Salmond[5] puts it—

> "General damage is that kind of damage which the law *presumes* to follow from the wrong complained of and which, therefore, need not be expressly set out in the plaintiff's pleadings. Special damage, on the other hand, is damage of such a kind that it will not be presumed by the law and must therefore be expressly alleged in those pleadings so that the defendant may have due notice of the nature of the claim...."

For instance, in an action for libel: (a) the plaintiff need not plead what loss he has incurred by the attack on his reputation, to recover general damages; as soon as he proves his reputation and that it has been affected by the defendant's false statement, the Court would award damages on the assumption that some damage must have been caused to the plaintiff by such statement; (b) on the other hand, that if the plaintiff claims that, in addition to such general damages, he has incurred special loss by loss of employment or loss of customers as a result of such defamatory publication, he must plead those facts on which such special damage is based; otherwise, the claim for special damages would be disallowed and the plaintiff would get only general damages.

Similarly, in an action for damages for personal injuries caused by the negligence of the defendant, besides a reasonable sum for the pain and suffering endured by the plaintiff, the plaintiff is allowed to recover the expenses incurred for medical and other necessary attendance during the period of his illness as well as a fair recompense for the loss of profits of his profession or business during such period, if the relevant facts are pleaded to support the claim for special damages.[6]

§ 5. Injunctions

An injunction is "a judicial order the general purpose of which is to restrain the commission, continuance, or repetition of some wrongful act of the party enjoined". As stated above, the remedy of injunction is not like the remedy

5. Salmond, 15th Ed., pp. 715-16.
6. *British Transport Commr.* v. *Gourley*, (1956) A.C. 185.

of damages, universally applicable in actions of tort, but is available in those kinds of wrongs where the remedy of damages would be inadequate or practically useless. It is granted at the discretion of the Court, but this discretion is exercised according to well-settled judicial principles. For example, it will be refused if the damage is too trifling, or if the plaintiff's conduct has been inequitable, or if the granting of it would be unduly harsh.

Injunctions are of two kinds, either prohibitory or mandatory. A prohibitory injunction is an order restraining the defendant from committing or repeating an injurious act, e.g., a trespass to land or the erection of a building which would obstruct the plaintiff's right to light. 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 things created by him, e.g., to pull down a building which he has already erected to the obstruction of the plaintiff's lights.[7]

§ 6. Specific Restitution of Property

This remedy is available only in the case of certain specific torts, such as when a person is dispossessed of his property, movable or immovable. At common law, an action for specific restitution of chattels is called *detinue*, and that for land is known as *ejectment*.

§ 7. Joint Wrongdoers

1. When more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrongdoer is liable for the whole damage and it does not matter whether one of them is the agent or servant of another. Nor is there any distinction as to degrees of responsibility corresponding to that which exists in criminal law between principals and accessories. The rule in the law of torts is that joint wrongdoers are JOINTLY AND SEVERALLY RESPONSIBLE for the whole damage. As to joint liability the following points should be noted—

(i) The person injured may sue one of the wrongdoers *separately* for the whole of the damage, or he may sue all of them *jointly* in the same action, and even in this latter case the judgment so obtained may be executed in full against any one of them.

(ii) It was formerly held that if a judgment was obtained against one of the joint wrongdoers it operated as a *bar to any further action* against the others even though the judgment remained unsatisfied. This rule was based on the ground that otherwise a vexatious multiplicity of actions would be encouraged.[8]

---

7. For a full treatment of Injunction in cases of Tort, see Author's *Textbook of Equity*, 4th Ed., pp. 293–99; 306–07.

8. *In England*, this rule has been abrogated by the Law Reform (Married Women and Tort-feasors) Act, 1935, which declares that a judgment against a joint tort-feasor shall not bar an action against another. But if more than one action is brought, the damages recoverable in them shall not exceed those awarded in the first action and the plaintiff shall not be entitled to costs in the later actions unless he had reasonable ground for bringing them. Multiplicity of actions has thus been discouraged.

(*Continued on p. 67*)

2. Who are joint tort-feasors? Persons may be jointly responsible for a wrong in three classes of cases—

(a) *Agency*. Wherever any person employs, authorises or procures, another to commit a tort, the law imputes the wrong to both of them and the principal and agents are jointly as well as individually responsible for the acts of the agent.

(b) *Vicarious Liability*. One person is sometimes liable for a wrong equally as the wrongdoer, though he has in fact no part in it. These cases have already been dealt with in Chap. 3.

(c) *Common Action*. Persons who join together in some form of common action become responsible together for tort which is committed in course of it, no matter what part each may take, so long as there is concerted action. But in order to constitute joint liability the act complained of must be joint and not separate. If *independent* acts of several persons cause the same damage, they are not joint tort-feasors. They are *severally* liable for the same damage but *not jointly*.[9]

§ 8. Contribution between Joint Wrongdoers

It has been seen that persons are said to be joint tort-feasors (i.e., joint wrongdoers in torts) when their respective shares in the commission of the tort are done in furtherance of a *common design*. Mere similarity of design on the part of independent actors, causing independent damage is not enough there must be *concerted action* to a common end. The liability of joint tort-feasors being joint and several, the aggrieved party may obtain judgment against any of them; then the question arises whether such wrongdoer who has discharged the joint liability may recover anything from the other wrongdoers by way of contribution.

(*Continued from p. 66*)

In *India*, no Act similar to the Law Reform Act, 1935, has been passed. Hence, the old common law rules are still applicable [*Nawal Kishore* v. *Rameshwar*, A. 1955 All 594].

This has been affirmed by the Supreme Court in *Khushro* v. *Guzder*, A. 1970 S.C.1468, laying down the following propositions:

(i) The common law rule of joint and several liability of joint tort-feasors still applies in India, as a principle of 'justice, equity and good conscience'.

(ii) In so far as it is joint, it is one and indivisible, if satisfaction is accepted by the plaintiff, *in full*, from one person, it would operate as a satisfaction of the entire cause of action. But before the other tort-feasors can rely on 'accord and satisfaction' in their defence, they must show that the plaintiff has received *full satisfaction* of his claim, as distinguished from a mere covenant with one of the wrongdoers not to proceed against him.

Thus, where in a suit for damages for defamation against several defendants, one of the defendants tenders an *apology* which is accepted by the plaintiff and embodied in a compromise decree, it cannot be treated as a 'full satisfaction' for the tort, so as to release the other defendants. The acceptance of the apology would only mean that the plaintiff elected not to pursue his several remedies against the particular defendant who had offered apology.

9. A caused an excavation near B's house. C, a water company left a watermain insufficiently stopped also near B's *house*. As a combined result of A and C's acts, the foundation of B's house subsided. *Held*, that A and B, inasmuch as their acts were independent of each other, were not joint wrongdoers, and could not be joined as such in the same action [*Thompson* v. *London County Council*, (1899) 1 Q.B. 1880].

A. In *England*, the law has undergone legislative changes: (I) Until the passing of the Law Reform Act, 1935, the following rules prevailed in *England*:

1. As a general rule, no action for contribution lies as between joint tort-feasors themselves, that is to say, if one of them has been sued alone and compelled to pay the whole damages, he has no right to sue the others for contribution. This is known as the rule in *Merryweather* v. *Nixan*.[10] The reason alleged for the rule is that any such claim to compensation must be based on an implied contract between the wrongdoers to contribute, and such a contract being made in contemplation of the commission of an illegal act, must necessarily be illegal and void.

2. Later decisions tended towards limiting the application of the rule in *Merryweather* v. *Nixan*. Thus, "from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."[11] Where the wrongful act is not clearly illegal but may have been done in honest ignorance, or good faith to determine a claim of right, there is no objection to contribution or indemnity being allowed. In other words, the rule against contribution or indemnity APPLIES ONLY TO MANIFESTLY ILLEGAL ACTS OR WILFUL WRONG-DOING and not to wrongful acts done by mistake or ignorance. Thus, an auctioneer who in good faith sold goods in the way of his business on behalf of a person who turned out to have no right to dispose of them was *held* to be indemnified by the person against the resulting liability of the auctioneer to the true owner.[11]

3. Thus, the rule was limited by the following EXCEPTIONS—

(i) The principal must *indemnify* his agent for all liability incurred by him in consequence of the act being without knowledge of the agent an illegal one.[11]

(ii) On the same principle, where one party induces another to do an act which is not clearly in itself a breach of law, the party so inducing shall be answerable to the other for the consequences.[12]

(II) In *England*, the rule in *Merryweather* v. *Nixan* has been TOTALLY ABROGATED by the Law Reform (Married Women and Joint Tort-feasors) Act, 1935, which allows contribution *even in cases of torts which are crimes*. The Law Revision Committee observed,—

"At first sight public policy might appear to demand that an exception should be made, at any rate, when the crime is wanton and deliberate and not merely the result of inadvertence. We have however come to the conclusion that it is impracticable to draw such a distinction.

The relevant provisions of the Act are—

(i) One tort-feasor may recover contribution from another tort-feasor, whether

---

10. *Merryweather* v. *Nixan*, (1799) 8 T.R. 186. M and N jointly destroyed the machinery of one S who brought an action against both and obtained a judgment for £840 which he levied wholly on M. M brought this action against N for contribution of a moiety. *Held*, the plaintiff could not recover.

11. *Adomson* v. *Jarvis*, (1827) 4 Bing. 66.

12. *Betts* v. *Gibbins*, (1834) 2 A & E. 57 (*74*).

jointly or otherwise, liable in respect of the same damage; but not from another tort-feasor who is entitled to indemnity from the former.

(ii) The amount of contribution recoverable from a tort-feasor shall be just and equitable having regard to the extent of his responsibility for the damage.

(iii) The Court may exempt any person from liability to make contribution or direct that the contribution from any person shall amount to complete indemnity.

B. In *India*, there being no statute corresponding to the Law Reform Act, 1935, the rule in *Merryweather* v. *Nixan*[10] as modified by the equitable modification made in *Adamson* v. *Jarvis*[11] (see *above*) should apply and has been applied in many cases.[13] But in some later cases,[14] it has been held that the rule in *Merryweather* v. *Nixan*[10] is wholly inequitable and should not be applied in India and that, accordingly, there should not be any bar to one tort-feasor recovering contribution from another.

§ 9. Effect of Death of Parties

(A) *England.* 1. A general rule of the common law was that the death of either the wrongdoer or the party injured put an end to the right of action for a tort. An action for tort must therefore be begun in the lifetime of both the parties, and even if after it has been so begun, either of the parties dies before a judgment has been obtained, the action abates, and cannot be continued or recommenced *by or against the representatives* of the deceased. The maxim is '*Actio personalis moritur cum persona,*' i.e., personal action dies with the persons. An extreme application of this maxim led to the curious doctrine that at common law causing the death of a human being gave rise to no civil liability [This part of the doctrine will be more fully discussed elsewhere: Chap. 7, § 4]. The result is, that subject to the exceptions noted below, no executor or administrator could sue or be sued for any tort committed against or by the deceased in his lifetime.

2. This rule was, however, criticised as not founded on any rational basis. There is no satisfactory explanation why the estate of a wrongdoer should escape liability for wrongs committed by him, nor why the estate of the injured forego compensation where a personal wrong has affected his property as well. Technically, a cause of action on a contract is as much 'personal' as a cause of action based on tort. The rule is one of antiquity but is of obscure origin and seems to be a relic of the age of private vengeance. Hence, it was cut down by a number of statutory EXCEPTIONS whose aggregate effect was to abolish the rule so far as it relates to injuries to PROPERTY, but to leave it unaffected so far as it relates to injuries of other kinds.

3. The rule has been FINALLY ABROGATED by the Law Reform (Miscellaneous Provisions) Act, 1934, which declares that on the death of any person all causes of action subsisting against or vested in him shall survive against or for the benefit of his estate, except causes of action for defamation,

---

13. *Yegnarayana* v. *Jagannadha*, A.I.R. 1932 Mad. 1; *Ramratan* v. *Aswini*, (1901) 37 Cal. 559; *Basanta* v. *Ram*, (1931) 59 Cal. 859 (898).

14. *Khusalrao* v. *Bapurao*, A. 1942 Nag. 52; *Dharni* v. *Chandra*, *I.L.R.*, (1952) All. 779 F.B.

seduction; inducing one spouse to leave the other and claims for damages for adultery. A suit by or against the deceased may therefore be continued by or against his representatives, except in the cases just mentioned. Thus, it has been held that if a person is injured by a negligent act of the defendant and he dies thereafter, the cause of action for damages for loss of expectation of his life would survive to his personal representatives.[15]

4. But a suit can be brought *against* the representative only if the cause of action arose not earlier than six months before the death of the wrongdoer and the suit is brought not later than six months after the personal representation.

(B) *India.* 1. S. 306 of the Indian Succession Act, 1925, adopts the English rule as it stood before its abrogation:

> "All demands whatsoever and all rights to prosecute or special proceeding existing in favour of or against a person at the time of his decease *survive* to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code or other personal injuries causing the death of the party; and except also cases, where after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

It follows from the above, that the general rule is that of survival of the cause of action; it is only in the excepted cases that there will be abatement. Now, as to the expected cases, defamation and assault are specifically mentioned. There has, however, been judicial controversy as to the interpretation of the expression 'personal injuries'.

2. (i) The Madras,[16] Bombay,[17] Allahabad,[18] and Patna[19] High Courts have held that the words 'personal injuries' are to be construed *ejusdem generis* with defamation and assault and should not be restricted to 'physical injuries'. Hence, according to these High Courts, a suit for *malicious prosecution* abates on the death of either party to the suit.

(ii) The Calcutta[20] High Court has, on the other hand, held that 'personal injuries not causing the death of the party' refer only to physical injuries which do not cause death of the person injured. Hence, a suit for malicious prosecution does not abate.

3. As regards 'fatal accidents', the law is to be found in the Fatal Accidents Act, 1855, which provides that the party who caused the injury shall be liable in damages at the action of the wife, husband, parent or child, if any, of the deceased person. The measure of damages is the pecuniary benefit which the plaintiff would have got from the deceased if the latter had not died.[21] [see Chap. 7, § 6, *post*].

---

15. *Rose* v. *Ford*, (1937) A.C. 826.
16. *Rustomji* v. *Nurse*, (1920) 44 Mad. 357.
17. *Motilal* v. *Harnarayan*, A.I.R. 1933 Bom. 408.
18. *Dehra Dun M.E.T. Co.* v. *Hansra*, A.I.R. 1935 All 995.
19. *Punjab Singh* v. *Ramautar*, A. 1920 Pat. 841.
20. *Krishna Behari* v. *Corporation of Calcutta*, I.L.R. (1904) 31 Cal. 993; *Bhupendra* v. *Chandramani*, (1926) 53 Cal. 987.
21. *Union of India* v. *Supriya*, A. 1973 Pat. 129.

II. EXTRA-JUDICIAL REMEDIES

§ 10. The Extra-judicial Remedies

1. *Self-help.* It is lawful for every man to use a reasonable degree of force for the protection of his person or property. This remedy is to be distinguished from the right of private defence in that while the latter is allowed for the *prevention* of a wrong, self-help is a method of redress which may be used when the party wronged can, by his own lawful act, *put an end* to the state of things by which he is wronged. But the right of self-help is subject to the same limitations as private defence, viz., that the force must not be (i) unnecessary, or (ii) disproportionate to the evil to be prevented. The remedies noted below are rather examples of this right of self-help.

2. *Expulsion of Trespassers.* It is lawful for any occupier of land to use a reasonable degree of force to prevent a trespasser from entering his land, or to eject him after he has entered.

3. *Re-entry on Land.* The forcible ejectment of a trespasser must be distinguished from re-entry upon land of which possession has been wrongfully taken. When a trespasser has not merely entered but has dispossessed the occupier, the remedy of the latter is different from that in the preceding case. In this case, the person dispossessed may retake possession by his own act, provided he can do so *peaceably and without the use of force.*

4. *Recaption of Chattels.* Anyone entitled to the possession of a chattel may defend his possession, or may retake the chattel if it has been unlawfully taken out of his possession, either by the use of peaceable means or by the use of reasonable force.

5. *Distress Damage Feasant.* It is lawful for any occupier of land to seize any cattle or other chattels which are wrongfully upon his land doing damage there, and to detain them till the payment of compensation for the damage done. This phrase literally means 'the distraint of things doing damage'. The right extends to trespass by all chattels, animate or inanimate. But (i) the chattels seized must have caused actual damage either to person or property on the land; (ii) the seizure must be made at the time the damage is done, and on the land itself; (iii) the right does not include a right of sale, but merely a right to detain until payment of compensation by the owner.

6. *Abatement of Nuisance.* It is lawful for any occupier of land TO ABATE (i.e., to terminate by his own act) ANY NUISANCE by which the land is injuriously affected. Thus, the occupier of a land may (i) cut off the overhanging branches of his neighbour's trees, or sever roots which have spread from these trees into his own land,[22] or (ii) pull down an obstruction to his ancient lights, or (iii) break down a fence which obstructs his right of way, and so on.[23]

It is to be noted however that—(a) If it is necessary to enter on the wrongdoer's land for abatement, or the nuisance is created by a building in actual

22. *Lemmon* v. *Webb*, (1895) A.C. 1.
23. *Penruddock's case*, (1598) 5 Co. Rep. 100.

occupation, the wrongdoer must, except in the case of great emergency, be first asked to abate the nuisance himself; that is to say, the party injured must first give notice to the wrongdoer, and if the latter refuses thereafter, the former may lawfully enter on the land of the wrongdoer to abate the nuisance. (b) When no entry on the land of the other party is required, the wrongdoer is not entitled to any notice, e.g., for the cutting of overhanging branches.[22] (c) If the nuisance is due to an act of omission and not an act of commission, notice is required before abatement. (d) In every case, the party taking on himself to abate a nuisance must avoid doing any unnecessary damage. On the same principle, the right of removing overhanging branches does not justify the appropriation of the fruits of the branches. (e) The party abating a nuisance, loses his right of action.

The right of abating nuisance is generally applicable to private nuisances. A public nuisance can be abated only in so far as special damage is caused to the abater. The right of abatement in this case is not looked upon with favour.

BOOK II

SPECIFIC TORTS

7

Wrongs affecting Personal Safety and Freedom

§ 1. Trespass to the Person

1. The right to personal safety is indispensable for society; the law, therefore, protects us against every kind of physical interference or restraint which is not otherwise justified or excused. While the law of crimes prescribes punishment, the law of torts awards damages for an infringement of this primary right.

2. The several wrongs to the person included in this Chapter fall under the comprehensive expression 'trespass to the person' or 'bodily harm'. The law relating to this comprehensive category has been reviewed in the case of *Fowler* v. *Lanning*,[1] and the following propositions have been laid down:

(i) Either intention or negligence is essential for an action for trespass to the person. There is no difference on this point between trespass to the person committed on the highway[2] and that committed elsewhere.[3]

(ii) The onus of proving either intention or negligence on the part of the defendant lies on the plaintiff.

§ 2. Defence

Apart from the general defences available in all actions for tortious liability, interference with another's person may be *justified* on some special grounds—

(1) *Self-defence*. This is a general exception to liability for tortious acts [Cf. p. 61, *ante*]. In assault the plea of self-defence is technically known as '*son assault demesne*' which means that the assault complained of was the effect of the plaintiff's own attack. But the use of force to another is not justifiable unless it conforms to the two general conditions—viz., that (a) it was not unnecessary, and (b) it was not disproportionate to the evil to be prevented. Thus, if A strikes B with his hand, B cannot justify his drawing the sword.

The defence extends to acts done in the defence of the person not only

1. *Fowler* v. *Lanning*, (1959) 1 All E.R. 291 (297); also *Letang* v. *Cooper*, (1964) 2 All E.R. 929 (C.A.).
2. *Holmes* v. *Mather*, (1875) 10 Exch. 261.
3. *Stanley* v. *Powel*, (1891) 1 Q.B. 86.

of the defendant himself, but also that of his wife or her husband, parent, child, master or servant.

(2) *Repelling Trespass.* The reasonable use of force is also justified where the plaintiff trespasses upon land or chattel in the possession of the defendant.

(3) *Reasonable Correction.* Force may be used for the chastisement or correction of a pupil, child, or apprentice, provided the force is not excessive or unreasonable. It may be noted that a husband as such has no corresponding power over his wife.[4]

(4) *Leave and Licence* [Cf. p. 58, *ante*]. The consent may be express as well as implied. Thus, a friendly push, or shaking hands, constitutes no wrong.

(5) *Preservation of the Public Peace.* In this case, too, the use of force should not be more than what is necessary.

(6) *Execution of Lawful Service of Process.* The use of force is also justified where it is necessary for the purpose of, or where it is applied in course of effecting a lawful arrest or lawful service of other process.

§ 3. Assault and Battery

1. The intentional *application of the 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. "The least touching of a man *in anger* is a battery."[5]

2. ASSAULT is an act which arouses an *immediate apprehension* of the application of unlawful force to one's person, though no force may actually be applied.

3. Assault may thus be described as inchoate battery.[6] 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, this is an assault, e.g., if A lifts up his cane or his fist in a threatening manner at B. (a) In an action for battery, the plaintiff must prove (i) the use of force to him, either directly to his body, e.g., slapping or pushing; or bringing an object into contact with his body, e.g., throwing water on him; and (ii) 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 a battery. (b) 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 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 the threat into execution immediately. Thus, if a sword is flourished at such distance that it would be impossible to hurt any person, it would not be an assault. On the other hand, the essence of the wrong being the putting of another person in *reasonable* fear of immediate violence, showing of an un-

4. *R.* v. *Jackson*, (1891) 1 Q.B. 671.

5. *Cole* v. *Turner*, (1705) 6 Mod. 149.

6. In practice, however, the term 'battery' is now seldom used, 'assault' being often used as including 'battery'.

loaded fire-arm may constitute assault if it causes such reasonable apprehension, though *actually* there was no present ability to do harm on the defendant's part.

Neither assault nor battery lies when there is some lawful justification for it.

§ 4. Bodily Harm and Nervous Shock

1. Any intentional or negligent doing of actual harm to a man's person, though it may be indirect and may not amount to a battery, is an actionable wrong, e.g., where a physician negligently administers a poisonous drug.

2. Even further, bodily harm includes illness due to mere nervous shock (i.e., apprehension of harm) though there has been no physical impact. *'Nervous shock'* is however to be distinguished from *'mental'* shock or shock to the moral or intellectual sense. No action lies for *mere mental pain* or sorrow, or any other injury to feelings or emotions. "Mental pain or anxiety the law cannot value, and does not pretend to redress."[7] 'Nervous shock', on the other hand, is a shock to the nerves *caused by fear of personal injury* to the person injured. It has been SETTLED in a group of later cases that action lies for nervous shock though unaccompanied by any actual physical impact, PROVIDED IT HAS RESULTED IN PHYSICAL INJURY.[8–10] The shock may be caused either by acts or words causing fright.

3. It has been held further, that action might lie even where the shock was due to fear of injury not only to the plaintiff personally but also to any member of his or her family.[11] It was explained in this case, that the cause of action in 'nervous shock' arises from the breach of the ordinary duty to take reasonable care to avoid inflicting personal injuries, followed by damage, even though the type of damage be unexpected, namely, shock.

4. No action for nervous shock, however, lies unless there was any duty on the part of the defendant to take care *to the plaintiff* and the defendant

---

7. *Lynch* v. *Knight*, (1861) 9 H.L.C. 577.

8. *Malcolm* v. *Broad Hurst*, (1970) 3 All E.R. 508; *Behrens* v. *Bertram Mills Circus*, (1957) 1 All E.R. 583 (C.A.).

9. The defendant, by way of practical joke, falsely represented to the plaintiff that her husband had met with a serious accident whereby both his legs were broken. The plaintiff suffered a violent nervous shock and fell seriously ill; her hair turned white, and her husband had to incur expenses for her treatment. *Held*, an action for damages lay [*Wilkinson* v. *Downton*, (1897) 2 Q.B. 57].

10. The defendant's horse and van, owing to negligent driving crossed the footpath, and ran into the plaintiff's husband's public house. The plaintiff, who was standing by, sustained a severe shock, and prematurely gave birth to an idiot child. *Held*, the defendant was liable [*Dulieu* v. *White*, (1901) 2 K.B. 669].

11. *Hambrook* v. *Stokes*, (1925) 1 K.B. 141. The defendants' servants negligently left a motor lorry unattended in a steep and narrow street with the result that it ran down the street. The plaintiff, who was walking there, became frightened for the safety of her children whom she had just then left further down in that street. She sustained a severe shock and illness of which she died. *Held*, the defendants were liable. The *ratio decidendi* was that the defendant owed a duty to the mother not to leave the lorry in a position of danger to her *children*.

was guilty of negligence in not taking that care.[12] As regards the duty to take care, it has been held[12] that the test is whether the defendant could have *reasonably foreseen* any damage to the plaintiff. Where the plaintiff was outside 'the area or range of reasonable anticipation', the plaintiff cannot recover damages for mental shock caused by the defendant's act.[13]

§ 5. Death

(A) *England.* 1. An anomalous rule of English common law is that *no civil action* lies against a person for *causing the death* of another, though it lies for causing smaller injuries to the person. The rule is an accident of legal history and is based on little logic. It is traceable to the operation of two doctrines—(a) *Firstly*, the maxim *actio personalis moritur cum persona* [Cf. p. 69, *ante*]. The wrong done to the deceased himself by the taking away of his life dies with him. (b) *Secondly*, the doctrine that no man has any legally protected interest in the life of another. This prevents the relatives and representatives of the deceased from suing in their own right.

2. This unsatisfactory state of the law led to the passing of the Fatal Accidents Act, 1846, usually known as Lord Campbell's Act. Under it, 'it is a civil wrong, actionable by or on behalf of the near relatives of the deceased, to cause the death of a human being, if the deceased himself would have had a right of action had he been merely injured and not killed, and if those relatives

---

12. *Bourhill* v. *Young*, (1943) A.C. 92 (H.L.). A motor cyclist, driving at an excessive speed, collided with a motor car. The plaintiff (a woman), who was standing at a distance of 45 feet, *heard* the crash, though she did not see the collision. *Held*, that she had no cause of action against the motor cyclist because the latter had no duty to take care towards the plaintiff, judged by the standard of reasonable and probable causation. "The duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable and probable consequence caused injury to others, and the duty is owed to those to whom injury may *reasonably and probably be anticipated* if the duty is not observed." (In this case, the cyclist could not reasonably anticipate injury to a person who was so far outside the range of the collision. The shock resulting to the Appellant situated as she was, was not within the area of potential danger which the cyclist should reasonably have in view." So stated the rule laid down in this case is only an illustration of the rule of remoteness of damages (see p. 65, *ante*).

13. *King* v. *Phillips*, (1953) 1 All E.R. 617 (C.A.). A taxi-driver backed his taxicab negligently and slightly injured a child. The child's mother, who was in her house 70 or 80 yards away, looked out of her window on hearing him scream but could not see the child and thus suffered nervous shock. *Held*, that in the circumstances of the case, the driver could not have reasonably anticipated that he might cause damage to the mother and, therefore, the damage was too remote and her claim was accordingly dismissed. [On the facts, this case was hardly distinguishable from the facts in *Hambrook* v. *Stokes* (see f.n. 11, above); but that case was distinguished on the ground that breach of duty was there admitted by the defendant in his pleadings. But, apart from that, the tendency since the House of Lords decision in *Bourhill* v. *Young* (see above) is to think that there is no absolute duty in such cases to members of the family of the person who receives the actual physical injury as was previously supposed, but that in each case, the test of remoteness of damage and of reasonable foreseeability is to be applied, and a person would succeed in an action for damages for nervous shock only if it could be shown that the defendant should have reasonably foreseen that nervous shock would be caused to the plaintiff as a result of his negligent act).

have suffered a pecuniary loss in consequence of his death'. This Act has not, however, totally abrogated the general common law rule and the latter still exists, subject to this statutory exception. The Act is limited (a) as to the classes of person on whose behalf a claim can be made, as well as (b) as to the kind of damages that may be recovered.

(a) The relatives whose interests are protected by the Act are husband, wife, children, grandchildren, step-children, father, mother, step-parents and grandparents. Adopted or illegitimate children, though dependants, are not included. So a master cannot sue for injuries which cause the immediate death of the servant, though he suffers loss by being deprived of his services.

(b) Damages can be recovered only for the *'loss of pecuniary benefit'* resulting to the plaintiff from the death of his relative. Nothing can be claimed for mental suffering and bereavement. Further, there is no cause of action where there is no reasonable expectation of some appreciable benefit from the continuance of the deceased's life. But as has already been stated (p. 69, *ante*), under the Law Reform (Miscellaneous Provisions) Act, 1934, the cause of action for damages for loss of expectation of life of the deceased, now passes to the personal representatives and such damages are to be assessed according to the principles laid down in *Benham* v. *Gambling* (see below).

(c) There is no right of action unless the deceased himself could have used had he been merely injured by the defendant's act and not killed. The defendant has the same defences open to him as in an action by the party injured if he were alive, e.g., self-defence, contributory negligence, consent, accord, and satisfaction.

(d) The action must be brought within 3 years of the death by the executor or administrator, or within 6 months by the relatives themselves.

3. The Carriage by Air Act, 1961, places the carrier under a liability to make compensation to the dependants of a passenger who is killed as a result of an accident to the aircraft, subject to the conditions specified therein. It gives effect to the Warsaw Convention.

4. The National Insurance Acts, 1965–67 and the National Insurance (Industrial Injuries) Acts, 1946–53, provide for the payment of a death grant or death benefit to the members of the deceased's family and dependants irrespective of any question of negligence of the person who caused the death. This Act replaced the (Eng.) Workmen's Compensation Act.

5. The Coal-Mining (Subsidence) Act, 1957, subjects the National Coal Board to liability under the Fatal Accident Acts in respect of death caused to a person by coal-mining subsidence, irrespective of any wrongful act, neglect or default.

(B) *India*. 1. The Fatal Accidents Act, 1855 provides that on the death of a person caused by the 'wrongful act', neglect or default, of another person, the personal representative of the deceased can maintain an action for damage on behalf of the wife or husband, parent and child of the deceased if "the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof . . .".

2. Another Act under which compensation is recoverable by the depen-

dant of the deceased is the Workmen's Compensation Act, 1925, but this Act applies only if the deceased was a 'Workman' as defined by this Act and the death was caused by 'accident arising out of and in the course of his employment'.

3. Sec. 17 of the Carriage by Air Act, 1934, makes the carrier liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

§ 6. Measure of Damages for Personal Injury

1. In cases of bodily harm, the injured person is entitled to recover a solatium not only for physical pain and infirmity but also for mental pain and disgrace. Damage for mental pain and disgrace may be exemplary when defendant's conduct has been wanton or attended with insult to the dignity of the person who is assaulted.[14]

2. Besides, plaintiff is entitled to pecuniary loss for medical expenses, loss of business, profession or calling and the like.

3. The plaintiff is also entitled to recover damages for LOSS OF EXPECTATION OF LIFE CAUSED by the injury, and that even if death has taken place as a result of the injury, the personal representatives of the injured can recover such damages for loss of expectation of life, under the provisions of the Law Reform Act, 1934. In *Rose* v. *Ford*[15], the House of Lords observed,—

> "A man has a legal right to his own life...He has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering and disability, but also in regard to the continuance of life for its normal expectancy. His normal expectancy is a thing of temporal value, so that its impairment is something for which damages should be given."

But the fixing of proper standards for assessing damages for loss of expectancy of life raised some difficulty, and in *Benham* v. *Gambling*,[16] the House of Lords laid down the following rules—

(i) The damages are in respect of *loss of life*, not of loss of future *pecuniary prospects* and that accordingly, the damages should not vary according to the social position or prospects of worldly success for the victim.

(ii) The damages for the loss of life of a child of tender years with uncertain prospects of life would be smaller than those in the case of an adult with settled prospects.

(iii) The measure of damages is not subjective, but objective, viz, what kind of future on earth the victim might have enjoyed. Thus, loss of expectation of a life or constant pain or suffering cannot be regarded as inflicting the same injury as in normal cases.

---

14. *Loudon* v. *Ryder*, (1953) 1 All E.R. 741 (C.A.).
15. *Rose* v. *Ford*, (1937) A.C. 826 (H.L.).
16. *Benham* v. *Gambling*, (1941) A.C. 157; see also *Davies* v. *Powell*, (1942) A.C. 601 (*617*).

India. There is no bar to such a claim being made in India[17] if the victim is alive at the time of the suit. But if he dies, his personal representative cannot bring an action on this ground in India, for, under s. 309 of the Indian Succession Act (contrary to the Law Reform Act, 1934, in England) the cause of action for personal injuries causing the death of the party does not survive to his representatives. The case of 'fatal accidents' should be distinguished, for, they are governed by the Fatal Accidents Act (see below).

§ 7. Measure of Damages for causing Death, under the Fatal Accidents Act

A. *England.* In England, the question of damages which may be claimed under the Fatal Accidents Acts has been explained by the House of Lords in several cases, including *Nance* v. *Br. Columbia Electric Ry. Co.*, (1951) A.C. 601. In this case, it has been laid down that in assessing the damages payable to the representatives of the deceased a balance has to be struck between the loss and the gain to the representative arising from the death:

I. On the first head, the starting point is the amount of wages the deceased was earning, having regard to the regularity of his employment. The probable loss to the dependants is to be computed by multiplying the wages by the normal expectation of the life of the deceased, having regard to his age, bodily health and possibility of premature death by accidents. The tax payable on the income should be deducted from the possible earnings.[18] But for the death caused by the fatal accident, this is the sum or pecuniary benefit which would have accrued to the deceased.

But, then, the deceased would have spent some amount of probable income for the maintenance of himself and his family, had he survived. This sum will also have to be multiplied by taking the number of years of the normal expectation of life of the deceased.

The balance under this head now represents the *loss* of future pecuniary benefit to the dependants caused by the death of the deceased.

Any savings which the deceased might possibly make should be added under this head.[18]

II. As against the foregoing loss to the dependants is to be balanced the possible benefit, if any, accruing to each of the dependants as a result of the death, e.g., any advantage from whatever source that may come to the dependant by reason of the death, excepting statutory exemptions. Thus, in the case of the widow, the following considerations have to be balanced:

(a) The benefit accruing to the widow from the acceleration of her own interest in the estate;

(b) The possibility of the wife dying earlier if the husband had lived the full span of life;

(c) The possibility of the widow marrying again and thus ceasing to be a dependant.

B. *India.* The foregoing principles laid down by the House of Lords have been applied by our Supreme Court in *Gobald Motor Service Co.* v.

17. *Dinbai* v. *Farukh*, A. 1958 Bom. 218 (*221*).
18. *Taylor* v. *O'Connor*, (1970) 1 All E.R. 365 (H.L.).

Veluswami[19], a case under the Fatal Accidents Act, 1855. The relevant provisions of this Act, in ss. 1–2 are:

Section 1 says—

"Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured."

Section 2 provides—

"Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint;

Provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for, and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default..."

This suit was brought by the father, widow and sons claiming compensation under ss. 1 and 2 of the Act for causing the death of one Rajaratnam who was killed as result of an accident while travelling in a bus of the appellant company.

The following questions were dealt with by the Supreme Court:

1. *Was the driver of the bus negligent?* It was proved that the accident took place not on the main road but on the offside, uprooting the stone at the drain and attacking tamarind tree twenty-five feet away with such a velocity that its bark was peeled off and the bus could stop only after travelling some more distance from the tree. It was evident that the bus was running at a high speed and, having regard to the ground at the spot, it gave rise to a presumption that the accident was caused by the negligence of the driver.

2. *Was the employer company liable for the driver's negligence?* The answer was in the affirmative because the driver was in the course of the employment of the company when the said accident happened. The company was accordingly liable in damages under the Act.

3. *The measure of damages under s. 1.* The Court upheld the award of damages to the extent of Rs. 25,200 to the widow and the sons by reason of the death of Rajaratnam. The Court laid down that under this section the damages should be calculated by assessing, on the one hand, the pecuniary loss to the claimants due to the premature determination of the life of the deceased and, on the other hand, deducting therefrom any pecuniary advantages which from whatever source come to them by reason of the death. Having regard to the age of the deceased and the circumstances of the family and the like the Court held that the sum awarded was a reasonable one.

4. *Whether any additional amount could be awarded under s. 2.* Under s. 2, as quoted above, a claim for loss to the estate of the deceased is an exception from the general principle that more than one claim shall not be made on the same subject-matter. The claim for loss to the *estate* is thus regarded as quite

19. *Gobald Motor Service Co.* v. *Veluswami*, A. 1962 S.C. 1.

distinct and independent from the claim for loss of *income* to the dependants under s. 1. The capitalised value of the income of the deceased, having regard to the expectation of his life, would represent the loss to the estate, subject to relevant deductions. The Court also upheld the award of Rs. 5,000 under s. 2, as proper.

§ 8. False Imprisonment

1. The right to personal freedom follows from the right to personal safety. It includes immunity not only from the actual application of force, but from every kind of detention and restraint not authorised by law. The infliction of such restraint constitutes the wrong of false imprisonment; it is a distinct wrong, though it is generally coupled with assault. False imprisonment has been defined as the "*total restraint of the liberty of a person for however short a time without lawful justification.*" This wrong is also comprised in the wider expression TRESPASS TO THE PERSON'.

2. To constitute the wrong of false imprisonment—

(i) The imprisonment need not be in a common prison or goal. "Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets" (*Blackstone*). Thus, to unlawfully prevent a man from leaving his own house is imprisonment.

(ii) But 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.[20]

(iii) Actual use of force is not necessary. A mere threat of force whereby the restraint is effected is sufficient ground for action.

(iv) The imprisonment must have been caused by the defendant or his agents or servants. In this respect, FALSE IMPRISONMENT IS TO BE DISTINGUISHED FROM MALICIOUS PROSECUTION. Where A *charges* B with a crime before a magistrate, who thereupon remands the latter to custody, the arrest is in law the *act of the magistrate in his judicial capacity*, and not that of the complainant. If the complaint turns out to be false, the remedy of the accused B is not an action for false imprisonment but an action for malicious prosecution; the magistrate is not agent of the complainant A to cause the arrest of the accused. But if, on the other hand, A had got a police officer such as a constable to arrest B and the constable acted merely as the ministerial agent of A, A would be liable in an action of false imprisonment [For further discussion of this topic, see Chap. 10, § 2].

(v) The imprisonment must be without any lawful justification.

---

20. Part of a public footway was used to provide seats to view a boat race, and separated by a temporary fence. The Plaintiff, claiming a right to use that part, climbed over the fence but was stopped by two policemen, who told him that he *might go back if he pleased.* He refused to do so and remained there half an hour. *Held*, there was no imprisonment [*Bird* v. *Jones*, (1845) 7 Q.B. 742].

3. If the above conditions are satisfied, the defendant is liable for false imprisonment, without proof of any actual damage.

§ 9. Justification

(A) *England.* 1. The onus of proving lawful excuse is on the defendant. He may 'justify' his act if he has arrested (a) *under* a legal warrant, or (b) in some specified case, even *without* a warrant.

2. (I) A PUBLIC OFFICER, e.g., a constable, may lawfully arrest without warrant—

(i) Any person whom he reasonably *suspects* to have committed a felony, whether he has actually committed it or not.

(ii) To prevent a breach of the peace, or where a breach of the peace has been committed in his presence.

(iii) Under statutory authority.

(II) A PRIVATE PERSON MAY ARREST WITHOUT WARRANT—

(i) Any person whom he suspects to have committed a felony, provided, a felony has actually been committed. In this respect a distinction has been made between the powers of a private individual and a public officer.

(ii) One whom he sees committing, or about to commit a breach of the peace.

(iii) Under statutory authority.

3. When a person is arrested without warrant, upon *reasonable suspicion*, whether by a policeman or by a private person, the person arrested is entitled to know *on what charge or on suspicion of what crime he is seized.* If he is not so informed, the person arresting is liable for false imprisonment—(i) except when the circumstances are such that the arrested person must know the general nature of the alleged offence (e.g., where he is caught red-handed), or (ii) where he himself produces the situation which makes it practically impossible to inform him (e.g., by immediate counter-attack or by running away).[21]

(B) *India.* 1. The English common law right of a *private person* to arrest another person without warrant does not apply in India. The right is conferred by sec. 43 of the Criminal Procedure Code, 1973 which says—

> "Any private person may arrest... any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender",

but he must

> "without unnecessary delay, make over any person so arrested to a police-officer... or to the nearest police-station."

If these conditions are fulfilled, no action for false imprisonment will lie against the person who arrested the other person.

2. The right of police officers to arrest without warrant is contained in ss. 41–42 of the Criminal Procedure Code, 1973.

3. Apart from this, where any statute gives to a public officer the power to arrest and detain another person, no action for false imprisonment would

21. *Christie* v. *Leachinsky*, (1947) 1 All E.R. 567 (H.L.).

lie if the statutory power is done in good faith (see, for instance, sec. 16 of the Maintenance of Internal Security Act, 1971).

§ 10. Measure of Damages

Substantial damages must be awarded where a person has been wrongfully deprived of his liberty. The principle of *restitutio in integrum* has no application in such a case. The damages are awarded not only for the discomfort and inconvenience suffered by the plaintiff, but in proper cases, they are also calculated to remove any impression on the minds of the persons concerned that the authority which they had, or which it was supposed they had, could not be used in contravention of law.[22] In proper cases, plaintiff should be compensated also for any economic loss incurred by him resulting from the imprisonment.[23] The question of damage actually suffered is not material.[24]

22. *Raja Pedda* v. *Araovala*, (1837) M.I.A. 504.
23. *Walter* v. *Alltools Ltd.*, (1944) 171 L.T. 371 (C.A.).
24. *John Lewis* v. *Tims*, (1952) A.C. 676 (*680*).

8

Wrongs Affecting Domestic Relations

§ 1. Seduction

1. Security of domestic relations comes next in importance to security of the person. But the law of damages for infringement of rights belonging to this group still retains the artificiality of early law. The original relation between persons protected by common law was the relation between master and servant and the remedy pertaining to it was extended to the other relations only by means of the *fiction* of service. Thus, at the present day an action lies at the instance of the head of family for enticing away any person who is under his lawful authority—wife, child, or servant, but on proof of a constructive 'loss of service'.

2. According to *Salmond* (15th Ed., p. 454), the torts falling under this Chapter have a common feature, namely, that they "are an injury neither to the *person*, nor *reputation*, nor physical *property*, but are based on a wrongful interference with a man's relations with others, for example, his wife, his children or those with whom he holds contracts."[1]

§ 2. Interference with Domestic Relations

The various torts recognised under this category are as follows:

I. ENTICEMENT OF SERVANT

1. An action lies against any person who interrupts the relation subsisting between master and servant by (1) procuring the servant to depart from the master's service, or (2) knowingly harbouring a servant during breach of service. The cause of action is loss of service but it is not necessary to prove the existence of a binding contract of service between the plaintiff and the person seduced away [where there is a *contract of service*, the modern action of 'procuring a breach of contract' (Cf. Chap. 10, § 4) would also lie].

2. A corollary from a master's right to the services of his servant is the right of the master to recover damages from a third party who injures his servant.[2] But, as the Privy Council has observed,[3] this action is a relic from

1. In this Chapter, we are dealing with interference with domestic relations; interference with contractual relations will be dealt with in Chap. 10, *post*.

2. *Admiralty Commrs.* v. *Amerika*, (1917) A.C. 38 (*60*).

3. *A.G. for N.S.W.* v. *Perpetual Trustee Co.*, (1955) 1 All E.R. 846 (*858*) P.C.

the time when service was a status and should not be extended to any sphere outside that of *domestic service*.[3] The right cannot, accordingly, be claimed by the Crown for injury to public servants.[4]

II. ENTICEMENT OF WIFE

(A) *England.* The husband has a right of action against anyone who *entices* away, or induces his wife to live separately from him without a sufficient cause [*Place* v. *Searle*, (1932) 2 K.B. 497]. The cause of action is loss of *consortium* or loss of society. On the same principle, it has been held that a wife may sue another woman for damages for enticement of her husband [*Newton* v. *Hardy*, (1933) 49 T.L.R. 552].

(B) *India.* Such a cause of action has been recognised in India in *Subharam* v. *Tikaram*, (1936) 58 All 903. But the foundation of the action is not loss of service but infringement of the husband's rights under the contract of marriage (which are rights *in rem*), as against third parties. In suits for restitution of conjugal rights, damages are often claimed against persons who have prevented the husband from having the society of his wife [vide *Ibrahim* v. *Ahmed*, (1864) 1 B.H.C. 236].

III. ENTICEMENT OF CHILDREN

On the fiction of loss of service, a parent can sue for any injury done to a child living under his care and control, or for enticement of such child, provided the child is old enough to be capable of rendering service. In the case of male children *de facto* service must be proved.

A much more common action is that for SEDUCTION OF FEMALE CHILDREN. The foundation of the action is the fiction of service, but in the case of a daughter *under age* (i.e., under 21) living with her father, forming part of his family, and liable to his control and command, proof of actual service is unnecessary. The law conclusively presumes service, provided of course, the child is old enough to be capable of performing acts of service. But if the daughter is of *full age*, the father must prove *de facto* service. The slightest habitual participation in domestic affairs is, however, sufficient for this purpose, and even making tea has been said to be an act of service. Where the daughter, whether of full age or not, was 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 he is supposed to have a legal right or interest." This artificial basis of the action for seduction has not been without criticism. It has thus been observed that "it affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers" [*It is to be noted that this form of action for seduction of children is not common in India*].

4. *Inland Revenue Commrs.* v. *Hambrook*, (1956) 3 All E.R. 338 (C.A.).

IV. INJURY TO SERVANT

On the same assumption of a proprietory right of a master in his servant and the consequent right to be compensated for loss of the latter's services, the master can sue in torts against anybody who imprisons or causes any bodily injury (other than death) to the servant,[3] independently of the servant's own right of action against the wrongdoer.

V. INJURY TO WIFE

On the same principle of loss of services, a husband is entitled to damages for loss of consortium against a person who negligently *injures* his wife.[5]

But the House of Lords has refused to extend the principle to a wife for loss of the society of her husband owing to injury caused by a third party, observing that "today a husband's right of action for loss of his wife's consortium is an anomaly" because it is founded on old authorities decided at a time when the husband was regarded as having a quasi-proprietary right in his wife. There is, accordingly, "no good reason for extending it". Hence, it was held that though the wife can recover damages where the husband is enticed away from her, she cannot claim any damages where the husband is *injured* by a third party, even though such injury incapacitates the husband for having normal marital relations with her. It was also pointed out that a wife was never regarded as having a proprietary right in her husband.

5. *Best* v. *Samuel Fox*, (1952) 2 All E.R. 394 (*400*) H.L.

9

Defamation

§ 1. What is Defamation?

1. Defamation is an injury to a man's REPUTATION. The right to reputation is an absolute right *in rem*, and anybody who touches the reputation of another is said to do so 'at his peril'. "A man's reputation is his property, and, if possible, more valuable, than other property." [*Dixon* v. *Holden*, (1869) 7 Eq. 488].

2. The wrong of defamation consists in the *publication of a false and defamatory statement respecting another person without lawful justification or excuse* (Salmond, 15th Ed., p. 179). A statement is said to be 'defamatory' when it was a tendency to injure the reputation of the person to whom it refers. Such a statement is one 'which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession or calling' [*Neville* v. *Fine Arts Ins.*, (1897) A.C. 68 (72)].

3. In a civil action for defamation, intention of the defendant is, in general, immaterial.[1] "A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both" [*Hulton & Co.*, v. *Jones*, (1910) A.C. 20 (*23*)].

4. A defamatory statement differs from mere insult or any other form of injurious falsehood. The test of the defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinions or feelings of other persons. While insult is an injury to one's dignity or self-respect, defamation is an injury to the esteem or regard in which one is held by *others*. The essence of defamation,—to anticipate a term,—is PUBLICATION. Insult *per se* constitutes no *civil* wrong.

5. Defamation is in some cases also a criminal offence. We are here concerned only with the *civil* remedy available in an action of tort. In *India*,

---

1. Defendants published in a newspaper the photograph of plaintiff's husband with that of a Miss X, announcing that they were engaged. The photograph as well as the caption were supplied by the plaintiff's husband and the respondents had no reason to suppose that plaintiff was not single. ***Held***, that though defendants had no reason to defame the plaintiff, plaintiff was entitled to damages since the publication was capable of bearing the meaning that the plaintiff was the *mistress* of her husband [*Cassidy* v. *Daily Mirror*, (1920) 2 K.B. 331].

while the criminal law of damages is codified in s. 499, I.P.C., the civil law of defamation is not yet codified and still rests on English common law.[2]

§ 2. Libel and Slander

(A) *England.* 1. In English law, the wrong of defamation may take either of two forms,—Libel and Slander according as the defamatory statement is made by way of speech, or by way of writing or its equivalent. It is libel if the defamatory representation is made in some PERMANENT and visible form, e.g., writing, painting, effigies, caricature, etc.; it is slander if made in some TRANSITORY form, such as word of mouth, gestures, or inarticulate sounds. As *Pollock* puts it,—using the terms 'written' and 'spoken' in an extended sense, we may say, that libel is a *written defamation* and slander is a *spoken defamation.* Similarly, it has been said that while libel is addressed to the 'eye' slander is addressed to the 'ear'.[3] The real distinction between the two rests on whether the statement has been made in a permanent form or not.

2. In *English* law, an *important distinction* lies between Libel and Slander in two respects:

Firstly, Libel is not merely a civil wrong (i.e., tort), but also a criminal offence. Slander is a civil wrong only, except where the words are also blasphemous, seditious, obscene, or amount to a contempt of Court. The ground for this distinction is said to be this that while libel conduces to a breach of the peace, slander has generally no such serious effect.

Secondly, 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. But Slander is (except in 4 cases) 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): and the damage must not be 'too remote'. Trouble of mind caused by defamatory words, for instance, is not special damage sufficient for action.

There are however, FOUR EXCEPTIONAL CASES IN WHICH SLANDER IS ACTIONABLE PER SE, without proof of special damage—

(1) An imputation that the plaintiff has committed a *criminal offence.* The imputation must be a direct charge of some offence, which when proved would expose the plaintiff to punishment.

(2) An imputation that the plaintiff suffers from a *contagious disease* such as renders him unfit for society, e.g., venereal disease, leprosy, etc.

---

2. Curiously, in *England*, the law of defamation has now been codified and reformed in the Defamation Act, 1952. The law applicable in India is the common law which existed prior to this Act and apart from the statutory changes.

3. Thus, in *Youssoupoff* v. *Metro-Goldwyn Mayer Ltd.*, [(1934) 50 T.L.R. 581 (C.A)] the Court of Appeal held that defamatory matter in a talking film was a libel. For,—"There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye, and is a proper subject for an action for libel, if defamatory. I regard the speech which is synchronised with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen."

(3) An imputation against the plaintiff in the way of his *business or office*; e.g., a charge of insolvency against a trader, of incompetence against a surgeon, of ignorance against a lawyer. At common law, such words are actionable on two conditions—(a) They must be spoken of him *in relation to the position* which he holds or the business he carries on at the time of speaking. (b) They must amount to a charge of incompetence or unfitness which, if believed, would tend to the loss of the party's employment or business. Thus, spoken charges of adultery or immoral conduct against a clergyman or a domestic servant are actionable; but not so if made against a clerk, or a physician, or a schoolmaster, unless the imputation is in some way *specifically connected* with his occupation: Similarly, it is actionable to charge a solicitor with cheating his clients, but not with cheating other people on occasions unconnected with his business [*Pollock*].

The common law rule has been partially relaxed by the Defamation Act, 1952, which lays down that in an action for slander in respect of words *calculated* to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

(4) An imputation of *unchastity* against a woman. This is not actionable *per se* at common law, but it has been made so by *statute*. The Slander of Women Act, 1891, enacted that "words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable."

(B) *India*. 1. The foregoing distinction between libel and slander has *not* been recognised in India.

Firstly, defamation, whether in a written or a spoken form, constitutes a criminal offence, as defined in s. 499 of the Indian Penal Code. The authors of the Code criticised the English rule as 'scarcely consistent with itself'. "For if defamation be punished on account of its tendency to cause breach of the peace, spoken defamation ought to be punished even more severely than written defamation, as having that tendency in a higher degree."

Secondly, as regards the *civil* remedy, the Courts are agreed that (a) so far as the mofussil is concerned, the peculiar distinction of English law is not applicable here, and action lies for slanderous words without special damage. (b) So far as cases arising within the Presidency towns are concerned, the Bombay and Madras Courts have held that special damage is not necessary. The Calcutta High Court has, however, held to the contrary, that the mere use of abusive language is not actionable without proof of special damage [*Girish Chandra* v. *Jatadhari*, (1899) 26 Cal. 653 F.B.] and that an action for oral imputation of unchastity to a woman would not lie without special damage even though the common law rule has been abrogated in England by statute [*Bhooni Mony* v. *Natobar*, (1901) 28 Cal. 452].

2. In *India*, in short, if the conditions under the next caption are satisfied, an action for defamation will lie for any 'statement', whether it is published by words of mouth, writing, photograph, picture, film, broadcasting or television.

§ 3. Conditions of Defamation in General

Leaving aside the additional requisite of special damage in an action for slander (in England), four conditions may be said to be required to constitute an action for defamation (whether libel or slander). In other words—"*In order to found an action, whether for libel or slander, four distinct factors must be present. And in the case of slander, but not libel, a fifth factor* (i.e., special damage) *must be present.*"

These four conditions are—

I. The statement must be *defamatory.*
II. The statement must refer to the *plaintiff.*
III. The statement must be *published by the defendant.*
IV. The statement must be *false.*

I. THE STATEMENT MUST BE DEFAMATORY

1. It has already been stated that a statement is defamatory when it has a tendency to injure a person's reputation. It is not essential that there must be some disparagement of the moral or intellectual character of the plaintiff in the ordinary sense.[4] The test of the defamatory nature of a statement is its tendency to excite against the plaintiff the ADVERSE OPINIONS OR FEELINGS OF OTHERS,[5] such as hatred, ridicule, comtempt.

2. In determining whether a statement is defamatory or not, the *motive or intention* with which it was used by the defendant is immaterial. Good faith or ignorance of the defamatory nature of the statement is no defence, for "a man utters defamatory statements at his peril." The statement is defamatory if, under the circumstances in which the writing was published, "reasonable men to whom the publication was made would be likely to understand it in a libellous sense."[5] The expression 'reasonable men' has, again, been interpreted to mean—"The *right thinking members* of society *generally*" [*Sim* v. *Stretch* (1936) 2 A.E.R. 1237 (*1240*], i.e., not the

---

4. A badly written story, written by a grocer's assistant, was published by the defendants, purporting to have been written by the plaintiff, a well-known writer. Those who would read the story as published would infer that the quality of the plaintiff's work had *deteriorated. Held*, that plaintiff was entitled to damages for libel [*Ridge* v. *English Illustrated Magazine*, (1913) 29 T.L.R. 592].

5. *Capital & Counties Bank* v. *Henty* [(1897) A.C. 68]. 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 & Sons, hereby give notice that they will not receive in payment cheques drawn on any of the branches of the C. & C. Banks." 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, *held*, that the natural meaning of the words were not libellous, and the inference suggested by the innuendo to the effect that the plaintiffs were insolvent was not the inference which reasonable persons draw. Hence the circular was not libellous [It was, at the same time, observed that such a statement might have conveyed an imputation on the bank's credit, if it had been published in a time of financial panic or in such special circumstances, which the plaintiff could not prove in this case].

cynical or hasty but the right-minded persons, who are neither extremely suspicious nor extremely naive.[6]

3. The burden of proving the defamatory effect, however, lies on the plaintiff.

(a) The statement must primarily be understood in its ordinary and natural meaning; and a statement is said to be *prima facie* defamatory when its natural, obvious and primary sense is defamatory.

> "In determining whether the words are capable of a defamatory meaning the Judge will construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some *unusual* meaning might succeed in extracting from them."[7]

(b) But 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.[8] When a statement is thus *prima facie* innocent, but the plaintiff alleges a defamatory significance to it, he must, in his pleading, set forth the circumstances which make it actionable; in technical language, 'he must prove an INNUENDO' [*Capital and Counties Bank* v. *Henty*[5], (1882) 7 A.C. 741]. By *innuendo* is meant this explanatory statement in the plaint 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. The plaintiff is bound by his own innuendo and must prove the meaning so alleged.

II. THE STATEMENT MUST REFER TO THE PLAINTIFF

1. In every action for 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 [*Hulton & Co.* v. *Jones*,[9] (1910) A.C. 20]. In other words,

---

6. *Lewis* v. *Daily Telegraph*, (1963) 2 All E.R. 151 (*154*) H.L.

7. Gatley on Libel and Slander approved in *Morris* v. *Sandess Products*, (1954) 1 All E.R. 47 (*52*).

8. Thus, when a newspaper describes a man as 'unmarried', the same statement *necessarily* implies that any woman holding herself out as his lawful wife is not entitled to that status [*Morgan* v. *Odhams Press*, (1971) 2 All E.R. 1156 (*1180*) H.L.].

9. The appellants, in their newspaper, published an article in which one "Artemus Jones", described as a church-warden, was accused of living with a mistress in France. The article was written as a fiction, and the writer of the article was 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 no church-warden), and those who knew him supposed the article to refer to him. *Held*, by the House of Lords, that the defendants were liable, notwithstanding the absence of any intention to defame the plaintiff inasmuch as reasonable men understood the word to refer to the plaintiff. "A person charged with a libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both" [*Hulton & Co.* v. *Jones*, (1910) A.C. 20].

it is immaterial whether the defendant intended his words to apply to the plaintiff, or knew of the plaintiff's existence, if it is found as a fact that the words might reasonably be thought applicable to him by persons acquainted with him. This rule is an extension of the doctrine that 'a man publishes defamatory statements at his peril'.

2. Whether a person is named in the statement or not, plaintiff can call witnesses to show that those who know him understood the words to refer to him.[10]

3. It is not necessary that the plaintiff should be referred to by name.[8] It may be made under a fictitious name or in the name of a class. There is, however, a rule that if a libel is made in the name of a class, a particular individual can bring an action only if he can show that it applies to himself. Thus, "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual" [*Eastwood* v. *Holmes*, (1858) 1 F. & F. 347].

Whether an individual member of a group can complain of defamatory matter written about the group is to be decided by asking two questoins: The first is whether the words are capable of referring to the plaintiff. The second is one of fact and is whether reasonable people who know the plaintiff think the words refer to him" [*Knupffer* v. *London Express Newspaper*, (1944) 1 A.E.R. 495 (H.L.)].

III. THE STATEMENT MUST BE PUBLISHED BY THE DEFENDANT

1. *Publication is the gist of the wrong of defamation.* No civil action 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. 'A man's reputation is the estimate in which *others* hold him, not the good opinion which he has of himself'. There must be communication at least to one *third* person. Where therefore a libellous statement is sent straight to the person to whom it is written, e.g., in a sealed or registered letter addressed to the plaintiff, there is no publication sufficient to found civil proceedings.

2. Publication, however, does not necessarily mean, as in common parlance, making the contents known to the *public*. Publication of a defamatory statement means the making known of the statement to any person other than the object of it. Communication to a *single individual*[11] may

10. *Advocate Co.* v. *Leslie*, A. 1946 P.C. 13.

11. According to the doctrine that husband and wife are 'one in the eye of law', the uttering of a libel by a husband to his own wife (about a third party) is no publication [*Wennhak* v. *Morgan*, (1888) 20 Q.B.D. 635]. Such ground, however, does not exist when the communication is made by the libeller to the wife of the party defamed, for "a person may suffer grievously if imputations on his character are made to his wife" [*Wenman* v. *Ash*, (1853) 13 C.B. 836]. In the latter case, the husband and wife are regarded as distinct and different persons; the law would not allow the fiction of unity of the spouses to be used "for the purpose of having the honour and feelings of the husband assailed and injured by acts done or communications made to the wife".

therefore constitute publication, provided such person is capable of understanding the defamatory significance of the statement. Thus, if a libel be transmitted in a telegram, or written on a postcard addressed to the person defamed, that is a publication; because the telegram must be read, and the postcard will in all probability be read by some person in the course of transmission, unless the statement is of such a nature that it would not be understood as defamatory by persons reading it casually. If, however, the defamatory statement is communicated by a closed cover (though not sealed) addressed to the plaintiff, the defendant has no reason to believe that it would be opened or read by any person other than the plaintiff to whom it is addressed. Hence, if in such a case the letter is, in fact, opened and read by a servant or other person who had no right to do so, there is no publication and defendant is not liable.[12]

3. There has been some difference of opinion on the question whether the dictation of a letter to the writer's own typist, for typing it in the ordinary course of business, before sending it to the addressee, would constitute a *publication* for purposes of an action for defamation by the addressee. The latest view, taken by the Court of Appeal,[13] is that the writer of the letter and his typist or a photocopier has a *common interest* in the writing of the letter in the usual course of business. Hence, if there is a disclosure of the letter to the typist or photocopier *alone*, there would be no publication even though the purpose of the letter was to defame the addressee.

4. 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". Thus, if a libel appears in a newspaper, the proprietor, the editor, the printer, and the publisher may all be sued jointly as well as severally. It has however been established, that where a person is a mere *unconscious* instrument in *circulating* libellous matter, he is free from liability if he can prove that (a) he did not know, and (b) could not with reasonable diligence have known, that the document he circulates contains any such matter. Such is the case of a news-vendor, as distinguished from the publisher, printer or proprietor of the newspaper [*Emmens* v. *Pottle*, (1885) 16 Q.B. 354]. In this case, it was observed: "A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do injury." Otherwise, even a railway company which carried a parcel of newspapers or books, would have been liable for the defamatory matter contained in the parcel. The burden of proof, however, lies on the distributor such as the news-vendor, and where the defendant fails to prove the plea, he is liable [*Vizetelly* v. *Mudie's Select Library*, (1900) 2 Q.B. 170]. The question to be determined in such cases is—"Ought the defendant to have known that the matter was defamatory, i.e., was it due to his negligence in conducing his business that he did not know" [*Sun Life Co.* v. *Smith & So.*, (1934) 150 L.T. 211].

12. *Ruth* v. *Huth*, (1915) 3 K.B. 32; *Powell* v. *Gelston*, (1916) 2 K.B. 615.

13. *Bryanston* v. *de Vries*, (1975) 2 All E.R. 609 (*616–17, 622, 631*) C.A.; *Osborn* v. *Thomas*, (1930) All E.R. 154 (C.A.).

IV. ABSENCE OF LAWFUL JUSTIFICATION

The defamatory statement must be false. No civil action lies for the publication of a defamatory statement which is true. It is customary to allege therefore that the statement is fal e. But 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 (see § 5, below).

§ 4. Defences to an Action for Defamation

Besides the general defences applicable to all torts, there are three special defences available in an action for defamation—(1) JUSTIFICATION, (2) FAIR COMMENT, (3) PRIVILEGE.[14] These are the conditions which form exceptions to the rule that a man utters defamation at his peril.

§ 5. Justification

1. TRUTH of the defamatory statement is a complete defence to a *civil action* brought in respect of it, and if the matter is true the purpose or motive with which it was published is irrelevant. The principle is that "the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess".[15] The defence that a statement is true is known as a plea of justification, the defendant being said to 'justify' his statement.

2. The burden of proof rests on the defendant to prove that the statement is true, and though it is not necessary that the statement is literally true, he must *prove* that it is as a whole SUBSTANTIALLY true. The form of the plea is that "the words complained of are true in substance and in fact". If the statement is proved to be substantially true, it does not matter if it is incorrect on some unimportant detail. Thus, where the plaintiff was stated to have been convicted and sentenced to three weeks' imprisonment, while in fact it was only a fortnight, *held*, there was sufficient justification [*Alexander* v. *N.E. Ry. Co.*, (1865) 6 B. & S. 340]. Mere belief in truth of the statement, however, is no defence; for a man attacks the reputation of another at his peril,—and mistake, however innocent or inevitable, can be of no help. The plea of justification is indeed a dangerous one, for, if the defendant does not succeed in

---

14. In addition to these common law defences, there is in England a statutory defence (under the Libel Act, 1843) known as *apology*, which is available where the libel is contained in a public newspaper or other periodical publication. The Defamation Act, 1952, has now extended the plea to any mode of publication by providing that any person may make an offer of amends if he claims that the alleged defamatory words were published by him *innocently*.

There is no such legislation in India, so that apology cannot be pleaded to defeat a suit, though it may be pleaded to mitigate damages [*Narayanan* v. *Mahendra*, A. 1957 Nag. 19].

15. In *criminal proceedings* truth is not in itself a good defence; it is necessary to prove that the publication was for the *public benefit* [Cf. sec. 499, Exp. 1, Indian Penal Code]. In civil proceedings, on the other hand, the cause of action is injury to reputation and where the plaintiff has in fact no reputation to lose, there is no cause of action.

proving *every material* part of his statement the fact that the defence was attempted may be treated as an aggravation of the original injury.[16]

3. Where the plaintiff pleads *innuendo*, the scope of justification widens to cover the full ambit of the *innuendo* pleaded by the plaintiff. Thus, where a newspaper alleged that M had been arrested on a charge of *fraud*, and the plaintiff pleaded that the allegation, generally, was that he was a *dishonest* man, the House of Lords held that the defendant was, by reason of the *innuendo*, entitled to lead evidence of all sorts of the dishonesty of the plaintiff.[17]

§ 6. Fair Comment

1. Nothing is a libel which is a fair comment on a matter of public interest. In order to substantiate the defence, the defendant must show that (1) the words published relate to some matter of PUBLIC INTEREST; (2) they are a COMMENT and not a statement of fact; (3) the comment is FAIR.

2. The matter (i) may in itself be of common interest, e.g., the conduct of persons in public offices or affairs, the administration of justice, management of public institutions, or (ii) may be laid open to the public by the voluntary act of the person concerned, e.g., books and every form of public literature, words of art publicly exhibited, public musical or dramatic performances. Such matters though not of themselves of public interest are deemed to have been submitted to public criticism and opinion.

3. Comment or criticism must be distinguished from a statement of fact. A comment is an expression of opinion—an inference from facts. If it is a mere statement of fact the only defence available are justification and privilege. But comment being a matter of opinion, and not capable of definite proof, he who expresses it is not called upon by the law to *justify* it as being true, but is allowed to express it, even though others disagree with it, provided it is *fair and honest*.

4. The plea of fair comment is, however, available only if it appears as a comment and is not *mixed up with facts* in such a way that the reader cannot distinguish between what is report and what is comment. The reason behind this rule is—

> "If the facts are stated separately and the comment appears as an inference from the facts, the injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him...."[18]

Where the comment is thus intermingled with facts, it must be justified

---

16. The stringency of the above common law rule has, however, been alleviated in *England* by s. 5 of the Defamation Act, 1952, which provides that the defence of justification will not fail solely because the truth of *one out of several* charges is not established, provided that, having regard to the truth of the remaining charges, the charge not proved *does not materially* injure the plaintiff's reputation.

17. *Maisel* v. *Financial Times*, (1915) 84 K.B. 2145 (H.L.).

18. *Hunt* v. *Star Newspaper Co.*, (1908) 2 K.B. 309 (320) (C.A.).

as a statement of fact.[18] But the words complained of may consist partly of allegations of fact and partly of expression of opinion (both being separable). In such a case, the rule now applicable is that contained in sec. 6 of the Defamation Act, 1952.

5. What is fair criticism is a question of fact. According to the more widely accepted view, a comment is fair if "an *ordinary set of men with* ordinary judgment would say that any fair man, however prejudiced he may be, however exaggerated or obstinate his views, would have made that comment." What is *fair* is thus not capable of precise definition, but several tests may be laid down:

(i) 'Fair' embraces the meaning of honest and also of relevancy. The view expressed must be *honest* and must be such as can fairly be called criticism. It must be *relevant* to the facts of public interest and must be a reasonable inference based on those facts. Thus, though public acts and performances or the conduct of public men may be freely criticised or censured, imputation of wicked or dishonest motive to the person concerned, is not fair comment. Thus, as a rule, a man's moral character is not a proper subject for fair comment. A novel may fairly be attacked as immoral and the comment, in order to be fair, need not be confined to its literary content,[19] but yet an attack on the moral character of the author would not be fair, unless it is found that it is a *reasonable* inference from the facts, which, again, must be *truly stated*.[20]

As to the truth of the facts stated on the basis of which the plea of fair comment is claimed, the common law rule was very stringent and any deviation from the truth would deprive the defendant of the defence of fair comment.[21]

(ii) Criticism must not be made a cloak for malice, and it is therefore open to the plaintiff to show that the defendant has been actuated by malice. [As to the difference between the defence of fair comment and that of qualified privilege on this point, see § 11, below.]

§ 7. Privilege

In particular circumstances, a person is allowed to make defamatory statements so as to incur no liability even if the statement be untrue. A defence founded on such a right is called the defence of 'privilege', and the occasions on which the immunity is conferred by law are called 'PRIVILEGED OCCASIONS'. These constitute further exceptions to the rule that a man attacks the reputation of another at his risk,—the exigencies of occasion, the protection of public interest, or of the rights of lawful interests of individuals amount to a lawful excuse for the defamatory statement. Privilege is of two kinds, absolute and qualified.

(a) 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 however false the statement may be. The existence of malice is entirely irrelevant in these cases.

---

19. *Kemsley* v. *Foot*, (1952) 1 All E.R. 501 (*505*) H.L.

20. *Dakhyl* v. *Labouchere*, (1909) 2 K.B. 325 (*229*) H.L.

21. *Merivale* v. *Carson*, (1887) 20 Q.B.D. 272. [But the rigours of this rule have been minimised in *England*, by the Defamation Act, 1952.]

(b) QUALIFIED PRIVILEGE, on the other hand, exists when the defendant is exempted not absolutely but only conditionally, i.e., in the absence of malice. [As to what constitutes malice, see § 10, below.] In these cases the demands of public policy are not so high, but the law recognises that the defendant had some lawful interest or duty in making the statement, and consequently, he should be protected from liability so long as he is not proved to have acted from an improper motive. The defence of qualified privilege is, thus, rebuttable by the plaintiff proving *actual malice* on the part of the defendant. "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 this occasion is protected. But in the case of qualified privilege the defendant does not prove privilege until he has shown how the occasion was used. It is not enough to have an interest or duty in making a communication, the interest or duty must be shown to exist in making the communication complained of." Qualified privilege is thus a middle course between the common rule of unqualified responsibility for one's statements regarding others, and the absolute protection given by law to statements made in cases of absolute privilege.[22]

§ 8. Absolute Privilege

Cases of absolute privilege may be enumerated under the following heads:

1. STATEMENTS MADE IN COURSE OF 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 walls of the House, nor to a speech printed and privately circulated outside the House.

In *India*, absolute immunity for anything said by any member in Parliament, and for anything published *under the authority* of either House of Parliament, is guaranteed by Arts. 105 (2) and 194 (2) of the Constitution.

2. STATEMENTS MADE IN COURSE OF JUDICIAL PROCEEDINGS. No action lies for words written or spoken by judges, counsels, witnesses, or parties, in the course of any proceedings before any court recognised by law, even though the words were written or spoken maliciously, without any justification or excuse. In order to be privileged the statement need not be 'relevant' or 'proper', and 'fair',—it is enough if it has some *reference* to the inquiry before the court. [The same rule has been applied in India in many cases. As regards criminal liability, however, it has been held by some of the High Courts that only a qualified privilege is allowed by the I.P.C. to *parties, advocates and witnesses.*]

This rule of absolute privilege is not confined to courts but extends to quasi-judicial tribunal holding authorised inquiries in a manner similar to that in which a court acts.[23]

3. STATEMENTS RELATING TO AFFAIRS OF STATE. Communications relating

22. *Pollock* seems to apply the term '*Privileged occasion*' to cases of qualified privilege only while cases of absolute privilege are grouped by him under the term 'privileged immunity'.

23. *Royal Aquarium Society* v. *Parkinson*, (1892) 1 Q.B. 431 (*432*).

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.

§ 9. Qualified Privilege

The following are the chief instances of qualified privilege:

1. STATEMENTS MADE IN PERFORMANCE OF A DUTY. Such duty may be legal, moral, or social. The foundation of this qualified privilege is that the person who makes the statement regarding the plaintiff "has an interest or a duty legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. "*The reciprocity is essential*" [*Adam* v. *Ward*, (1917) A.C. 309 (*334*)]. Such communications are protected for the convenience and welfare of society.

(1) An important kind of social duty is the duty of ANSWERING INQUIRIES made by a person having a lawful interest in the matter. Answers to questions regarding a *servant's character* given by a former employer to another who is going to employ that servant fall within this category. There is no legal duty to give a character to the servant, but there is a moral duty, and the person who receives the character has an interest in having it; therefore the occasion is privileged.

But if the information is *voluntarily* given, the communication is not necessarily privileged. Nor is the communication privileged if it is made from motives of self-interest or profit and not in the discharge of any public or private duty, e.g., where a company, trading for profit, sells information about the credit of customers or other traders [*Macintosh* v. *Dun*, (1908) A.C. 390]. But if the information is supplied by a mutual association of traders to its *own members*, about the credit of third parties, the suppliers of the information are *confidential agents* if its members and not *vendors* of information and would not therefore be liable to third parties about whom the defamatory report may be made [*London Association* v. *Greenlands Ltd.*, (1916) 2 A.C. 15]. In other words:

> "When a *common interest* exists between the person communicating and the person to whom it is communicated, a communication, warranted by reasonable exigency and honestly made, is protected for the common convenience and welfare of society; but social or moral duty does not cover information furnished for reward by a person not having any common interest in the business for the purpose of which the information is supplied."

(2) Where there is a CONFIDENTIAL RELATION between two persons such as creates a special duty of giving information, communications made by one to the other are privileged, even when no inquiry is made, e.g., communication made (i) by a solicitor to his client about the soundness of a security, or (ii) by a father to his daughter of full age about the character and standing of the man whom she proposes to marry, or (iii) by a host to his guest about a servant who is suspected of dishonesty.[24]

24. The plaintiff was a valet, and while he and his master were staying as guests of the defendant, who was a magistrate, the chief constable showed the defendant a letter

(*Continued on page 101*)

2. STATEMENTS MADE IN THE PROTECTION OF AN INTEREST. (1) Even when there is no duty to make the statement, it is nevertheless privileged if it is made in the protection of some lawful INTEREST OF THE PERSON MAKING IT.[25-28] Thus, a master is privileged in warning his servants against their associates. (2) The interest to be protected may be the COMMON INTEREST of the persons making and receiving the communication. Thus communications made (i) by one creditor to another, or (ii) by one party to a dispute to the other as to the fitness of the proposed arbitrator are similarly privileged.

(*Continued from page 100*)

received from the Edinburgh police stating that the plaintiff had committed a theft at a hotel there. The defendant, without making any inquiry, told the plaintiff's master privately that the plaintiff was suspected of a theft. On the basis of this communication, plaintiff was dismissed by his master. *Held*, the defendant made the statement to the plaintiff's master in discharge of a moral or social, though not a legal duty and that the occasion was privileged. There being no evidence of malice, defendant was not liable to the plaintiff in an action for defamation [*Stuart* v. *Bell*, (1891) 2 Q.B. 341].

25. T, who was a film critic under an agreement with the B.B.C. to review films of the previous week, made an adverse criticism of an M.G.M. film. Thereupon, the M.G.M. Pictures Ltd., wrote to the B.B.C. not to invite T to review M.G.M. films as she was 'out of touch with the tastes and entertainment requirements of the picture-going millions who are radio listeners'. T claimed damages against M.G.M. Pictures Ltd. for libel, alleging that the letter imputed to her incompetence in her professional capacity. *Held*, it was a case of qualified privilege and it was necessary for T to establish malice in *fact*. The fact that in writing the letter the respondents (M.G.M.) were actuated by financial considerations was not, itself, evidence of malice, since they had a right to protect their interests. The statements objected to by T were expressions of opinion, and to find whether the statements were malicious, the test was not whether the respondent's views were reasonable but whether they were *honest*. In this case, the respondents had honestly made the communication in order to defend their own financial interests and not for the purpose of attacking A. Hence, there was no malice and the action must fail [*Turner* v. *M.G.M. Pictures Ltd.*, (1950) 1 All E.R. 449 (H.L.)].

26. In *criminal law*, this privilege is embodied in the *Ninth Exception* of sec. 499 of the Indian Penal Code:

"*Ninth Exception: Imputation made in good faith by person for protection of his or other's interest.* It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations

(a) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception."

The conditions for the application of this exception are—(a) good faith; (b) the imputation having been made for the protection of the interest of the accused or of a third person or for the public good.

The plea of good faith is not available where there is *excessive publication*, that is, giving the imputation a wider publicity than was necessary for the protection of the interest for which it was made [*Queen* v. *Shankara*, 6 Mad. 381]. The mode of publication is thus to be taken into consideration in determining the question of good faith [*Thaigarava* v. *Krishnaswami*, 15 Mad. 214].

(3) The same principle is extended to the case where the interest to be protected is only a GENERAL OR PUBLIC INTEREST.[27]

Thus, communications addressed in good faith to persons in a position for the purpose of securing redress of grievances, the punishment of crimes, or the security of public morals are privileged, provided they are made to the proper persons.[28] If the communication is made to a wrong person, or to persons indiscriminately, the privilege will be forfeited. Similarly, statements contained in the election address of a candidate at an election concerning the opposite candidate are entitled to the protection of a qualified privilege (i) if they are made without malice, and (ii) are relevant to the matters which the electors will have to consider in deciding which way they will cast their votes. Under modern democratic institutions, the electors have an interest in receiving a communication of that kind [*Braddock* v. *Bevins*, (1948) 1 All E.R. 450 (C.A.)].

---

27. Exceptions on the ground of public interest are also admitted by the *criminal law*. The *Second* and *Third Exception* to s. 499 of the Indian Penal Code are relevant:

"*Second Exception: Public conduct of public servants.* It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further."

"*Third Exception: Conduct of any person touching any public question.* It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested."

'Good faith' under either Exception means 'with due care and attention'.

28. In *Criminal Law*, this privilege is contained in the *Eighth Exception* to s. 499 of the Indian Penal Code which says—

"*Eighth Exception: Accusation preferred in good faith to authorised person.* It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception."

The essential ingredient of this defence is 'good faith'. In order to take advantage of this *Exception* it is not necessary for the accused to prove that the allegations made by him are true. It is sufficient if he proves that he had good reason, after due care and attention, to believe that the allegations were true and in that belief he made the accusation to the lawful authority [*Shibo Prosad's case*, (1878) 4 Cal. 124]. Thus, if a person signs a defamatory document in the belief that large number of other persons who were signing the same document were speaking the truth, he would be entitled to the plea of good faith even though the allegations in the document turn out to be untrue [*Romesh* v. *Romesh*, (1949) 4 D.L.R. 51 (Cal.)].

3. FAIR REPORTS OF PROCEEDINGS. (1) *Reports of Judicial Proceedings.* The report must be a *fair* and *substantially correct* account of what took place in Court. 'Report' must be distinguished from 'comment'. If they are mixed, there is no privilege. Again, the report must not be partial to the extent of misrepresenting the judgment; must give a substantially complete account of the case. The privilege belongs not only to newspapers but to any private publication.

In this context, the distinction between the scope of absolute privilege and qualified privilege relating to judicial proceedings should be pointed out.

(a) Absolute privilege relates to *statements* made in a Court, by Judge, lawyer or party to the proceedings. These persons are absolutely privileged and immune from liability even if such statements be defamatory; this privilege does not extend, at common law, to reports of such statements by a newspaper. A newspaper report of such statements must, therefore, come under qualified privilege, in *India.*[29]

(b) Qualified privilege relates to reports in newspapers, of whatever happens in a proceeding before a Court. There is no question of immunity of the Judge, lawyer or party in the case of such *reports.*

(2) *Reports of Parliamentary Proceedings.* The principles applicable to reports of judicial proceedings are also applicable to fair and accurate reports of proceedings in Parliament or in any of its committees[30] (excepting those which are published under authority of either House of Parliament).

2. In the result, if his report is fair and honest, the reporter is not liable to an action for libel even if the speaker in the debate which has been reported was actuated by malice or his statement was based on entirely wrong facts.[31]

3. Once the defendant establishes that the alleged libel is a *bona fide,* fair and accurate report of proceedings in a House of Parliament or Committee thereof, defendant would be immune, and the plaintiff cannot impugn the validity of such report on the ground of any procedural defect[30] or make any comment[32] on such report for any purpose at that trial, for, under Art. 9 of the Bill of Rights, proceedings in Parliament cannot be impeached or questioned in any court or place out of Parliament.[30]

4. Not only is a fair report of Parliamentary proceedings privileged, the reporter is entitled, further, to make any fair *comment* on it,[31] because the reporting of Parliamentary proceedings is in the public interest,[33] and this privilege would even extend to a sketch or summary of the proceedings, provided it is 'fair', i.e., not unbalanced and not actuated by malice.[30]

(3) *Reports of Public Meetings.* The principle has been extended to reports in newspaper of the proceedings at any public meeting, provided that (a) the

---

29. In *England,* by statute (The Law of Libel Amendment Act, 1888, followed by the Defamation Act), the absolute privilege has been extended to newspaper reports as well. In *India,* there is no such statutory provision.

30. *Dingle* v. *Associated Newspapers,* (1960) 1 All E.R. 294.

31. *Cook* v. *Alexander,* (1973) 3 All E.R. 1037 (*1041*) C.A.

32. *Church of Scientology* v. *Johnson-Smith,* (1972) 1 All E.R. 378.

33. *Wason* v. *Walter,* (1868) 4 Q.B. 73 (*89*).

meeting itself is lawful, (b) the discussion relates to matters of public concern, and (c) the report is fair, accurate.[34]

§ 10. Malice in an Action of Defamation

1. It has been traditional to allege in the plaint in an action of defamation that the defendant made the defamatory statement "falsely", and "maliciously". But, in fact, the plaintiff is not bound to prove either falsity or malice. Firstly, all defamatory words are *presumed* to be false, and it is for the defendant to prove that they are true (unless he raises any other defence). Similarly, malice is also presumed and the plaintiff is not bound to prove it except when the defendant rebuts the presumption by the plea of qualified 'privilege'. The reason is that defamation is *prima facie* unjustifiable, so that the plaintiff need not in the first instance prove any malice.[35]

2. But when the defendant pleads that there was a lawful excuse in that the occasion in which the statement was made privileged, the plaintiff, in order to succeed, must prove that the defendant has abused that privilege actuated by express malice or a wrong motive. Privilege in this connection, of course, refers to 'QUALIFIED' PRIVILEGE, for, in cases of absolute privilege, we have shown, *absolute* immunity has been conferred by law. The defence of qualified privilege is not available if the defendant was actuated by malice. This means that if the existence of a privileged occasion is established by the defendant, the plaintiff must prove, affirmatively, that the defendant was actuated by ill-will or improper motive or that the defendant did not honestly believe what he says to be true; or that he was reckless, i.e., careless as to whether it was true or false.[36]

3. But it cannot be said that a defendant was actuated by malice or was reckless, where he can show that there were circumstances from which he *honestly* believed in the truth of what he had said, however *irrational* he might be in leaping to the conclusions unfavourable to the plaintiff.[36] In such a case, the plaintiff can succeed only on proof of actual malice, namely, that the defendant *misused* the (privileged) occasion for some purpose other than that for which the privilege is accorded by the law.[36]

4. A finding on the question of malice in an action of defamation is a question of fact.[37]

§ 11. Fair Comment distinguished from Justification and Qualified Privilege

1. The defence of fair comment differs from that of justification in material respects: (i) The plea of justification contains a statement of *fact*, while fair comment relates to a statement of *opinion*. (ii) Comment being a matter of opinion, the defendant is not called upon to justify it as true, but is protected even though others disagree with it provided only it is *fair and honest*. (iii) Fair comment is a defence if it relates to a matter which is of

34. *Khan* v. *Ahmed*, (1957) 2 All E.R. 157.
35. *S.W. Miners' Federation* v. *Glamorgan Coal Co.*, (1905) A.C. 239 (*250*).
36. *Horrocks* v. *Lowe*, (1974) 1 All E.R. 662 (*667, 669, 671-72*) H.L.
37. *Sabhapathi* v. *Huntley*, A. 1938 P.C. 91.

public interest; a statement of fact is actionable even though the facts so stated would, if true, have possessed the greatest public interest and importance. (iv) "If a defendant justifies, he must prove that the imputation contained in the libel is substantially true, that is, true not only in its allegations of fact, but also in any comments made therein. If he succeeds, he makes out his defence and there is no need to inquire whether the comments were fair, it is sufficient that it was correct; if he fails, he may, nevertheless, successfully contend that the statements are in the nature of comment on a matter of public interest, for, provided that the facts are truly stated on which the comment was made, the defendant need not prove the comment to be correct, or even just; it is sufficient if he can satisfy the jury that it was fairly and honestly made" (*Underhill*).

2. The defence of fair comment also differs from that of privilege. On this point, however, there is a difference of opinion which is based on the effect of the existence of malice on either of these defence. We have seen that the defence of qualified privilege is that the statement made by the defendant was made on an occasion which was 'privileged', and that this defence may be rebutted by proof of actual malice by the plaintiff. Now, the defence of fair comment also may be destroyed by proof of malice. From this, *Salmond* (6th Ed.) held that the defence of fair comment is simply a particular instance of qualified privilege. Every man has a *qualified privilege* to comment on matters of public interest or submitted to public criticism, and this defence may be rebutted in the usual way by proof that the privilege has been maliciously abused. He based his view on cases like *Thomas* v. *Bradbury Agnew & Co.*, [(1906) 2 K.B. 640], where it was held that a comment which may be objectively and *prima facie* fair may become unfair if made with a malicious motive.[38] Accordingly, *Salmond* concluded that "fair comment means comment *not inspired by any malicious motives.*"

Salmond's view is however not shared by the majority of text-writers according to whom fair comment is an independent defence.[39] Proof of malice destroys the defence of fair comment. But it does not follow that fair comment is merely an instance of qualified privilege.[39] The DISTINCTION rests on important points. (i) The defence of fair comment is a denial of the libel, while the defence of privilege is an admission of the libel, but a claim that it was published under a privileged occasion. (ii) If the publication was upon a privileged occasion, the burden is upon the plaintiff to prove express malice. He can succeed only by proving malice affirmatively. If the motive was honest there is no liability. In fair comment, on the other hand, the burden of proving that it has been fair is on the defendant. If the comment is not fair, judged from the standpoint of an 'impartial bystander', honest belief in itself cannot prevent the matter being libellous. If fair comment be taken as an instance of qualified privilege, it would protect immoderate or irrelevant comment

38. This view has since been affirmed by the House of Lords in *Sutherland* v. *Stapes*, (1925) A.C. 47 (*63–64*) H.L.

39. This view has been adopted by Heuston in the 15th Ed. (p. 233) of Salmond on Torts.

unless malice is proved and this would unduly extend the limits of criticism. (iii) Fair comment is a rule of common right, not of allowance to persons in any particular situation.

§ 12. Defamation of a Corporation

1. A corporation being a fictitious person, it 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, a suit would not lie at the instance of a municipal corporation for libel charging it with bribery and corruption in the administration of municipal affairs [*Mayor of Manchester* v. *Williams*, (1891) 1 Q.B. 94].

2. But a corporation can sue for defamation *when it affects its business and property*, and that even though the charge is levelled against individual members [*Morris* v. *Perrott*, (1945) All E.R. 567 (C.A.)]. In order that a corporation may sue for a defamation two conditions must exist: (a) The statement must be of such a nature that it would be defamatory if directed against an individual. (b) It must also be of such a nature that its tendency is to cause actual damage to the corporation in respect of its *property and business*. Thus, a libel charging a trading corporation with insolvency or with dishonest or incompetent management is actionable at the suit of the corporation [*South Hetton Coal Co.* v. *N.E. News Association*, (1894) 1 Q.B. 133 (C.A.)], even though there may not have been any *actual loss*.[40]

§ 13. Damages

1. An action for defamation is an action for damages for injury to the reputation of the plaintiff. But reputation is a thing which is not capable of scientific measurement. In a sense, the amount of damages depends upon the assessment made by the tribunal, subject only to certain principles which have been laid down by the case-law for the guidance of the tribunal, and the pleadings of the parties. While in *England*, the assessment of damages is a function of the Jury, in *India* this is done by the Judge himself.

2. The amount of damages may be said to depend on the following broad considerations:

(i) *Rank and Social Position of the Parties*. Thus, heavy damages are called for when the plaintiff (person defamed) is a person of high social position.[41–42]

(ii) *Nature of the Imputation*. Thus, imputation of a crime, immorality[43]

---

40. *Lewis* v. *Daily Telegraph*, (1963) 2 All E.R. 151 (*156*) H.L.
41. *Ley* v. *Hamilton*, (1936) 153 L.T. 384 (H.L.).
42. *Youssoupoff* v. *Metro-Goldwin Mayer*, (1943) 50 T.L.R. 581 (C.A.).
43. *Roberts* v. *Daniel*, (1888) 5 T.L.R. 542.

or unchastity or imputation regarding one's trade or business[44] are viewed with more seriousness by the Courts.

(iii) *Mode of Publication.* It is evident that the injury to reputation is heavier where the imputation is published in a newspaper than when it is confined to a few individuals and even the circulation of the newspapers in which it is published is a relevant consideration.[45]

(iv) *Mitigating Circumstances.* Just as the plaintiff can rely on aggravating circumstances to claim exemplary damages, so is the defendant entitled to contend that the damages should be nominal or contemptuous on account of 'mitigating' circumstances, and the defendant is entitled to adduce evidence to establish such circumstances. Thus,—

(a) Defendant is entitled to show that the plaintiff's reputation was of little weight and is entitled to give *general* evidence as to the plaintiff's bad reputation.[46-47] But the defendant is not entitled to adduce evidence of *particular* facts as tending to show the character and disposition of the plaintiff, nor is he entitled to give evidence of *rumours* and *suspicions* to the same effect as the defamatory matter complained of. The same considerations and limitations apply to cross-examination designed to the same end.[46]

In other words,

> 'You cannot show that in certain specific matters the plaintiff has been convicted or has done that which is dishonest or wrong, although you may give evidence to show that he is a man *who is generally known as a person of bad reputation.*"[48]

But the bad reputation which is sought to be established must be relevant to the imputation which is the subject-matter of the action. Thus, where a person who is defamed in respect of his financial integrity, damages would not be mitigated by showing that his sexual character was bad.[49]

(b) Where the plaintiff's reputation had already been impaired by the statements of third parties who were not before the Court and the defendant became liable for defamation by repeating those statements, the amount of damages cannot be a very heavy one, for, the defendants cannot be made liable for damage to the plaintiff's reputation which was clearly due to statements made by other people.[50]

(c) Provocation by the plaintiff is also a mitigating circumstance.[51] Thus, nothing but nominal damages can be awarded to either of two persons who are "concerned in publishing libels against each other every day".[52]

---

44. *Wilson* v. *United Counties Bank*, (1920) A.C. 102.
45. *Parnell* v. *Walter*, (1860) 24 Q.B.D. 441.
46. Halsbury's *Laws of England*, 2nd Ed., Vol. XX, p. 513.
47. *Devi Dial* v. *Crown*, A.I.R. 1923 Lah. 225.
48. *D. & L. Caterers* v. *D'Anjou*, (1945) 1 All E.R. 563 (C.A.).
49. *Hobbs* v. *Tinling*, (1929) 2 K.B. 1.
50. *Subhas Chandra* v. *Knight*, (1928) 32 C.W.N. 490 (*504*).
51. It is to be noted, however, that provocation is *no defence* to an action for defamation. In other words, a person who has been defamed, is not entitled to defame his opponent, though he may publish matters as will clear his own conduct [*Radha Kishen* v. *Bates*, A. 1953 All. 302].
52. *Finnerty* v. *Tipper*, (1809) 2 Camp. 77.

(d) Anything that goes to show that the publication was *limited*,[53] would mitigate damages, e.g.,

(i) that the newspaper had a poor circulation;

(ii) that though the circulation of the paper was large, the impugned matter was not defamatory *ex facie* or did not patently refer to the plaintiff but would be understood as referring to the plaintiff only by a small number of friends or the like who knew the relevant circumstances;[53]

(iii) that the article was so vague and sensational that few of the witnesses believed in its truth or the unfavourable impression created in the minds of some was likely soon to be dispelled.[53]

General and Special Damage. 1. Though in a suit for defamation, damages are decreed in lump, it is assessed under two heads,—general and special.

2. General or presumptive damage means damage which the *law* presumes as a *natural and probable* consequence of the defendant's words. It is a pecuniary solatium awarded to the plaintiff for the mental pain,[54] or annoyance caused to the plaintiff by the publication of the defamatory statement.

Because of this presumption in law, the items constituting general damages need not be specifically pleaded, but under s. 12 of the Evidence Act, the plaintiff is competent to lead evidence as to any facts which would enable the Court to determine the amount of damages which ought to be awarded. Some circumstances would *aggravate* the damages, e.g., malice, repetition of the libel.

On the other hand, there are some circumstances which would *mitigate* the damages, e.g., apology, provocation by the plaintiff, plaintiff's bad character.

Nominal and Real or Substantial Damage. 1. Since defamation is actionable *per se* and the law presumes damage, the Court would ordinarily award nominal damages, in the absence of aggravating circumstances.

Where, however, there are aggravating circumstances or the plaintiff proves that he has actually suffered some damage or loss, the award of damages should be substantial.

B. Nominal damages should not, however, be awarded where there are aggravating circumstances, e.g., where the defendant never expressed regret.[55]

Compensatory and Exemplary or Punitive Damages. 1. The primary object of damages is to compensate the plaintiff for the material loss suffered by him, which, in the case of defamation, may include—(a) any actual or anticipated pecuniary loss or any social disadvantages which result or may be thought likely to result, from the injury to the plaintiff's reputation; (b) injury to the plaintiff's feelings, including aggravation of the mental pain or suffering which is caused by the defamation by reason of the high-handed, oppressive or insulting or contumelious behaviour by the defendant.[55]

2. The object of punitive or exemplary or vindictive punishment is to *punish* the wrongdoer, for the wrong done by him (The concept in this aspect

53. *Morgan* v. *Odhama Press*, (1972) 1 All E.R. 1156 (*1185*) H.L.
54. *Lynch* v. *Knight*, (1861) 9 H.L.C. 577 (*598*).
55. *Ramalingam* v. *Daily Thanthi*, A. 1975 Mad. 309 (para. 14).

of the law of torts is thus quasi-criminal). Where exemplary damages are awarded in an action of defamation, it is awarded by adding a sum to the compensatory damages, including even damages enhanced by *aggravating* circumstances. In awarding exemplary damages thus, the Court considers not what the plaintiff would receive, but "what the *defendant ought to pay*",[56] because of his outrageous conduct.

3. In *England* prior to the House of Lords decision in *Rookes* v. *Barnard*,[57] and in the Commonwealth countries,[58] including *India*, there had been cases where punitive or exemplary damages were awarded in addition to compensatory damages (including aggravation thereof in specified circumstances) for—

(i) imputing dishonesty to a substantial businessman, attended with insolence or arrogance on the part of the defendant;[58]

(ii) where the defendant's conduct in defaming the plaintiff has been actuated by *malice* or ill-will against the plaintiff;[59]

(iii) where the defendant acts in contumelious disregard of the plaintiff's rights.[60]

In *Rookes* v. *Barnard*,[61] the House of Lords, speaking through Lord Devlin, reduced the relevant tests to one only, namely, where the defendant's conduct in libelling the plaintiff has been "*calculated* by him *to make a profit for himself* which may well exceed compensation payable to the plaintiff."

4. In *India*, subsequent to the House of Lords decision in *Rookes* v. *Barnard*,[61] a Division Bench of the Bombay High Court has[62] held that the outrageous conduct of the defendant may be considered as an aggravating circumstance while assessing compensatory damages; but nothing should be added as punitive or exemplary damages on this ground, following the House of Lords,[61–62] in preference to the Privy Council,[59] on this point.

§ 14. Summary of the Indian Law of the Civil Wrong of Defamation

A statement is said to be defamatory if it conveys concerning a person any imputation tending to bring him into hatred, contempt, or ridicule, or being concerning him in the way of his office, profession or calling, tends to injure him in respect thereof.

To support an action for defamation the plaintiff must prove—(1) That the statement is defamatory. (2) That it refers to the plaintiff. (3) That it has been published. The defences peculiar to an action for defamation are —(1) Truth, (2) Fair comment, and (3) Privilege.

Privilege is of two kinds—absolute and qualified. In cases of absolute privilege, defendant is not liable even though he has been actuated by malice.

---

56. Cf. *Lewis* v. *Daily Telegraph*, (1962) 2 All E.R. 698 (*715, 725*) C.A.
57. *Rookes* v. *Barnard*, (1964) 1 All E.R. 367 (*410–11*).
58. Cf. *McElroy* v. *Cowper-Smith*, (1967) 62 D.L.R. (2nd) 65 (Can.).
59. Cf. *Australian Consolidated Press* v. *Uren*, (1967) 3 All E.R. 523 (*526*) P.C.
60. *Mayne on Damages*, (1961), 12th Ed., pp. 196–97.
61. *Rookes* v. *Barnard*, (1964) 1 All E.R. 367 (*411*) H.L.
62. *Karanjia* v. *Thackersey*, A. 1970 Bom. 424 (*435–36*).
63. *Broome* v. *Cassell*, (1972) All E.R. 801 (*834, 836, 842, 875, 877*) H.L.

The plea of qualified privilege, on the other hand, is rebuttable by the plaintiff by proving that the defendant was actuated by malice or improper motive.

§ 15. A Note on the Criminal Law of Defamation

1. It has been stated at the outset (p. 89, *ante*) that defamation constitutes a civil wrong as well as a criminal offence.

2. In *India*, while the civil law of defamation is not yet codified and still rests on English common law (as it existed prior to the enactment of the Defamation Act, 1952), which regards a man's reputation as his property, the criminal law of defamation is codified in ss. 499–502 of the Indian Penal Code, so that it will be an offence only if the conditions laid down in s. 499 are satisfied, regardless of any exceptions of English common law which have not been adopted in the I.P.C.[64]

3. The law contained in s. 499 of the I.P.C. differs from the *English* law relating to the offence of defamation in several important respects:

(i) In *England*, the essence of the crime of private libel is its tendency to cause a breach of the peace. Hence, even where the defamatory matter is *not published* to a third person, but is communicated to the plaintiff himself, it will support an indictment (though not an action in tort), provided it is likely to provoke a breach of the peace [*R.* v. *Adams*, (1888) 22 Q.B.D. 66]. But in *India*, publication is an essential condition for the criminal offence under s. 499 of the I.P.C., as for an action for damages.

(ii) Proceeding on the basis of the test of likelihood of causing breach of the peace, the English law of crimes draws a distinction between libel and slander and lays down that no indictment shall lie for spoken defamation except in certain cases of serious imputation which have an obvious intention to cause a breach of the peace, e.g., where it is seditious, blasphemous, grossly immoral or obscene or uttered to a Magistrate in the execution of his duties or uttered as a challenge to fight a duel or with an intention to provoke the other party to send a challenge. But the *Indian* law, as contained in s. 499 of the I.P.C., makes no distinction between written or spoken words and the offence is constituted in either case, provided the conditions laid down in the section are satisfied.

4. On the other hand, the criminal law contained in sec. 499 of the I.P.C. differs from the Indian law of damages for defamation in an important respect: It has been seen (p. 91, *ante*) that in a civil action for defamation, *intention* of the defendant is, in general, immaterial and that it is no defence in a civil action that the defendant did not intend to defame the plaintiff. But an essential ingredient of the offence of defamation under sec. 499 of the I.P.C. is that the imputation must be published—"*intending* to harm, or *knowing or having reason to believe* that such imputation will harm." Good faith on the part of the accused is thus a good defence in a criminal prosecution but not in a civil action for defamation except in cases of qualified privilege [p. 100, *ante*].

64. *Verghese* v. *Poonam*, A. 1970 S.C. 1876 (paras. 10–11).

10

Wrongs of Malice and Fraud

I. ABUSE OF LEGAL PROCESS

§ 1. Malicious Prosecution

1. The tort of malicious prosecution consists in instituting unsuccessful criminal proceedings against another person, maliciously and without reasonable and probable cause.

2. The right to put the machinery of law in motion is a privilege which every person enjoys,—a privilege which the law allows from motives of public policy. But if anybody *abuses* this privilege and sets the law in motion not for the purpose of vindicating justice but of the purpose of indulging in personal spite, he loses this protection of law and is liable to action; for, everybody has a corresponding right not to suffer from legal proceedings *improperly* instituted against him. The most important species of this group of wrongs is the wrong of instituting against another *criminal*[1] proceedings, maliciously, and without reasonable and probable cause. Damage is said to be the gist of the action for malicious prosecution.[2] But in the case of prosecution on a criminal charge, damage need not be proved, but is presumed. Though the

---

1. The bringing of an ordinary CIVIL ACTION is not, generally, an actionable wrong however unfounded or malicious it may be. The reason is that in contemplation of law the defendant who is unreasonably sued is sufficiently indemnified by a judgment in his favour which gives him his costs against the plaintiff. There is no special damage beyond the costs of defence of which the law can take notice. Action, however, lies for instituting *bankruptcy proceedings* against a trader, or *liquidation proceedings* against a company, maliciously and without reasonable and probable cause, for prosecution on a charge involving either scandal to reputation, or the possible loss of liberty to the person necessarily imports damage [*Quarry Hill Co.* v. *Eyre*, (1883) 11 Q.B.D. 674; *Amin* v. *Jogendra*, (1947) 51 C.W.N. 723 (729) P.C.]. Again, action similar to that for malicious prosecution lies for maliciously procuring the arrest of a person, or the issue of execution against his property in a civil action. Thus, the wrong of *malicious arrest* is committed when the defendant puts the law in motion, maliciously and without reasonable cause, to effect the arrest of the plaintiff by means of civil (judicial process).

2. Hence, even in criminal prosecutions, where there is no likelihood of damage to the plaintiff's fair fame, no action for malicious prosecution lies, e.g., where proceedings were brought by an urban authority for neglect to comply with its notice requiring him to make certain repair to a house [*Wiffen* v. *B. & R. Urban Council*, (1915) 1 K.B. 600], or for prosecution under the Cattle Trespass Act for illegally impounding cattle [*Sriramulu* v. *Kolandavelu*, (1916) 31 M.L.J. 479], or under the Madras Estates Land Act for illegal distraint for non-payment of rent [(1929) 117 I.C. 797 (Mad.)].

prosecution ends in acquittal, there is a damage to reputation as well as loss of expenses for which the complainant must answer. As Holt C.J., observed in *Savile* v. *Roberts*, [(1699) 1 Raym. 374], the damage in a criminal prosecution is threefold,—

"*first* damage to a man's *fame* as if the matter whereof he is accused is scandalous;[2] *second*, damage to the *person*, as where a man is put in danger to lose his life, or limb, or liberty; and *third*, damage to his *property*, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused."[3]

Hence, in an action for malicious prosecution plaintiff is entitled to claim damages under three heads—(i) damage to the person; (ii) damage to property; (iii) damage to reputation [*Amin* v. *Jogendra*, (1947) 51 C.W.N. 723 P.C.].

3. In an action for malicious presecution, THE PLAINTIFF MUST PROVE[4]—

(a) That he was *prosecuted* by the defendant on a criminal charge.
(b) That the proceedings *terminated in his favour*.
(c) That the defendant acted *without reasonable and probable cause*.
(d) That the defendant acted with a *malicious* intention as distinguished from the mere intention of carrying the law into effect.

(a) PROSECUTION BY THE DEFENDANT. 1. Prosecution means a proceeding in a court of law charging a person with a crime.[5] Though criminal proceedings are conducted in the name of the Crown, the person liable as prosecutor is the person at whose instance the proceedings are due. Instigating a prosecution is however to be distinguished from the act of merely *giving information* on the strength of which a prosecution is commenced by someone else in the exercise of his own discretion.

The question becomes nice in a country like INDIA, where the police have special powers in regard to the investigation of criminal charges and prosecution in the strict sense by a private person is not common. In *Balbhaddar* v. *Badri Shah*,[4] the Privy Council observed:—

"In any country where, as in India, prosecution is not private, action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused, an action will lie."

Whether there has been a 'prosecution' by the complainant in such a case depends on the particular facts of the case. The position has been clearly stated in another Privy Council case, *Gaya Prosad* v. *Bhagat Singh* [(1908) 30 All. 525 P.C.], thus—

"If a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make

---

3. Malicious prosecution, thus, involves defamation plus something more, namely, injury to the plaintiff's person and property as well.

4. *Balbhaddar* v. *Badri Shah*, A.I.R. 1926 P.C. 46.

5. It has, however, been held that the prosecution need not necessarily be for an 'offence'. A suit for malicious prosecution lies also in respect of malicious criminal proceedings, such as proceedings under s. 144 or s. 145 of the Criminal Procedure Code, provided the other conditions for an action for malicious prosecution are present [*Akkuliya* v. *Venkataswamy*, A.I.R. 1951 Mad. 659].

him responsible in damages for the failure of the prosecution. But *if the charge is false to the knowledge of the complainant*; if he misleads the police by bringing suborned witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the Magistrate—it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—who was the prosecutor? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant, before and after making the charges must also be taken into consideration. Nor is it enough to say that the prosecution was instituted or conducted by the police."

In a Calcutta case where the defendant had merely given information of his honest suspicion about the plaintiff to the police and the police without further interference on his part launched a case against the plaintiff: *held*, there was no 'prosecution' by the defendant [*Nagendra Nath Roy* v. *Basanta Das Bairagya*, (1922) 57 Cal. 25].

2. As to the *time* when a criminal proceeding will be said to constitute a 'prosecution' for sustaining an action for malicious prosecuting, it has been laid down by the Privy Council in *Amin* v. *Jogendra*,[6] that for the purposes of an action for damages for malicious prosecution, there need not be any 'prosecution' in the technical sense which it bears in the Criminal law; the test is whether it has reached a stage at which *damage* to the plaintiff results, involving scandal to reputation or possible loss of life or liberty. Of course, mere presentation of a false complaint which seeks to set the criminal law in motion will not *per se* found an action for damages for malicious prosecution; for, if the Magistrate dismisses the complaint as disclosing no offence (under sec. 203 of the Cr. P.C. 1973), it may well be that there has been nothing but an *unsuccessful attempt* to set the criminal law in motion, and no damage to the plaintiff results. But where the Magistrate holds an enquiry in open Court under sec. 202, on a charge, such as *cheating*, there is damage to property involving costs of defence as well as damage to reputation.[7]

(b) TERMINATION OF THE PROCEEDINGS. No action for malicious prosecution lies until the prosecution or other proceeding has terminated in favour of the person complaining of it, if from its nature, it is capable of such a termination. If, however, the prosecution has actually determined in his favour, it matters nothing in what way it has taken place. What the plaintiff requires to prove is not a judicial determination of his innocence, but merely the absence of any judicial determination of his guilt by the tribunal before which he was accused. There need not have been *acquittal* on the merits; it is enough if the prosecution has been *discontinued*, or if the accused has been *discharged*, or if the complaint has been *dismissed* for default, after examination of the complainant, and an inquiry.[7]

(c) ABSENCE OF REASONABLE AND PROBABLE CAUSE. 1. No action will lie for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause. Reasonable and probable cause means 'an *honest belief* in the guilt of the accused based

6. *Amin* v. *Jogendra*, (1947) 51 C.W.N. 723 P.C.
7. *Bonnan* v. *Imperial Tobacco Co.*, (1929) 33 C.W.N. 1034 P.C.

upon a full conviction, founded upon *reasonable grounds*, of the existence of circumstances, which assuming them to be true, would reasonably lead any *ordinarily prudent man*, placed in the position of the accused to the conclusion that the person charged was *probably* guilty of the crime imputed [*Hicks* v. *Falkner*, (1878) 8 Q.B.D. 167].

"Honest belief must at the date of the prosecution be based on grounds which or some of which are reasonable and arrived at after due enquiry" [*Halsbury*].

In *Herniman* v. *Smith* [(1936) 2 A.E.R. 1377], the Court of Appeal formulated two questions for determining whether the defendant had reasonable and probable cause:

"(i) Did the defendant commence the prosecution without any honest belief of the plaintiff's guilt? and (ii) Did he fail or neglect to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution?"

In other words, there must be an honest and reasonable belief in the guilt of the accused; mere suspicion will not do. But the fact that he placed his information before his lawyers, and acted on *legal* advice would be evidence of reasonable and probable cause, even though that advice may transpire to have been wrong.[7] On the other hand, mere honest belief does not necessarily constitute reasonable and probable cause, if the defendant came to his conclusion rashly and inconsiderably. "The crucial points are (a) Did the prosecutor believe the story on which he acted? (b) was his conduct in believing it, and acting on it, that of a reasonable man of ordinary prudence?[8]

3. The question of reasonableness is thus not subjective but objective—not what the prosecutor thought but what, on the facts known to him as a reasonable person, he ought, in the view of the Court, to have thought.[9] But, at the same time, it is not the duty of the prosecutor, in order to avoid liability for malicious prosecution, to have found out whether the proposed accused was guilty or whether there was a possible defence to the accusation but whether there was a reasonable and probable cause for the prosecution.[10] Though malice may, in proper case, be inferred from want of reasonable cause, want of such cause cannot be inferred from the existence of malice, for, 'honest belief' is the ingredient of the existence of a 'reasonable' cause.[10]

4. The initial burden of proving the absence of reasonable and probable cause lies upon the plaintiff, and it is not for the defendant to prove that he had reasonable cause. If there is no sufficient evidence of the absence of such cause, the plaintiff must fail [*Abrath* v. *N. E. Ry.* Co.,[11] (1883) 11 Q.B.D.

8. *Corea* v. *Peiris*, (1909) A.C. 549 (*555*).

9. *Tims* v. *John Lewis*, (1951) 1 All E.R. 814 (C.A.).

10. *Glinski* v. *McIver*, (1962) 1 All E.R. 696 (*701*).

11. *Abrath* v. *N.E. Ry. Co.*, (1886) 11 A.C. 247. One M had recovered from the defendant Railway 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 manufactured by Dr. A (the plaintiff)—the surgeon of M. The Railway made enquiries and with legal advice prosecuted A for conspiracy, but he was acquitted. In an action brought by A for malicious prosecution against the Railway, *held*, that the defendants were not liable as they did take reasonable care to inform themselves of the facts, and that they honestly believed in the case. It was the plaintiff's duty

(*Continued on page 115*)

440]. But if the plaintiff gives some evidence which *prima facie* suggests absence of reasonable and probable cause, the onus may then shift to the defendant, to rebut that evidence, according to the circumstances of the case. Moreover, as the Privy Council has pointed out, in *Balbhaddar* v. *Badri Shah*, [A.I.R. 1926 P.C. 46], in order to prove absence of reasonable and probable cause on the part of the defendant, *the plaintiff need not prove that he was innocent* of the charge upon which he was tried, it is enough to prove that the proceedings complained of 'terminated in favour of the plaintiff, if from their nature they were capable of so terminating'.

5. On the other hand, if the plaintiff takes upon himself to prove, substantially, that he was innocent of the charge, that is not enough; he must show that the prosecution was instituted by the defendant without reasonable and probable cause, and the initial burden of proving all that is necessary to prove absence of reasonable cause is on the plaintiff.[11]

6. In certain *exceptional cases*, however, innocence may lead to an inference of absence of reasonable and probable cause,—viz., where the charge was *false to the knowledge of the prosecutor* or where he might discover its falsity had he taken reasonable care:

"For example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and probable cause. *Except in cases of this kind, it is never true* that mere innocence is proof of want of reasonable and probable cause."[11]

(d) MALICE. The gist of the action of malicious prosecution is malice or improper motive.

Malice in this connection is *express malice* or malice in fact. It may be recalled [Cf. p. 13n, *ante*] that malicious prosecution is one of those few wrongs where improper or wrongful motive is essential to constitute liability. A prosecution is malicious if it is actuated by a desire to use the criminal law for some purpose for which it was not intended. Malice thus means, "any motive, other than that of simply instituting a prosecution for the purpose of bringing a person to justice,"—*'a wish to injure the party rather than to vindicate the law.'* In short, malice, in an action for malicious prosecution, means 'any *wrong* or *indirect* motive' [*Brown* v. *Hawkes*, (1891) 2 Q.B. 718]. The burden of proving malice is on the plaintiff. (The plaintiff must prove malice in the first instance, and not, as in an action of defamation, not way of rebutting the plea or privilege.)

Malice is not to be inferred from absence of reasonable cause; the two must unite to create liability. Thus, a prosecution is not malicious merely because it is inspired by *anger*. However wrongheaded a prosecutor may be, he is not liable if there was *honest belief*. On the other hand, if a man

(*Continued from page 114*)

to show absence of reasonable care (that is to say, that the Railway Co. did not take reasonable care to inform themselves), and that the defendants were not bound to make good anything.

acts on his own knowledge, then the fact that the complaint was a false one will raise a presumption that there was absence of reasonable and probable cause and that malice existed unless it is shown that his memory was defective or that there was some valid ground for misapprehension.[12]

In short, there may be malice without absence of reasonable and probable cause and, conversely, absence of reasonable and probable cause is not *per se* evidence of malice. But in particular circumstances, the two questions may be interwoven and the same facts may constitute both malice and want of reasonable and probable cause, viz., *where the complaint was false to the knowledge of the complainant.*[13]

§ 2. False Imprisonment, Malicious Prosecution and Malicious Arrest

In all these wrongs the common cause of action is the loss of liberty of the plaintiff. There are however substantial points of distinction between the three:

(a) 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 [Cf. p. 83, *ante*] while in malicious prosecution (or in malicious arrest) 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. The distinction was pointed out in *Austin* v. *Dowling*, (1870) 5 C.P. 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 to 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 judgment of a judicial officer are interposed between the charge and the imprisonment."

The reason for the distinction lies in the fact that a man cannot be sued for false imprisonment unless he has personally or by agents done the act complained of. But a *court of justice* is not the agent of the complainant, but acts in the exercise of its own independent discretion; and acts done by it in the exercise of that discretion cannot be imputed to the complainant at whose instance they have been done. The latter is only liable for malicious prosecution if he has set the court in motion maliciously and without reasonable cause. On the same principle, a person will not be liable for imprisonment where the arrest of another is secured at his suggestion or information by an officer of the law who acts not in a ministerial capacity, but in the exercise of his discretion and in discharge of the power vested in him by law. It will depend on the facts of each case whether the arrest was done by the officer at the complainant's request or in the exercise of his own powers. Thus, the mere signing of a charge-sheet before the police is not an imprisonment,

12. *Brajasundar* v. *Bamdeb*, A.I.R. 1944 P.C. 1.

13. Thus, malice was inferred when defendant filed a petition in insolvency against the plaintiff, knowing fully that there was no just debt due by the plaintiff to the defendant [*Nagappa* v. *Trojan & Co.*, (1948) 2 D.L.R. 612 (Mad.)].

but where a police officer consents to take a person into custody only upon a charge being distinctly made and signed by the complainant, the complainant on signing the charge-sheet must answer for the imprisonment.

(b) In malicious arrest, the party himself obtains an order or authority from a judge to make an arrest, by imposing on the judge some false statements or certain assertions of doubtful authority. In malicious prosecution the party may have placed all the facts before the Court, and the Court ordered the arrest in the exercise of its discretion.

(c) Imprisoning is *prima facie* a tort, prosecution is not so in itself. Any interference with a man's personal liberty is *prima facie* wrongful, but any one is *prima facie* entitled to set a court of justice in motion. Consequently, in malicious prosecution the PLAINTIFF must prove affirmatively the non-existence of reasonable and probable cause, while in an action for false imprisonment it is for the DEFENDANT to prove affirmatively the existence of reasonable and probable cause.

(d) In an action for malicious prosecution, plaintiff must also prove malice. In false imprisonment, on the other hand, plaintiff need not prove malice; nor is it a defence that the defendant had no malice and made a *bona-fide* mistake. Similarly, damage is the gist of an action for malicious prosecution but not for false imprisonment.

"The gist of the action for false imprisonment is the *mere* imprisonment; the plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification" [*Halsbury*].

§ 3. Maintenance

(A) *England.* The wrong of maintenance is somewhat akin to that of malicious prosecution. But it differs in that *special* damage must be proved. It is committed by any person who gives unlawful assistance to either party in a (*civil*) law suit, in which the person who gives such assistance has no legitimate interest [*Bradlaugh* v. *Newdegate*, (1883) 11 Q.B.D. 1]. It has been defined as the "officious intermeddling by pecuniary or other assistance with another's litigation in which the intermeddler has no concern." Actions for maintenance are not very common in modern times. It has been held that mere charity with or without reasonable ground, is no excuse for maintaining the suit of a stranger [*Harris* v. *Brisco*, (1886) 17 Q.B.D. 504]. Champerty is a species of maintenance in which the intermeddler renders assistance by bargaining for a share of the profits of the litigation.

(B) *India.* The English law of maintenance and champerty is not in force in INDIA. An agreement to supply funds for a litigation, or to share the subject of litigation, if recovered, is not *per se* opposed to public policy. But it would be so, if found extortionate, unconscionable, or inequitable [*Ram Coomur* v. *Chandra Canto*, (1876) 2 Cal. 233 P.C.; *Achal Ram* v. *Kazim Hosain*, (1905) 27 All. 271 P.C.].

Thus, in the absence of malice, an agreement for transfer of property subject to the result of litigation may be enforced.[14]

14. *Bhagwat* v. *Debi Dayal*, (1908) 35 Cal. 420 (P.C.).

II. INTERFERENCE WITH CONTRACTUAL AND BUSINESS RELATIONS

§ 4. Procuring a Breach of Contract

1. *Intentionally and without lawful justification* to induce any one to break a contract made by him with another is a tort actionable at the suit of that other if damage has resulted to him.[16] The recognition of this wrong is comparatively a recent development. Formerly, relief for interference with contractual rights could be obtained only indirectly, through actions for other wrongs, e.g., for loss of service or seduction of servants. But the wrong of inducing a breach of contract was recognised as an independent tort in *Lumley* v. *Gye*,[16] where action was allowed against the defendant who induced a singer to break off her engagement to sing at the plaintiff's theatre. This case was approved in *Quinn* v. *Leathem*[17] where the House of Lords laid down that a violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to *interfere with contractual relations* recognised by law if there be no sufficient justification for interference.

2. Malice in the sense of improper motive or ill-will is not, as was supposed in the earlier cases, necessary to constitute liability for this wrong. It is sufficient if the breach of contract is induced *knowingly*, and there is *no justification* for it.[17] What amounts to a legal justification is to be determined with reference to the facts of the particular case. Anyway, mere *advice* must be distinguished from *inducement*, and is not actionable: e.g., when a parent advises his daughter to break an engagement of marriage.

3. An actionable interference with contractual relations may take different forms[15]:

(a) Directly inducing A to break his contract with B;[16]

(b) Rendering performance of the contract impossible;[18]

---

15. *Thomson Deakin*, (1952) 2 All E.R. 361 (C.A.). Appellants alleged that in order to bring pressure upon appellants (a firm of printers), the respondents (officials of a trade union) to stop their policy of employing non-union men, induced the employees of another firm who used to supply printing materials to the appellants to refuse to deliver the materials to the appellants, thus causing that other firm to break their contract with the appellants. *Held*, that if these facts were proved, appellants would have been entitled to recover damages from the respondents.

16. *Lumley* v. *Gye*, (1853) 2 E. & B. 216.

17. *Quinn* v. *Leathem*, (1901) A.C. 425.

18. *Stratford* v. *Lindley*, (1964) 3 All E.R. 102 (*106, 107, 112*) H.L. S was an owner and repairer of barges. He came to an agreement with a workers' Union, without informing Respondents who were members of a rival Union. Coming to know of the agreement, Respondents placed an embargo on their members handling the barges of S, as a result of which his customers became unable to perform their contracts of hiring and repair with S, and, consequently, S suffered heavy loss. *Held*, S was entitled to recover damages from Respondents because (a) their embargo which led to their members to refuse to handle S's barges in breach of their contract, was an *unlawful means*; (b) it made *impossible* on the part of *S's customers* to perform their contracts with S, about which contracts, Respondents were aware; (c) S suffered damage in consequence; (d) it was not in furtherance of any trade dispute, and there was no other legal justification for Respondent's conduct.

(c) Inducing C to do some unlawful act which will necessarily bring about a breach of the contract between A and B.

Any such interference is actionable if it is done (i) intentionally, and (ii) with knowledge of the existence of the contract, or recklessly and damage is caused to the party aggrieved;[18] and (iii) without any legal justification.[19]

4. An exception to the present rule has been established, in *England*, by the Trade Disputes Act, 1906, sec. 3 of which enacts—"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment". This Act was a triumph for the trade unions in England who were thus protected in organising strikes. The Trade Disputes and Trade Unions Act, 1927, withdrew this protection in the case of strikes or lock-outs declared 'illegal' by that Act, e.g., general strikes, but the Act of 1927 has been *repealed* in 1946. In *India*, similar protection is given by the Trade Unions Act; but it would not extend to acts done in pursuance of a strike which is 'illegal' under the Industrial Disputes Act, 1947 (ss. 23–24), or in furtherance of a 'trade dispute'[19] between the parties.[19]

5. 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 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 [see *Allen* v. *Flood*, p. 120n].

§ 5. Intimidation

Apart from procuring breach of contract, it is an actionable wrong to intimidate a *third person*[20] to do something to the damage of the plaintiff though the act be such that there is no legal remedy against the third person for doing it. The cause of action is the injury to the plaintiff. When A by threat coerces B into breaking a contract with C or into committing a tort against C, the *procurement* of the *illegal act* is in itself illegal, and whether it is done by intimidation or persuasion is immaterial. But in the present case, we are concerned with intimidation which constrains third persons to do acts against the plaintiff which they themselves have a *legal right* to do; for example, where A intimidates C (who has not made any contract with B), not to employ B. In this case, A has not interfered with any contractual or other legal right of B: yet action would lie under certain circumstances. Such intimidation (i.e., intimidation which constrains third persons to do acts against the plaintiff *which they themselves have a legal right to do*) is actionable at least in two cases—

---

19. Cf. *Emerald Construction* v. *Lowthiar*, (1966) 1 All E.R. 1013 (C.A.); *Torquay Hotel* v. *Cousins*, (1969) 1 All E.R. 522 (C.A.).

20. There is no clear authority on the point whether to *intimidate the plaintiff himself* to act against his will, and thus causing damage to him, constitutes an actionable wrong. *Salmond* (15th Ed., p. 489) says it does: (1) The threat complained of must be a threat to do an illegal act, for no threat to exercise one's legal rights can amount to a wrong even if the motive be malicious, and (2) damage must result therefrom.

(i) Where the intimidation of the third person is made *by threat of illegal acts*, e.g., threat of violence.

(ii) Where the intimidation is made *by a combination of persons* conspiring together to do harm to the plaintiff by intimidating others.

The two cases may be dealt with separately:

1. INTIMIDATION BY A SINGLE INDIVIDUAL. 1. In this case there must be a threat to commit an *illegal act*. Otherwise no action will lie. This was laid down by the House of Lords in *Allen* v. *Flood*,[21] that 'inducing a man, *without lawful means*, to do something which he has a right to do, though to the prejudice of a third person, gives that person no right of action, whatever the persuader's motives might have been'. But the defendant will be liable if he procures the act by *illegal means*, e.g., by threat of violence [*Tarleton* v. *McGawley*, (1793) 1 Peake 270], or by threat of injury to property or to institute vexatious legal proceedings [*Ware & De Freville* v. *Motor Association*, (1921) 3 K.B. 83].

2. As the House of Lords has held in *Rookes* v. *Barnard*,[22] in order to constitute the tort of intimidation, the unlawful act which is threatened to be done to the third party, so that the latter may cause injury to the plaintiff, need not be an offence or a tortious act, but may be a threat to break a contract with the third party who is so threatened.

3. The ingredients of the tort of intimidation, therefore, are—

(a) The defendant using unlawful means, such as violence or a tort or a breach of contract to compel another person to obey his wishes, in order to cause loss to the plaintiff.

(b) The person so threatened must comply with the demand of the defendant rather than risk the threat being executed.

(c) Damage caused to the plaintiff as a result of the compliance by the third person with such demand of the defendant.

---

21. *Allen* v. *Flood*, (1898) A.C. 1. The plaintiffs were shiprights, engaged by the G.I. Co., to work on a ship, by the day. The defendant, Allen, an official of the trade union of ironworkers who also were engaged in the same work, informed the G.I. Co., that unless the Co. would dismiss the plaintiffs who were non-union men, the men of his union would cease to work; whereupon the Co. 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 defendant was 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 contract with the plaintiff). *Held*, no action lay. Merely to induce another to refrain from entering into a contract is not, in itself and *without more*, an actionable wrong, though the motive be malicious.

22. *Rookes* v. *Barnard*, (1964) 1 All E.R. 367 (*374, 386, 395, 400, 416*) H.L.—Both R and B were employees of BOAC. There was an agreement between their Union and BOAC that there would be no strike and in the event of disputes, they would be settled by direct negotiations or reference to the Government. R resigned his membership of the Union owing to some disagreement, whereupon B, along with others threatened BOAC that they would go on strike if R was not dismissed. This threat was thus a threat to do something in breach of their contract with BOAC that they would not strike. BOAC submitted to the threat and dismissed R. The House of Lords *held* that R was entitled to recover damages for B for loss of his employment. Threat to commit breach of contract was regarded as a threat to do an unlawful act, for purposes of the tort of intimidation, even where the plaintiff was not a party to that contract.

If the third person does not respond to the threat, plaintiff has no cause of action against the defendant merely on the ground that he intended to injure the plaintiff by offering the threat to the third party.[22]

II. INTIMIDATION BY CONSPIRACY. When the intimidation is committed not by a single individual, but by two or more persons acting together in pursuance of a common intention, it is *not necessary* that the intimidation should amount to a threat of illegal action. The essence of the wrong, *Salmond* points out, *consists in the combination* of two or more persons to coerce others or induce persons to do harm to the plaintiff. This was laid down by the House of Lords in *Quinn* v. *Leathem*,[23] where Lord Lindley observed, "Numbers may annoy and coerce, where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. A conspiracy to prevent others from working by annoying them if they do is *prima facie* unlawful, and if damage is caused thereby to any person, the members of the conspiracy are liable". Similarly, Lord Macnaughten observed, "A conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts, *which by themselves, and apart from element of combination or concerted action could not be regarded as a legal wrong*".

Since the very combination of two or more persons wilfully to injure another is actionable, if it results in damage to him, it would be expedient to treat the wrong of 'conspiracy' separately. It is now settled that CONSPIRACY itself is an independent wrong, being a combination of two or more persons to injure another by unlawful *means*,—intimidation *or otherwise*.[24]

§ 6. Conspiracy

1. Conspiracy is both a crime as well as a tort; but there is a difference between the two. "The crime of conspiracy consists in the agreement to effect an unlawful purpose,[24] but the *tort* is committed only if the agreement is carried into effect and *damage to the plaintiff is thereby produced*."[24]

In *India*, the offence of 'criminal conspiracy' is defined in s. 120A of the Indian Penal Code. The ingredients of this offence are—

(i) An agreement between two or more persons;

---

23. *Quinn* v. *Leathem*, (1901) A.C. 495. The defendants were a trade union of butchers. The plaintiff, Leathem, was a meat-seller who had employed men who were not members of the trade union. The defendants resented this, and called upon the plaintiff to dismiss all non-union men in his employment. On the plaintiff's failing to comply with the demand, the defendants procured M, a customer of the plaintiff, to stop buying meat from the plaintiff by threatening M that otherwise they would ask M's employees to stop work. They also used 'black lists' containing names of traders who had dealings with the plaintiff. The plaintiff suffered damage from all this. *Held*, that the defendants were liable.

[*Allen* v. *Flood* was distinguished (per Halsbury) on two grounds—(1) In that case the defendant neither uttered nor carried into effect any threat at all. The words amounted only to a warning. (2) There was no case of conspiracy or combination. What was alleged to have been done was only the independent and single action of the defendant. In *Allen* v. *Flood* itself, Lord Macnaughten observed, "The decision of this case can have no bearing on any case which involves the element of oppressive combination"].

24. *Crofter* v. *Veitch*, (1942) A.C. 435 (*443–44*).

(ii) The agreement should be—

(a) for doing an *illegal act;* or

(b) for doing, by *illegal means*, an act which itself may not be illegal.

But the word 'illegal', as defined in s. 43 includes—(a) an offence; (b) an act which is prohibited by law; (c) an act which gives rise to a ground for a civil action, e.g., a breach of contract or a tort.

(iii) Hence, it is provided that where the agreement is to commit an act which is illegal but does not constitute an 'offence', the agreement itself will not constitute criminal conspiracy unless some overt act is done by any of the parties to the agreement in pursuance thereof.

But whether any injury is actually caused to any party as a result of the agreement is *immaterial* to constitute the offence of 'criminal conspiracy'.

But no action for the civil wrong (i.e., tort) of conspiracy lies unless damage has been caused to the plaintiff as a result of the conspiracy.[23-24]

2. The elements necessary to constitute an actionable conspiracy are—(a) a combination; (b) for an unlawful purpose; or for a lawful purpose in the execution of which unlawful means are employed; (c) damage caused to the plaintiff by the execution of the agreement.

(a) A combination means an agreement of two or more persons to execute a common purpose.[23]

(b) The expression 'unlawful purpose' is to be broadly understood as including a purpose which is (i) an offence; (ii) or prohibited by law; or (iii) which constitutes a ground for a civil action, such as a tort or a breach of contract. In all these cases, the *means*[23] which is adopted or the *motive* to injure the plaintiff becomes immaterial,[25] if the plaintiff is, in fact, injured as a result of such combination. But this is subject to an important *exception*, namely, that

> notwithstanding the presence of the foregoing conditions, it will not constitute a tort of conspiracy if the *real and dominant purpose* of the combination is to advance the *lawful interests* of the members of the combination, which they honestly believe would suffer if the proposed action is not taken.[24]

This plea in defence to an action for conspiracy has sometimes been called a plea of 'justification'.[26-27]

> "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".[26-27]

25. *Scala* v. *Ratcliffe*, (1958) 3 All E.R. 220.

26. *Sorrel* v. *Smith*, (1925) A.C. 700. The plaintiff, a retail news-agent, withdrew his custom from a wholesale news-agent R. The defendants, an association of newspapers, disapproved of this, and with a view to compel the plaintiff to resume his business, with R, threatened to discontinue the supply of newspapers to W, so long as W supplied the plaintiff. Plaintiff brought this action to restrain the defendants from interfering with the right of the plaintiff to continue contractual relations with W. *Held*, no action lay, for the defendants had acted only with a view to advance their own interests and had not committed or threatened to commit any wrong. "It is true that the defendants combined and that their action resulted in injury to the plaintiff. But they combined not for the purpose of injuring the plaintiff but to forward or defend their own interests."

27. *Mogul Steamship Co.* v. *McGregor Gow & Co.*, (1889) 23 Q.B.D. 589 (H.L.).

(*Continued on page 123*)

A combination is, therefore, lawful where its object is 'the legitimate benefit of the combiners",[27] i.e., "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 plaintiffs was not taken".[27] The lawful interest of the combiners the furtherance of which will not constitute a tortious conspiracy need not be pecuniary or commercial interest.[25]

It is not absence of malice but the presence of a 'just cause' which makes the combination lawful even though damage to another ensues.[27] Malice, in the sense of 'ill-will' is thus not an essential ingredient of the tort of conspiracy.[27]

(c) But even where the purpose of a combination is lawful, it would become an actionable conspiracy if unlawful *means*[28] are adopted by its members as a result of which damage is caused to the plaintiff.

3. Under the Trade Disputes Act, 1906, conspiracy is not actionable if done in contemplation or furtherance of a trade dispute [see p. 119, *ante*]. The immunity is not available if the conspiracy is made, not in furtherance of a trade dispute but of a personal grudge.

§ 7. Deceit

The wrong of deceit consists in leading a man into damage by wilfully or recklessly causing him to believe and act upon a false representation. The gist of the action is fraud, and injury resulting therefrom. FRAUD has been defined as "a false representation of fact made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it."[29] Thus, IN AN ACTION OF DECEIT THE PLAINTIFF MUST PROVE—

(1) That the defendant made a *false* (i.e., untrue) representation.

(2) That the defendant either *knew* it to be false, or was *reckless* whether it was true or not.

(3) That the defendant made it with *intent* that the plaintiff should act upon it.

(4) That the plaintiff *acted* in reliance on the statement and suffered *damage* in consequence.

I. FALSE REPRESENTATION. 1. To found an action for deceit, the

---

(*Continued from page 122*)

The defendants who were firms of shipowners trading between China and Europe, with a view to obtain for themselves a monopoly of the trade, formed an association, offered a rebate to those merchants and shippers who dealt with them exclusively, and other concessions also, which they denied to the plaintiffs who were rival shipowners. The effect of this was serious loss of business to the plaintiffs, as was intended. *Held*, 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 being undertaken in concert by several persons for a common interest. They were not liable. Because, *firstly*, they combined only to advance their own trade interests; *secondly*, they did not adopt any illegal means like fraud or molestation.

28. *Crofter* v. *Veitch*, (1942) A.C. 435 (*460*) H.L.

29. In *England*, it would also constitute an 'offence' under the Trade Descriptions Act, 1968, if such statement is made in the course of any trade or business.

representation complained of must be a statement of *fact*, and not merely a promise or a statement of opinion. For a breach of promise an action for breach of contract may lie but not for tort. On the other hand, one cannot ordinarily sue another for damages on the ground that he has suffered loss by following an opinion of that other which has turned out to be erroneous.

2. There must be a POSITIVE false statement. Mere suppression of truth is not generally actionable as fraud. "No mere silence will ground the action of deceit." There are, however, EXCEPTIONAL CASES where mere non-disclosure will amount to fraud—

(a) The non-disclosure of a part of the truth may make the statement of the residue positively false. Thus, it may happen that the statement of which every part is literally true may be false as a whole, if by reason of the omission of material facts it is as a whole calculated to mislead a person ignorant of those facts into an inference contrary to the truth.

(b) Where there is a duty to disclose, active concealment will amount to fraud.

II. KNOWLEDGE OF FALSEHOOD OR ABSENCE OF BELIEF IN TRUTH. 1. The plaintiff must prove that the defendant either knew his representation to be false, or did not believe it to be true. Consequently, if a man makes a false statement, *honestly believing* it to be true, he cannot be rendered liable in an action for deceit. The test is the genuineness of belief and not its reasonableness; if the defendant really believed it to be true, he is not bound to show that there was *reasonable* ground for such belief. This amounts to saying that MERE NEGLIGENCE in the making of false statements is not actionable.

2. Formerly, absence of reasonable grounds for belief in its truth was thought sufficient to constitute liability for mis-representations *negligently* made. But in *Derry* v. *Peek*'[30] the House of Lords definitely laid down that

30. *Derry* v. *Peek*, (1889) 14 A.C. 337. The defendants were directors of a tramway company which had power by a special Act to make tramway, 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 the use of 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. *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 of deceit [The effect of the actual decision in this case as regards statements in a prospectus has, however, been nullified by Statute—the Directors' Liability Act, 1890, which has made a director or promoter of a company liable for loss caused by untrue or misleading statements made *without reasonable ground* in a prospectus or report. A similar rule has been enacted in the Indian Companies Act].

Lord Herschell observed, "In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, —carelessly whether it is true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a state-

(*Continued on page 125*)

a false statement made with honest belief in its truth cannot render the maker liable in an action for damages for deceit though that is sufficient for obtaining a rescission of contract. "A false statement though want of care falls far short of, and is very different thing from fraud and the same may be said of a false representation honestly believed though on insufficient grounds." *Derry* v. *Peek*[30] is thus authority for saying that "A FALSE STATEMENT IS NOT ACTIONABLE AS A TORT UNLESS IT IS WILFULLY FALSE." Even the greatest carelessness will not make a man liable for a false statement without a specific finding of fact that he knew the statement to be false or was recklessly ignorant whether it was true or false.

3. In other words, as the Privy Council has put it,[31] to sustain an action for deceit in respect of an alleged fraudulent misrepresentation, what is necessary to establish is *not* whether the defendant honestly believed the representation to be true in the *objective* sense. He will not be liable where he honestly believed the representation to be true in the sense in which *he* understood it, though erroneously, provided that sense is not so far removed from the sense in which it would be understood by any *reasonable* person as to make it impossible to hold that the defendant honestly understood it in that sense and honestly believed it to be true in *that* sense.

III. INTENT TO DEFRAUD. 1. The plaintiff must prove that the defendant made the false representation with intent to defraud the plaintiff, i.e., intending that the plaintiff shall act upon it.[32] But it is not necessary that the representation should have been made *directly* to the plaintiff; it is sufficient if the representation was *intended* for him to act upon, and he has acted in the manner contemplated and has suffered damage in consequence, the damage being not remote.[33]

(*Continued from page 124*)

ment under such circumstances can have *no real belief in the truth of what he states.* To prevent a false statement being fraudulent, there must be an honest belief in its truth." (It is to be noted that the term 'recklessly' in the above observation is not used in the ordinary sense to indicate negligence or as being equivalent to 'without any *reasonable* ground for believing'. 'Recklessly' means that "it cannot be said that the statement was made with an honest belief in its truth. But it is conceivable that a man may honestly believe that what he states is the fact, though the Court may think that there are not sufficient grounds to warrant his belief....A man who forms his belief carelessly, or is unreasonably credulous may be blameworthy when he makes a representation on which another is to act but he is *not fraudulent.*")

31. *Akerhielm* v. *De Mare*, (1959) 3 All E.R. 485 (502) P.C.

32. *E.&B. Steamship Co.* v. *Mishrimal*, A. 1966 S.C. 1892 (a shipowner making a representation of fact in a bill of lading, knowing it to be false, and with intent that it should be acted upon, held liable in damages to buyer).

33. *Langridge* v. *Levy*, (1837) 2 M. & W. 519. The plaintiff's father purchased a gun from the defendant for the use of himself and his son. The defendant fraudulently stated the gun to be of good construction and the son was injured by the gun bursting while he was using it. *Held*, the plaintiff was entitled to damages for deceit though the representation was not made to him. Since the defendant knew that the gun was to be used by the buyer's son, and the gun was sold as such, his assertion was a representation on which he intended or expected the buyer's son to act. "There was fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results the party guilty of the fraud is responsible to the party injured."

2. But the mere fact that the plaintiff acted on the defendant's representation will not be proof of deceit. If the representation was in fact intended for a person or persons other than the plaintiff to act upon, the plaintiff cannot complain. Thus, in *Peek* v. *Gurney* [(1873) 6 H.L. 377], it was held that the prospectus of a new company so far as it alleged matters of fact concerning the position and prospectus of the undertaking, were intended only to induce the public who might apply for shares in the company,—it was not deemed to be addressed to persons who after the establishment of the company became purchasers of shares from the original shareholders; and therefore, the directors were not liable to such subsequent purchasers.

IV. RELIANCE ON THE STATEMENT. 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" [*Horsfall* v. *Thomas*, (1862) 1 H. & C. 90]. The gist of the action is fraud as well as damage. Fraud without damage, or damage without fraud will not found an action, but where both concur an action will lie. The plaintiff cannot complain where his conduct has not been influenced by the defendant's representation either because (a) the representation was never communicated to him, or (b) he acted wholly on other sources of information, or (c) he decided to take the risk on himself knowing the representation to be false.

The tort of fraudulent misrepresentation is not complete when the representation is made; it becomes complete only when it is acted upon by the person to whom the representation has been made.[34]

§ 8. Injurious Falsehood and Slander of Title

1. Injurious falsehood is a wrong akin to that of deceit in that in this case also the plaintiff suffers loss due to a false statement made by the plaintiff. It differs however from the ordinary type of fraud in that *third persons*, and not the plaintiff himself, are induced by the defendant's falsehood to act in a manner causing damage to the plaintiff, and the representations made to such persons are statement, *respecting* the *plaintiff*. In short, while in deceit the cause of action is a misrepresentation *made* to the plaintiff, in injurious falsehood and wrongs of that group, it is a misrepresentation *concerning* the plaintiff. So stated, injurious falsehood has some analogy to defamation, but in fact is distinct from it. In defamation, there is an attack on reputation, in injurious falsehood reputation is not affected.

2. An important variety of this species of injury is SLANDER OF TITLE. Slander of title may be defined as a false and malicious statement in disparagement of a person's title to property or his business causing special damage to such person. The disparaging statement may be in relation to the plaintiff's real property, or of chattels, or of exclusive interests analogous to property, e.g., invention, designs, patents and copy-rights. The phrase SLANDER OF GOODS is sometimes used when the disparagement relates to goods. No action for slander of title however lies for an assertion of title for self-defence,

34. *Briess* v. *Woolley*, (1954) 1 All E.R. 909 (*918*) H.L.

nor does an action lie for any statement, however false or malicious, made by one trader to the effect that his goods are better than those of a rival. In an action for slander of title THE PLAINTIFF MUST PROVE—

(1) That the statements complained of were *untrue*.
(2) That they were made *maliciously*.
(3) That the statement *disparaged the plaintiff's property or business*.

Common law required another condition for an action for slander of title or of goods, viz., 'special damage'.[35] But the Defamation Act, 1952, has now provided that in such action, it shall not be necessary to allege or prove special damage if the words upon which the action is founded are *calculated* to cause pecuniary damage to the plaintiff in respect of his profession, calling, trade or business.

No such legislation having taken place in *India*, the common law rule still applies.[36]

4. The use of the term 'Slander' suggests some relation to the wrong of defamation, but in fact slander of title is founded on quite different principles. *Firstly*, defamation is an attack upon reputation, slander of title is injurious to the plaintiff's property or business. *Secondly*, the principle of liability in the latter case is more lenient than in the case of defamation. In slander of title or goods, the plaintiff must prove (a) *actual* damage, and (b) *malice* in the sense of bad faith.

5. It is to be noted that in *England*, the making of false statements in the course of a trade or business has been made a criminal offence, in certain circumstances, by the Trade Descriptions Act, 1968.[37]

35. Cf. *Royal Baking Powder Co.* v. *Wright*, (1901) 18 R.P.C. 95 (99); *White* v. *Mellin*, (1895) A.C. 154 (167).
36. *Imperial Tobacco Co.* v. *Bonnan*, A.I.R. 1928 Cal. 1.
37. Cf. *Br. Airways* v. *Taylor*, (1976) 1 All E.R. 65 H.L.

11

Wrongs to Immovable Property

§ 1. Trespass Generally

1. Trespass, etymologically, means passing beyond, transgression or wrong. In legal terminology too, it was first used in the widest sense to include any wrongful act, relating to person or property. In modern use, it has however been identified with injury to property only, trespass to person having acquired the name of 'assault and battery'. Trespass to property consists of any unlawful interference with property which is in the possession of another. Trespass may be committed by various acts of which the most obvious are (a) entry on another's LAND, and (b) taking another's GOODS. Trespass to goods will be dealt with in the next Chapter.

2. The liability for trespass is *absolute* in the sense that every kind of intermeddling with anything which is the subject of property of another is a wrong unless there is a lawful *justification* for it. A man touches the property of others at his peril, and neither honest mistake in acting for his own interest, nor even honest intention to act for the benefit of the true owner will exempt him from liability.

§ 2. Trespass to Land

1. TRESPASS TO LAND IS A WRONGFUL ENTRY UPON THE LAND OF ANOTHER. Entry may be either actual or constructive. It may be committed in one of three ways—

(i) *By actually entering on the land:* The most common form of trespass is a *personal entry*[1] by the defendant on the land of another. The slightest crossing of the boundary is sufficient. He who owns the surface of land also owns the underlying strata. Hence, any entry beneath the surface at whatever depth is an actionable trespass, e.g., where the owner of an adjoining coal mine takes from under the plaintiff's land.

(ii) *By remaining on the land:* A person who has lawfully entered on land in the possession of another commits a trespass if he remains there after

---

1. TRESPASS BY a man's CATTLE is dealt with exactly like trespass by himself. Thus, the owner of a horse which put its mouth across a fence and it ate the grass and bit the mare of a neighbour, was held liable in trespass [*Ellis* v. *Loftus Iron Co.*, (1874) 10 C.P. 10]. But in the modern view of the law, in *England*, trespass by cattle has been included as a part of the body of rules imposing an exceptionally strict and unqualified duty of safe custody on grounds of public expediency [see Chap. 15, § 3].

his right of entry has ceased.[2] Thus a person who has entered by leave or license of the occupier will be liable as a trespasser if after request he fails to leave the premises [This is to be distinguished from *'trespass ab initio'* which consists in the *abuse of authority*].

(iii) *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 the plaintiff's land, even though there may be no crossing of the boundary. Thus, throwing stones into a neighbour's land or even pouring water or driving nails into another's wall constitutes trespass. These are cases of *constructive* entry. It must be carefully noted, however, that the act of interference in these cases must be *direct*. If it is indirect or consequential, it is not a trespass but may be a nuisance, e.g., *allowing* water to escape into another's land, *allowing* one's trees to overhang branches on a neighbour's land, or digging in one's *own* land causing subsidence of his neighbour's [see Chap. 13, § 3].

2. TRESPASS IS ACTIONABLE PER SE. It is immaterial whether there has been any actual damage or not. "Every invasion of private property, be it ever so minute, is trespass" [*Entick* v. *Carrington*, (1765) 19 St. Tr. 1030]. At the same time, neither the use of force, nor the breaking of an enclosure, nor even an unlawful intention is necessary to constitute a trespass. Of course, the entry of the defendant must be a voluntary act; if it is involuntary[3] or accidental, it is no trespass. Thus, no action will lie against a person whose horse runs away with him on a public highway, and carries him, without any negligence of his, upon adjoining land of the plaintiff. But if the act is voluntary, even an entry made by mistake is actionable as trespass. The plaintiff need not prove that it was wilful or negligent, much that it was attended with any force, violence or damage. *Merely setting foot on another's property is in law a trespass.*[4]

3. TRESPASS IS PRIMARILY A WRONG TO POSSESSION. It is actionable only at the suit of him who is or was actually in possession of the land. In an action for trespass the plaintiff must prove—(i) that he was in possession of the property, and (ii) that the defendant disturbed his possession. Possession means the right to immediate and exclusive occupation. Thus—

(a) On the one hand, *ownership unaccompanied by possession*, though protected by the other remedies, is not generally protected by an action for trespass. A landlord cannot sue for trespass to land in the occupation of his

---

2. A person who has a right of entry on another's land for a specific purpose commits a trespass if he *exceeds* that right, i.e., if he enters for any other purpose. Thus, a person who goes on the highway, or on a land over which he has a right of way, for any purpose other than that of passing or repassing, e.g., for interfering with the adjoining occupier's right of shooting [*Harrison* v. *Rutland*, (1893)], or for watching what is being done on the adjoining land [*Hickman* v. *Maisey*, (1900)], may be sued in trespass or forcibly ejected by the adjoining occupier. The mere excess of the right constitutes the wrong.

3. *Stanley* v. *Powell*, (1891) 1 Q.B. 86.

4. In this respect the civil wrong of trespass differs from the offence of criminal trespass the essence of which is trespass committed with the intention to annoy, insult, or intimidate; *vide* s. 441 of the Indian Penal Code.

tenant; only the tenant can bring such action. The owner, who has parted with the possession in favour of a tenant or lessee, can maintain an action only where the injury is more than a mere trespass, i.e., where actual harm has been done to the property, of such a nature as to affect the value of his *reversionary interest* in it (In such cases the tenant is entitled to sue in respect of the immediate injury, and the reversioner in respect of the diminished saleable value of the property).

For the same reason, the mere *use* of land without the exclusive possession of it, is not sufficient title to found an action of trespass for the disturbance of that use. Thus, in general, a lodger or boarder cannot sue in trespass for any disturbance of his use of the room. Similar is the case with a guest at an inn or in a private house, or a passenger in a railway carriage, or a spectator in a theatre.

(b) On the other hand, MERE DE FACTO POSSESSION IS SUFFICIENT TO SUPPORT AN ACTION FOR TRESPASS. Just as a legal title to land without possession of it is insufficient for this purpose, so conversely, mere possession without title is *enough*. In other words, a person whose possession was devoid of any legal title, and might indeed have been acquired *wrongfully*, has a right of action against all who disturb it without having some better right than his. If a person is in possession, no matter how he acquired it, he is entitled to maintain it against all the world except the true owner.[5] This is what is meant by the dictum—"Any possession is legal possession against a wrongdoer" [*Graham* v. *Peat*, (1801) 1 East 244], or, "Possession is good against all the world except the person who can show a good title" [*Asher* v. *Whitlock*, (1865) 1 Q.B. 1]. The result is, that in an action for trespass, the defendant cannot plead the *jus tertii*[6] or the plea that a third party has legal right and not the plaintiff. A mere stranger cannot be heard to say that one whose possession he has violated was not entitled to possess.

4. 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 there leaves them, 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" [*Winterbourne* v. *Morgan*, (1809) 10 R.R. 537].

§ 3. Defences

In an action for trespass the plaintiff has only to prove interference with

---

5. The reason behind the rule may be variously stated, but the rule exists from very early times. It is commonly said that existing possession is regarded as *prima facie* evidence of ownership, "The presumption of law is that the person who has possession has the property" [*Jeffries* v. *G.W.R. Co.*, (1856) 5 E. & B. 802].

6. *Jus tertii* means right of a third person. When 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 *jus tertii*. This defence is of no avail in trespass.

But the defendant may set up title in *himself* and if he succeeds in establishing this, he cannot, obviously, be held liable as a trespasser.

his possession. It is for the defendant to prove a lawful justification. The defences to an action for trespass are twofold: (i) consent of party, and (ii) authority of law.

(I) LEAVE AND LICENCE. An act of interference with the property of another may be justified by the consent of that other. "The consent, which without passing any interest in the property to which it relates merely prevents the acts for which consent is given from being wrongful" is called licence. A licence is thus 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. A licence may be (a) *express*, as in the case of a guest in a house, or of a person who has purchased a ticket to attend a cinema, or (b) *implied*, as in the case of a customer entering a shop, or of a person habitually allowed to use the plaintiff's land as a shortcut.

At common law, a licence was revocable at the will of the licensor, even if consideration was given for it. But a Court of Equity would in appropriate cases, restrain premature revocation by injunction. Since the fusion of law and equity by the Judicature Act, 1873, it has been established that a licence *for a fixed period* cannot be revoked before expiry of the period and forcible ouster during the period is actionable.[7]

Again, though a bare licence is revocable at will, it is irrevocable if it is coupled with a grant [*Wood* v. *Leadbitter*, (1845) 13 M. & W. 838].

Where a licence is granted to enter land for a particular purpose, it will be a trespass if the licensee enters upon it, without fresh permission, for some other purpose.[8]

(II) AUTHORITY OF LAW. Apart from authority by party, a trespass may be justified or excused by authority of law. Authority of law may be of two kinds—(a) In favour of a true owner against a wrongful possession such as re-entry on land and retaking of goods. (b) In favour of a paramount right conferred by law against the rightful possessor; this may be in the execution of legal process, or in some cases by necessity or by statute for specific purposes. The cases under this head may be enumerated as follows—

(1) *Re-entry*. 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. Of course if he enters forcibly he may be liable to criminal prosecution under statutory provisions, but nevertheless he is not liable in damages for trespass if he uses only the necessary amount of force to re-enter.

---

7. The plaintiff, who had purchased a ticket for a cinema show, was turned out by the manager, under the mistaken impression that the plaintiff had obtained admission without payment. *Held*, plaintiff was entitled to recover substantial damages. The purchaser of a ticket for a seat at a theatre or similar entertainment has a right to stay and witness the whole of the performance, provided he behaves properly and complies with the rules of management [*Hurst* v. *Picture Theatres Ltd.*, (1915) 1 K.B. 1 (C.A.)].

8. Plaintiff agreed to allow the defendant to use his land for the training of racehorses. The defendant walked up and down the highway which crossed the plaintiff's land, for a considerable time, for taking notes of the horses' form for publication in a racing publication. *Held*, the defendant was guilty of trespass [*Hickman* v. *Maisey*, (1900) 1 Q.B. 752].

(ii) *Re-taking of Chattels.* The defendant may justify an entry upon the plaintiff's land to recover his goods when they have been wrongfully taken and placed there by the plaintiff and in this case he may use whatever force is reasonably necessary for the recaption.

(iii) *Execution of Legal Process.* Persons who execute legal processes 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 (a) the warrant is not illegal on the face of it, (b) they do not exceed the authority given by it, and (c) they conform to the mode or procedure prescribed by law.

(iv) *Distress.* The right of distress or distraint is the right to take without legal process chattels out of the possession of another for the satisfaction of a debt or wrong.

(v) *Necessity.* There are cases in which entry on land without consent is excused by the necessity of self-preservation, or the defence of the realm, or an act of charity saving the occupier from irreparable loss, or sometimes by the need of public safety or convenience, as in putting out fires.

(vi) *Abatement of Nuisance.* An occupier of land may enter upon another's adjoining land for the purpose of removing a nuisance upon them. But he must previously give notice to the occupier of that land unless the case is one of emergency [see p. 72, *ante*].

§ 4. Trespass ab initio

1. WHEN A PERSON ENTERS ON ANOTHER'S LAND BY AUTHORITY OF LAW, AND HE SUBSEQUENTLY ABUSES THAT AUTHORITY, HE BECOMES A TRESPASSER AB INITIO,—i.e., the authority is not only determined, but treated, as if it never existed. The subsequent unlawful act relates back, and makes the original entry itself unlawful. For example, the law gives authority to a person to enter into a common inn, or to a landlord to distrain for rent, but if a person who enters into the inn steals away anything, or the landlord who distrains, kills or destroys the cattle distrained, the law presumes that he entered for that very purpose and holds him liable for the original entry itself.

2. To make a man a trespasser *ab initio*, the following conditions must exist:

(i) The authority abused must be given *by the law* and not by an individual. When a person who has entered by *consent or license* of the owner, subsequently abuses that licence, he is no doubt liable for that abuse, but not as a trespasser. The ground of distinction probably is that authority given by act of the party can be limited or recalled at will, but an authority given by law is otherwise and therefore requires greater protection. Consequently, the rule is, that authority given by law without the owner's consent protects the person exercising that authority from being dealt with as a trespasser only so long as the authority is not abused.

(ii) The subsequent abuse must amount to a positive wrongful act or

'*misfeasance*' as opposed to a mere omission or '*non-feasance*' [*Six Carpenters' case*[9], (1610) 1 Sm. L.C. 134].

(iii) Even in the case of misfeasance, the trespass *ab initio* is committed only in respect of the act of misfeasance.[10]

(iv) A person cannot be held liable for trespass *ab initio*, if he has any independent ground for entry, apart from the abuse complained of.[11]

9. Six carpenters entered a tavern, asked for wine and paid for it. Afterwards they asked for a second supply, but refused to pay for it. *Held*, that mere non-payment was a non-feasance which was not sufficient to render them trespassers *ab initio* [*The Six Carpenters' Case*].

10. Police officers, having lawfully entered into certain premises, unlawfully seized certain documents. *Held*, that the police officers were liable as trespassers *ab initio* only in respect of the unlawful seizure of the documents [*Elias* v. *Pasmore*, (1934) 2 K.B. 164].

11. *Chic Fashions* v. *Jones*, (1968) 1 All E.R. 229.

12

Wrongs to Movable Property

§ 1. Trespass to Goods

1. Trespass to goods, like trespass to land, is an infringement of the right to possession, not of ownership.

"Trespass to goods may be committed by taking possession of them or by any other act 'in itself *immediately injurious*' to the goods in respect of the possessor's interest, as by killing, beating, or chasing animals, or defacing a work of art" (*Pollock*), or, as *Salmond* [15th Ed., p. 118] puts it, "consists in committing without lawful justification *any act of direct physical interference* with a chattel in the possession of another person..."

It may assume either of two forms—

(a) *Taking the thing away* from the plaintiff's possession, when it is termed 'asportation.' This would amount to the crime of theft or larceny if a dishonest intent were present, and to robbery if it was also forcible.

(b) *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.

2. As in the law of trespass to land, so in the law relating to goods—

(i) A person out of possession cannot sue. For example, the owner cannot sue the bailee in trespass for damaging or disposing of the goods, for, in bailment the possession is in the bailee.

But a servant's possession is in the eye of law the possession of his master, so that the master alone can sue a third party in trespass and the servant himself is liable in trespass to the master if he does anything inconsistent with the master's possession.

(ii) A person in possession, though not the owner, e.g., a bailee, can sue a trespasser. Even the possession of a finder or of a wrong-doer is sufficient to maintain an action for trespass to goods against a person without title, i.e., a person other than the owner of the goods.

(iii) The trespasser cannot escape liability by setting up *jus tertii.*

3. Wrongful intent is not a condition for this tort and even the removal of goods from one room to another in good faith, and with the object of their preservation, when there was no real necessity of doing so, may constitute this wrong [*Kirk* v. *Gregory*, (1876) 1 Ex. D. 55].

4. Inevitable accident has, however, been held to be a defence to an action for trespass to goods.[1]

§ 2. Conversion

1. Conversion is the tort committed by a person who deals with chattels not belonging to him in a manner which is inconsistent with the rights of the lawful owner, by which the latter is deprived of the use and possession of the chattel. It is the wrong done by "an unauthorised act which deprives another of his property permanently or for an indefinite time." "The grievance is the UNAUTHORISED ASSUMPTION OF THE POWERS OF THE TRUE OWNER" (*Pollock*). Such an act may or may not include a trespass. Thus, if a person wrongfully removes goods from the possession of another with the design of depriving that other of them, or being in possession of goods belonging to another wrongfully refuses to deliver them up to him, sells, disposes or destroys them, he is guilty of conversion. If the wrongdoer deals with the goods *as owner*, it is a conversion though for a very short time, and for a limited purpose. In contemplation of law, the true owner is, by conversion, totally deprived of his goods.

2. The term 'conversion', thus, has in the law of torts a highly technical meaning, different from the literal sense of transformation or change of form. In an action for conversion no such change need be proved by the plaintiff; nor does he succeed merely by proving it. In the majority of cases no change has occurred at all, and the chattel is in the same state as it was before the conversion. Conversion consists in the 'DEPRIVATION OF THE PLAINTIFF'S USE AND POSSESSION'. It comprises a large variety of acts which contain in common only this element of deprivation of use and possession, viz., making detention, disposal, destruction.

3. In an action for conversion, the plaintiff has to prove,—(i) that he was either in possession or had the *immediate* right to the possession of the chattel; (ii) that the defendant deprived the plaintiff of the possession or the right of dominion over it.

(i) Conversion resembles trespass in that the action is based on the right of immediate possession, and not on the right of ownership,[2] and that a mere possessor can sue the wrongdoer unless the latter has a better title or right to be in possession. The plaintiff may, therefore, be a bailee, an agent, a finder, or even a trespasser. The leading case is *Armory* v. *Delamirie* [(1721) 1 Sm. L.C. 393] where a chimney sweeper boy found a valuable jewel and 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 there half-pence for it, which the lad declined and demanded back the

1. The plaintiff's predecessor-in-title placed an electric cable under the land of a country council without their knowledge or consent. The contractors employed by the council, not being aware of the cable, damaged it in the course of excavation. Plaintiff sued for damages for the injury to the cable. *Held*, that the contractors were not liable since their act was not intentional but accidental [*National Coal Board* v. *Evans*, (1951) 2 K.B. 861 C.A.].

2. Thus, a reversioner cannot sue unless by reason of conversion he has been actually deprived of his future interest, as by destruction.

jewel. The defendant refused to return it, whereupon the boy sued him for the value of the jewel. *Held*, that the plaintiff was entitled to succeed. "The finder of a chattel, though he 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, and consequently may sue for its value any wrongdoer who has wrongfully converted it." The finder has a good title against all except the true owner. [The finder himself does not commit a trespass by taking the article in his possession, unless he takes it intending to misappropriate it, when he knows or can by reasonable inquiries ascertain who the owner is, and does not commit a tort by merely keeping it in his custody for a reasonable time until the true owner is discovered [*Hollins* v. *Fowler*, (1875) 7 H.L. 757].

4. It follows that THE DEFENDANT CANNOT, in an action for conversion, SET UP THE PLEA OF JUS TERTII or the title of a third party. "The law is, that a person possessed of goods has a good title against every stranger and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person: for against a wrongdoer possession is title" [*Jeffries* v. *G.W. Ry. Co.*, (1856) S.E. & B. 802]. But as *Salmond* points out, there are three EXCEPTIONS to this rule. In these cases the defendant may plead the *jus tertii*—

(1) When he defends the action on behalf of and by the authority of the true owner.

(2) When he committed the act complained of by the authority of the true owner.

(3) When he has already made satisfaction to the true owner either by returning the property to him or by paying him the value of it.

(ii) In order to constitute conversion there must be—(a) a positive and voluntary act done by the defendant, e.g., taking, disposal, or refusal to deliver on demand. Thus, mere continuance in possession by a bailee without any demand by the bailor is not conversion; similarly, if the goods bailed are lost by accident, the bailee is not liable for conversion; (b) the act must amount to some interference or intermeddling which is inconsistent with or *adverse* to the plaintiff's right of dominion. For this reason, the simple taking or removal of a chattel, without any intention of making a further use of it, although it may be sufficient to found an action of trespass, is not sufficient to establish a conversion.

5. But at the same time, it must be borne in mind that neither (a) damage, nor (b) appropriation by the defendant to his own use nor (c) intention to cause loss to the plaintiff or gain to the defendant, need be proved by the plaintiff. Similarly, it is no defence to say that the defendant acted under a mistaken but honest supposition of being lawfully entitled, or even the intention of benefitting the true owner, for a person deals with another's goods at his own peril. We may now consider the various instances of conversion.

§ 3. Acts of Conversion

As stated already, though mere possession or a right to possess is sufficient to enable the plaintiff to bring an action for conversion, the wrong is not

committed unless the defendant exercises an act of ownership over the goods, which means some physical act which is inconsistent with the plaintiff's title or the right to immediate possession. Such an act, for instance, is the unauthorised user, consumption, or destruction (as distinguished from mere damaging) of the goods.

Such acts may be grouped under the following heads:

I. *Conversion by Taking.* Conversion may be committed by wrongfully taking a chattel out of the possession of another. But in this respect, CONVERSION MUST BE DISTINGUISHED FROM TRESPASS TO GOODS:

(1) A mere taking or asportation is actionable trespass. But "every asportation is not a conversion" [*Burroughes* v. *Bayne*, (1860) 5 H. & N. 306]. It is a conversion only if it amounts to an *adverse exercise of dominion* by the defendant. The usual instance of such conversion is taking for the *use* of the defendant or of a third person. The defendants may also take it to *destroy* it. *But a simple taking of a chattel, without any intention of making any further use of it, is not sufficient to establish a conversion.* So it was laid down in *Fouldes* v. *Willoughby* [(1841) 8 M. & W. 540], where the defendant who was the manager of a ferry-boat removed the plaintiff's horses from the boat and turned them loose on shore, in order to compel the plaintiff whose behaviour in the boat was considered objectionable, to leave the boat with the animals and the horses were ultimately lost to the plaintiff; *held*, the removal was not a conversion though it might be a trespass.[3]

In short, while trespass is an unlawful taking which may simply be for the sake of removing the property, conversion is an unlawful taking for the purposes of exercising adverse dominion over it. While trespass is committed by any unjustifiable interference with the plaintiff's actual possession, conversion is not committed unless the defendant does an unauthorised act that puts the plaintiff's title in jeopardy.

(2) 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 obtained possession can sue his vendor for conversion.

II. *Conversion by Detention.* Apart from taking, conversion may also

3. In this case, Alderson, J. observed—"Any asportation of a chattel for the *use* of the defendant, or a third person, amounts to a conversion for the simple reason that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man *takes* that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel and *refuses to deliver it* up this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times and in all places, I am entitled to make of it, and consequently amounts to an act of conversion. So the *destruction* of the chattel is an act of conversion, for its effect is to deprive me altogether. But the question here is, when a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but on the contrary, recognising throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot."

be committed by detention, if the detention is adverse to the right of the person entitled to possession e.g., where bailee refuses to return the chattel to his bailor on damand. The essence of this form of conversion is *refusal on demand*, and 'every detention is not conversion'.

Before a plaintiff can maintain an action under this head, he must establish that he had title to the goods and that he was entitled to possession thereof when he called upon the defendant to deliver them [*Leach & Co.* v. *Skinner*, A.I.R. 1947 S.C. 357].

III. *Conversion by Delivery.* If the defendant delivers the goods of the plaintiff to a third party without the plaintiff's authority, he is guilty of conversion. Thus, a bailee, who sells or pledges the goods to a third person, commits conversion.

The conversion may be actual or constructive—it may effect (a) a transfer of property or (b) a mere change of possession without affecting property.

(a) If the delivery purports to transfer the property, it is a clear act of deprivation of the owner's right by creating a hostile right in another. Defendant's ignorance of the unauthorised character of his act is no defence. Thus, if a person purchases a chattel from a thief, without knowing the absence of title of his vendor, and then effects a transfer, he would be liable to the true owner, even though he acted in ignorance of the latter's title. On the same principle, brokers[4] and auctioneers have been held liable for selling goods without the real owner's authority and bankers[5] have been held liable for collecting on behalf of persons not entitled to them, even though they are ignorant of the real owner's title.

(b) The ordinary rule is that a mere delivery of possession of another's goods, without his authority, to a third person is *prima facie* adverse to that of other's rights. So, a bailee, agent or servant who delivers the goods of the bailor or employer without the latter's authority to a third person, is liable to him for conversion, though no transfer of title is effected by the delivery.

IV. *Conversion by Destruction.* An unauthorised destruction of the plaintiff's goods constitutes conversion, provided it amounts to an adverse exercise of dominion. So, injury due to accident is not conversion. Again, mere damage which falls short of destruction is not in itself a conversion. The destruction may take place by unauthorised user or consumption.

---

4. *Hollins* v. *Fowler*, [(1875) 7 H.L. 757]. The defendants (*H. & Co.*,) were a firm of brokers. They purchased some bales of cotton from B without knowledge of the fact that the cotton belonged to the plaintiff (F), and then sold it to M. B had got the cotton from the plaintiff, pretending to act for a principal who did not exist; consequently there was no contract between *B* and the plaintiff and the title was still in the plaintiff: *Held*, the defendants were liable for the full value of the cotton though they acted only as brokers in the transaction of purchasing from B and selling to M, and that in ignorance of the plaintiff's ownership.

5. *Kleinwort Sons & Co.* v. *Comptoir National* [(1894) 2 K.B. 157]. The payee of a crossed cheque specially endorsed it to the plaintiff and posted it to them. A stranger having obtained possession of the cheque in transmission obliterated the endorsement to the plaintiffs and having substituted a special endorsement to himself presented it at the defendant bank, and requested them to collect it for them. They did so, and handed over the proceeds to him (the stranger). *Held*, the defendants were liable to the plaintiffs for the amount of the cheque, in an action for conversion.

§ 4. Detention

(A) *England.* In England, the action for detention was known in common law as an action of '*detinue*'. The old form of action has been replaced by the modern 'action for detention of goods' which is, however, governed by the same substantive law which was applicable to an action of detinue. The gist of this action is the unlawful detainer of goods by the defendant after demand by the plaintiff who is entitled to immediate possession of the goods.

The principal distinction between 'conversion' and 'detention' is in the remedy sought. When the defendant had got possession of the plaintiff's goods (whether wrongfully in the first instance, or by keeping them wrongfully after having lawfully obtained possession) the plaintiff can sue him either for conversion or for detention of the goods. *Conversion* is the appropriate remedy where the plaintiff seeks merely to recover *damages* for the loss of the goods. Thus, it is the proper remedy where the defendant is no longer in possession of the goods, of where they cannot be specifically identified, e.g., so many bushels of corn. *Detention* is the action for the *recovery of* the *specific goods* wrongfully detained as well as for damages for the detention from the plaintiff by the defendant. This action is brought where the defendant is at the time of action in possession of the goods which the plaintiff wishes to recover *in specie*, e.g., a horse.

(i) To maintain an action for detention the plaintiff must, as against the defendant, be entitled to immediate possession at the *time of the action;* while in an action for conversion, he must prove right to such possession at the time of conversion.

(ii) The judgment in an action for detention is for return of the goods and also damages for wrongful detention; the judgment in an action for conversion is damages only.

(B) *India.* 1. In India, the remedy for detention is codified in sec. 7 of the Specific Relief Act, 1963, which relates to a suit for 'recovery of specific movable property'. It says—

"A person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

Explanation 1. A trustee may sue under this section for the possession of movable property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation 2. A special or temporary right to the present possession of movable property is sufficient to suppost a suit under this section.

This section provides specific relief for wrongful taking or detention of movable property. (a) This form of specific relief is therefore applicable only when the goods themselves are 'specific' so as to be *recoverable.* The relief sought is consequently limited to the delivery of the goods and any special damage for their detention. If, however, for any reason, recovery of the goods is rendered impossible, and the relief sought is for the wrongful taking of the goods or for misappropriation of the same then the only relief that may be granted is the ordinary one, viz., damages. (b) The detention necessary for seeking relief under this section must be an *adverse* or wrongful detention. It must be proved not only that the defendant holds the goods, but also that he prevents plaintiff from having the possession of

them. (c) The plaintiff must therefore show that he *demanded* the goods from the defendant, who, however, *refused* to deliver the same.

2. The above section says that the mode of recovery shall be such as is prescribed by the Civil Procedure Code, O. 21, r. 31, prescribes the mode of execution of a decree for specific movable property and O. 20, r. 10 lays down the form of decree in such suit. O. 20, r. 10 says—

"Where the suit is for movable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had."

Where a decree is for delivery of movable property and states the amount to be paid as an alternative if delivery cannot be had, the goods must be delivered if capable of delivery; otherwise the assessed damages should be paid.

§ 5. Wrongful Attachment

(A) *England.* In England, the execution of a decree is entrusted to the Sheriff, an officer, who is bound to use his own discretion, and is directly responsible to those interested, for the illegal seizure of goods which do not belong to the judgment-debtor. The judgment-creditor is not responsible for the consequences of goods illegally taken in execution of a judicial order for the satisfaction of his debt [*Walker* v. *Olding*, 1 H. & C. 621].

(B) *India.* In India, on the other hand, warrants of attachment in execution of a decree are issued on the *ex parte* application of the judgment-creditor, who is bound to *specify* the property which he desires to attach and no discretion is allowed to the officer of the Court who effects the attachment. Hence, the judgment-creditor is liable in damages, without proof of malice or probable cause, if the goods of a person other than his judgment-debtor are attached [*Kissori* v. *Harsukh*, (1889) 17 Cal. 436 (*422*) P.C.]. The third person whose goods are wrongfully attached has a right to possess his property against all the world and anybody who interferes with that right is liable in damages. Hence, the decree-holder who specifies the property of a person other than his judgment-debtor is liable and *bona fide* mistake is no defence. The attaching officer has, however, no responsibility, for the reason stated before [*Bajrang* v. *Sitaram*, A.I.R. 1949 Cal. 457].

13

Nuisance

§ 1. The Nature of Nuisance

"Nuisance is the wrong done to a man by unlawfully disturbing him (a) in the enjoyment of his property, or , in some cases, (b) in the exercise of a common right." (*Pollock*). The wrong of nuisance is divided into two classes, Public and Private.

(A) A PUBLIC OR COMMON NUISANCE is some unlawful act or omission "which endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise of some right which is common to all members of the community", e.g., obstruction of a highway[1], keeping a common gaming house or a disorderly inn. It must affect the public or some considerable portion of them.

(B) A PRIVATE NUISANCE, on the other hand, is an act which affects some particular individual or individuals as distinguished from the public at large. It is an act which unlawfully interferes with a person in the enjoyment of his own land or premises.[2]

§ 2. Public Nuisance

1. PUBLIC NUISANCE is not, however, primarily a civil wrong at all. It DIFFERS ESSENTIALLY FROM A PRIVATE NUISANCE on the following points—

(a) Public nuisance is a criminal offence, and the remedy is by indictment [Cf. sec. 268, I.P.C.]. Interference with a common right is not by itself a civil cause of action for the individual citizen. It is only when he suffers *special or particular* damage beyond that suffered by the public generally, that it is actionable as a tort at his suit.[3] Ordinarily, thus, a public nuisance does not

---

1. Cf. *Dymond* v. *Pearce*, (1972) 1 All E.R. 1142 (C.A.).
2. The same act may sometimes be both a public and a private nuisance, e.g., where a trade causes offensive noise or smell injurious to the neighbours as well as to the passers-by on the adjoining highway, or where the obstruction of a highway results also in the loss of access to occupiers of adjoining property.
3. The plaintiff brought an action aganist the defendant for obstruction of a public footway on the ground that he had sometimes been delayed in removing the obstruction, and sometimes obliged to turn aside by another way. *Held*, he could not recover damages for he could not show that he had suffered any more inconvenience than the rest of the public. Kelly J. observed, "If we were to hold that everybody who merely walked up the obstruction, or who chose to incur expenses in removing it, might bring his action for being obstructed,

(*Continued on page 142*)

fall within the law of torts, and no private individual can maintain an action for damages for it. For example, if A digs a trench across a highway where B and others are prevented from freely passing and repassing therein, B cannot in his individual capacity bring an action for it; for, the inconvenience is suffered alike by all men who use the road. But if B, going along the road in dark, and not knowing of the obstruction, falls into the trench and is lamed, this is a special damage for which A will be liable to B. To enable a private individual to bring an action for damages in respect of a public nuisance, he must prove—

(i) That he has suffered a *particular* injury to himself beyond that suffered by the rest of the public;

(ii) That such injury is *direct* and not merely consequential; and

(iii) That such injury is of a *substantial* character, not fleeting or evanescent.[4]

(b) A private nuisance may become legal by prescription. A public nuisance cannot be legalised by any length of time.

2. It is no answer to an action for public nuisance that the state of things causing nuisance is in some other way a public convenience, nor is it material whether it interferes with actual exercise of the right as it is for the time being exercised. But in an action for nuisance, it is not necessary to prove negligence.[1]

§ 3. Kinds of Private Nuisance

The classification of nuisance in different text-books is not uniform. This is due to the fact that the wrong of nuisance covers a wide field of wrongs relating to property many of which may be assimilated to the principles governing other wrongs as well. The classification must, therefore, be to some extent overlapping. Generally speaking, the wrong of nuisance falls under two broad clauses—(i) those causing damage to property, and (ii) those causing personal discomfort (in the occupation of property).

I. INJURY TO PROPERTY

This includes a very wide class of wrongs. Any unauthorised interference with property or proprietary rights of another, causing damage, is actionable as a nuisance. This may take the form of—

(1) ENCROACHMENT ON THE PROPERTY OF THE PLAINTIFF, e.g., where the defendant allows his tree to overhang its branches or to grow its roots

---

(*Continued from page 141*)

there would really be no limit to the number of actions which might be brought" [*Winterbottom* v. *Derby*, (1867) 2 Ex. 316].

4. Where horses and wagons were kept standing for an unreasonable time in the highway opposite the plaintiff's house, so that the access of custom was obstructed, the house was darkened, and the people in it were annoyed by bad smells, *held*, the damage was sufficiently 'particular, direct and substantial' to entitle the plaintiff to maintain an action [*Benjamin* v. *Storr*, (1874) 9 C.P. 400].

into the plantiff's soil; or where the defendant causes or allows the escape of harmful things, such as electricity, smoke, gas or fume. This class of nuisances is however TO BE DISTINGUISHED FROM a larger and more important species of wrongs to property, viz., TRESPASS. There is a good deal of similarity and apparent overlapping between the two; e.g., nuisance, like trespass, is actionable only at the suit of the person who is in *possession* of the land injuriously affected by it. But, in fact, as *Salmond* [15th Ed., p. 70] points out, the wrongs of nuisance and trespass are mutually exclusive. "Nothing is to be rightly classed as a nuisance if it is really a trespass." The distinction depends on whether the injury is or is not a *direct* act of physical interference with the plaintiff's land. "Directly to cause a material and tangible object to enter another person's land is a trespass and no nuisance; but (a) where the thing is not material and tangible (e.g., electricity, noise, smell, or smoke), or (b) where, though material and tangible, its entry is not the direct act of the defendant, but merely consequential on his act, the injury is not trespass. Thus, to plant a tree in another man's land is a trespass; but to allow it to spread its roots or branches across the boundary is a nuisance and not a trespass."

A person is liable for nuisance, where, without trespassing upon another's property, he has been guilty of "wrongful interference with another's *enjoyment* of his land or premises by the use of land or premises either occupied or, in same cases, owned by himself."[5] A person may thus be liable for nuisance where, with the knowledge or means of knowledge that the premises over which he has control is likely to cause injury to his neighbour's land or premises, does not take steps to prevent it.[5]

The CHIEF IMPORTANCE OF THIS DISTINCTION is that while trespass is actionable *per se*, nuisance is actionable only on proof of actual damage [see *below*]. The cause of action in trespass, is the interference with the right of a possessor in itself, in nuisance the cause of action is the injury, either resulting from, or presumed by law as resulting naturally from, such interference; thus, an overhanging roof is a nuisance to the land it overhangs because of its necessary tendency to discharge rain-water upon it' (*Pollock*).

(2) OBSTRUCTION OF INCORPOREAL RIGHTS OF PROPERTY ENJOYED BY THE PLAINTIFF. Unlike trespass, nuisance may be constituted by an injury not only to possession itself, but also to some right accessory to possession, e.g., obstruction of rights of way and other rights over the property of others, such as the rights to light, etc.

[These, however, properly fall under the law of easements and for a detailed discussion of these species of wrongs, the student is advised to look up a text-book on that subject. I shall, however, shortly discuss only two of such rights,—(a) right to support, and (b) right to light and air.]

5. Trespassers laid a drainage pipe upon the respondents' land, but provided it with no effective grating. Respondents knew of this condition and employed a servant to clean out the ditch in which it lay, but did not provide an effective grating, as a result of which the pipe became blocked and the appellant's land was flooded. *Held*, the respondents must be presumed to have knowledge of the danger and since they had done nothing to prevent the flooding, they were liable [*Sedleigh-Denfield* v. *O'Callaghan*, (1940) A.C. 880].

into the plantiff's soil; or where the defendant causes or allows the escape of harmful things, such as electricity, smoke, gas or fume. This class of nuisances is however TO BE DISTINGUISHED FROM a larger and more important species of wrongs to property, viz., TRESPASS. There is a good deal of similarity and apparent overlapping between the two; e.g., nuisance, like trespass, is actionable only at the suit of the person who is in *possession* of the land injuriously affected by it. But, in fact, as *Salmond* [15th Ed., p. 70] points out, the wrongs of nuisance and trespass are mutually exclusive. "No-thing is to be rightly classed as a nuisance if it is really a trespass." The distinction depends on whether the injury is or is not a *direct* act of physical interference with the plaintiff's land. "Directly to cause a material and tangible object to enter another person's land is a trespass and no nuisance; but (a) where the thing is not material and tangible (e.g., electricity, noise, smell, or smoke), or (b) where, though material and tangible, its entry is not the direct act of the defendant, but merely consequential on his act, the injury is not trespass. Thus, to plant a tree in another man's land is a trespass; but to allow it to spread its roots or branches across the boundary is a nuisance and not a trespass."

A person is liable for nuisance, where, without trespassing upon another's property, he has been guilty of "wrongful interference with another's *enjoy-ment* of his land or premises by the use of land or premises either occupied or, in same cases, owned by himself."[5] A person may thus be liable for nuisance where, with the knowledge or means of knowledge that the premises over which he has control is likely to cause injury to his neighbour's land or premises, does not take steps to prevent it.[5]

The CHIEF IMPORTANCE OF THIS DISTINCTION is that while trespass is action-able *per se*, nuisance is actionable only on proof of actual damage [see *below*]. The cause of action in trespass, is the interference with the right of a possessor in itself, in nuisance the cause of action is the injury, either resulting from, or presumed by law as resulting naturally from, such interference; thus, an overhanging roof is a nuisance to the land it overhangs because of its necessary tendency to discharge rain-water upon it' (*Pollock*).

(2) OBSTRUCTION OF INCORPOREAL RIGHTS OF PROPERTY ENJOYED BY THE PLAINTIFF. Unlike trespass, nuisance may be constituted by an injury not only to possession itself, but also to some right accessory to possession, e.g., obstruction of rights of way and other rights over the property of others, such as the rights to light, etc.

[These, however, properly fall under the law of easements and for a detailed discussion of these species of wrongs, the student is advised to look up a text-book on that subject. I shall, however, shortly discuss only two of such rights,—(a) right to support, and (b) right to light and air.]

5. Trespassers laid a drainage pipe upon the respondents' land, but provided it with no effective grating. Respondents knew of this condition and employed a servant to clean out the ditch in which it lay, but did not provide an effective grating, as a result of which the pipe became blocked and the appellant's land was flooded. *Held*, the respondents must be presumed to have knowledge of the danger and since they had done nothing to prevent the flooding, they were liable [*Sedleigh-Denfield* v. *O'Callaghan*, (1940) A.C. 880].

Cassidi vs. Daily mirror

(i) Disturbance of Right of Support

1. The right of support may be claimed in respect of a building or in respect of a piece of land in its natural state. There is a marked distinction between the two cases. While the right to support for land in its natural state, from adjoining land, is a natural *right of property*,[6] the right of support for buildings is not a right of property, but an *easement*, to be acquired by grant or prescription. As regards the latter, it was observed in *Partridge* v. *Scott*, [(1838) 3 M. & W. 220],—"Rights of this sort, if they can be established at all, must we think, have their origin in grant. If a man builds a house at the extremity of his land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbour's unless he has a grant to that effect."

2. *Support of Land without Buildings:* It is a tort to so use one's own land as to deprive his neighbour of the subjacent or adjacent support of soil, mineral, matter and other like substances necessary to uphold such neighbour's land in its natural and unencumbered state. The cause of action is the subsidence of the plaintiff's land, not the excavation of or removal of soil or other material from the defendant's land. Thus, a man may not pump from under his own land a bed of wet sand so as to deprive his neighbour's land of support [*Jordesan* v. *Sutton*, (1899) 2 Ch. 217], but he may drain water from under his own land with impunity even though the drainage operations cause a subsidence of his neighbour's land [*Popplewell* v. *Hodkinson*, (1869) 4 Ex. 248].

3. *Support of Buildings:* No tort is committed by a person who so uses his own property as to take away the support necessary to uphold his neighbour's buildings, unless a right to such support has been gained by *grant* or *prescription*, i.e., by 20 years, uninterrupted user,—peaceably, openly and without deception.[7]

4. When unencumbered land is weighted by a superstructure, the owner cannot, by reason of his natural right of support for the surface, claim additional support for the superstructure, for a landowner cannot, by altering the natural condition of his land, deprive the neighbour of his natural right to use his land as he liked.[8] But the owner can maintain an action for

6. Cf. s. 7, ill. (*e*), Indian Easements Act.

7. Plaintiff's house was nearly a hundred years old, but 27 years before, it had been altered into a coach factory, in a manner which increased the weight on the wall near the defendant's premises and the lateral pressure on the defendant's soil. Defendants now pulled down their contiguous house for building a new one and dug foundations which were deeper than those of the plaintiff's with the result that the soil near the plaintiff's foundations was exposed to air and gave way bringing down a considerable portion of the factory. *Held*, by the House of Lords, that the plaintiffs were entitled to damages as they had acquired a right to support by open and peaceable enjoyment for 20 years [*Dalton* v. *Angus*, (1881) 6 A.C. 740].

8. A dug a well near B's land, which sank in consequence, and a building erected on it within 20 years (i.e., the right to support had not yet been acquired for the building by prescription) fell. It was proved that, if the building had not been on B's land, the land would

(*Continued on page 145*)

disturbance of the natural right of support for the surface, if he can show that the foundation would have sunk as a result of the defendants' act, even in the absence of the weight of the superstructure or buildings; and in that case he may recover compensation for the injury to the building too as a *consequential damage* [*Brown* v. *Robins*, (1859) 4 H.N. 186]. Plaintiff must, however, prove appreciable damage.[6]

(ii) Obstruction of Light

(A) *England.* 1. A person has no 'natural' right to the LIGHT coming to his building laterally, as it would involve a serious restriction of the natural right of the owner of adjacent land to build as he pleases. But he can acquire a right to lateral light, i.e., light coming over the adjoining space, (a) by grant, or (b) by prescription. He can by prescription acquire a right to light coming to his building through definite apertures and called '*ancient light*'.

2. An action will lie for darkening or obstruction of ancient light, provided it is shown that there has been a *substantial diminution* of light, so as to interfere with the *ordinary use* of the plaintiff's premises. "The owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of the mankind" [*Colls* v. *Home & Colonial Stores Ltd.*, (1904) A.C. 179]. The plaintiff must therefore prove not a mere obstruction or diminution of the light previously enjoyed, but that sufficient light is not left for the ordinary purposes of inhabitancy or business, according to the *ordinary notions of mankind.*

3. In cases of such tort not only are damages available to the plaintiff, but the Court will grant a prohibitory injunction to restrain an interference with the right, and in proper cases, also grant a mandatory injunction to pull down the structure causing obstruction.

(B) *India.* The law of prescriptive acquisition of an easement of light or air is contained in sec. 25 of the Limitation Act, 1963 and sec. 15 of the Indian Easements Act, the two provisions being similar as to the mode of enjoyment and the period of enjoyment required for acquisition of the right by prescription. The provision is—

"Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years, and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested...."

(*Continued from page 144*)

still have sunk, but the damage to B would not have been appreciable. *Held*, B had no right of action against A [*Smith* v. *Thackerah*, (1866) 1 C.P. 564].

The object of the section is to make more easy, the establishment of easement rights, by allowing an enjoyment of 20 years, if exercised under the conditions prescribed, to be given without more, a title to the easement. The conditions are—

(i) The right should be enjoyed—(a) peaceably; (b) as an easement; (c) as of right; (d) openly except in the case of light and air; and (e) without interruption.

(ii) The enjoyment must be for a period of 20 years [If the property over which the right is claimed belongs to Government, the period of enjoyment must be 60 years].

(iii) In the suit in which the right is contested, it must be proved that the obstruction complained of has taken place within two years preceding the suit and that before such obstruction, the 20 years' user had been completed.

2. As to the amount of obstruction that will constitute an actionable nuisance, the principles of English law have been followed so far as the right to light is concerned.

S. 33 of the Easements Act expressly provides that it must be a substantial interference in the English sense. It provided thus:

> The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement, or of any right accessory thereto: provided that the disturbance has actually caused substantial damage to the plaintiff.
>
> *Explanation I.* The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damages within the meaning of this section....
>
> *Explanation II.* Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit."

There is, of course, no corresponding provision in any statute law in those States where the Indian Easements Act does not apply.[9] But the English law as enunciated in *Colls* v. *Home & Colonial Stores*, (see p. 145, *ante*) has been applied in those territories, the leading case being that of *Paul* v. *Robson* [(1914) 18 C.W.N. 933 P.C.], where it has been held that to constitute an illegal obstruction to light, it is not sufficient for a plaintiff to show that he has *less* light than he enjoyed previously, or his premises cannot be used for all the purposes to which they might otherwise be applied; to maintain an action there must be substantial interference with the plaintiff's comfortable or profitable use of his dwelling house or business premises *according to the ordinary notions of persons in the locality*. The test is not how much light has been taken, and is the remaining amount of light such as to materially lessen the enjoyment and use of the house, but the test really is *how much light is left*, and is that sufficient for the comfortable use and enjoyment of the house according to the ordinary requirements of persons in the locality. In

9. The Easements Act has been extended only to Madras, Bombay, Madhya Pradesh, Oudh, Ajmer-Merwara, Coorg.

determining whether or not the quantity of light which the owner of the dominant tenement will continue to enjoy after the obstruction, is sufficient, regard will be had to the light *coming from other sources* which the dominant owner is by grant or prescription entitled to receive.

(iii) Obstruction of Air

Similarly, a right to AIR coming laterally to a premises through apertures may be acquired by prescription. But in *England*, the right to air is treated differently from the right to light. While an action for obstruction of light lies on proof of substantial interference with comfort as explained above, an action for obstruction of air is allowed only on proof of *danger* to health or something very nearly approaching it [*City of London Brewery Co.* v. *Tenant*, (1803) L.R. 9 Ch. App. 221].

But ventilation of a house is of much greater importance in *India* than in England. Accordingly, the Indian Easements Act (s. 33) places light and air on the same footing and allows an action for interference with the right to air when it materially affects the physical comfort of the plaintiff, though it is not injurious to his health. This seems to be the law also in those States where the Easements Act does not apply.[10]

II. INJURY TO COMFORT

The continuous doing of something which interferes with another's health or comfort in the occupation of property is actionable as a nuisance. Thus, carrying on a noisy or offensive trade, the ringing of large bells, loud music, shouting, and collection of a crowd of disorderly people by noisy entertainment of music and fireworks, to the annoyance of neighbours have been held to be nuisances. While liability for injury to person or property may arise in other modes than a nuisance, disturbance of comfort is actionable only as a nuisance.[11] What amount of annoyance or inconvenience will amount to a nuisance cannot be defined as a point of law. It will depend, from the nature of the question, on the facts of each case.

§ 4. Conditions of Actionable Nuisance

1. In an action for nuisance the plaintiff must prove—

(i) *That the plaintiff has suffered actual damage.* As has already been stated, no action will lie for a nuisance unless it is the cause of actual damage to the plaintiff. (In this respect nuisance is to be distinguished from trespass

10. *Bagram* v. *Khettranath*, 3 B.L.R. 18; *Madhoosoodan* v. *Bissonath*, 15 B.L.R. 361.

11. The conception of private nuisance was originally limited only to injuries done to a neighbour's *property*, being based on the maxim '*sic utere tuo ut alienum non laedus*' [so use your own (property) as not to injure another's] and injury to the right of comfort has been recognised as an actionable wrong only as an incident to the possession of property. The proof of the cause of action, however, for nuisance grounded on discomfort differs in material respects from that for nuisance to property. The principal conditions of liability in both cases are given below.

which is actionable *per se*.) The damage may take the form either of (a) material injury to property, or (b) sensible personal discomfort in the beneficial use of property.

(ii) *That the damage is substantial and not merely trifling or fanciful.* Thus, where the nuisance complained of consists of damage to property, the damage must be proved to be of 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 discomfort must not be so trifling that an average or reasonable man would not complain of it at all. It must be an inconvenience materially interfering with the *ordinary comfort* physically of human existence, not merely according to elegant or dainty modes and habits of living. In short, while the term 'substantial' when applied to injury to property means a demonstrable or physical phenomenon, it only refers to a conclusion of law, when applied to discomfort. The degree of inconvenience necessary to constitute nuisance is a question of fact which is to be determined in each case with reference to the standard of 'ordinary comfort'. Thus, while noise due to the singing of music lessons for two or three hours a day would not be considered as excessive and actionable [*Christie* v. *Davie*, (1893) 1 Ch. 316], it would be otherwise if the hours were longer or a residential house was converted into a music schoc for strangers [*Motion* v. *Mills*, (1896) 13 T.L.R. 427].[12] But at the same time it must be noted that no particular combination of sources of annoyance is necessary to constitute a nuisance, nor is it necessary that the acts complained of should be injurious to health.

But the standard of comfortable living referred to above is not a single universal standard for all times and places, but a VARIABLE STANDARD differing in different localities. As *Salmond* [15th Ed., p. 73] points out, "the question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort but whether the average man residing in that locality would take the same view of that matter. The law of nuisance consequently, does not guarantee for any man a higher immunity from personal discomfort or inconvenience than that which prevails generally in the locality in which he lives".

In this respect "it is a very desirable thing to mark the DIFFERENCE between an action brought for a nuisance upon the ground that the alleged nuisance produces material INJURY TO PROPERTY, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible PERSONAL DISCOMFORT. (a) With regard to the latter, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those

12. Similarly, where a club established for pugilistic encounters caused the collection of large and noisy crowds in the club—it was *held*, that an action for nuisance lay by the occupiers of neighbouring houses against the proprietors of the club [*Bellamy* v. *Wells*, (1890) 63 L.T. 635].

operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. 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 may arise much discomfort from the trade carried on in that shop. (b) But when any occupation is carried on by one person in the neighbourhood of another, and the result of that trade or business is a material injury to *property*, then there unquestionably arises a very different consideration" [*St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H.L.C. 642].

(iii) *That the plaintiff has a possessory interest in the premises affected by the nuisance* [*Read* v. *Lyons*, (1946) 2 All E.R. 471 (*482*) H.L.J. 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.

2. In an action for nuisance it is NO DEFENCE—

(i) That *the plaintiff himself came to the nuisance.* It was at one time thought that a person could not complain of a nuisance if with full knowledge of its existence he chose to become the owner or occupier of the land affected by it, e.g., if he knowingly took a house close to a noisy factory. But it has now been settled that the maxim *Volenti non fit injuria* has no application to such a case, and that nothing short of prescription (i.e., expiry of the statutory period of limitation) or the equitable plea of acquiescence will bar the plaintiff's claim.

(ii) That *the nuisance although injurious to the plaintiff is beneficial to the public at large.* Thus, "a tan-house is necessary, for all men wear shoes; and nevertheless it may be pulled down if it be erected to the nuisance of another" [*Jones* v. *Powell*].

(iii) That *the place from which the nuisance proceeds is the only place suitable for carrying on the operation complained of.*

(iv) That *the act of the defendant would not amount to a nuisance unless other persons acting independently did the same thing at the same time.*

(v) Nor is it a defence in an action of nuisance that the defendant had *taken all reasonable care* to prevent it [*Rapier* v. *London Tramways Co.*, (1893) 2 Ch. 588 (*600*)]. While in an action of negligence, plaintiff has to prove a duty to take care and a failure in that duty, this is not required in an action for private nuisance [*Jacobs* v. *L.C.C.*, (1950) 1 All E.R. 737 (*744*) H.L.]. In short, negligence is not an essential element in nuisance, though there may be cases where the same facts will establish both nuisance and negligence. Thus, an occupier may be liable for the emission of noxious fumes or noise, although he has used the utmost care in building and using his premises.[13]

13. T had bought an estate in a neighbourhood where many manufacturing works were

(*Continued on page 150*)

But foreseeability sets the limit to liability in an action for nuisance as in an action for negligence, so that the defendant will not be liable in nuisance if the *injury* was one which was *not* reasonably foreseeable.[14]

(vi) The defence of *negligence of an independent contractor* is therefore not available in an action for nuisance [*Spicer* v. *Smee*, (1946) 1 A.E.R. 489 (K.B.)].

§ 5. Defences

1. A special defence available in the case of nuisance is PRESCRIPTION. The right to continue a (private) nuisance may be acquired as an easement by prescription,—if it has been peaceably and openly enjoyed as an easement and as of right, without interruption and for 20 years.[15] On the expiration of the period, the nuisance becomes legalised *ab initio*, as if it had been authorised by a grant of the owner of the servient land. For the operation of the rule of prescription, it is essential that the thing to do which a right is claimed must have been a *nuisance* during the whole period of 20 years; and the time runs from the day when the actual nuisance began and not when the operation which has been the cause of nuisance began.[16]

2. Apart from prescription, a nuisance may be legalised by *statutory authority*. When a statute expressly authorises an act to be done by a certain person, no action lies for a nuisance which is the *inevitable result* of the making or doing what is authorised.[17] As to the test of inevitability, it was observed—

"....the criterion of inevitability is not what is theoretically possible, but *what is possible* according to the state of scientific knowledge at the time, having also in view *a certain common-sense appreciation*, which cannot be rigidly defined, of *practical feasibility* in view of situation and expense."[17]

§ 6. Liability of Landlord and Tenant for Nuisance

The foregoing pages give the law relating to nuisances, i.e., to wrongs

---

(*Continued from page*)

carried on. Among them was the copper smelting company of the defendants, the fumes from whose works injured the trees and crops on T's estate. *Held*, that it was an actionable nuisance, inasmuch as the fumes caused material injury to the plaintiff's property [*St. Helen's Smelting Co.* v. *Tipping*, (1865) 11 H.L.C. 642 (*650*).

14. The Wagon Mound (No. 2) [*Overseas Steamship Ltd.* v. *Miller Steamship Co.*, (1966) 2 All E.R. 709 (*716*) P.C.].

15. *See* Indian Easements Act, s. 15; Indian Limitation Act, s. 29. But a *public nuisance* cannot be legalised by prescription.

16. The defendant had for *more* than 20 years carried on a noisy business on his premises adjoining the garden of the plaintiff on which there was no dwelling house. Some short time before the action (1873), the plaintiff (a physician) built a consulting room at the foot of his garden, and then found that he was seriously inconvenienced in the use of it by the noise of the defendant's machinery. The defendant pleaded a prescriptive right. *Held*, that the plea of prescription could not stand, because there had been no actual nuisance until the erection of the plaintiff's consulting room, and until then he had no cause of action [*Sturges* v. *Bridgman*, (1879) 11 Ch. D 852.]. (*Note* that if 20 years had run from the building of the consulting room the defendant would have got right by prescription, and the plaintiff could no longer complain.)

17. *Manchester Corpn.* v. *Farnworth*, (1930) A.C. 171 (*183*).

to *adjoining* property. It has got nothing to do with the liability as between the landlord and tenant, or the liability of a landlord for dangerous premises, to persons *coming upon* the premises.

As between landlord and tenant, the general rule is that no action lies against a landlord for any nuisance existing on premises in occupation of a tenant. But the landlord may become liable in some cases, if he has authorised the creation or continuance of the nuisance. Thus the landlord is liable—

(i) If he has contracted with the tenant to repair or reserves to himself the right to enter and execute repairs, and the nuisance is due to want of repair; (ii) if he has let the premises in a ruinous condition, with knowledge of such condition, and without requiring the tenant to repair; (iii) if the nuisance had been created before the premises were let by him; (iv) if he has let the premises authorising the tenant, expressly or impliedly, to cause a nuisance.

§ 7. Liability of Occupier for Nuisance on Premises

1. Though an occupier of a land may not be its owner, he may be liable for nuisance on the land in his occupation from which hazard arises to his neighbours. This liability depends on the fact that it was within his power to remove the hazard as the person was in occupation. The danger, in such a case, may not be from the escape of a dangerous thing from the land, which comes within the Rule in *Rylands* v. *Fletcher*,[18] which will be dealt with separately.

2. It follows from the foregoing principle that the occupier would be liable not only where the nuisance has been created by him or under his authority, but also where it has been caused by a trespasser, if he takes no *reasonable* steps for removing it, after coming to know of its existence.[19] The same principle has been extended to nuisance caused by Act of God.[20]

3. Similarly, an occupier may be liable for having adopted or continued a nuisance which had been in existence on the land from before his occupation, i.e., either by making use of the construction or the like which causes the nuisance or by failing to take reasonable steps to bring it to an end.[19]

4. Of course, the occupier would not be liable where the nuisance could not be abated by taking reasonable steps within his capacity and resources.[20]

---

18. *Rylands* v. *Fletcher*, (1868) 3 H.L. 330.
19. *Sedleigh-Denfield* v. *O'Callaghan*, (1940) 3 All E.R. 349 (H.L.).
20. *Goldman* v. *Hargrave*, (1966) 2 All E.R. 989 (995-96) P.C.

14

Negligence

§ 1. What is Negligence?

1. Negligence, we have stated earlier [*ante*, p. 14], is the breach of a legal duty to take care. While there is a *general* duty not to harm others, there is no general duty to take care about others. For mere omission, therefore, a man is not ordinarily answerable to another. But when there is an antecedent relation which imposes a duty to take care towards another, the omission to take that care will constitute an actionable wrong *if that other suffers injury*. Apart from contract the duty to take care mostly arises from some voluntary act of the party held liable. Thus the general rule is that one who enters on the doing of anything attended with risk to the persons or property of others must use a reasonable measure of care and caution to guard against that risk.

"Actionable negligence" consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property [*Heaven* v. *Pender*, (1883) 11 Q.B.D. 507].

2. Salmond considered 'negligence' as a state of mind which was an element for liability for torts, in general, as an alternative to 'intention'. It is, however, established that negligence is a *specific* tort[1] if the following conditions are present, which must be established by the plaintiff—

(i) that the defendant was under a duty to take care towards the plaintiff to avoid the damage complained of;
(ii) that there was a breach of that duty on the part of the defendant; and
(iii) that the plaintiff has suffered actual damage and that the breach was the direct and proximate cause of the damage complained of.

I. DUTY TO TAKE CARE

1. Conduct which is negligent with reference to one may not be so with reference to another. For, as already stated, there is no negligence unless there is in the particular case a duty to take care. "The law takes no cognisance of carelessness in the abstract. It concerns itself only when there is a duty to take care and where failure of that duty has caused damage" [*Donoghue* v. *Stevenson*, (1932) A.C. 562 (618)].

1. *Donoghue* v. *Stevenson*, (1932) A.C. 562.

(i) The duty must be towards the *plaintiff* himself. "The duty to take care is not in the air, but towards particular people" [*Thomas* v. *Quartermaine* (1887) 18 Q.B.D. 695]. For instance, an occupier of premises is bound to take care towards persons lawfully entering the premises that they are free from danger, but he owes no such duty to a trespasser.

(ii) The duty must be in respect of the particular conduct complained of. The duty to take care is not universal. For instance, a man is under no duty to take care in respect of the truth of his statements unless there is a specific duty by virtue of contract or special relationship.[2]

2. Since the decision of the House of Lords in *Hedley's case*,[3] however, the principle has been amplified to include the following propositions:

(a) Negligence may arise not only from the doing or the omission to do an *act*, but also from a *statement*, even where there is no contract nor any fraud involved;[2] and where the injury resulting from the negligence is not physical but *financial*.

(b) But such duty to take care in making a statement would arise only where there is a special relationship between the parties which gives rise to such responsibility;[3] it would comprise not only 'fiduciary relationship', such as that between solicitor and client, banker and customer, but any business transaction in which the advisor has a financial interest in the matter on which he gives advice,[4] or he is a professional man professing special knowledge or skill,[5] apart from any contractual liability.[5]

(c) Even where there is such special relationship, any responsibility for the statement may be avoided by disclaimer, that is, by stating that the advice was being given 'without responsibility.'[2]

(d) No such liability for negligence would arise in the case of a person who acts in the capacity of an arbitrator, whose decision would be binding upon the parties, as distinguished from a professional adviser.[5] In fact, the immunity extends to all persons exercising judicial or quasi-judicial function.[5]

3. In the final stage, the House of Lord holds[6] that:

(a) In order to establish that a duty of care arises in a particular situation, it is *not* necessary to bring the facts within those of *previous* situations in which a duty of care has been held to exist. The first question to be answered is whether three is a sufficient relationship of proximity or neighbourhood, that in the reasonable contemplation of the wrongdoer, carelessness on his part may be likely cause damage to the plaintiff.

(b) If the foregoing question is answered in the affirmative, are there any considerations which *negate*. *reduce* or *limit* the scope of the duty, or the class of persons to whom it is owed or the damages to which a breach of it may give rise.[6]

---

2. *Hedley Byrne & Co.* v. *Heller*, (1963) 2 All E.R. 575 (H.L.).
3. Cf. *Nocton* v. *Ashburton*, (1914) A.C. 932 (*963-64*) H.L.
4. *Mutual Life Assce.* v. *Evatt*, (1971) 1 All E.R. 150 (*161*) P.C.
5. *Sutcliffe* v. *Thackrah*, (1974) 1 All E.R. 859 (*862, 869, 870, 880, 881*) H.L.
6. *Anns* v. *London Borough*, (1977) 2 All E.R. 492 (*498*) H.L.

II. ABSENCE OF DUE CARE

1. The question whether the defendant's conduct amounts to a breach of duty to take care has to be decided according to the facts of each case.

The STANDARD of due care is the same in all cases,—the standard of an ordinarily careful man : it is 'not the foresight and caution which this or that particular man is capable of, but the foresight and caution of a prudent man —a *reasonable man*, standing in this or that man's shoes'. On the one hand, the standard of due care does not depend on the judgment of the dependant, nor does the law require, on the other hand, that he must exercise the highest degree of care which human nature is capable of. Whether the defendant was negligent is to be determined with reference to a single, invariable standard. Thus, Alderson, B., defined "negligence" as "the omission to do something which a resonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent resonable man would not do" [*Blyth* v. *Birmingham Water Works Co.*, (1856) 11 Ex. 781 (*784*)].

In recent cases, this principle has been formulated as the principle of *reasonable foreseeability*. Thus, in *Donoghue* v. *Stevenson*,[7] Lord Atkin observed—

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".[7]

This principle has been applied by the House of Lords also in the case of *Hay* v. *Young* (see p. 78n.).

The test of foreseeability has, however, to be applied to the '*likelihood*' which is distinct from mere 'possibility'.

> "People must guard against reasonable *probabilities*, but they are not bound to guard against fantastic possibilities".[8]

2. But what a reasonable man would or would not do is to be determined with reference to the facts of each particular case. Though the standard is the same the AMOUNT of due care will be different in different cases. "The degree of want of care which constitutes negligence must vary with the

---

7. *Donoghue* v. *Stevenson*, (1932) A.C. 562.

8. *Fardon* v. *Harcourt-Rivington*, (1932) 146 L.T. 391 (H.L.). Defendant parked his car by the roadside leaving his dog inside. The dog jumped about and broke the glass of one of the windows and a splinter from the glass injured the plaintiff, a pedestrian. *Held*, Defendant was not liable because the injury was due to a bare possibility which could not have been reasonably foreseen.

9. *Latimer* v. *A.E.C. Ltd.*, (1953) 2 All E.R. 449 (H.L.). Owing to an exceptionally heavy rain, a factory was flooded with surface water which became mixed with an oily liquid. When the water drained away from the floor which was structurally perfect it left an oily film on the surface and made it slippery. The respondents (employers) spread sawdust on the floor, but owing to unprecedented storm, the sawdust was displaced and slippery patches were created here and there, as a result of which the appellant (a workman) fell down on one of those patches and was injured. The appellant failed to establish by evidence that having regard to the nature of the risk created by the slippery patches, a reasonably

(*Continued on page 155*)

circumstances" [*Caswell* v. *Powell* (1940) A.C. 152]. A reasonable man, for example, will not show the same amount of care when handling an umbrella as when handling a loaded gun. Thus the amount of care required varies with the *magnitude* of the possible harm that might result from the defendant's conduct.[9]

It would follow, therefore—

(a) The degree of care required varies with the degree of *likelihood* of harm.

(i) Now, in estimating the probability of risk to others, the defendant is entitled to assume, in the absence of anything to show to the contrary, that they have the full use of common faculties, and are capable of exercising ordinary caution. The normal measure of caution, required from a lawful man must be fixed with regard to other men's normal powers of taking care of themselves. Thus, if a driver warns a pedestrian by a shout or a whistle, but the latter fails to hear it by reason of his being deaf and is run over, the driver is not *prima facie* liable for any negligence.

(ii) But if there is notice of such abnormality, a greater degree of care is required. If the driver sees that a blind man[10] or a cripple is crossing the road, he must take more caution than in ordinary cases. If the blind man is run over, it will be no defence for him to say that a young and active man with good sight would have come to no harm. This follows from the ordinary rule that *when the risk is apparent*, a man must take more care than normally. Thus in the leading case of *Glasgow Corporation* v. *Taylor*, (1922) 1 A.C. 44, where poisonous berries were grown in a public park frequented by children, and no precautions were taken to warn the children of the danger of eating them, and a child ate some of the berries and died, it was *held* by the House of Lords, that the owners of the park were liable for negligence, for they owed a 'special duty' to take every precaution to make the park reasonably safe for CHILDREN, as distinguished from adults.

"The duty which the owner of premises owes to the person whom he permits to enter upon them must be measured by his *knowlegde*, actual or imputed of the habits, capacities, and propensities of those persons." [see, further, under § 3, *post*].

But the principle would not be extended to cases where the thing is not *inherently* dangerous[11] or such as to be an allurement to normal children, as distinguished from a 'mischievous boy'.[12] Thus,

(i) There is no inherent danger in leaving unattended in the street, a sound, stationary and immobile vehicle. So, if a child, while playing in the street, climbs on the van and injures himself, the owner of the van is not liable for negligence.[11]

(ii) Where an owner kept a pile of lime mortar in the gutter outside his home and a mischievous boy threw a quantity of mortar from that pile and injured another boy in his

(*Continued from page 154*)
careful employer would have suspended all work in the big factory. *Held*, since the respondents had taken every step that an ordinarily prudent employer would have taken in the circumstances to secure the safety of the appellant, the respondents were not liable in damages for negligence.

10. Cf. *Haley* v. *London Electricity Bd.*, (1964) 3 All E.R. 185 (H.L.).

11. *Donovan* v. *Union Cartage Co.*, (1933) 2 K.B. 71, see p. 19n., *ante*.

eye, *held*, the act of the owner in keeping in the gutter was not unreasonable inasmuch as it was not a dangerous thing or an object of allurement to children and the owner had no reason to apprehend that a mischievous boy would use it to injure another boy.[12]

This principle is sometimes expressed as 'a defendant must take the plaintiff as he finds him'.[13] It means that once it is held that the defendant owes a duty to the plaintiff to take care, he becomes liable to take a *greater degree* of care if it is known to the defendant that the plaintiff suffers some disability or incapacity, e.g., because he is a child or a blind man which would enhance the likelihood of injury and hence require a greater degree of care on his part. But, infirmity of the plaintiff, as such, would not give rise to a duty to take care where there was no such duty otherwise.

(iii) This principle has been extended to hold that in taking precautions, a reasonable and prudent man should be influenced not only by the greater or lesser probability of an accident occurring but also by the *gravity of the consequences if an accident does occur*.[14] Thus, if to the knowledge of the employer, a workman is suffering from a disability which, though it does not increase the risk of an accident occurring while he is at work, does increase the risk of serious injury if an accident should befall him, that special risk of injury is a relevant consideration in determining whether the employer has taken reasonable care for the safety of the individual workman.[14]

(b) In matters *requiring special skill* the degree is higher. The test is whether the defendant has done "all that any skilful person could *reasonably* be required to do in such a case". The very undertaking voluntarily to do an act which can be safely done only through the possession of special skill, by a person who does not possess that skill is a negligent act; for a reasonable man would not intermeddle where he is not competent.

But even in the doing of an act requiring special skill, the standard of care required by the law of torts is not that of the *most* skilful man, but that of a person *reasonably* skilled in that profession. On the one hand, the standard is higher than that of an ordinary man; on the other hand, it is not as high as that of an expert:

"...where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the *ordinary skilled man* exercising and professing to have that special skill... it is sufficient if he exercises the ordinary skill of an *ordinary competent* man exercising that particular art".[15]

This principle extends to medical man, lawyer, architect, engineer and the like.[16]

---

12. *Prince* v. *Gregory*, (1959) 1 W.L.R. 177 (C.A.).
13. *Robinson* v. *Post Office*, (1974) 2 All E.R. 737 (*750*) C.A.
14. *Paris* v. *Stepney B.C.*, (1951) 1 All E.R. 42 (H.L.).
15. *Chin Keow* v. *Govt. of Malaysia*, (1967) 1 W.L.R. 813 P.C.
16. *Greaves* v. *Baynham*, (1975) 3 All E.R. 99 (*104*) C.A.

(c) On the other hand, under compulsion of *necessity*, a greater risk may legitimately be taken.[17]

3. There is no duty to take care where the likelihood of injury is not reasonable foreseeable [*Hay* v. *Young*, (1943) A.C. 92 (H.L.); see p. 78n. *ante*].

"People must guard against reasonable probabilities, but they are not bound to guard against *fantastic* possibilities" [*Fardon* v. *Harcourt-Rivington*, (1932) 146 L.T. 391 (H.L.)].

4. For an act to be negligent there must be, not only a reasonable probability of the *happening* of the event complained of, but also of *injury* being caused by it.[18]

But once it is established that the defendant had a duty to take care and that it was reasonably foreseeable that his act complained of was likely to cause injury to the plaintiff, it would be no defence to the defendant that the danger which actually materialised was not *identical* with the danger which was reasonably foreseen and guarded against,[19] provided, of course, the damage caused was not *too remote*.[20] [see p. 19, *ante*].

III. ACTUAL DAMAGE

(a) It is not enough for the plaintiff to prove that the defendant's conduct has been negligent; he must also prove that actual damage has resulted to

17. To answer an urgent call, firemen took out a lorry which was not adapted to carry a heavy jack, as a result of which the jack fell when the brakes were suddenly applied and injured a fireman. When the emergency call had been received, all the vehicles specially fitted for the purpose were out and the officer in charge had no other way of answering the emergent call than by ordering the lorry to be used. *Held*, that though the defendant Council carrying on the fire service should ordinarily keep proper vehicles, the risk to be avoided by answering the emergent call justified the use of the lorry and so the defendants were not liable for the damage caused to the fireman [*Watt* v. *Hertfordshire* C.C., (1954) 2 All E.R. 368, (C.A.)].

18. *Bolton* v. *Stone*, (1951) 1 All E.R. 1078 (H.L.). During a cricket match a batsman hit a ball which crossed a seventeen feet high protective fence and injured the respondent who was standing on a highway, about 100 yards off from the fence. There was evidence that during a period of 30 years the ball had been hit into the highway only on six occasions but no one had been injured. *Held*, on the facts of the case the risk of injury to a person on the highway resulting from the hitting of the ball was so *small* that the probability of such injury would not be anticipated by a reasonable man. Hence, the action must fail.

19. *Hughes* v. *Lord Advocate*, (1963) 1 All E.R. 705 (H.L.). Post Office employees had opened a manhole to repair a cable and had marked the manhole with four paraffin lamps. A boy playfully took up a lamp to explore, resulting in an explosion of the lamp which caused him injury. The House of Lords held the Post Office was liable, rejecting the contention that though it was reasonably foreseeable that a paraffin lamp could burn, it could not be so foreseen that it would cause explosion. It was observed that it was reasonably foreseeable that an open paraffin lamp might cause injury to a wandering boy in the neighbourhood and the accident that did happen was a 'natural and probable consequence' of that wrongful act. "It is not necessary that the *precise result* should be foreseen" [*Carmarthenshire C.C.* v. *Lewis*, (1955) 1 All E.R. 565 H.L.]. A paraffin lamp was a "potentially dangerous object", unlike a tea urn, which was the subject-matter of the earlier case of *Glasgow Corpn* v. *Muir*, (1943) 2 All E.R. 44 (H.L.). which was thus distinguished.

20. *The Wagon Mound Cases*: No. 1, (1961) 1 All E.R. 404 (P.C.); No. 2, (1966) 2 All E.R. 709 P.C.

him in consequence. While in an action for breach of contractual duty damage is imported from the breach itself, in an action for tort for breach of a duty *not* founded on contract, plaintiff can succeed only on showing that physical damage has been caused to his person or property.

(b) Plaintiff must further prove that the negligent act of the defendant is the 'direct and proximate' cause of the damage. If the casual connection between the negligent act and the damage is not direct, the damage is too remote, for which, we have seen [*ante*, p. 15], there is no remedy at law. The causal connection is remote in a special sense when the defendant's negligence has no doubt been the occasion of the injury, but the immediate cause of it has been the failure to take care by the plaintiff himself. The defendant is guilty of a breach of duty to take care, but had the plaintiff taken reasonable care for his own safety or that of his property such as everybody is expected to take, damage would not have happened. In such a case the plaintiff is not entitled to any remedy. It is a *good defence* for the defendant if he can show that the damage complained of has been due to the 'contributory negligence' of the plaintiff. For example, if A and B drive their cars rashly and without lights in a dark night in opposite directions and collide, none can recover damages from the other.

§ 2. Contributory Negligence

1. Contributory negligence has been defined as "negligence in not avoiding the consequence arising from the negligence of some other person, when means and opportunity are afforded to do so". The term negligence in this context does not, ordinarily,[21] mean any breach of duty to *another*, but only failure *to take reasonable care of one's own self*. Every man has a duty to look after himself, and he will have no remedy for injuries which he might have avoided by the use of reasonable care. As stated in an old case, "one person being in fault will not dispense with another's using ordinary care of himself" [*Butterfield* v. *Forrester*,[22] (1809) 11 East 60].

More recently, Lord Denning[23] has distinguished 'negligence' and 'contributory negligence' as follows:

> "Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to *others*. Contributory negligence is a man's carelessness in looking after *his own* safety."[23]

2. The principle underlying the doctrine has been stated to application of the maxim *'In pari delicto potior est conditio defendentis'*, which means that when both parties are equally to blame, neither can hold the other liable.

---

21. See, however, paragraph 7, *below*.

22. *Butterfield* v. *Forrester*. The defendant wrongfully obstructed a street by placing a pole across it. The plaintiff 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. *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.

23. *Froom* v. *Butcher*, (1975) 3 All E.R. 520 (*524*) C.A.

But the more accepted view is that it is an application of the rule as to remoteness of damage. The law takes account only of proximate causes, —'*In jure non remote causa sed proxima spectatur*'. Though the defendant has in fact been negligent, yet if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence, he cannot recover (Cf. *Pollock*, p. 475). But whatever may be the principle behind it, the rule is clearly one of public policy,—the motive being 'to prevent accidents by inducing each member of the community to act up to the due care set by the law'.

In short,

"He (the plaintiff) is guilty of contributory negligence if he ought *reasonably* to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself."[23]

3. At common law,[24] contributory negligence of the plaintiff is a complete defence to an action for damages for negligence of the defendant, the burden of establishing it being on the defendant.[25]

4. Contributory negligence is, however, no defence where the plaintiff was not bound to take such care as the defendant contends but has a *right to assume* that the defendant had done all things rightly and carefully.

An illustration of this principle is to be found in the House of Lords decision in *General Cleaning Contractors* v. *Christmas* [(1952) 2 All E.R. 1110 (H.L.)], where a window cleaner was injured owing to the negligence of the employer to provide hooks, safety belts, or the like. The employer took the plea that the plaintiff could have avoided the injury by equipping himself with a safety belt. The House of Lords negatived the plea of the employer and held him liable on the ground that where an employee works in the usual manner as the employer expected him to do it and the employer has failed to take the steps necessary to keep the system reasonably safe the employer cannot contend that the employee could have avoided injury by himself taking precautions. He has the right to expect the system to be 'reasonably safe' having regard to the dangers *necessarily* inherent in the operation.

5. Again, 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. This was laid down in *Davies* v. *Mann*[26] [(1840) 10 M. & W. 546]. The rule in *Davies* v. *Mann* was confirmed by the House of Lords in

---

24. In *England*, by reason of the Law Reform (Contributory Negligence) Act, 1945, the plea of contributory negligence has ceased to be a complete defence and has been made a ground for *apportionment* of the damages to be awarded by the Court against the defendant for his negligence. In this book, we are dealing with the common law defence (unless otherwise stated).

25. *Owens* v. *Brimmell*, (1976) 3 All E.R. 765 (*769*); *Heranger* v. *Diamond Co.*, (1939) A.C. 74 (*104*).

26. *Davies* v. *Mann*. The Plaintiff had negligently left his donkey with its legs tied, in the highway, and the defendant subsequently coming with his wagon at a smart pace negligently ran over the donkey. *Held*, the plaintiff was entitled to his remedy, notwithstanding any negligence on his part inasmuch as the accident might have been avoided by the exercise of ordinary care on the part of the driver, i.e., by going at such a pace as would be likely to avoid the mischief. "Although the ass may have been wrongfully there, still

(*Continued on page 160*)

Radley v. *London & N. W. Ry. Co.* [(1876) 1 A.C. 74], where Lord Penzance stated it thus, "Though the plaintiff may have been guilty of negligence and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him." Read with this qualification, the rule of contributory negligence therefore amounts to this—*He who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible.*[27] So stated, the rule is in fact an application of the rule of *remoteness*. The law takes account only of the proximate or decisive cause. If the plaintiff and the defendant were both in default, the determining question is, 'who is it that had been negligent at the *final* stage; without whose negligence the mischief might not have happened'?[28]

The law on the subject was summarised by the House of Lords in the case of *Swadling* v. *Cooper* [(1931) A.C. 1] thus—

"The law in these collision cases has long been settled. In order to succeed, the plaintiff must establish that the defendant was negligent and that negligence caused the collision of which he complains. If it is established from his own evidence, or by evidence adduced on behalf of the defendant, that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails, because his injury is due to his own

(*Continued from page 159*)

the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this is not so, man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

27. For instance, B is driving on the wrong side of the road. A, driving on the same side in the opposite direction, runs into B's carriage though with ordinary care he might keep clear of B. A will be liable to B (*Pollock*). The reason is explained thus—"A and B are drivers of carriages approaching one another. Each is entitled to assume that the other will drive competently and observe the rule of the road, but when it becomes manifest to A that B is driving on the wrong side, or otherwise negligently, A must take such precautions as are reasonably fitted, having regard to B's conduct, to avoid a collision.

On the other hand, it cannot be said that where (at night) there is an unlighted obstruction in the roadway, a careful driver of a motor vehicle is bound to see it in time to avoid it and must therefore be guilty of negligence if he runs into it. There is no rule of law which in every case disqualified a motorist from recovering damages where he had run into a stationary unlighted object. The question of his contributory negligence will depend upon the facts of each case; for, the visibility of an unlighted obstruction to a person driving a lighted vehicle along the road must depend on a variety of facts such as the *colour* of the obstruction, the background against which it stands and the light coming from *other sources* [*Stewart* v. *Hancock*, A.I.R. 1940 P.C. 128].

28. *British Columbia Electric Ry. Co.* v. *Loach*, [(1916) 1 A.C. 719]. Sands was travelling in a wagon driven by his friend Hall. They drove it across a level crossing at a speed of 35 to 40 miles, though they could clearly see an electric train of the defendant company coming. The driver of the train first saw the wagon when his train was 400 ft. from the crossing and he at once applied his brakes. He could have stopped the train, but the brakes were defective and the train knocked the wagon and killed Sands. The representative of the deceased (L) sued the Co. for damages. *Held*, by the Privy Council, on appeal from Canada, that the Co. was liable notwithstanding the contributory negligence of Sands as the Co. had by its own negligence, in sending out the train with defective brakes, deprived itself of the last opportunity to avoid the accident.

negligence in failing to take reasonable care. If, *although the plaintiff was negligent*, the defendant could have avoided the collision by the exercise of reasonable care, than it is the defendant's failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover."

In this case, the defendant was driving his car at a speed of thirty miles per hour on a main road, when a motor cyclist came from a side road without warning and collided with the car and was killed. *Held*, the defendant was not liable.

6. The soundness of the 'last opportunity' test founded on *Davies* v. *Mann* has, however, been questioned by the House of Lords in *Admiralty Commissioner* v. *North of Scotland* [(*Boy Andrews* v. *St. Rognvald*) (1947) 2 A.E.R. 350 (H.L.)]. Their Lordships quoted with approval the statement of the Law Revision Committee, 1939:

"In truth, there is no such rule—the question, as in all questions of liability for a tortious act, is, *not*, who had the last opportunity of avoiding the mischief, but *whose act caused the wrong*."

The decision in *Davies* v. *Mann* was also explained thus : The negligence of the absent donkey owner, serious as it was, created a *static* position where nothing that he could do when collision threatened would have avoided the result whereas the negligence of the driver of the vehicle continued *right up to the moment* when the collision became inevitable. As by driving more carefully he could have avoided hitting the donkey, his negligence was the *sole cause*. The negligence of the donkey-owner was, therefore, a fault *not contributing* to the collision. It was merely a *causa sine qua non*.

The *causation* test is, in fact, the test followed in recent cases. Thus, in the case of *Stapley* v. *Gypsum Mines*, [(1953) 2 All E.R. 478 (H.L.)], the House of Lords formulated the test as follows : "whose negligence is the sole 'real' or 'effective' cause of the accident?" In this case, the House of Lords approved the observation of Viscount Birkenhead in an earlier case [*Admiralty Commissioners* v. *Volute*, (1922) 1 A.C. 144]:

"The question of contributory negligence must be dealt with somewhat broadly and *upon commonsense principles* as a jury would probably deal with it. And while, no doubt, *where a clear line can be drawn*, the subsequent negligence is the only one to look to, there are cases in which the two acts come *so closely together*, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame.... might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a cause of contribution."

In every case, therefore, the commonsense test is to be applied, viz., whose negligence has been the *effective cause* of the accident which has resulted in the damage claimed.[29]

7. Another controversial topic relating to contributory negligence is whether the existence of a duty is necessary to raise the plea. The position has been authoritatively summarised by the Privy Council in *Nance* v. *British Columbia Ry. Co.* [(1951) 2 All E.R. 448 (P.C.)] thus:

(i) When negligence is alleged, as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a *duty* owed by

29. *Sigurdson* v. *Br. Columbia Electric Ry.*, (1953) A.C. 291 (P.C.); *Rushton* v. *Turner*, (1959) 3 All E.R. 517 (*521*).

the defendant to the plaintiff to take due care. But when contributory negligence is set up as a defence, its existence does not, generally depend on any duty owed by the injured party to the party sued and all that is necessary to be shown in order to establish such defence is that the injured party *did not* in his own interest *take reasonable care of himself* and contributed, by his want of care, to his own injury. The principle underlying the defence of contributory negligence is that where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

(ii) In cases relating to 'running-down accidents', however, the question of duty to take care in relation *to the other party* does, in fact, come in. The general principle in such cases is : "When two parties are so *moving* in relation to one another as to involve risk of collsiion, *each owes a duty* to the other to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle."

If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, e.g., if the individual's *rashness* causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind, or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care.[30]

8. In ENGLAND, the doctrine of contributory negligence has undergone a great shock by the passing of the *Law Reform (Contributory Negligence) Act*, 1945, which has introduced the principle of apportionment of liability in all cases of contributory negligence, which was before this Act confined to Admiralty proceedings only. After the passing of this Act, the common law rule which applied before, viz., that parties guilty of negligence had no claim has *disappeared*, and the Court has to assess the liability of both parties, and *apportion the damages* accordingly:

The Act provides—

"Where any person suffers damage as the result partly of his own fault and partly of any other person or persons, a claim in respect of that damage *shall not be defeated* by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall 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."

Thus, if both parties are equally guilty of negligence, only 50 per cent of the damages recoverable for the injury will be awarded to the plaintiff, and it will be further reduced as his share in the responsibility for the accident increases. But, in determining whether there has been contributory negligence in any case, the common law principle of causation is still employed, and after it is

30. *Nance* v. *Br. Columbia Ry. Co.*, (1951) 2 All E.R. 448 (P.C.).

found that there has been contributory negligence, the damages are apportioned in terms of the statute.[31]

In INDIA, there has been no such legislation, so that where contributory negligence is established, plaintiff cannot recover any damages, as under the English common law rule.

§ 3. Contributory Negligence of Children

The defence of contributory negligence is more difficult to make out against a child than against an adult. When the plaintiff is a child, he will not be disentitled to relief merely because he has failed to show as much care as a person of mature age. Allowance must be made for his inexperience and infirmity of judgment [*Lynch* v. *Nurdin*,[32] (1841) 1 Q.B. 29]. This rule is sometimes expressed in the form 'contributory negligence of a child is no defence'.[33] This statement however is not to be literally accepted, but only as meaning that what amounts to contributory negligence in a grown-up person may not be so in a child of tender years. This has also been recognised by the House of Lords in *Glasgow Corporation* v. *Taylor*,[34] [(1922) 1 A.C. 44; see p. 150, *ante*]. In this case it was observed:

"The presence in a frequented place of some object of attraction tempting a child to meddle where he ought to abstain, may well constitute a 'trap', and in the case of a child *too young to be capable of contributory negligence* it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and attractiveness of the peril of the object."

Hence, the age and mental development of the child becomes relevant.

§ 4. The Doctrine of Identification

1. According to the ordinary rule of liability contributory negligence of

---

31. In short, while *before* 1945 a plaintiff who was guilty of contributory negligence was *disentitled* from recovering anything if his own negligence was one of the substantial causes of the injury, *after* 1945 he is no longer defeated altogether; he gets *reduced* damages [*Froom* v. *Butcher*, (1975) 3 All E.R. 520 (*524*) C.A.].

32. *Lynch* v. *Nurdin*. The defendant negligently left his horse and cart unattended in the street. The plaintiff, a boy of seven, climbed on the cart in play, while another child led the horse on, and the plaintiff was thrown down and hurt. *Held*, the defendant was liable.

33. By an untrue statement, a boy aged 9 years pevailed upon the employee of the defendant company to obtain some quantity of petrol. The children used the petrol for enacting a Red Indian scene, in course of which the boy was burnt. *Held*, the defendant company was liable for negligence; for, the defendant's employee having given an explosive substance to a boy who had limited knowledge of the likelihood of explosion and its possible effect, and the boy having done what a child of his age might be expected to do, the defendants could not avail themselves of the defence of contributory negligence. The fact that the boy's statement was untrue did not make any difference because the untrue statement was such as to arouse suspicion [*Yachuk* v. *Oliver*, (1950) 1 A.E.R. 150 (P.C.)].

34. *Glasgow Corporation* v. *Taylor*. T brought this action against the corporation for damages for death of his son who died as a result of eating 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 opened by children. The defendants knew that the berries were a deadly poison but took no precaution to warn children of the danger or to prevent them from picking them. *Held*, they were liable.

the plaintiff's servants is imputed to the plaintiff, in cases where the plaintiff would be responsible for the negligence of such servants. But the contributory negligence of an independent contractor of the plaintiff is no bar to his action. An anomalous extension of the doctrine was, however, made in what has been called the doctrine of 'identification' propounded in *Thorogood* v. *Bryan* [(1849) 8 C.B. 115], according to which, if a person voluntarily engaged another person to carry him, he so identified himself with the carrier as to be precluded from suing a third party for negligence in cases where the carrier was guilty of contributory negligence. Thus, if a passenger in an omnibus was hurt in a collision with another omnibus by the negligence of both drivers, he could not, according to this doctrine, succeed in an action against the owner of the other omnibus, because he was considered as so identified with the driver of the omnibus in which he voluntarily became a passenger that the negligence of that driver was a good defence against him.

2. This unreasonable doctrine has however been EXPRESSLY OVERRULED by the House of Lords in *The Bernina Mills* v. *Armstrong*, [(1888) 13 A.C. 1], a case of collision between two ships at fault, where it was *held* that action lay by a passenger against the owner of both the ships. It was laid down that "where damage is sustained by the concurrent negligence of two or more persons, there is a right of action against *all or any* of them at the plaintiff's option, and the exception of contributory negligence extends only to the acts and defaults of the plaintiff himself, or of those who are really his *agents*". The passenger in one of two colliding buses, for example, can recover damages not only from the owner of the bus of which he was passenger, but also from the owner of the other. Thus it has been established that *contributory negligence of a third person* is no defence.

3. A special application of the doctrine of identification was made 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 a third person as well as the contributory negligence of the custodian. Thus, in *Waite* v. *N.E. Ry.*, [(1859) E.B. & E. 719], where a little boy of five was knocked down in crossing the line with his grandmother, it was *held* that the little boy was so identified with his grandmother that her negligence was his, and so he was disentitled from recovering by reason of contributory negligence.

But the decision in *Waite's case* has been OVERRULED in the latter case of *Oliver* v. *Birmingham & Midland Omnibus Co.*,[35] (1933) 1 K.B. 35, in which it was held that the doctrine of identification as propounded in *Thorogood's case* having been overruled by the case of *the Bernina* (see above), the decision in *Waite's case* is no longer good law. Hence, the contributory negligence of a *third* person is no defence in any case and neither the young, the maimed nor the blind are identifiable with those in whose care they may happen to

35. The plaintiff, a child aged four, was crossing a road with his grandfather who was holding his hand. They had reached the middle of the road when the grandfather was startled by the approach of the defendant's omnibus and released the child's hand and jumped aside to a place of safety. The child was struck down and hurt. *Held*, the child could recover [*Oliver* v. *Birmingham & Midland Omnibus Co.*].

be, so as to lose the right to recover damages for injury caused by the combined negligence of a stranger and his custodian.

Of course, as has been already stated, the child himself may be guilty of contributory negligence in exceptional cases [pp. 157-58, *ante*].

§ 5. Burden of Proof in Action of Negligence

1. The general rule is that in an action of negligence the burden of proof is on him who complains of negligence. The plaintiff must establish a breach of duty to take care and its causal connection with the injury complained of. If he fails to prove either, his action fails. He must not only show that he suffered harm in such a manner that it might be caused by the defendant's negligence, but must also prove facts inconsistent with due diligence on the part of the defendant [*Wakelin* v. *L. & S. W. Ry. Co.*,[36–37] (1886) 12 A.C. 41].

2. The exceptions are—

(1) Where there is a contract or personal undertaking to take care between the parties. The onus in these cases is on the defendant to prove that the loss or damage was not due to his negligence. For example, a train stopping at a station overshoots the platform so that the front carriages stop at an inconvenient or dangerous place, and a passenger bound for that station, unaware of the inconvenience of the place, gets down and suffers an injury. Here, the passenger is entitled by his contract with the railway company to reasonable facilities for alighting, and so the company will be liable unless they can show that they were reasonably diligent in affording such facilities [*Cockle* v. *S.E. Ry. Co.*, L.R. 7 C.P. 321].

(2) Where the facts proved or admitted amount to a *prima facie* evidence of negligence on the part of the defendant. Such are the cases technically referred to by the phrase *res ipsa loquitur*.

§ 6. Res Ipsa Loquitur

1. The rule that in an action of negligence the plaintiff must affirmatively prove negligence may cause hardship in cases where the plaintiff can

---

36. A man was found run over on a railway line near a level crossing. The plaintiff simply alleged but could not prove that he was run over by *negligent driving*. *Held*, "mere allegation without proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions which might possibly have occasioned injury to somebody, but had no connection with the injury for which redress is sought; and therefore, the plaintiff must allege and prove not merely that they were negligent, but that their negligence caused or materially contributed to the injury." Lord Halsbury observed, "What is there to show that the train ran over him rather than he ran against the train?" [*Wakelin* v. *L. & S. W. Ry. Co.*].

37. An employee, who worked as a machine oiler, contracted dermatitis as a result of constant contact with oil. In an action for damages against the employer, the employee proved that other employers commonly supplied 'barrier cream' to similar works as a precaution against dermatitis but that the defendant had not supplied that cream to the plaintiff. It was found that there was a difference in medical opinion as to the efficacy of the cream, as a preventive for dermatitis and the plaintiff failed to prove that the cream, if supplied, would have probably prevented him from contracting the disease. *Held*, the defendant was not liable [*Brown* v. *Rolls Royce Ltd.*, (1960) 1 W.L.R. : (1960) 1 All E.R. 577 (H.L.)].

prove the accident, but cannot show how it happened, the facts being solely 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 itself speaks). 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 rule was thus stated in *Scott* v. *London Docks Co.* [(1865)] 3 H. & C. 596]—

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, *and the accident is such as in the ordinary course of thing 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], for example, where a barrel of flour fell from a window in the defendant's warehouse and knocked down the plaintiff, a passer-by in the street below, it was *held*, that the accident alone was *prima facie* evidence of negligence.

"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 witnesses from the warehouse to prove negligence seems preposterous. So in building or repairing a house, or putting post in 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."

In other words, where damage is done by the falling of objects into a highway from a building, the accident, in the absence of explanation, is of itself evidence of negligence.

2. The foundation of the doctrine of *res ipsa loquitur* is that the operation of the thing which caused the accident was at the time *wholly* under the control of the defendant. This must be *prima facie* established by the plaintiff before the doctrine may be invoked. Thus, in *Easson* v. *London & N. E. Ry.*, (1944) 2 All E.R. 425 (C.A.),—the plaintiff, a boy, fell through a door on the *off-side* of the train while the train was running between two stations. The door was provided with a safety catch which would have prevented the door from flying off even if it had been improperly shut. It could be opened only from outside. It was an express train and the people were getting in and getting out at stopping places. In this case, the accident could happen only if some person had interfered with the safety catch from outside at some intermediate stopping place. *Held*, that though it was the duty of the railway company to see that the doors were properly fastened before the train leaves a station, there is no such duty to inspect the *off-side* doors at every stop, particularly if the doors are provided with a safety catch or some such modern invention. It was observed that *Gee* v. *Metropolitan Co.* did not lay down any such general proposition. It only laid down that it is the duty of the railway company to have the train in a fit condition before it starts on the journey or leaves a station. The duty is one of *reasonable* inspection and care.

3. Another point which has to be established by the plaintiff to invoke

this rule of presumption is that the accident is of such a kind that it does not, in the ordinary course of things, happen if those who have the management use proper care [*Scott* v. *London Docks Co.*, (1865) 3 H. & C. 596 (*601*)]. The rule has thus been applied not only to accidents resulting from the fall of materials from buildings but also to accidents resulting from defective machine, apparatus or vehicle [*Ballard* v. *North Br. Ry. Co.*, (1923) S.C. 43 (H.L.)].[38]

4. Once the above conditions are satisfied, it is for the defendant to rebut the presumption of negligence.[39] This does not mean that he must prove how and why the accident happened; it is sufficient if he satisfies the Court that he was *not* negligent and had exercised all reasonable care. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered; yet if the Court is satisfied by his evidence that he was not negligent, the plaintiffs' case must fail.[40] But the defendant's onus is not discharged merely by showing that the accident could have happened owing to *hypothetical* causes consistent with his absence of negligence, but he must go further and show either (i) that he has not been negligent, or (ii) that the accident was due to a specific cause not connoting his negligence.[41]

5. But the doctrine of *res ipsa loquitur* in nothing but *a rule of evidence* affecting onus of proof, viz., that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence, was by itself presumptive evidence of negligence,—in the absence of explanation of an accident. But, although it is the duty of the defendant to give adequate explanation, the facts speak for themselves, and then the solution is to be found by determining whether or not on the established facts, negligence was to be inferred.[42]

§ 7. Liability of Master towards Servant

The special defences open to an employer in an action for negligence brought by a servant against his own master have already been discussed (pp. 33–35, *ante*).

Under the present head, the duty of the master to take care, apart from statutory provisions,[43] will be explained in greater detail.

At common law, a master owes a special duty to his servant to take reasonable care for his servant's safety.[44] This duty consists of several elements:

(i) The master has a duty to his servant to take care to provide adequate

38. Breach of a canal bank [*State of Punjab* v. *Modern Cultivators*, A.I.R. 1965 S.C. 17].
39. *Swan* v. *Salisbury Construction Co.*, (1966) 2 All E.R. 138 (*141*) P.C.
40. *Woods* v. *Duncan*, (1946) A.C. 401 (*439*) H.L.
41. *Moore* v. *Fox*, (1956) 1 All E.R. (C.A.).
42. *Barkway* v. *S.W. Transport*, (1950) 1 All E.R. 392 (H.L.).
43. Which will be dealt with in Chap. 15, *post*.
44. *Cavanagh* v. *Ulster Weaving Co.*, (1959) 2 All E.R. 745 (*750*) H.L.

plant and appliances for the work and to maintain them in proper condition.[45]

(ii) The master has a duty to provide and maintain a reasonably *safe place* of work, which duty requires a higher degree of care than what is required of the owner or occupier of premises to an invitee.[46]

(iii) The master is under a duty to take reasonable steps to provide a *system* of work which will be reasonably safe, "having regard to the dangers necessarily inherent in the operation".[47]

(iv) The master is bound to take due care in *selecting* proper and competent persons for the work.

The duty, in short, is—"threefold—the provision of a competent staff of men, adequate material, and proper system and effective supervision."[45]

(i) *Master's Duty to provide Reasonably Safe Premises.* A master must take reasonable care as to the safety of the premises where the workmen are to work and must also clearly warn him of any danger that could be reasonably foreseen.[48]

(ii) The master is bound to take reasonable care to provide *safe appliances*, and to maintain them in a proper condition [*Smith* v. *Baker*, (1891) A.C. 325 (*362*) H.L.]

But where a master exercises reasonable care to purchase from a reputed dealer a tool which had a *latent* defect not discoverable on inspection, which was due to the negligence of the *manufacturers* with whom the employers had no contractual relationship and to whom the employers had not delegated the performance of any duty which the employers were to perform, the master would not be liable for damage caused by the defective tool to his workman, because he had not failed to take reasonable care [*Davies* v. *New Merton Board Mills*, (1959) 1 All E.R. 346 (H.L.)]. In other words, the liability of the master is not one of absolute insurance so as to include vicarious liability for the negligence of persons with whom he had no contractual relationship.[49] Em-

45. *Wilsons Co.* v. *English*, (1937) 3 All E.R. 628 (*642*) H.L.

46. *London Graving Co.*, v. *Horton*, (1951) 2 All E.R. 1 (*5*) H.L.

47. *General Cleaning Contractors* v. *Christmas*, (1953) A.C. 180.

48. *Ward* v. *Hopkins*, (1958) 3 All E.R. 225 (C.A.). A company, of which H was the director, undertook the work of clearing water from a deep well. After the pump had worked for some time, a haze of fumes was visible in the well. The working of the petrol engine of the pump also created a dangerous concentration of carbon monoxide. He noticed the fume and next morning he sent the workmen, as usual, to work in the well, with the words 'Don't go down that bloody well until I come'. A workman who went down the well was overcome by the fumes and a doctor who went down to rescue him was also overcome by the fumes and both died. *Held*, the company was liable in damages for causing the death of both the workman and the doctor:

(a) So far as the workman was concerned, the negligence consisted in not appreciating the great danger that he created in the well by operating a petrol engine pump, without taking expert advice on the proper method of emptying the well and, even after he had notice of the actual danger, he had not given *clear* warning to the workman of the deadly danger to which he might expose himself in descending the well.

(b) As regards the doctor, the defendants were held liable because the doctor's death was a 'natural and probable consequence' of the defendant's negligence towards the workman.

49. *Davies* v. *New Merton Board Mills*, (1959) 1 All E.R. 346 (H.L.).

ployers have to act as reasonable people and take reasonable care and even where they buy their tools from well-known makers, they are entitled to assume that the tools will be proper for the purpose for which both sides intended them to be used except where the article is of such a nature as requires inspection or test after delivery and the defect is discoverable on such inspection or test.[49]

(iii) A workman has the right to expect that the *system of work is* reasonably safe, having regard to the dangers which are *necessarily inherent* in the *working* of the system[50] or the operations involved or, in other words, not to expose him to 'unnecessary risks' [*Kimpton* v. *Steel Co.*, (1960) 2 All E.R. 274 (*279*) H.L.].[51] The duty in this case, as in others, is to take reasonable care, having regard to the nature of the operations involved:

(a) Where the system or mode of operation is *complicated* or *highly dangerous*, or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted.[51]

(b) On the other hand, where the operation is *simple*, and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the workmen on the spot.[51]

Where a complaint of failure to provide a safe system of work is made against an employer, a distinction has to be made between a case where sufficient and adequate provisions have been made, which will, if carried out, protect the workman unless one of his fellow workmen does not use proper care in carrying out the system, and a case where the *system itself makes* no such provision.[51]

(c) The standard of care required of the employer may also vary with the knowledge and experience of the workman. Thus, where the employers had kept a stock of protective spats to the knowledge of the plaintiff and which would be available to him for the asking but the employers had not advised the plaintiff to wear them, *held*, that the plaintiff could not recover damages for injury caused by the splashing of molten metal in the foundry because the plaintiff could have avoided the injury by wearing the spats and that he was so experienced in the work that the employers could not be held guilty of negligence in not giving him the warning to use the spats.[52]

(d) The duty of the employer to provide a safe system of work continues even when the employer sends his men to work on the premises belonging to others and if he knows or ought to know of a danger on the premises to

50. *General Cleaning Contractors* v. *Christmas*, (1952) 2 All E.R. 1110 (H.L.).

51. *Winter* v. *Cardiff R.D.C.*, (1950) 1 All E.R. 819 (H.L.). In this case, the respondent District Council employed certain men, including the appellant, under a competent foreman, to transport a heavy electricity regulator on a lorry. A rope was provided to secure the regulator, but neither the men nor the foreman saw fit to use it. As a result, the regulator slipped from the lorry and the appellant was injured. *Held*, that having regard to the nature of the work to be done, a proper system had in fact been provided by the employer, namely, a rope to secure the regulator and competent supervision.

52. *Qualcast* v. *Haynes*, (1959) 2 W.L.R. 510 (H.L.).

which his men are sent to work, he ought to take reasonable care to safeguard them from it.[53]

(e) Contributory negligence of the workman is no defence where a master has failed in his duty to provide a safe system of work.[54]

(iv) *Master's Duty to provide competent Staff.* 1. At common law, the scope of this head of liability was narrowed down by the application of the doctrine of 'common employment'. This doctrine laid down that though the master was under a duty to take care to select competent persons for the work in which a servant was engaged, he was under no duty to *warrant the competency* of the servants engaged in the work. Hence, if a servant was injured by a *fellow-servant* engaged in a 'common employment', the injured servant could not recover damages from the master [see p. 35, *ante*].

As stated earlier (p. 36, *ante*), the doctrine of 'common employment' has been abolished by the Law Reform (Personal Injuries) Act, 1948 (see p. 36, *ante*). Hence, now an employer will be vicariously liable for injury caused by a servant to another fellow-servant in the same way as for injury caused by the servant to a stranger.

2. Where the master is under a duty to take care in any of the foregoing matters, he cannot get rid of his responsibility by delegating the performance of it someone else, no matter whether the delegation be to his servant under a contract of service or to an independent contractor under a contract for services.[55-56]

3. But the master can absolve himself of liability if he can establish that the servant contracted to take the risk [*Bowater* v. *Rowley Council* (1944) 1 All E.R. 465].

§ 8. Liability of Common Carriers

(A) CARRIERS OF GOODS

1. A common carrier is a person engaged in the business of transporting for hire, from place to place, goods of all persons *indiscriminately* [*Mors* v. *Slew*, (1671) 1 Ventr. 190]. One who carries the goods of particular persons on special contract and does not profess to carry the goods of any member of the public, is a 'private', not a common carrier.

"A common carrier is one who holds himself out as being for hire to transport from place to place the goods of anyone wishing to employ him"[57] (*Halsbury*).

2. Common carriers of land are railways, omnibuses, etc., which carry goods of the public from place to place on hire. Ships carrying on such business on sea are common carriers by water. But Government engaged in such business is not a 'common carrier'.

3. At Common Law, while an ordinary carrier of goods was liable only as a bailee, a *common* carrier of goods was liable as an insurer of such goods, i.e., for

53. *Smith* v. *Austin Lifts*, (1959) 1 All E.R. 81 (*94*) H.L.

54. *General Cleaning Contractors* v. *Christmas*, (1952) 2 All E.R. 1110 (H.L.).

55. *Cassidy* v. *Minister of Health*, (1951) 1 All E.R. 574 (C.A.).

56. *Davies* v. *New Merton Board Mills*, (1959) 1 All E.R. 346 (*351*) H.L.

57. This definition is substantially adopted in INDIA in sec. 2 of the Carriers Act, 1865.

all loss or damage, irrespective of negligence. The only exceptions were—Act of God or King's enemies, inherent vice or other defects of the goods, or contributory negligence.

4. A carrier of goods is, however, free to limit his stringent obligations by special contract unless there are any statutory provisions curtailing that freedom of contract [*Peek* v. *N. Staffordshire Ry. Co.*, (1863) 10 H.L.C. 473].

5. Both in England and in India, the strict common law liability of a carrier of goods has been relaxed by statute. Thus, the Indian Carriers Act (III) of 1865, limits the liability of the carrier in the case of certain specified goods, e.g., jewellery, coins, precious stones, etc.

As regards Railways, the Railways Act (24) of 1989, has laid down detailed principles relating to the liability of railways, thereby replacing the application of English common law, or the provisions of the Carriers Act. Sec. 7, Carriers Act was repealed by the Railways Act, 1879.

6. The scope of the Carriers Act and the Railways Act may be explained with reference to the legislative history of the cognate statutes:

(1) Prior to 1865, the liability of carriers was governed by the English common law.

(2) The law was partially codified by enacting the Carriers Act, 1865, which would be applicable only as regards carriers who could come within the definition of *'common carriers'* in s. 2 of that Act (see *below*).

(3) The common law relating to contract was later codified in the Indian Contract Act, 1872. Nevertheless, it was held that common carriers continued to be governed by the special provisions in the Carriers Act, and not the Contract Act.[58]

(4) While the Carriers Act applied to contracts of carriage of property by land or inland navigatoin, so far as carriage by *railway* is concerned, the provisions of the Carriers Act were replaced by those of the Railways Act, 1879 and the current Act relating to Railways is the Railways Act, 1989. Similar special Acts have been passed to cover carriage of goods by sea [Carriage of Goods by Sea Act, 1925] and by air [Carriage by Air Act, 1972] (which has been extended to internal transport as well, by a notification of 1964).

(5) The points of difference in the applicability of the Carriers Act and the Railways Act as they stand amended are—

(i) Both Acts apply to the whole of India, but while the Carriers Act applies only to the carriage of goods (property), the Railways Act includes principles of liability for carriage of goods as well as passengers.

(ii) The Railways Act is applicable only if the goods, animals or passengers are carried by a 'railway' as defined in s. 2(31) of the Railways Act, which term includes even ferries, ships, boats and rafts which are owned, hired or worked by the Railway administration and used for the purposes of traffic on the railway on inland waters. Carriage of goods or animals by common carriers on land or inland waters by any means of transport other than a railway would be governed by the

58. *Irrawady Flotilla* v. *Bhagwandas*, (1891) 18 Cal. 620 (*627, 630*) P.C.

Carriers Act, e.g., by a roadways company [cf. *Assam Railways* v. *National Ins. Co.*, A.I.R. 1979 Cal. 178] or by a steamer service.[59]

(iii) The principles of liability under the two Acts had become different when the Indian Railways Act, 1890 was enacted repealing the earlier Railways Act. But by the amendments made in 1961 and by the Railways Act, 1989, the broad principles under the two Acts have become similar.

(a) The liability of the common carrier or railway is, in general, that of an insurer, so that in case of loss, etc., negligence or misconduct need not be proved by the plaintiff but railways' liability has been limited by several sections of the Railways Act introduced in 1949 and 1961 and in the Railways Act, 1989.

(b) But if the goods are valuable, the liability would be governed by special rules. The Carriers Act has listed such goods, but the Railways Act has prescribed a specific value in relation to weight, presently Rs. 50 per kg, beyond which the liability is limited unless extra percentage charge is paid on the excess value.

(c) The Railways Act, on the other hand, enables the Railway to reduce its liability by offering the owner a lower rate for the goods, known as 'the owner's risk rate'. There is no such provision in the Carriers Act.

But in the Carriers Act, there is provision enabling the carrier to reduce his liability by special contract. In the Railways Act the liability is reduced by statutory provisions.

(6) We may now proceed to analyse the main provisions of the two enactments:

A. Liability of a common carrier other than a Railway, in India.

1. The definition of a 'common carrier' in s. 2 of the Indian Carriers Act substantially follows the English common law concept, which has already been gien at p. 170, *ante*. The ingredients are—

(a) It includes any 'person', including an association, but excluding the Government.

(b) Such person must be engaged in the *business* of transporting property, from place to place. This would exclude any *casual* occupation, or a contract relating to a particular transaction or occasion.

(c) The contract must be for *hire*. It would not, therefore, include any gratuitous offer to transport.

(d) A common carrier is to be distinguished from a private carrier. A private carrier is one who undertakes to convey the goods of another *particular* person on a particular occasion or occasions; but a common carrier offers to do the same '*for all persons indiscriminately*'. Whether the business of a particular carrier is that of a private carrier or a common carrier is to be determined by what he *publicly professes*. He may profess to be common carrier either (a) by a public notice or (b) by actual indiscriminate carrying of goods, even though such carriage may be limited to particular kinds of goods or to particular routes or between two specified points.[59] In the absence of an express public notice, therefore, the *usual conduct* of the carrier becomes a material test.[59] Of course, a common carrier may restrict his liability under the Act by a 'special contract'; but the absence of a special contract in a

59. *R.S.N. Co.* v. *S.S. Tea Co.*, AIR 1962 S.C. 1276 (paras. 9, 11, 14).

particular case cannot show that he is not a common carrier.[59] The true test is whether he holds himself out as a person who is free to choose his customers or who would carry the goods of *any* person who pays him the hire. Since it is his business to transport for anyone who wishes to employ him, a common carrier *cannot refuse*[60] to carry the goods of any person who pays the hire, unless, of course, his conveyance is already full or the goods are not of such a nature that the carrier ordinarily professes to carry, or the destination is outside his usual route.

(e) The transportation must relate to property, e.g., goods, money, documents.

(f) The business of transportation must be by land or *inland* navigation, excluding railways.

2. The *general principle* of liability of a carrier is that of an 'insurer of goods'. This follows from ss. 6, 8, 9, which say that—

(a) The liability of a common carrier shall not be deemed to be limited by any public notice. But it may be limited by special contracts. Notwithstanding such contracts a common carrier shall be liable to the owner of the goods, for *loss or damage* to the goods caused by the negligence or criminal act of the carrier or his servants (s.8);

(b) But it will not be necessary for the owner to prove such negligence or criminal conduct of the carrier or his servants (s. 9).

This means that negligence is presumed from the very fact of loss or damage of the goods which had been entrusted to the carrier.

3. The foregoing general principle is subject to two riders:

I. In the case of certain articles such as gold, articles of art, narcotics etc. (which are specified in the 2nd Schedule of the Act), if the value of the articles exceeds Rs. 100, the carrier shall have no liability unless the value and description of the articles are declared by the consignor at the time of their delivery to the carrier for carriage (s. 3).

This provision, however, would exempt the carrier from loss or damage caused by operational factors only where the carrier had taken due care. But it would not protect the carrier from injury caused by the negligence or criminal act of the carrier or his agents or servants, because the provision in s. 8 (*see* above) is an *overriding* provision which applies—

"notwithstanding anything hereinbefore contained".

II. If the goods are outside Sch. 2 (i.e., goods not involving special risk), the carrier may limit his liability by a 'special contract' signed by the consignor or his agents (s. 6).

Here again, there would be no exemption from loss or damage caused by the negligence or criminal act of the carrier or his men, because, as stated *above*, s. 8 *overrides* s. 6. The net result is that there are two categories of liability under the Carriers Act :

(a) Loss caused by *negligence or criminal conduct*, for which the carrier would

59. *R.S.N. Co.* v. *S.S. Tea Co.*, AIR 1962 SC 1276 (paras 9, 11, 14).

60. *I.G.N.R. Co.* v. *Dekhari Tea Co.*, A.I.R. 1924 P.C. 40.

be absolutely liable; he cannot contract himself out of this liability by any contract, whatever be the nature of the goods or their value. If the carrier seeks to avoid this liability by contract, the contract will be void.[61]

(b) Even where the carrier is not guilty of negligence or criminal conduct, the carrier would be liable for loss or damage of the goods delivered to it for carriage. This branch of his liability arises from what is known as his legal obligation to be an 'insurer of the goods'. It arises out of the theory that by his public profession to carry the goods of anyone, he is presumed to carry on a 'public service' or 'public employment'[58] under an *implied* contract to answer to the owner 'for safe and sound delivery'.[60] Hence, he would be liable for loss or damage to the goods even where he had *not* been guilty of negligence or want of care. This part of his liability, however, he can avoid or limit by entering into a *special contract* with the consignor in writing (Proviso to s. 6).

But even such special contract shall be of no avail to the carrier where the loss or damage had been caused by the criminal act or negligence on the part of the carrier, or his agents or servants (s. 8).

In short, in an action for damages against a carrier, the Court will first find whether there was any negligence or criminal act on the part of the defendant; if this question is answered in the affirmative, the defendant shall be held liable. If, however, this question is answered in the negative, the Court has to enquire whether there is any special contract limiting the defednant's liability. If there is no such special contract, the defendant would still be liable unless the loss was occasioned by an act of God or the act of the enemies of the State over which the defendant had no control.

The onus of proving (a) that there was no negligence or criminal conduct on the part of the carrier as well as (b) the existence of a special contract, is upon the carrier (s. 9).

Hence, as held by the Privy Council,[62] if any fire breaks out in the carriage or ship under the control of the carrier, the carrier would not be immune from liability for loss or damage to the goods caused by that fire, unless the carrier adduces evidence as to *how* the fire was caused (and that the carrier and his men took all reasonable care).

B. Liability of a railway, in India, as carrier of goods.

What is a 'railway'. 1. It has already been stated that a Railway, as a carrier, is governed not by the Carriers Act, but by the Railways Act. The Railways Act, can, however, apply only if it is a 'railway' as defined in the Railways Act. Since this is an artificial definition, that is to say, it extends the ordinary or literal meaning of the word, it is essential to understand this definition before proceeding to the provisions relating to its liability.

61. *G.S.N. Co.* v. *Joykristo*, (1890) 17 Cal 39.

62. *R.S.N. Co.* v. *Choutmull*, (1899) 26 Cal. 398 (P.C.).

2. This definition in s. 2(31), Railways Act, 1989 is as follows:

" 'railway' means a railway, or any portion of a railway, for the public carriage of passengers, or goods, and includes—

(a) all lands within the fences or other boundary-marks indicating the limits of the land appurtenant to a railway;

(b) all lines of rails, sidings, or yards or branches used for the purposes of, or in connection with, a railway;

(c) all electric traction equipments, power suply and distribution installations used for the purposes of or in connection with a railway;

(d) all rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, waterworks, supply installations, staff dwellings and any other works constructed for the purposes of or in connection with, a railway;

(e) all vehicles which are used on any road for the purposes of traffic of a railway and owned, hired or worked by a railway; and

(f) all ferries, ships, boats and rafts which are used on any canal, river, lake or other navigable inland waters for the purposes of the traffic of a railway and owned, hired or worked by a railway administration."

It is evident that it includes much more than a carriage on the rails, which is used 'for the public carriage of passengers, animals or goods' but also includes all lands, rails, stations, sidings etc. which appertain to a railway, and even a steamer or boat on *inland waters* which is owned, hired or worked by the Railway for the purposes of its traffic.

General Principles of Liability

1. As has just been stated, the liability of railways in India, as a carrier of goods, is defined and limited by the provisions of the Railways Act, which underwent radical changes owing to amendments in 1949 and 1961 of the Indian Railways Act, 1890 and now incorporated in the Railways Act, 1989.

2. *Prior to 1961*, the liability of the Railway in this behalf was the same as that of a 'bailee' under the provisions of the Indian Contract Act which meant that the Railway was liable to take only that much of care as was due from a man of ordinary prudence under similar circumstances.

3. S. 73 of the Railways Act, *substituted in 1961*, and corresponding sec. 93, Railways Act, 1989, has obviated reference to the English common law or the provisions of the Indian Contract Act. The section omits any reference to the status of a 'bailee', and lays down self-contained provision as to the 'general responsibility' of the railway administration as a carrier of goods, and its liability to pay statutory compensation when the Railway fails to discharge its 'responsibility'. S. 93 is as follows:

"Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration in transit, or non-delivery of any consignment arising from *any cause except* the follwing, namely:—

(a) act of God;

(b) act of war;

(c) act of public enemies;
(d) arrest, restraint or seizure under legal process;
(e) orders or restrictions imposed by the Central Government or a State Government or by an officer or authority subordinate to the Central Government or a State Government authorised by it in this behalf;
(f) act or omission or negligence of the consignor or the consignee or endorsee or the agent or servant of the consignor or the consignee, or the endorsee;
(g) natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;
(h) latent defects;
(i) fire, explosion or any unforeseen risk.

Provided that even where such loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the goods."

4. The principles laid down in s. 93 are—

I. The liability of the Railway is no longer that of a bailee, but that of an insurer of the goods, subject to *specified exceptions*.[63] The principles of liability have been codified in detail, in the new provisions of the Indian Railways Act (and no reference to the English law need be made unless the Act is silent on any point).

II. The foregoing absolute liability is confined to cases of 'loss, destruction, damage, or deterioration in transit or non-delivery' of the goods. This expression refers to *actual or physical* loss or change of the goods and would not include any depreciation in the value of the goods, say, on account of a fall in the price of the goods.[63]

III. The foregoing absolute liability of the Railway remains only so long as the goods remain 'in transit'. If the loss etc. takes place *after termination of the transit*, the absolute liability is relaxed, under a separate provision in sec. 99. 'In transit' is defined in s. 2(21) : it means the period from the time the consignment is loaded or railway receipt is issued up to the arrival of the goods at the destination, *plus* the free time allowed for taking delivery, without payment of demurrage or wharfage.

IV. The foregoing absolute liablility is subject to a number of exceptions:

(a) *Vis major*, e.g., act of God, war, act of public enemies.
(b) Restraint or seizure of the goods under *legal process*.
(c) Orders or restrictions imposed by the Government.
(d) Act, omission or negligence on the part of the consignor or consigee.
(e) Latent defects in the goods.
(f) Natural deterioration due to inherent defect, quality or vice of the goods.
(g) Fire, explosion or any unforeseen risk.

But even in the case of any of these exceptional contingencies, the Railway can avoid its responsibility *only* if it can further prove that "it has used *reasonable*

63. *Union of India* v. *S.S.H. Syndicate*, A.I.R. 1976 S.C. 879 (paras. 7, 9-10, 12).

foresight and care in the carriage of the goods" [Proviso to s. 93]. If the Railway fails to prove such foresight and care, it will be liable for the loss, damage etc., even though that has been brought about by any of the exceptional causes such as *vis major*, latent defects, as mentioned in s. 93 *above*.

V. Under sec. 102, the Railways are also exonerated from liablity in cases of—

(a) Materially false description of the goods, fraud or improper loading or unloading, by the consignor.

(b) Riot, civil commotion, strike or lockout.

(c) Any indirect or consequential damages, such as loss of a particular market owing to delayed delivery of the goods or otherwise.

VI. Where the goods are carried at the *'owner's risk rate'*, the Railway shall not be responsible unless the owner proves that the loss, destruction etc., was due to *'negligence or misconduct'* on the part of the Railway (s.97). In other words, where the Railway has offered a *reduced rate* to the consignor and the goods are carried 'at the owner's risk rate', the liability of the Railway is reduced from that of an insurer to that of a bailee.

But in order to take advantage of the foregoing provision in s. 97, the Railway has initially to show that it had prescribed two rates—(a) an 'ordinary tariff rate' (known as the 'railway risk rate') and (b) a specially reduced rate (referred to as the 'owner's risk rate') and also that the sender did not elect, *in writing*, to pay the 'railway risk rate' (i.e., the higher rate). If no rate is opted the goods are deemed to have been entrusted at owner's risk rate; and the railways' liability will be governed by sec. 97 notwithstanding the provisions of sec. 93.

(a) But where the loss, etc. is proved by the owner to have been caused by 'delay or, detention' of the goods in the carriage, the Railway shall not be liable if the Railway proves that such delay or detention arose for reasons beyond its control, or *without* any negligence or misconduct on the part of the Railway [s. 95]. The principle behind this provision is that 'delay' *is prima facie* proof of misconduct or negligence, so that it is for the Railway to explain for it. This exception will therefore apply even in cases of consignments at 'owner's risk rate'. In short, s. 95 overrides s. 97, that is, where s. 95 applies, the owner will be relieved of his burden to prove negligence or misconduct of the Railway even though the case otherwise falls under s. 97. But he will have to prove that the loss, damage, etc., is caused by the delay or detention in carriage.

(b) Another modification of the rule of onus of the consignor to prove misconduct or negligence of the Railway in cases of consignment at 'owner's risk' is to be found in Proviso to sec. 97—a somewhat complicated provision. It says that the Railway shall have an initial duty[64] to *disclose* how the consignment was dealt with by the Railway during the time it was under the possession or control of the Railway in two cases—

(i) Where the *whole* of the consignment or package (booked at owner's risk rate) is *not delivered* to the consignee otherwise than owing to fire or accident; or

64. *Cf. Union of India* v. *Brijlal*, A.I.R. 1969 S.C. 817 (para. 4).

(ii) Where any part of such consignment or package (which is consigned under a cover or protection which is not 'readily removable by hand') is *pilfered* in transit and the consignee points it out to the Railway administration at the time of taking delivery.

If the Railway fails to make such disclosure, the consignor will be relieved of his burden[64] to prove negligence or misconduct on the part of the Railway as required of him. If the Railway makes such disclosure and the negligence or misconduct of the Railway can be *fairly inferred* from the facts so disclosed, the consignor would still be relieved of his burden to adduce positive evidence as to the negligence or misconduct of the Railway. In case, however, the disclosure *does not* lead to any such fair in erence, the owner cannot recover compensation unless negligence or misconduct of the Railway is proved by him by independent evidence.

VII. The general principles of liability, as enunciated in sec. 93 are subject to modification in the case of articles whose value in relation to their weight exceeds Rs. 50 per kg. (or Rs.100 per kg. in case of luggage).

In the case of such articles, the liability of the Railways for loss, destruction, damage or deterioration or non-delivery of the consignment is limited to the extent of Rs. 50 ; or Rs.100, per kg, as the case may be, unless the consignor.

(a) at the time of entrustment of the consignment to the Railway for carriage, declares the *value* and *contents* thereof, and

(b) pays such percentage *charge* on the excess value as the Railway administration *may* prescribe.

(i) If the consignor has failed to comply with these conditions, the liability of the railway administration shall not exceed Rs. 50, or Rs.100, per kg., as the case may be, he will be debarred from claiming anything from the Railway on account of loss etc. of such consignment. The same principles will apply if the Central Government, by notification, allows such articles to be booked *without any packing*.

(ii) If, however, the consignor has complied with the conditions as aforesaid, the Railway shall be liable to pay compensation up to a sum not exceeding the value declared by the consignor, according to the principles laid down in s. 93 (pp. 175-76 *ante*). In case of certain precious articles, like gold, silver, pearls, precious stones, jewellery, currency notes, Government stamps, the railway administration may refuse to carry the goods unless the consignor complies with both the conditions.

VIII Another limitation to the general principle laid down in s. 93 (p. 175, *ante*) is offered by s. 98, which relates to *defective packing* or *defective condition* of the goods, at the time they were delivered to the Railway for carriage. Where this section applies, the consignor cannot claim any compensation unless he affirmatively proves that the injury complained of was caused by the *negligence* or *misconduct* of the Railway or its servants. In other words, the liability of the Railway would be confined to cases of negligence or misconduct only, and the burden of proof to establish such negligence or misconduct shall lie upon the consignor, instead of the Railway.

64. *See* previous page.

S.98, however, is limited in its application to—

(i) Cases of damage, deterioration, leakage or wastage of the goods (*loss is excepted*).

(ii) Where the defective condition or defective packing was recorded by the consignor in his 'forwarding note' at the time of delivering the goods to the Railway. In this case, the defective condition or packing is *admitted* by the consignor *ab initio*.

(iii) Even where there is no such admission in the forwarding note, the Railway may throw upon the consignor the onus of proving its misconduct or negligence provided the Railway initially proves—

(a) that the goods had some inherent defect or that the packing was defective, and

(b) that such defect had not been brought to the notice of the Railway at the time of their delivery to the Railway for carriage.

Deviation of Route

S. 69 deals with the case where damage is due to 'deviation of *route*', i.e., due to the fact that the animals or goods have been carried by a route *other than* the the route by which they were booked or other than the usual or customary route. The Railway shall not be liable for breach of the contract of carriage if it proves that the deviation of route from the booked route was

(a) due to causes *beyond the control* of the railway; or

(b) due to *congestion* in the yard; or

(c) due to other *operational* reasons.

Wrong Delivery

S. 80 deals with the liability of the Railway for *'wrong delivery'*, i.e., delivery to a person other than the real consignee. In this case, the Railway will *not* be liable for any wrong delivery where the Railway delivers the consignment to a person who *produces* the original railway receipt; even if such person is not entitled to it, or the endorsement on the railway receipt is forged or otherwise defective.

The real owner cannot make the Railway liable on the ground that—

(a) the person to whom the Railway delivered the consignment was not entitled to it; or

(b) the receipt on which the Railway acted was *forged* or otherwise *defective*.

In short, unless there is any collusion between the Railway and the person who took delivery on production of the Railway receipt, the Railway shall not be liable for wrong delivery.

Onus

1. S.110 of the Railways Act provides the principles relating to the burden of proof in an application before the Railway Claims Tribunal against the Railway for *loss, destruction, damage, deteroriation or non-delivery*.

2. Broadly speaking, the person claiming compensation has to prove—

(i) the monetary loss actually sustained;

(ii) the extent of damage;

(iii) the value of the consignment as declared under sub-sec. (2) of sec. 103.

But it is *not* for him to prove *how* the delay, loss. etc., was caused. This means, once the plaintiff proves that he has suffered damage, it would be for the Railway to establish that the damage was due to causes (e.g., fire) over which the Railway had no control.[65]

(B) CARRIERS OF PASSENGERS

(A) Under English Common Law

1. A common carrier of passengers is a carrier who undertakes to carry passengers, without any distinction, whenever they offer themselves and are ready to pay for the service (provided, of course, there is sufficient room and accommodation). A 'passenger' is a person who has the permission of the carrier, express or implied, to use the carriage.

2. A common carrier of passengers is bound to take reasonable care to carry the passengers safely. This duty, however, arises not from contract but from the fact that it is carrying a public profession requiring skill and the duty to the passenger arises whether the carriage is gratuitous or for reward. In short, this duty is *independent of the contract* [*Austin* v. *G.W. Ry. Co.*, (1867) 2 Q.B. 442].

3. As to the degree of liability, however, the law makes a distinction between a common carrier of goods and a common carrier of passengers. While the carrier of goods is bound to answer for the goods at all events, the obligation of a carrier of passengers is only to carry with "*due care*". A carrier of passengers, whether common or not, is thus, not an *insurer* for the safety of the passengers [*Ludditt* v. *Ginger Airways Ltd.*, (1947) 1 A.E.R. 328 P.C.]. There is no warranty that the carriage in which the passenger travels shall be free from all defects which could not be detected by due care on the part of the carrier.

4. The following rules may be laid down as to the degree of care required of a common carrier of passengers, such as a railway :

(a) It is duty of the carrier to use *reasonable* care and skill to provide a safe, strong and sufficient carriage and to remove *patent* defects.[66] But there is no warranty for *latent* defects which would not be discovered by due diligence.

(b) The carrier is liable for want of due care on the part of the person in control of the carriage, in driving and managing it. The degree of care and skill required would vary according to circumstances, e.g., in driving along a crowded street, in overtaking a tram car and the like.

(c) The carrier is bound to use *reasonable care* in preventing injury to the passengers while travelling in the carriage. Here, again, the duty does not extend

---

65. *River Steam Navigation Co.* v. *Choutmal*, (1899) 26 Cal. 398 (P.C.).

66. Thus, an omnibus Co. was held liable for injury caused to a passenger by accident which was due to the fact that the bus was running with a defective tyre which could have been discovered by due diligence or reasonable care [*Barkway* v. *S.W. Transport*, (1950) 1 All E.R. 392 H.L.].

beyond taking reasonble care.[67] Thus, he cannot be expected to anticipate that persons travelling with children of tender years would not take due care in looking after them [*O'Connor* v. *British Transport Commission*, (1958) 1 All E.R. 558 (C.A.)].

5. Like a carrier of goods, a carrier of passengers is entitled to reduce or exclude his liability by a special contract, unless debarred from doing so by any statute. In the absence of any statutory restriction, such specific contract cannot be pronounced to be unreasonable by a court of justice. The specific contract becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him [*G.T. Ry. Co.* v. *Robinson*, (1915) A.C. 740]. Thus, in the absence of a statutory prohibition, a carrier of passengers by air may altogether exempt himself from liability for all casualties, by a special contract [*Luddit* v. *Ginger Airways Ltd.*, (1949) 1 A.E.R. 328 P.C.].

(B) Under the Indian Railways Act

1. Prior to 1943, the English common law, as stated above, was applied to determine the liability of a Railway for the loss of life or injury sustained by a passenger, while travelling in a train, so that the Railway would be liable only when negligence on the part of the Railway administration or its employees could be proved by the plaintiff.[68] Since this caused hardship to the poorer classes, as dependants of those killed or injured in accidents or due to acts of sabotage, when no negligence or default could be proved against the Railway, the Railways Act, 1890 was amended in 1943, by inserting s. 82A, the provisions of which are now contained in sec. 124.

2. S. 124 makes the Railway administration liable to pay compensation in *all cases* of death of or injury to the passenger caused by an *accident*, up to the specified maximum of Rs.2,00,000 per person, *whether or not* such accident or injury has been caused by any *'wrongful act, neglect or default'* on the part of the Railway or its employees.

The following points are to be noted under this provision:

(i) The liability of the Railway under this provision shall prevail 'notwithstanding any other provision of law to the contrary'. The application of the English common law or other Indian statutes has thus been excluded to defeat the provisions of this self-contained provision, where it is applicable.

(ii) The Railway is liable to pay compensation in *all* cases of accident to a

67. To avoid running over a dog, an omnibus driver applied his brakes suddenly, as a result of which, the plaintiff, a passenger of the omnibus, who was at the moment walking down the gangway with the intention of alighting at the next stoppage, was thrown to the floor and injured. *Held*, the driver, faced with a sudden emergency caused by the dog's appearance in front of the omnibus, acted as an ordinary and careful driver ought to act in the circumstances and was, therefore, not guilty of negligence to take due care of the passengers. Hence, plaintiff could not recover damages [*Parkinson* v. *Liverpool Corporation*, (1950) 1 All E.R. 367 (C.A.)].

68. *E.I. Ry.* v. *Kalidas*, (1901) 28 Cal. 401 P.C.

train, whether due to collision, derailment or otherwise,—irrespective of any negligence or wrongful act of the Railway.

(iii) The claimant for compensation would no longer have to prove negligence or default or wrongful act on the part of the Railway or its employees. The Railway has thus been made an *insurer* in respect of the passenger in case of injury or death caused to the passenger by any accident to the train in which the passenger was travelling. Proof of 'due care' would, thus, be no defence to the Railway where this section applies.

(iv) The liability of the Railway to pay compensation to a passenger (or his dependent, as the case may be) would, however, be limited to the following cases—

(a) Loss occasioned by the death of the passenger, provided he has died 'as the *direct result* of such accident';

(b) Personal injury caused to the passenger by such accident;

(c) Loss, destruction or deterioration of animals or goods caused by such accident, provided (i) they were owned by the passenger and (ii) they were accompanying the passenger in his compartment or on the train.

(d) The person in respect of whom the compensation is claimed must have been a 'passenger' in the train which met with the accident. The word 'passenger', however, is defined in s.2(29) of the Railways Act. A passenger is a person travelling with a valid pass or ticket or with the permission of the railway servant empowered for the purpose. Though there is some judicial controversy in India as to whether a trespasser should be entitled to claim compensation merely because he was on the train (even though unlawfully), it would seem to be unreasonable that even a person who had boarded the train without the permission of the Railway or contrary to the prohibitions imposed by the Railways Act should be entitled to claim money compensation from the Railway. S. 55 of the Act expressly provides that no person shall enter or remain in any carriage, on a railway 'for the purpose of travelling therein as passenger', unless (i) he has with him a proper ticket procured on payment of the fare (s. 50) or a proper pass issued by the railway administration; or (ii) he has obtained permission for such travel from a duly authorised Railway servant with a certificate to the effect that "the passenger has been *permitted* to travel in such carriage upon condition that he *subsequently* pays the fare...." A person who, according to s. 55 has neither paid the fare nor has the 'permission' of the Railway to travel in that carriage, cannot be said to be a passenger so as to entitle him to claim compensation from the Railway, under s. 124.

Liability for Passenger's luggage

As regards passenger's luggages, at English common law, a common carrier of passengers stands on the same footing as a common carrier of goods and is liable for all loss which is not due to the contributory negligence of the passenger himself. The liability arises from the mere fact of acceptance of the luggage, and even though it has not been booked.

But in India, s.100 of the Railways Act restricts this liability by enacting that—

"A railway administration shall not be responsible for the loss, destruction, damage,

deterioration or non-delivery of any luggage unless a railway servant has booked the luggage and given a receipt therefor and in the case of luggage which is carried by the passenger in his charge, unless it is also proved that the loss, destruction, damage or deterioration was due to the negligence or misconduct on its part or on the part of any of its servants."

Hence, the Railway has no liability at all for any luggage which has not been *booked* by the passenger, according to the Railway Rules. If they are booked, the Railway will be liable on the principles laid down in s. 93 (p. 175, *ante*), which are applicable to all goods delivered to the Railway for carriage.

The second part of s.100, as amended in 1961, adds a further restriction of liability by providing that if the passenger does not deliver the luggage to be carried in the custody of the Railway administration (say, with the Guard or in a parcel van), but elects to keep them in his own custody in his compartment, the Railway shall not be liable unless the passenger proves that the Railway administration was guilty of *negligence* or *misconduct* which caused the loss, destruction etc. of his luggage, while in charge of the passenger himself. This limitation is based on the principle that where the passenger elects to take charge of his own luggage, it would be unreasonable to hold the Railway liable for loss etc. due to his own negligence.

§ 9. Liability of Innkeepers

1. Innkeepers have, under the common law, an absolute liability for the goods of their guests which are placed by the guest *'infra hospitium'*, i.e., within the buildings themselves or within precincts so intimately related to those buildings as to be treated for this purpose as forming part of them,[69] except for injury due to an accident, such as fire.[70]

2. In order to enforce this strict liability for loss of his goods, plaintiff must prove that at the time of the loss he was a 'traveller'. This term has, however, been widely interpreted so as to include even a person who had visited the inn merely for taking a drink. But persons who resort to the inn for purposes unconnected with the facilities offered by the inn (e.g. plumbers or repairers) are not 'travellers'.[69]

69. *Williams* v. *Linnitt*, (1951) 1 All E.R. 278 (C.A.).
70. *Williams* v. *Owen*, (1956) 1 All E.R. 104.

15

Breaches of Statutory Duty

§ 1. Nature of the Wrong

An action for damages for breach of statutory duty to take care is sometimes considered as a species of negligence.[1] But the better view, expressed by Lord Wright in *London Passengers Transport Board* v. *Upson*,[2] is that it is a specific wrong.[3]

> "A claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the 'statute' but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense."[2]

§ 2. Statutory Power and Statutory Duty

1. At the outset, a distinction must be noticed between the exercise of a statutory power and a statutory duty.

2. Where a statutory authority is merely endowed with a *power*, it is not liable for non-exercise of that power;[4] but if it is under a *duty* to exercise a statutory power, it would be liable for not exercising such power, since it would involve a breach of the duty.

3. From this it follows that where it is a mere power, and the statutory authority, in exercise of such power, fails to remedy a damage which has already occurred, it would not be liable for the failure if it does not cause any damage, more than if it does. Where, however, a *duty* to exercise a power is imposed by a statute, and such duty may be construed to be a duty to the plaintiff, as an individual, not to cause him injury, the plaintiff may sue for damages for omission to exercise that power if it causes damage.

---

1. Cf. *Winfield*, 6th Ed., pp. 506-07. [In the 8th Ed., however, it has been dealt with in Ch. 8, as a specific tort].
2. *London Passengers Transport Board* v. *Upson*, (1949) 1 All E.R. 60 (67) H.L.
3. *Salmond* (17th Ed., Chap. 10) treats it as a specific wrong.
4. *East Suffolk Catchment Bd.* v. *Kent*, (1940) 4 All E.R. 527 (543) H.L. The statutory Board had the *power* to repair a breach in the sea wall, which had not been erected by themselves. They made some delay in exercising that power as a result of which the plaintiff's land was flooded. *Held*, the Board was not liable for they had not added any damage to the plaintiff more than what he would have suffered if the Board had not exercised that power at all.

4. If, of course, the statutory authority chooses to exercise such power, it is not exonerated from the common law liability to exercise reasonable care, so that damages for negligence may be recovered, at common law, by a person who has suffered injury owing to the failure of the authority to take reasonable precaution[5–6], as distinguished from a mere 'error of judgment'.[4]

5. In the case of breach of a statutory duty, the statute itself might afford a statutory remedy (by way of damages or otherwise), if any member of the public suffers damage owing to such breach. But where an individual can establish that there was a particular duty to take care to him as an individual, he may recover damages under *common law* for the breach of such duty, even though it arises out of a breach of the statutory duty.[6]

§ 3. When Breach of Statutory Duty gives rise to an Action for Damages

1. The general rule is that when a statute creates an obligation (which did not exist at common law) and also prescribes a specific remedy for its non-performance, e.g., a fine or other penalty, the performance cannot be enforced in any other manner, so that no action for damages would lie for its breach.[7]

2. On the other hand, if a statute simply prescribes a duty but no penalty for its breach, a right to damages accrues to a person who is injured by its breach,[8] for, otherwise the duty imposed by the statute, being without any sanction, would be nugatory.

3. But even where the statute prescribes a specific remedy, a person injured by its breach may have a personal right of action in certain cases. It depends upon the intention of Parliament as to whether a civil remedy is excluded or not. The intention of Parliament is to be ascertained from the scope and purpose of the statute and, in particular, from the fact for whose benefit it is intended:[8]

I. If the statutory obligation is imposed for the benefit of the public (as distinguished from particular persons) who resort to a place open to the public, the only remedy for the breach is the statutory remedy.[8]

II. But when a statutory duty is imposed for the benefit of particular persons or a particular class of persons whether in addition to[6] public benefit or not, there arises at common law a correlative right in those persons who may be injured by its contravention.[9]

---

5. *Anns* v. *London Borough*, (1977) 2 All E.R. 492 (*503, 511*) H.L.
6. *Home Office* v. *Dorset Yacht Co.*, (1970) 2 All E.R. 294 (*301, 305, 322*) H.L.
7. *Pasmore* v. *O.U.D.C.*, (1898) A.C. 394 (H.L.).
8. *Cutler* v. *Wandsworth Stadium*, (1949) 1 All E.R. 544 (*548, 551*) H.L.—the Betting and Lotteries Act, 1934, provides that so long as a totalisator is being lawfully operated on a licensed dog-racing track, the occupier "shall not. . . . exclude any person from the track by reason only that he proposes to carry on book-making on the track" and prescribes a penalty by way of conviction for the breach of the provision. A book-maker who had been refused a space on the track for his book-making business, brought an action for damages. *Held*, that the obligation imposed by the statute was intended for the benefit of the public who resorted to the track and not for the benefit of the book-makers in the sense in which the Factory Act may be said to have been enacted for the benefit of the workmen in the factories. Hence, the action must fail.
9. *Black* v. *Fife Coal Co.*, (1912) A.C. 165.

Thus, in *England*, the regulations imposed by the Factory Act or the Coal Mines Regulation Act have been construed as having for their object the protection of the workmen who work in the factories so that each workman who is injured owing to failure of the employer to comply with the regulations has a right to sue for damages.[9]

III. Even where it is established that the Legislature intended to protect not only the public in general but also a particular class of persons, an individual cannot recover damages for breach of the statutory duty unless he can show—

(i) that he belongs to that class for whose protection the duty was imposed;[10]

(ii) that the injury complained of is an injury against which the statute was designed to protect him.[10] If the injury is of a different kind, no action will lie;[11]

(iii) that the breach of duty caused the damage complained of.[12]

§ 4. Defences to an Action for Breach of Statutory Duty

1. The liability created by a statute may be (a) absolute, or (b) to take due and *reasonable* care.

(a) Where the liability is absolute (e.g., under the Factories Act) the question of due care or negligence becomes immaterial.[13] Even the act of a third party will be no defence where the duty is absolute.[14]

But the absolute liability may be intended only in respect of a particular injury taking place in a particular manner. In such a case, the injured person shall have no right to damages if the injury was other than what was in the contemplation of the Legislature.[15] But this defence would not be available where the liability under the statute is not limited to a class of injuries caused in some particular way.[16]

---

10. *Grant* v. *National Coal Bd.*, (1956) 1 All E.R. 682 (*684*) H.L.

11. *Kilgollan* v. *Cooke & Co.*, (1956) 2 All E.R. 294 (*298*) C.A.

12. *McWilliams* v. *William*, (1962) 1 All E.R. 623 (*626*) H.L. ; *Wigley* v. *British Vinegares*, (1962) 3 All E.R. 161 (*165*) H.L.; *Ross* v. *Portland Cement Ltd.*, (1964) 2 All E.R. 452 (*455*) H.L.

13. *Carroll* v. *Andrew Barclay & Sons*, (1948) 2 All E.R. 380 (H.L.).

14. *Cooper* v. *Railway Executive*, (1953) 1 All E.R. 477 (*478*).

15. S. 14 of the Factories Act, 1937 provides—"Every dangerous part of any machinery . . . . shall be securely fenced." *Held*, the obligation to fence a dangerous machine under the Act was satisfied if the dangerous part was so screened as to prevent the body of the operator *from coming into contact with it*. Hence, the plaintiff could not recover damages for injury caused by articles *ejected* from the machine [*Nicholls* v. *Austin (Leyton) Ltd.*, (1946) 2 All E.R. 92 (H.L.).

16. The appellant, who was employed by the respondents at their colliery, was travelling from one point of his place of work to another by a bogie along an underground travelling road. The bogie was derailed owing to its running over some stone which had fallen from the roof of the travelling road and the appellant was injured. He sued the respondents for damages for breach of their statutory duty under s. 49 of the Coal Mines Act, 1911, which provides—

"The roof and the sites of every travelling road and working place shall be made secure. . . ."

It was contended by the respondents that the mine-owner would be liable under s. 49, only if the injury was directly caused by some material falling from the roof while it was

(*Continued on page 187*)

(b) Some statutes, however, prescribe a lower standard of care by using words such as "reasonably practicable", "sufficient for protecting such hands from....cattle....straying thereout".[17]

In such cases, it will depend upon the construction of the terms of each particular statute as to what degree of care was required by the statute from the person on whom the duty was imposed.[17]

2. The defence of *volenti non fit injuria* is *not* available in an action for breach of statutory duty.[18]

3. A person (e.g. an employer) on whom a statutory duty has been imposed cannot relieve himself of this obligation by saying that he has appointed reasonably competent persons and that the breach is due to negligence on their part.[19]

4. But the defence of contributory negligence on the part of the plaintiff was available, at common law, against a claim for damages for breach of statutory duty.[20]

In *England*, since the passing of the Law Reform (Contributory Negligence) Act, 1945, contributory negligence cannot defeat the action, but is a ground for appointment of apportionment of damages [see Chap. 14, § 2, *ante*].

§ 5. Burden of Proof

1. In an action for breach of statutory duty, the onus lies on the plaintiff to prove—

(a) that the defendant has committed a breach of a statutory duty,[21] imposed upon the defendant;[22]

(b) that the breach caused or materially contributed to the injury.[21] (The onus of proof that the injury was caused by the breach of duty is not shifted from a plaintiff employee merely because the breach is of a safety enactment intended for the protection of the employees);[21]

(c) that the breach is intended not only to be visited by a penalty but also to be a ground of civil liability to an ascertainable class of persons of whom the plaintiff is one;[23]

(d) that the injury is one against which the legislation was designed to protect him.[23]

(*Continued from page 186*)

actually falling. This contention was rejected by the House of Lords holding that the liability under s. 49 was not limited to a class of injuries, but extended to every injury which was due to the breach of the statutory duty to keep the roof and the sites of the travelling road secure [*Grant* v. *National Coal Board*, (1956) 1 All E.R. 682 (H.L.)].

17. *Cooper* v. *Railway Executive*, (1953) 1 All E.R. 477.

18. *Alford* v. *National Coal Board*, (1952) 1 All E.R. 754 (757) H.L.; *Wheeler* v. *New Merton Board Mills*, (1933) 2 K.B. 669 (C.A.).

19. *Lochgelly Iron & Coal Co.* v. *M'Mullan*, (1934) A.C. 1 (*13*).

20. *Caswell* v. *Powell Duffryn Associated Collieries*, (1939) 3 All E.R. 722 (H.L.).

21. *Bonnington Castings* v. *Wardlaw*, (1956) 1 All E.R. 615 (H.L.).

22. *Harrison* v. *National Coal Board*, (1951) 1 All E.R. 1102 (H.L.).

23. *Grant* v. *National Coal Board*, (1956) 1 All E.R. 682 (*684*) H.L.

(e) that the plaintiff belongs to a class of persons to protect whom the statutory obligation had been imposed.[24]

§ 6. Common Law Liability in cases of Statutory Duty

1. Where an action for damages for breach of statutory liability fails either because the plaintiff does not belong to the class of persons whom the *Legislature* wanted to protect or because the injury is not one against which the *Legislature* wanted to protect, the plaintiff may still recover damages on the footing of negligence at common law,[25] if he succeeds in proving that—

(a) there was a reasonable apprehension of damage,[26] having regard to the nature of the hazard involved;[26]

(b) the defendant had a duty (under common law) to take reasonable care to guard against such danger and he has failed to take such care;[26]

(c) the injury suffered by the plaintiff has been caused by the breach of duty on the part of the defendant, e.g., where the danger to the plaintiff was caused by the act or omission of the defendant.[27]

2. In short, common law lays down the general law relating to civil liability for the failure to take care where there is a duty to do so. This law is *supplemented, not supplanted,* by making a special statute to prohibit and penalise a specified kind of breach of the duty to take care.[28] The statutory obligation may not be co-extensive with the common law obligation.[29] Thus, if an employer fails to take the precautions prescribed by statute, he may incur the statutory penalty; but even where the charge of failure to comply with the statutory duty fails, the employer may be liable in damages if it is established that he has failed in the "ordinary common law obligations of an employer to take care for the safety of his men' [28]

3. The measure of damages for the common law liability includes all those which *forseeably* arise from the breach of the duty to take care.[25]

---

24. *Shenoy* v. *Udipi Municipality*, A. 1974 S.C. 2177 (para 25). [Injury caused to the neighbours by the construction of a cinema building illegally authorised by the municipality].
25. *Anns* v. *London Borough*, (1977) 2 All E.R. 492 (*501*) H.L.
26. *Kilgollan* v. *William Cooke, Gill* v. *Donald Co.*, (1963) 3 All E.R. 180 (*183*) H.L.; *Haynes* v. *Qualcast*, (1958) 1 All E.R. 441 (C.A.).
27. *Fisher* v. *Ruislip U.D.C.*, (1945) 2 All E.R. 458 (*468*) C.A.
28. *Gill* v. *Donald*, (1963) 3 All E.R. 180 (*183*) H.L.
29. *Bux* v. *Slough Metals*, (1974) 1 All E.R. 262 (*268, 272*) C.A.

16

Breaches of Duties of Insuring Safety

§ 1. Nature of these Duties

1. The rule of ordinary diligence and reasonable care is subject to exception in certain extraordinary cases where a stricter duty has been imposed by the law, because of the magnitude of the danger as well as the difficulty of proving negligence as specific cause of injury, in these cases. According to the ordinary rule, a man is answerable for negligence if he fails to take *reasonable* care—i.e., a degree of care that is proportioned to the apparent risk. He must therefore take a much greater precaution when dealing with dangerous things such as flood-water, fire, poison than when dealing with normally harmless things. In the case of such dangerous things, however, the law has obviated the necessity of enquiring as to what amount of care should properly have been taken, by laying down a rule of 'strict liability'. This is a logical and extreme application of the doctrine of Negligence.

2. All the cases falling under this group have one feature in common, viz., that the responsibility goes beyond the general duty of reasonable care by the party himself and his servants. *But the extent of the duty varies according to the nature of the case*:

(a) On the one hand, there is the rule of ABSOLUTE INSURANCE as regards risks arising from the artificial collection of dangerous matter on a man's land. Here the liability cannot be avoided even by proof that utmost diligence and precaution has in fact been used. This rule has developed from, and has a great affinity to, the law of trespass.

(b) On the other hand, the duty imposed on occupiers of premises towards persons coming on those premises is not so strict as in the above cases. It is sufficient to show that all has been done that might REASONABLY be done to ensure safety. But even in this case the liability extends to the acts and defaults of independent contractors as well as agents and servants.

(c) Then there is the case of dangerous goods and operations where there is no absolute liability but, nevertheless, a greater degree of care is necessary owing to the very nature of the operations. As Lord Macmillan has observed in *Read* v. *Lyons*, (1946) 2 All E.R. 576 (H.L.), nothing but the ordinary doctrine of negligence applies to these cases. The difference is not only a matter of *degree*:

"Every activity in which man is engaged is fraught with some possible elements of danger to others. Experience shows that even from acts apparently innocuous injury to others

may result. The more dangerous the act the greater is the care that must be taken in performing it. This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in *obviously dangerous* operations must be taken to know that if he does not take special precautions injury to others may very well result."

I. LIABILITY FOR DELETERIOUS THINGS

§2. The Rule in Rylands v. Fletcher

1. The rule as stated by Blackburn, J. [*Fletcher* v. *Rylands* (1866) 1 Ex. 278] is—

"The person who for his own purposes brings on his lands and collects and keeps there, anything likely to do mischief if it escapes, must keep it 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."

It was confirmed by the House of Lords where Lord Cranworth [*Rylands* v. *Fletcher*[1] (1868) 3 H.L. 342] put it thus—

"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 peril. If it does escape and cause damage, he is responsible, however careful he may have been and whatever precautions he may have taken to brevent the damage."

2. As stated above, the rule in *Rylands* v. *Fletcher*[1] is the most important of the 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 his neighbours, lest they suffer harm by reason of dangerous things artificially brought on his land,—and the duty is absolute because it is independent of any negligence on the part of the defendant or his servants.

"The fundamental rule of the principle is that the liability attaches because of the occupier of land bringing on to the land something which is likely to cause mischief to his neighbours" [*Hale* v. *Jennings*, (1938) 1 All E.R. 579 (C.A.)].

3. But, as has been explained in the later case of *Read* v. *Lyons* [(1946) 2 All E.R. 471 (H.L.)][2], two conditions are necessary in order to apply the

---

1. *Rylands* v. *Fletcher*. The defendant constructed a reservoir on his land. Underneath the site chosen for this purpose, there were disused mining shafts which communicated with the adjoining mine of the plaintiff. The defendant employed competent contractors to construct the reservoir, but through the negligence of the contractors the construction was not made strong enough, and when the reservoir was filled the water burst through the shafts, and flooded the plaintiff's mine. *Held*, the defendant was liable though guilty of no negligence either personally or by his servants. The person who has brought on his land something which was not naturally there, harmless to others so long as it is confined to his own property, but which is likely to be mischievous if it gets on his neighbours, must make good damage which ensues if he does not succeed in confining it to his own property. The defendant in bringing water into the reservoir was bound to keep it there at his peril.

2. *Read* v. *Lyons*. The respondents carried on the business of filling shell cases with high explosives in an ordnance factory of which they took the management under agreement with the Ministry of Supply. The appellant, an employee of the Ministry, while inspecting the filling of shell cases in the discharge of his duty, was injured by an explosion

(*Continued on page 191*)

rule in *Rylands* v. *Fletcher*, viz., (a) '*escape*' from a place of which the defendant has occupation or over which he has a control to a place which is outside his occupation or control of something likely to do mischief if it escapes; and (b) '*non-natural use*' of the land. If either of these conditions is absent, the rule of strict liability does not apply,[2] and any extension of the doctrine would not be favoured.

4. As regards the place from which the dangerous thing escapes,—it is not confined to the defendant's own land; it extends to all places over which the defendant has *control*. Thus, it has been applied to the escape of gas from the mains laid by an Electric Supply Co. in the property of the city (that is, in the sub-soil) in exercise of a franchise to do so [*Northwestern Utilities* v. *London Guarantee Co.*, (1936) A.C. 108].

§ 3. Exceptions to the Rule in Rylands v. Fletcher

The rule in *Rylands* v. *Fletcher* *is subject* to a number of important exceptions:

1. THINGS NATURALLY ON THE LAND. The rule applies only if the defendant *artificially* brings or accumulates on his land something that is likely to do mischief. It will not apply to the escape of things which are *naturally* there, howsoever dangerous they may be,—e.g., noxious weeds, thistles, or noxious animals like rats or rabbits. Similarly, it has been established that no action will lie for the escape of water by natural gravitation into the plaintiff's mine, if its escape is caused merely by the working of the defendant's mine in the ordinary manner. This, in fact, is a corollary from the wider exception that a man is not liable for injury due to the 'exercise of ordinary rights' [Cf. p. 9, *ante*] by him. *The rule in Rylands* v. *Fletcher* cannot possibly take away the general immunity given to occupiers of land for acts done in the 'natural use' of land. Thus, a person is not liable, in the absence of proof of negligence, for damage caused by fire kept in his fire-place which, for some unknown reason, put the room on fire while the defendant was out and the fire caused damage to the plaintiff's adjacent property [*Sochaki* v. *Sas*, (1947) 1 All E.R. 344], because the use of fire in a fire-place is an "ordinary, natural, proper and everyday use" [see, further, § 8, *below*].

But though not liable for the escape of things naturally on his land, the occupier will be liable if (i) he *artificially accumulates* them, or (ii) if he *actively causes* their escape. Thus, though he is not liable for the natural percolation of water from higher to lower levels, he will be liable if he collects the rainwater that falls on his land in a reservoir, and it subsequently escapes.

2. ACT OF GOD. The rule does not apply to damage directly caused

---

(*Continued from page 190*)

of a shell. *Held*, that the rule of strict liability as enunciated in *Rylands* v. *Fletcher* did not apply in this case as there was no 'escape' of the damage causing thing from the respondents' premises. The appellant was present on the factory as an invitee and the fact that the work in the factory was of a kind which required special care was a reason why the standard of care to be taken by the respondents should be high, but it was no reason for saying that the respondents were liable for resulting damage to an invitee *without proof of negligence at all*.

by *vis major* or the *Act of God*. This was established in *Nichols* v. *Marsland*[3] [(1875) 10 Ex. 255] where the only material element of fact which distinguished it from *Rylands* v. *Fletcher* was that the accident in the former was due to an *extraordinary* storm. An Act of God is an event which results directly from the *forces of nature without human intervention*. It does necessarily mean an operation of natural forces so violent and unexpected that *no human foresight or skill could possibly have prevented its escape*. It is enough that the accident should be such as human foresight could not be reasonably expected to anticipate.[4]

But in certain cases, there is a duty to take precautions even against extraordinary events, and in such cases, even Act of God is no defence. Thus, one who obstructs the *natural flow of a river* has a duty to prevent water brought down even by an extraordinary rainfall [*Greenock Corporation* v. *Caledonian Ry. Co.*,[5] (1917) A. C. 556]. In this case, the House of Lords distinguished the decision in *Nichols* v. *Marsland*[3], on the footing that in that case the jury found as a matter of fact that the damage was due to accident. In view of the decision of the House of Lords in *Greenock's case*, the correctness of the decision on the facts in *Nichols* v. *Marsland* has indeed been doubted in *A.G.* v. *Cory Bros.*, [(1921) A.C. 521].

3. THE ACT OF A STRANGER. The rule does not apply where the damage is due to the act of a stranger. It may be recalled that a man is as a rule liable only for his own acts and defaults or for those of his servants. But in the

---

3. The defendant was an owner of artificial pools formed by damning a natural stream. The rainfall accompanying an extremely violent thunderstorm broke the embankments, and the rush of water down the stream carried away certain bridges. *Held*, that defendant was not liable inasmuch as the accident was directly due to the Act of God—the flood was so great that it could not reasonably have been anticipated [*Nichols* v. *Marsland*].

4. 'Act of God' must be carefully distinguished from an 'inevitable accident'. This was pointed out in *Nugent* v. *Smith*, [(1876) 1 C.P.D. 423 (*444*)—"All causes of inevitable accident may be divided into classes—(a) those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and (b) those which have their origin either in the whole or in part in the agency of man." It is in the former class that the accident is said to be due to the act of God. An act of the God is thus 'the opposite of the act of man', whereas an inevitable accident is an accident which is due to the act of human agencies but is nevertheless *not due to any negligence* on anybody's part. For instance, if a building is set on fire by lightning, this is the act of God; but if a similar accident happens through the upsetting of a lamp by human agency, even though this is due to no negligence on his part this is an inevitable accident. We have seen that inevitable accident is a general defence to an action in tort; but that a most important exception to this rule is that this defence is not available in the case where there is an absolute duty of insuring safety. But though inevitable *accident* is not, *Vis major* is a defence in this class of cases. Here the defence is not that due diligence has been used, but that it is directly due to natural agencies and not to any human act at all.

5. The Corporation of Greenock, in laying out a park, constructed a paddling pond for children in the bed of a natural stream and altered the course of the stream and obstructed the flow of water therefrom. The plaintiff's premises were damaged by an overflow from the stream due to extraordinary rainfall. *Held*, the Corporation was liable in damages. "Assuming an act of God, such as flood, wholly unprecedented, the damage in such a case results not from the act of God, but from the act of man in that he failed to provide a channel sufficient to meet the contingency of the act of God.... To construct

(*Continued on page 193*)

cases where there is an absolute duty of insurance he is liable even for the negligence of independent contractors employed by him. But if the third party is a person who is altogether a stranger, i.e., a person over whom the defendant has no control, e.g., a trespasser who without authority enters on the defendant's premises, or a person who even without entering on the defendant's premises, without authority causes the escape of dangerous things from those premises, the defendant will not be liable.[6]

But the act of a stranger will be no excuse if the defendant, having knowledge of the act of the stranger which was likely to cause damage, did nothing to prevent it [*Northwestern Utilities* v. *London Guarantee Co.*, (1936) A.C. 108].

4. COMMON BENEFIT. The rule does not apply to escape of things brought or kept upon the premises for the common benefit of the plaintiff and the defendant. In such a case there is no duty beyond that of reasonable care.[7]

5. LEGAL AUTHORITY. The rule does not apply to damage caused by persons acting in the performance of a legal duty, or in the exercise of power specially conferred by law. Statutory authority is however of two kinds—(a) absolute, and (b) discretionary. While in the former case the immunity is absolute, in the latter the immunity applies only if reasonable care and caution is exercised.[8]

6. CONSENT OF THE PLAINTIFF. A person who permits another to accumulate the thing which escapes, cannot sue in damages.[9]

§ 4. The Rule in Rylands v. Fletcher distinguished from Nuisance

1. The rule in *Rylands* v. *Fletcher* may be said to be a species of nuisance concerned with 'noxious or dangerous things', explosives, combustibles, gas, for, injury to another's land by the escape of electricity, smoke, noise or smell have been decided on the principle [see p. 143, *ante*], and there are instances which overlap.

(*Continued from page 192*)

a reservoir on your land is a lawful act. To close or direct the natural flow so as to render it less effluent is not." [*Greenock Corporation* v. *Caledonian Ry. Co*].

6. Appellant was the lessee of an office building and sub-let the second floor to the respondent. Some unknown person blocked the waste pipes of a wash basin and turned on the tap on the fourth floor, as a result of which there was an overflow of water and the respondent's goods were damaged. *Held*, that though the fourth floor was in the possession of the Appellant, he was not liable for damage due to the act of a stranger which could not in the circumstances of the case, be reasonably prevented by the Appellant [*Rickards* v. *Lothian*, (1913) A.C. 263 (P.C.)].

7. The defendant was the plaintiff's landlord, and was living in the floor above him. Some rats gnawed a rain-water box maintained by the defendant for the benefit both of himself and the plaintiff and the water running through injured the plaintiff's goods below. *Held*, no action lay [*Carstairs* v. *Taylor*, (1871) 6 Ex. 217].

8. *Read* v. *Lyons*, (1947) A.C. 156 (*183*).

9. In *India*, where the owner of land is required by law [*Madras Ry. Co.* v. *Zemindar of Carvatenagarum*, [(1874) 1 I.A. 364] or custom [*Ramlal* v. *Lill Dhary*, (1877) 3 Cal. 776 P.C.] to preserve water on his land as the means of cultivating large tracts of land which would otherwise be waste, the rule in *Rylands* v. *Fletcher* is not applicable to such cases.

2. *But as Dr. Winfield*[10] points out, there are essential differences between the principles underlying the two rules, e.g.,

(i) Nuisance is confined to injuries which primarily affect the *use or enjoyment of land.* But under the rule in *Rylands* v. *Fletcher,* injury may be caused even to some non-occupier of land.

(ii) Nuisance may be caused in many other ways save by 'escape' of a thing from plaintiff's land.

(iii) Act of God is a defence perhaps peculiar to *Rylands* v. *Fletcher,* whereas inevitable accident constitutes a similar defence to nuisance. Similarly, the defendant in *Rylands* v. *Fletcher* is liable for the wrongs of an independent contractor, but not so in nuisance except in some particular cases.

(iv) In nuisance, a non-occupier of the land on which the injury originates may sometimes be liable, e.g., a landlord for nuisance on premises in the occupation of a tenant; but occupation of the land or the holding of some franchise over it is essential to liability under *Rylands* v. *Fletcher.*

(v) Further, as Street[11] points out, while the rule in *Rylands* v. *Fletcher* is limited to damage following from *non-natural* user of land, even a natural use may give rise to liability in nuisance. *Secondly,* in nuisance no accumulation or escape is necessarily required. *Thirdly, Rylands* v. *Fletcher* is confined to damage due to accumulation of physical objects while nuisance may be caused by intangible objects such as noise.

II. LIABILITY FOR ANIMALS

§ 5. Cattle-Trespass

1. From early times, trespass by one's cattle has been regarded as equivalent to trespass by himself. In *Cox* v. *Burbidge,* [(1863) 13 C.B.N.S. 430], it was laid down—"If a man's cattle, or sheep, or poultry, stray into his neighbour's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences." This liability is based on the *nature* of such animals to do damage to others by straying. It is the nature of cattle and other livestock to stray if not kept in, and to do damage if they stray; hence the owner is, according to this rule, bound to keep them from straying on the land of others *at his peril.* But there is a distinction "between animals which from their natural tendency to stray, and thereby to do real damage, require to be and usually are kept restrained, and a dog, which is not usually kept confined." A man is not, therefore, liable for the trespass of his cats and dogs as for that of his ox.

2. So strict is the rule that if *any part* of an animal which the owner is bound to keep in is over the boundary, this constitutes trespass. And the liability is not merely for the trespass but also for its natural and probable *consequences* [*Ellis* v. *Loftus Iron Co.*,[12] (1874) 10 C.P. 10].

---

10. *Tort,* 7th Ed., pp. 465–67.

11. *Law of Torts, 1955,* 271.

12. The defendant's horse injured the plaintiff's mare by biting and kicking her *through* the fence that separated the defendant's land from the plaintiff's. *Held,* the defendant was liable irrespective of any negligence [*Ellis* v. *Loftus Iron Co.*].

3. But at the same time it must be noted that the liability is only for consequences that are natural and probable. The English decisions on this point are not quite consistent and the result is (1) it is natural for a stallion to bite and kick a mare [*Ellis* v. *Loftus Iron Co.*[12]] or (2) for strange horses to kick one another when left at large in a field [*Lee* v. *Riley*, (1865) 144 E.R. 629], but (3) it is not natural for a horse straying in the highway to kick a human being [*Cox* v. *Burbidge*, (1863) 143 E.R. 171].

The Court of Appeal has held that it is natural for lame cattle, such as a heifer, to knock down a human being into whose *garden* it trespasses, when resisted and in such cases the owner of the garden may recover damages not only for injury to property but also for personal injury [*Wormald* v. *Cole*, (1954) 1 All E.R. 683 (C.A.)].

4. But the rule as to trespass by cattle has no application to damage done by cattle *straying off a highway* along which they are being lawfully driven. In such a case the owner is liable, at common law, only on *proof of negligence*.

In short, a man who has his property adjoining a highway, takes the risk of invasion by straying animals and cannot recover damages from the owner of the animals unless he proves that the owner was under a duty to take care towards the plaintiff.[13] It has been held by the House of Lords that unless the animal is a dangerous animal or is known to be mischievous,[14] the owner of an animal has no duty to prevent his animals from straying *on the highway*. The rule of strict liability as to damage done to neighbouring land by straying cattle, thus, does not extend to damage done by the cattle straying on an adjoining *highway*. The reason is this: A person on the highway is exposed to the ordinary risks, taken by those using the highway and, if an accident happens owing to those risks, no legal consequence follows. Every user of a highway is expected to exercise reasonable care in riding or driving along the road and he must, accordingly, take care of animals on the road.

"At least on country roads and in market towns, users of the highway, including cyclists and motorists must be prepared to meet from time to time a stray horse or cow, just as they must expect to encounter a herd of cattle in the care of a drover. An underlying principle of the law of the highway is that all those lawfully using the highway, or land adjacent to it must show mutual respect and forbearance. The motorist must put up with the farmer's cattle; the farmer must endure the motorist. It is commonly part of a man's legal duty to his neighbourhood to tolerate the untoward results of the neighbour's *lawful acts*."[13]

The result, in short, is that a person who keeps an animal, *not known to be dangerous*, is under no duty to take care to the users of the adjoining highway so as to prevent the animal from straying on the highway. Hence, a cyclist who is injured by such an animal cannot recover damages from the owner of the animal on proof that the owner did not keep his fence in order.[13]

In *England*, the foregoing proposition has been modified by the enactment of the Animals Act, 1971, under which it is an offence (except in specified cases) if an owner of *any* animal allows it stray from his unfenced land to a

13. *Searle* v. *Wallbank*, (1947) 1 All E.R. 12 (H.L.).

14. In such cases the liability of the owner follows from a different doctrine, viz., that a man who keeps a dangerous animal, keeps it at his peril (see *below*.)

highway and causing damage there. Of course, there is no civil remedy for breach of this duty to take care.[15]

No such statute having been made in *India*, the common law applies.

§6. Injury by Dangerous Animals

1. Liability for injury caused by dangerous animals kept by a person depends upon KNOWLEDGE of the mischievous propensity of such animals. It differs from the case of trespass by cattle, just discussed, in an important respect. In the case of trespass by cattle the responsibility is absolute in the fullest sense. For, it is the nature of cattle to stray, and no proof of the knowledge of such nature can reasonably be required as a necessary condition of liability. The liability of owners of dangerous animals, on the other hand, rests on the knowledge of the dangerous character of the animal. "Whoever keeps an animal accustomed to attack and bite mankind, with *knowledge* that it is so accustomed is *prima facie* liable at the suit of any person attacked or injured by the animal, 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 knowing its mischievous propensities.*" When proof of such knowledge is given, the liability is absolute as in the case of cattle trespass. "A person keeping a mischievous animal with knowledge of its propensities is *bound to keep it secure at his peril*, and that if it does mischief, negligence is presumed without express averment. The negligence is in keeping such an animal after notice" [*May* v. *Burdett*, (1846) 9 Q.B. 101].

2. But in some cases, such knowledge need not be expressly proved, for it is conclusively presumed by law. (i) If the harm done is *natural* to that species of animal, knowledge of its dangerous character is conclusively presumed to have been known by the defendant. Thus, it is the natural tendency of tigers and other wild beasts to attack mankind, and if injury is done by them, the plaintiff can recover only on proof that the injury was caused by an animal of that kind kept by the defendant. (ii) On the other hand, if the harm done is *not natural* to the species, but has yet been done by the particular animal in question, the plaintiff must prove actual knowledge on the part of the defendant of the tendency of the individual animal to do the harm complained of. Such proof is technically called proof of *scienter*. For example, it is not the natural tendency of dogs to bite human beings; therefore it is necessary for the plaintiff in such a case to prove that the defendant actually knew that the particular animal was "accustomed to bite mankind". The rule of liability for keeping dangerous animals thus falls under two heads—(a) keeping a naturally ferocious animal, irrespective of any question of knowledge on the part of its owner, (b) keeping a naturally tame animal with knowledge that particular animal is vicious—

(A) ANIMALS NATURALLY FEROCIOUS (FERAE NATURAE). If the animal is of a naturally ferocious species, e.g., a lion, a bear, a wolf, or a monkey, no proof of *scienter* is required. Thus, in *May* v. *Burdett* [(1846) 9 Q.B. 101], the owner of a monkey was held liable for biting a lady. He who keeps a

15. *Davies* v. *Davies*, (1974) 3 All E.R. 817 (C.A.).

savage animal does so at his peril. Of course, the mere keeping of such an animal is not a wrong in itself. The wrong arises as soon as injury is done by that animal to any person. Whether a particular species of animals is naturally ferocious or not is a question of law, to be determined according to the 'experience of mankind'.

(B) ANIMALS TAME BY NATURE (MANSUETAE NATURAE). If the animal belongs to a class which according to the experience of mankind, is not dangerous, the plaintiff must prove that the owner had *knowledge* of the mischievous propensities of *that* animal.[16] But once the animal has been found by the owner to possess a vicious nature, it passes into the class of animals which the owner must keep at his peril. It is, however, enough to show that the animal has on foregoing occasions manifested a savage disposition whether with the actual result of doing mischief on any of these occasions or not. And a single instance of such disposition is sufficient notice.

3. But *scienter* or knowledge of ferocity on previous occasions must be proved; otherwise the plaintiff cannot recover.[17]

4. A concise SUMMARY of the law relating to the liability for animals has been given in *Bucke* v. *Holmes*, [(1926) 2 K.B. 125] thus—

"The responsibility of the owners of animals for damage done by them has developed along two main lines: one a branch of the law of *trespass*, and the other a branch of the law which imposes upon the owner of a *dangerous* animal or thing a duty to take measures to prevent it from doing damage. With respect to this second branch there are two classes of animals. The first includes animals *ferae naturae*, for example, a tiger or a gorilla which are obviously of a dangerous nature, although individuals may be more or less tamed. A person who keeps an animal of this class keeps it at his peril. If he loses control of it and it does damage he is responsible. The second class includes dogs, cows and horses which are not naturally dangerous to mankind. Of this class individuals may develop dangerous propensities, but unless and until they do so they are not treated as belonging to the class of animals which the owner keeps at his peril and the owner is not responsible for damage which these animals do when not trespassing. An individual of this class, however, may cease to be one for whose damage its owner is not responsible if it has given him indications of a vicious or dangerous disposition. When the animal has been found by its owner to possess such a nature it passes into the class of animals which the owner keeps at his peril."

Tortious liability for injury caused by one's animals, thus, is of various categories, depending upon the class of theo ffending animal, viz., whether it is

16. A camel at defendant's zoo bit the plaintiff while he was, without authority, feeding it with apples. *Held*, a camel not being ferocious in nature and the defendant, having no previous knowledge (*scienter*) of the tendency of the particular camel to bite, was not liable [*McQuaker* v. *Goddard*, (1940) 1 All E.R. 471].

17. To this, however, an exception has been introduced in England by the Dogs Act, 1906, which provides that "the owner of a dog shall be liable in damages for injury done *to any cattle* by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such propensity or to show that the injury was attributable to neglect on the part of the owner." So as against a cattle dog is no longer allowed his 'first bite'; the owner is liable irrespective of *scienter*. But as against human beings or other animals the privilege still remains. In the result, though there is no presumption that a dog will bite a man there is a statutory presumption that a dog will injure a cattle (including horses, mules, asses, sheep, goats and swine). The Act has been amended in 1928, extending the liability to injury by dogs to poultry.

cattle, an animal which is ferocious or tame by nature, or a dog. This is why it has been observed by Lord Simonds in *Read* v. *Lyons*[18]:

"The law of torts has grown up historically in separate compartments, and . . . beasts have travelled in a compartment of their own".[18]

III. LIABILITY FOR SPECIALLY DANGEROUS THINGS

§7. Things Inherently Dangerous

There are things which are inherently dangerous such as fire, fire-arms, poison, explosives. The law, therefore, imputes a strict liability to take care and precaution so that they may not cause damage to others within their proximity. In *Dominion Natural Gas Co.* v. *Collins*,[19] Lord Dunedin observed,—

". . . in the case of articles dangerous in themselves, such as *loaded firearms, poisons, explosives* and other things *ejusdem generis*, there is a peculiar duty to take precaution, imposed upon those who send them forth or instal such articles when it is necessarily the case that other parties will come within their proximity."[19]

Since a broader principle of liability has been enunciated by the House of Lords in 1932,[20] namely, that in every case of damage by negligence, the *degree* of care required of the defendant would depend upon the *nature* of the chattel or thing which has caused the damage, the need for classifying the goods as specially dangerous or otherwise has been obviated. The case of a thing which is naturally dangerou has thus become "a special instance of *negligence* where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety".[20] Since the later case of *Read* v. *Lyons*[21], the opinion of Salmond[22] and other authorities to hold that

"There is really no category of dangerous things; there are only some things which require more and some which require less care."

§8. Liability for Fire

Liability for damage done by the spread of fire lighted on one's own premises is governed by similar principles. But, in *England*, there is a statute on the subject which has made a distinction between the fire used for *domestic* and for *non-domestic* purposes.

(A) DOMESTIC FIRE. A statute of George III [Fires Prevention (Metropolis) Act, 1774] enacts that no action shall be maintained against any person in whose house, chamber, building, or estate any fire shall *accidentally* begin. But the statute extends only to inevitable accident, and

---

18. *Read* v. *Lyons*, (1947) A.C. 156 (*182*).

19 Appellants installed a gas regulator, fitted with a safety-valve which opened into a room where respondents had to work. Due to gas from the safety-valve coming into contact with boiler jets in the same room there was an explosion which injured the respondent. *Held*, the appellants were liable as they failed to establish that the escape of the gas was attributable to interference by their parties [*Dominion Natural Gas Co.* v. *Collins*, (1909) A.C. 640].

20. *Donoghue* v. *Stevenson*, (1932) A.C. 562 (*596, 511-12*).

21. *Read* v. *Lyons*, (1947) A.C. 156 (*161*).

22. *Salmond*, 15th Ed., pp. 389-90; *Winfield*, 7th Ed., 262.

fires due to negligence are still a source of liability.[23] Consequently, the occupier would be liable if the escape of fire is due to any negligence on the part of himself, his servant, or an independent contractor entrusted with the liability or custody of fire [*Black* v. *Christchurch Finance Co.*, (1894) A.C. 48]. The liability would also extend to the case where the damage is due to the negligence of an invitee or licensee, i.e., a person lawfully on the land with the occupier's permission. But he is not responsible for the act of a stranger or for damage which is purely accidental, e.g., fire accidentally caused by electric wiring used for domestic purposes [*Collingwood* v. *Home & Colonial Stores*, (1936) 3 All E.R. 200].

(B) NON-DOMESTIC FIRE. The use of fire for purposes unconnected with the ordinary occupation of houses and land is attended with *absolute liability*. Thus, one who brings fire into dangerous proximity to his neighbour's property, in such ways as by running locomotive engines on a railway without express statutory authority for their use, or bringing a traction engine on a highway, does so at his peril [*Jones* v. *Festinog Ry. Co.*, (1868) 3 Q.B. 733]. The rule on this point is assimilated to the rule in *Rylands* v. *Fletcher*, and even proof of diligence would be immaterial.

§ 9. Liability for Fire-arms, etc.

1. The rule of liability attending the use of specially dangerous things has been worked out on similar principles. LOADED FIRE-ARMS, for instance, are regarded as highly dangerous things, and persons, dealing with them are answerable for damage done by their explosion, even if they have used apparently sufficient precaution [*Dixon* v. *Bell*[24] (1816) 5 M. and S. 198]. 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 abolish its dangerous character altogether.

2. On a like principle it is held that persons sending EXPLOSIVES or goods of similar nature to be carried are bound to give reasonable notice of their nature, and if they do not, are liable for consequential damage. Thus, where the defendant sent nitric acid to a carrier without warning, and the carrier's servant, handling it as he would have handled a vessel of any harmless fluid, was injured by its escape, *held*, the defendant was liable [*Farrant* v. *Barnes*, (1862) 31 C.P. 137].

§ 10. Other Dangerous Chattels

1. Similar principle also applies to dealing in POISONOUS DRUGS or any

23. *Goldman* v. *Hargrave*, (1966) 2 All E.R. 989 (P.C.).

24. *Dixon* v. *Bell*. The defendants having left a loaded gun with another man, sent a young girl to fetch it, with a message to that man to take out the priming first. That was done and the gun delivered to the girl. The girl loitered on the errand, and thinking that it 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. *Held*, 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 innoxious. The gun ought to have been so left as to be out of all reach of doing harm." (The intervening negligence of the servant was no defence).

other dangerous chattel. In *George* v. *Skivington*, [(1869) L.R. 5 Ex. 1], where the defendant manufactured a hairwash out of ingredients known only to him and sold it to the plaintiff's husband, representing it to be harmless, and the plaintiff suffered injury from its use, it was *held* that the defendant was liable, though there was no contract with the plaintiff.

This view has been strongly affirmed by the House of Lords in the case of *Donoghue* v. *Stevenson*,[25] where it has been laid down that the manufacturer of an article would be liable to a person other than the immediate buyer if injury is caused to him owing to a *latent* defect in the article due to the manufacturer's want of care. Lord Atkin observed,—

"A manufacturer of products, which he sells in such a form as to show that he intends to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life and property, owes a duty to the consumer to take that reasonable care."

2. The view taken in some earlier cases that the manufacturer was not liable except to a person to whom he was bound in contract, viz., the immediate buyer, unless the article was "intrinsically dangerous" has been SUPERSEDED by the above decision in *Donoghue* v. *Stevenson*.

3. That the principle in *Donoghue* v. *Stevenson*[25] is not confined to articles of food or drink, but to any other product for hire or purchase, is illustrated by the Privy Council case of *Grant* v. *Australian Knitting Co.*,[26] where it was applied to articles of wear which caused infection. The principle has also been extended to a case of repair. A person who is engaged to do repairs on a chattel (not necessarily dangerous) and by his negligence creates a latent danger in it would be liable not only to the person with whom he had contracted but to any person who is injured thereby [*Malfroot* v. *Noxal*, (1935) 51 T.L.R. 551].

§ 11. Extension of the Principle in Donoghue v. Stevenson

1. The history of the law in England, subsequent to *Donoghue* v. *Stevenson*[27], is one of extension of the general principle of the duty of a person to take care not to cause any injury to his neighbour by any act or omission

25. *Donoghue* v. *Stevenson*, (1932) A.C. 562. Defendant (S) was a manufacturer of ginger beer. One of the bottles supplied by him to a retailer contained the remains of a dead snail. The plaintiff (D) who had bought the bottle from the retailer, sustained injury by drinking its contents. The bottle being of dark opaque glass, the impurity of its contents could not be discovered by the retailer nor by the plaintiff until the greater part of its contents has been consumed by her. *Held*, the manufacturer was liable in damages. His duty was to take reasonable care that the article was free from a defect which the immediate buyer or the ultimate consumer could not discover by inspection.

26. *Grant* v. *Australian Knitting Mills Ltd.*, (1939) A.C. 85. Plaintiff got a skin disease by using a paint manufactured by the defendant company, which contained some injurious chemical. *Held*, that mere *possibility* of tampering of the goods between the manufacturer and the use by the ultimate consumer was not sufficient to exempt the manufacturer from liability. He may get immunity only by proving intermediate tampering by third person.

27. *Donoghue* v. *Stevenson*, (1932) A.C. 562 (*580*) H.L.

which, he could reasonably foresee, would be likely to cause injury to his neighbour, until it has reached a stage[28] where it has been held that the general principle should be applied to all cases of such injury to a neighbour unless there is in a particular case some justification for its exclusion.

2. Thus, it has been applied—

(a) Not merely to the escape of dangerous things or injury caused by dangerous chattels, but to make the Government liable for the *escape of* Borstal *prisoners*, from an island of detention causing damage to boats of neighbouring boat-owners, which could be reasonably foreseen.[28]

(b) It has even been extended (by the Court of Appeal) to hold an owner of a building for having created a hidden defect in building it,[29] even though in cases which had preceded it the extension of the rule in *Donoghue's case* from chattels to *reality* had been generally resisted.

But it would not be extended so as to unsettle the law in those spheres where the law has been settled by a long line of decisions, e.g.,

(a) Causing damage to rival competitors in business by promoting one's own interests;[28]

(b) The relationship between landlord and tenant.[28]

IV. LIABILITY FOR DANGEROUS PREMISES

§ 12. Duty of an Occupier of Premises towards Persons entering on It

An occupier of building or other structure intended for human use and occupation is under a duty to take reasonable care about the safe condition of such building or structure.

The common law rules on this subject were highly complicated inasmuch as they made a distinction between different classes of visitors. Apart from trespassers who had no legal right to enter upon a premises, the law made a distinction as between 'invitees', 'licensees' and persons entering by virtue of a contract.

In *England*, all this distinction has now been done away with by the *Occupiers' Liability Act*, 1957, which has laid down one uniform standard of care as regards all these different classes of persons who lawfully enter upon a premises, though the basis of their right to enter may differ.

Before taking up the statutory provisions, the common law rules under the three different heads should be examined.

A. Under Common Law

1. *Duty of Occupier in respect of* INVITEES

An INVITEE is "a person who resorts to a building in the course of business which concerns the occupier and upon his invitation, express or implied, and

28. *Home Office* v. *Dorset Yacht Co.*, (1970) 2 All E.R. 294 (*297, 321*) H.L.

29. *Dutton* v. *Bognor Building Co.*, (1974) 1 All E.R. 462 (*471, 479*) C.A. [Also *S.C.M.* v. *Whittall*, (1970) 3 All E.R. 245 (*249, 260*) C.A.—damage caused by the carrying out of construction works in the vicinity of plaintiff's factory].

not upon bare permission." The common case is that of a customer in a shop; but this is only one of a class which includes persons who go not as mere volunteers or licensees or guests but who go upon BUSINESS WHICH CONCERNS THE OCCUPIER, and upon his invitation,[30] express or implied.

1. The duty towards an invitee was laid down in the leading case of *Indermaur* v. *Dames*,[31] [(1866) L.R. 1 C.P. 274] thus—

"with respect to such a visitor, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part, use *reasonable care to prevent damages from unusual danger*, which he knows or ought to know."

2. *Scope of the Rule in Indermaur* v. *Dames*. (i) The duty is to take reasonable care that the premises are safe. On the one hand, the invitee is 'not entitled to find a state of positive safety, but only to warning of *unusual danger* incident to the nature and uses of the place'. On the other hand, the occupier is 'not entitled to create or maintain a state of things so dangerous as to make the place practically inaccessible or impassable, even if he gives warning'.

(ii) 'Unusual danger' in the present context means—

"such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises."[32]

Thus, if the invitee belongs to a particular class of tradesmen, the test to be applied is whether the danger in question is an unusual danger for that class of tradesmen.[32] For instance, minor defects in windows are not unusual dangers to window cleaners. They are dangers against which window cleaners must provide their own safeguards.

(iii) The duty arises in respect of a danger which the occupier knew or ought to have known by reasonable care. Hence, he cannot plead ignorance and is liable for danger created by servants or independent contractors.

3. *Limitations of the Rule*. The invitee cannot recover damages for inquiry if he comes to or remains on the premises with full *knowledge or notice* of the existence of the danger through which he has suffered, provided the full significance of the risk is recognised by the invitee.[32] A mere knowledge

30. Invitation in common parlance refers to the relation of host and guest. But a guest (i.e., a visitor who does not pay for his entertainment) is not given the benefit of the protection afforded by law to an "invitee." In point of law, a guest is nothing but a 'bare licensee' [see *below*].

31. *Indermaur* v. *Dames*. The plaintiff, a journeyman gas-fitter employed to examine and test some new burners in the sugar refinery of the defendant, fell from an upper floor of the building through an unfenced shaft which was used in working hours and was seriously hurt. *Held*, the defendant was liable. For, though "there was no absolute duty to prevent danger but only a duty to make the place as little dangerous as such a place would reasonably be, having regard to the contrivances necessarily used in carrying on the business", yet, "there was evidence that the plaintiff was in the place by the tacit invitation of the defendant upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained by reason of that danger and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it."

32. *London Graving Co.* v. *Horton*, (1951) 2 All E.R. 1 (5) (H.L.).

of a defective condition on the part of the *invitee*, without a 'full appreciation of the danger' is not sufficient to defeat his claim where the want of reasonable care on the part of the occupier has been established.[32]

II. *Duty of Occupier in respect of Persons* ENTERING ON A WARRANTY OF SAFETY

1. The right arising from invitation may co-exist with a right arising from contract, as where the person entering on a building or structure has paid for admission, e.g., in a theatre, hotel, etc. Where such contract includes a warranty of safety the plaintiff is no doubt entitled to its benefit. But even in the absence of an express warranty, a warranty is implied by law. 'Such a person is entitled, without qualification, to find a state of things as safe for the purpose in hand as reasonably competent care and skill can make it'.

2. The rule which was established in the case of *Francis* v. *Cockrell*,[33] [(1870) L.R. 5 Q.B. 134] may be stated thus (*Salmond*)—

> "When the occupier of premises agrees for valuable consideration that some other person shall have a right to enter and use them for some specific purpose, the contract contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of one can make them."

III. *Liability of Occupier to* BARE LICENSEES

1. A 'bare licensee' is a person who enters on the premises by the permission of the occupier, *granted gratuitously in a matter in which the occupier has interest*.[34] If there is a common interest the case will come under the rule in *Indermaur* v. *Dames*. Permission may be express or implied. But if neither express permission nor tacit consent is established, the person entering will fall within the category of a trespasser. The typical example of a bare licensee

---

33. *Francis* v. *Cockrell*. C, the occupier of a racecourse contracted with a builder for the erection of a stand thereon. F purchased from C a ticket entitling him to enter the stand to see the races. Through the negligence of the contractor the stand was improperly constructed and during the races it fell and injured F, who was upon it. *Held*, the defendant (C) was liable although guilty of no negligence.

Kelly, C.B. observed, "Firstly, there is the principle which I hold to be well established by all the authorities the one who lets for hire or engages for the supply of any article or thing whether it be carriage to be ridden in or a bridge to be passed over or a stand from which to view a steeple-chase or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant and does impliedly contract that the article or thing is reasonably fit for the purpose to which it is to be applied; but, secondly, he does not contract against any unseen and unknown defect which cannot be discovered or which may be said to be undiscoverable by any ordinary or reasonable means of enquiry and examination."

34. The landords of a housing estate had laid out a forecourt between the highway and the entrance to some stops which they had let. Anyone going to the shops from the highway had to cross the forecourt which remained in the occupation of the landlords. While on the way to make a purchase at one of the shops, J. stepped from the pavement of the highway on the forecourt and caught her foot on the cover of a stop-cock which projected above the surface of the forecourt,—a danger which was *not known* to the landlords. *Held*, that J. was a mere licensee and not invitee in relation to the landlords for the forecourt was open to the public at large whether or not they intended to enter a shop and it could not be said that a member of the public had any common interest with the landlords in the forecourt. Hence, J. being a licensee could not recover damages from the landlord for a danger of which they were not aware [*Jacobs* v. *London Council*, (1950) 1 All E.R. 737 (H.L.)].

is a person who is gratuitously allowed by the occupier of a land to use a way across that land for purposes which exclusively concern the licensee himself. A licensee is not entitled to find the premises in any particular state of safety or convenience but must take it as it is. The only duty of the occupier is to give *warning* of any *concealed danger* of which he actually knows.[35] In other words, "he is to refrain from knowingly leading the plaintiff into a trap by allowing him to enter, without warning, premises which he, the occupier, actually knows to be safe. But he is under no duty to make them safe, or even to ascertain whether they are safe or not." A concealed danger within the meaning of this rule is a danger which is known to the occupier but is unknown to the plaintiff and is of such a nature that a reasonably prudent man in the position of the plaintiff would not anticipate it or guard against it.[36]

2. The rule which was enunciated in the case of *Gautret* v. *Egerton*,[37] [(1867) L.R. 2 C.P. 371] may be stated thus—

"Without notice, the occupier *must not leave* a 'trap' (or concealed danger) for a licensee."

3. The licensee is entitled only not to be led into danger by 'something like fraud'. In the latter case, however, the occupier would be liable not for failure in a special duty, but for wilful wrong for having made his property dangerous to persons using ordinary care, and then held out his permission as an inducement to come to it. Apart from such improbable case, the licensee's rights are measured by the actual state of the property at the time of the licence.

4. But where the licensee is a child, the duty of the occupier would seem to be more than a mere duty to give warning of concealed dangers. To allow a child to enter upon premises known to be dangerous is itself an act of negligence [see *ante*] unless sufficient precautions are taken to protect him from injury [*Cooke* v. *Midland G.W. Ry. of Ireland*,[38] (1909) A.C. 229; *Ellis* v. *Fullham Borough Council*,[39] (1938) 1 K.B. 212].[40]

---

35. *Perkowski* v. *Willington Corpn.*, (1958) 3 All E.R. 368 (P.C.).

36. *Fairman* v. *Perpetual Investment Building Society*, [(1923) A.C. 74]. The defendants were owners of a block of flats which they let out to various tenants the defendants keeping possession and control of the common staircase giving access to the flats. The plaintiff who lodged with her sister, the wife of the tenant of one of the flats was injured while descending the stairs by having her heel caught in a depression formed in one of the steps by the wearing away of the cement. The plaintiff's action for damages against the defendants was dismissed on the ground that she was a mere licensee in relation to the defendants; that there was no concealed danger and the depression which caused her fall could have been seen by her if she had looked.

37. *Gautret* v. *Egerton*. The defendants had permitted the public to use a way through certain docks, intersected by canal cuttings. A person who was habitually using it, fell into one of the cuttings and was drowned. *Held*, the defendants were not liable to any one who suffered damage in consequence of the dangerous condition of the way.

38. The defendant railway company had tacitly allowed children to enter upon the railway premises and there to amuse themselves by moving a turntable. *Held*, 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 [*Cooke* v. *Midland Ry. of Ireland*].

39. *Ellis* v. *Fullham Borough Council*. The defendant Council maintained a paddling pool in a public park for children. Loads of sand were put at the side of the pool to give the appearance of the sea-side. The boy of a rate payer, while paddling, stepped upon a

(*Continued on page 205*)

5. But there is no liability unless the defect was actually *known* to the defendant, for a licensee cannot claim a higher duty to take care towards him [*Sutton* v. *Bootle Corporation*, (1947) 1 A.E.R. 92 (C.A.)].[41]

B. Under Occupiers' Liability Act, 1957, in England[42]

So long we are discussing the common law of England which contrives to be applicable in India,[42] while it has been radically changed by statute, in England[43]

(a) The Act sets one "common duty of care" for persons who lawfully enter a premises, thus including *both invitees and licensees*[43],—which is defined in sec. 2, as follows:

"A duty to take such care as *in all the circumstances of the case is reasonable* to see that the visitor will be reasonably safe in using the premises *for the purposes for which he is permitted by the occupier to be there.*"

It is to be noted that once the visitor (which term is used by the statute to include all persons lawfully on the premises) exceeds the lawful authority under which he had entered, he at once becomes a *trespasser* and loses the protection given by the statute. The words "in all the circumstances of the case" indicate that the standard of care is variable according to the nature of the visitor or the purposes for which the authority is given.

But, in any case, there is no duty to avoid what was not reasonably foreseeable [*Wheat* v. *Lacon*, (1966) 1 All E.R. 582 (H.L.)].

(*Continued from page 204*)

piece of glass hidden in the sand, and cut his toe. The pool was raked every morning and the accident happened almost immediately after the pool had been raked out by an official of the defendants. *Held*, the boy being in the position of a licensee 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.

40. See also the case of *Southern Portland Cement Ltd.* v. *Cooper*, (1974), 1 All E.R. 87 (P.C.), under 'Duty towards trespassers', *post*.

41. *Sutton* v. *Bootle Corporation*. The plaintiff, a child of 9, while playing in the playground in one of the defendant corporation's public parks, was boarding a swing when her finger, the top joint of which was already amputated, was caught between the unguarded lug and socket of a checking device designed to prevent the swing too far. The defect was one which could easily have been remedied. The defendants who had no knowledge of the danger, had obtained the swing from an old-established firm of manufacturers and the model was one which had been in use for years without any previous accident of a similar nature. *Held*, that the defendants owed the plaintiff the obligation of a licensor to a licensee, and since, as such, they were bound to do no more than warn her of danger *actually known to them* no liability attached to them. (In this case, the decision in *Glasgow Corpon.* v. *Taylor* was distinguished by pointing out that in that case the decision proceeded on the footing that the defendants "were aware of the existence of a concealed or disguised danger to which the child might be exposed").

42. It is to be noted that no such statute having been made in *India*, the common law continues to apply.

43. The common law distinction between invitees and licensees is thus abolished by this Act [*Slater* v. *Clay Cross*, (1956) 2 All E.R. 625 (627) C.A.].

So far as children[44] are concerned, the statute expressly provides in sec. 2 (3) (a):

"An occupier must be prepared for children to be less careful than adults."

The common law principles in this behalf are, therefore, still applicable.

The old principle of *volenti non fit injuria* constitutes an exception to this liability because it specifically provides that the statute does not impose upon an occupier any obligation to a visitor in respect of "risks *willingly accepted* as his by the visitor" [sec. 2 (5)].

(b) Where an occupier is bound by a contract to permit a third party to enter his premises, there also the occupier is bound by the above statutory duty to care; the contract may provide for a *higher* duty but the statutory duty cannot be relaxed or reduced by the contract.

(c) The statutory duty of care extends to the landlord in respect of his tenant's visitors where the landlord is responsible to his tenant for the maintenance or repair of the premises.

(d) The Act is expressly binding on the Crown.

IV. *Duty of occupier towards* TRESPASSERS

1. Hitherto we have been considering the rights of persons *lawfully entering* on dangerous premises. To conclude the subject, we must now consider the case of a trespasser, or who enters without leave or license. The ***general principle*** is that he who enters wrongfully enters at his own risk in all respects. To a trespasser the occupier owes no duty either to see that his premises are safe, or to give warning of their danger—not even that limited duty of warning which he owes to a bare licensee.[45] Thus, a burglar who breaks his leg by falling down the stairs cannot complain that they are insecure, nor can a beggar recover damages because he is bitten by the dog [*Sarch* v. *Blackburn*, (1830) 4 C.P. 279].

2. But in view of the change in social conditions which have enhanced the ordinary risks of movement even to innocent persons, and of the development of humanitarian considerations, e.g., towards unguarded children, a number of exceptions have been acknowledged by the Courts to the foregoing general proposition, so that in the following exceptional circumstances, an occupier may be liable even to a trespasser coming unlawfully upon his land. These cases have been summarised, after review of a mass of precedents, in the unanimous House of Lords decision in *British Ry. Board* v. *Harrington*[46], and by the Privy Council in *Southern Portland Cement* v. *Cooper*[47], Thus—

(I) An occupier who *intentionally* harms a trespasser by creating on his premises a source of danger for that purpose is liable for the harm so done, unless the danger so created by him can be justified as being nothing more than a reasonable and therefore lawful measure of *self-defence*. A trespasser is not an outlaw, and the occupier cannot treat him as he pleases. Thus, he

44. See *Cooke* v. *Midland G. W. Ry.* (1909) A.C. 229.
45. *Addie & Sons* v. *Dumbreck*, (1929) A.C. 358.
46. *Br. Ry. Board* v. *Herrington*, (1972) 1 All E.R. 749 (H.L.).
47. *Southern Portland Cement* v. *Cooper* (1974) 1 All E.R. 87 (P.C.).

cannot shoot or be labour an intruder or set man-traps like a spring gun.[48]

"The occupier *must not wilfully set a trap* for a trespasser."

But he can adopt measures for prevention of trespasser, e.g., putting up a barbed wire fence, a gate with iron spikes.

(II) Even in respect of a trespasser, the occupier is liable for positive acts of misfeasance done by himself with knowledge of the trespasser's presence. For instance, occupier cannot cause a dangerous explosion or practise shooting in premises or to fell a tree without warning [*Mourton* v. *Poulter*, (1930) 2 K.B. 183], when he knows or has reason to know that trespassers are there.

(III) But under the modern law, the duty of an occupier of land is no longer limited to cases where he knows that there is a trespasser on the land or that the arrival of a trespasser is likely. The nature and extent of his duty would be determined by the condition of his land and considerations of humanity, as follows:

A. *Where he has himself created a danger on his land:* In such a case, he is bound to take steps, even at substantial cost, to protect potential trespassers that might come that way. Cases of this nature are generally referred to as cases involving duty of 'fencing':

Ordinarily, an occupier has no duty to *fence* his land so as to exclude trespassers.[49] But he would be liable where he fails to do so, after having caused something on the land (e.g., digging pitfalls) or carrying on some activity there (e.g., excavation)[50] which would constitute a serious danger to a person who comes on the land, even as a trespasser. In such cases, the occupier's liability is not dependent on his knowledge of the presence of a trespasser on his land, but on the dangerous condition of his land,[51] and the proximity of such land to a place where the injured person had a *right* to go, e.g., a public path.[50]

B. *Where there is something on his land which causes an allurement to children:* In this class of cases, the responsibility of the occupier becomes

---

48. The defendant placed a spring in his garden to protect it from thieves and trespassers. The plaintiff, a boy, trespassed into the garden to recapture a foul which had strayed there. While so trespassing he was injured by the discharge of the gun. *Held*, the defendant was liable [*Bird* v. *Holbrook*, (1828) 4 Bing 628].

49. *Edwards* v. *Railway Executive*, (1953) 2 All E.R. 430 (H.L.). A railway line, laid on an embankment, was separated from a public recreation ground at the foot of the embankment, by a fence consisting of concrete posts and wires. A boy, aged nine, broke through the fence, climbed the embankment, looking for a ball, and while crossing the line, slipped and fell between the rail and was run over by an electric train and injured. In an action for negligence by the boy and his father, *held*, that the onus to prove that the boy was a licensee was not discharged by merely showing that the railway company had the *knowledge* that, in spite of the fence, children constantly broke through the fence pulling out the split pins. Implied permission could be established only by showing that the company had so conducted itself that it could not be heard to say that it did not assent to the use of the premises by children. The company was *not* bound to take *every possible* step to keep out intruders. It has erected a fence and had it repaired whenever children interfered with it. This showed that it resented the intrusion and it could not, in these circumstances, be inferred that the child had been there with the leave of the company. He was a trespasser and could not, therefore, succeed.

50. *Prentice* v. *Assets Co.*, (1890) 17 R. 484.

51. *Creed* v. *John*, (1955) 3 All E.R. 123.

greater because what may not be an allurement to an adult may be an allurement to a child.[52] The possibility of children straying into the land increases by reason of such allurement.[53]

52. *Commr. for Rys.* v. *Cardy*, (1964) 1 All E.R. 897 (*911*) P.C.

53. *Southern Portland Cement Ltd.* v. *Cooper*, (1974) 1 All E.R. 87 (P.C.). The company carried on the business of quarrying limestone and had created a mound by dumping waste material, which created a slope and thus constituted an allurement to children who were in the habit of playing at various places in the proximity of the company's land. Some of the children one day trespassed into the company's land to play on the mound, and while so doing, a boy came into contact with an electric cable near the mound and suffered injuries. *Held*, the company was liable because it had not take steps to prevent the formation of the mound in close proximity *to a high tension* electric line and that mere warning to the children on some occasion was not enough in such a case.

17

The Borderland of Tort

§ 1. 'Torts founded on Contract'

1. Under this head we shall discuss more fully the peculiar relation between the law of tort and the law of contract about which we spoke at the very beginning [p. 6, *ante*]. The Common Law Procedure Act, 1852, defined a tort as a 'wrong independent of contract,' and divided personal actions into those arising out of contract and those arising out of wrongs independent of contract. But this simple dichotomy cannot claim scientific precision. There are torts which are not apparently independent of contract'. Such torts have sometimes been called 'torts founded on contract'. This phrase is, however, misleading inasmuch as in these cases the cause of action is really independent of contract. If there has been a violation of a duty *imposed by the general law*, there is ground for an action in tort, though the defendant may be further bound by a contract which he has made.

Thus, the contractual relationship between a master and his servant implies a *contractual* obligation of care on the part of the master towards his servant and *vice versa*. A similar duty to take care also arises under the *general law*. When one of the parties is injured owing to a failure of the other in this duty to take care, the injured party thas the option to elect whether he should sue for damages for breach of contract or for damages for the wrong of negligence[1]. Once the plaintiff makes this election, the principles applicable for the determination of the case will be different according as the plaintiff has brought his action on the footing of contract or of tort[2–3].

In such cases, since the liability in tort is 'independent' of contract, the liability for negligence is not excluded in the absence of clear words in the contract. Hence, there may be cases where for the same act or default, there is no liability on the footing of breach of contract, but there is liability in tort.[4]

This result follows from a rule of construction of contracts. The rule is

1. Thus where a dentist undertook to extract plaintiff's tooth by his "painless process", plaintiff was held entitled to claim damages for negligent extraction of tooth, causing pain and suffering, without alleging breach of contract to employ a 'painful process' [*Edwards* v. *Mallan*, (1908) 1 K.B. 1002].
2. *Lister* v. *Romford Ice Co.*, (1957) 1 All E.R. 125 (130, 139) H.L.
3. *Davie* v. *New Merton Board Mills*, (1959) 1 All E.R. 346 (350, 365) H.L.
4. *Grant* v. *Australian Knitting Mills*, (1936) A.C. 85 (101–12) P.C.

that if in a contract, the liability for damages is sought to be excluded by a clause, the exemption clause will exclude the liability for damages for breach of contract only, unless the clause specifically and clearly excludes the liability for damages due to negligence of the party seeking to avoid the liability.[5] Such contract would be strictly construed.[6]

2. Now, there are cases which fall on the borderland between tort and contract where it is difficult to say whether there has been a breach of any general duty at all. The question is material because if the wrong is merely a breach of contract, only a party to the contract can sue for it, but if it is also a tort, a stranger who has suffered is entitled to sue. This contractual foundation of 'privity of contract' was carried to an untenable corollary in the province of torts in some early cases where it was supposed that where there was a substantial breach of contract, a stranger to the contract could not sue in contract even though the wrong done to him was independent of contract. This theory has been exploded since the House of Lords decision in *Donoghue* v. *Stevenson*[7], so that 'the privity of contract fallacy' has disappeared from the law of torts.[8]

3. Read in the light of the above principles much of the apparent conflict between decisions on this subject would be resolved. We may consider them under the following groups:

(A) (i) *There are cases where there are two causes of action, but even if it is doubtful whether a contract has been formed at all, there is at all events an injury for which action lies in tort.*

(a) Cases where the foundations for *both* actions exist are called cases of '*concurrent liability*', which exists, e.g., in the case of a bailee[9], a common carrier,[10] an innkeeper,[11] a medical practitioner.[12]

(b) The crucial instance of the latter principle was evolved by the House of Lords in the case of *Donoghue* v. *Stevenson*,[13] which has been noticed earlier. In this case, it was laid down that though there may not be a contract between the manufacturer of a drink and its ultimate consumer, the manufacturer owes a duty of care to the consumer, *independently of contract*[14], so that the consumer was entitled to recover damages from the manufacturer for injury caused by any deleterious substance in such drink.

(c) When a party to a contract obtains confidential information from the other party for purposes of the contract and thereafter publishes such information in breach of confidence, there is a concurrent cause of action in contract and tort.[15]

But even where there is no contractual relationship between the publisher

5. *White* v. *Warrick*, (1953) 2 All E.R. 1021 (C.A).
6. *Adler* v. *Dickson*, (1954) 3 All E.R. 397 (C.A.).
7. *Donoghue* v. *Stevenson*, (1932) A.C. 562.
8. *Candler* v. *Crane*, (1951) 2 K.B. 164 (177).
9. *Chesworth* v. *Farrar*, (1966) 2 All E.R. 107.
10. Heron II, (1967) 3 All E.R. 686.
11. *Constantine* v. *Imperial Hotels*, (1944) 2 All E.R. 171.
12. *Fish* v. *Kapur*, (1948) 2 All E.R. 176.
13. *Donoghue* v. *Stevenson*, (1932) A.C. 562 (H.L.).
14. *Grant* v. *Australian Knitting Mills*, (1936) A.C. 85 (101-02) P.C.
15. *Saltman* v. *Campbell*, (1963) 3 All E.R. 413*n* (C.A.).

of such confidential information and the person affected, the party affected may have a cause of action in tort for 'breach of confidence', on the principle that if the defendant has directly or indirectly obtained confidential information from the plaintiff, he cannot use it without the consent, express or implied, of the plaintiff.[15] Further, the obligation not to disclose will bind even a stranger, such as a journalist, in whose possession the confidential information may have improperly come.[16]

(ii) There are cases of contract, which though silent on the duty to take care, may yet give rise to such duty, under the law of torts. Thus, though the contract between an employer and an employee may exclude liability of the employer for negligence, the employee may yet hold the employer liable for the negligence of another servant of the employer, where the plaintiff could have proceeded against that servant personally.[17]

(iii) *The same act which makes the defendant liable for breach of contract to A, may make him liable for a tort to Z:*

1. An important species under this head arises out of what are known as "common callings" such as the calling of a surgeon, an innkeeper or common carrier. In such cases, if the surgeon is engaged by A for the treatment of Z, and the surgeon injures Z by his failure to exercise that degree of skill normally shown by persons of his calling, Z may sue the surgeon for damages in tort, though only A and not Z can sue the surgeon in contract (because of the absence of privity of contract between Z and the surgeon).[18]

2. A more prominent class of cases where it has been established that the privity of contract between A and B does not stand in the way of C being able to suc A in tort in respect of the subject-matter of the contract between A and B, relates to *dangerous goods*, as laid down by the House of Lords in *Donoghue* v. *Stevenson*, (1932) 1 All E.R. 1 (H.L.). In that case (see p. 152, *ante*), it was held that where a manufacturer sells goods to a retailer which has *latent* defects the consumer who is injured by such latent defects, is entitled to sue the manufacturer in damages for negligence even though there was no privity of contract between the consumer and the manufacturer.

On the other hand—

(i) *A breach of contract is not, of itself, sufficient to make the defendant liable to a stranger to the contract for consequential damage*: In other words, in the absence of any duty towards *himself*, B *cannot* maintain an action upon a contract made between A and the defendant.

(ii) *But if there is a culpable misfeasance in the performance of the contract, a stranger may have a right of action in tort.*[19]

---

16. *Argyll* v. *Argyll*, (1965) 1 All E.R. 611 (627).

17. *Fairline Shipping Corp.* v. *Adamson*, (1974) 2 All E.R. 967; *Adler* v. *Dickson*, (1954) 3 All E.R. 397 (C.A.).

18. Salmond, 15th Ed., p. 14.

19. *Langridge* v. *Levy*, [(1837) 2 M. & W. 519]. The father of the plaintiff bought a gun from the defendant informing him it was for the use of himself and his son. The defendant warranted the gun to be a good and safe gun; but the gun burst while the plaintiff was using it and injured his hand. *Held*, the defendant was answerable for *fraudulent* representation [see p. 125, *ante*], even though there was no contract between the plaintiff and the defendant.

§ 2. Emergent and Doubtful Torts

1. As has been stated at the outset, it is difficult to formulate a comprehensive definition of a tort which might include all civil wrongs which are recognised by the law as torts. Many scholars on the subject, therefore, pay more attention to the specific torts and describe the subject as the law of '*torts*'. From this standpoint, a civil wrong is a tort if the current law recognises it as a 'tort' for which damages may be available to the person wronged.

2. As in other branches of English common law, the law of torts has developed historically, and the process of admitting new categories of wrongs into the law of torts has not ceased. In modern times, "Courts have displayed willingness to create new heads of liability",[20] owing to various factors introduced by the development of a police State into a welfare State, newer problems created by the social and economic changes in the modern age which need protection of the law.

3. Not that all of such new categories of wrongs have been admitted into the law of torts all at once. The process is one of gradual development. There is one category which has been already firmly established, namely, *Negligence* as an *independent* wrong in certain cases where the law imputes a duty to take care, apart from negligence being a condition of liability for some other specific tort. Negligence as a separate tortious liability has already been dealt with at pp. 152 *et seq.*

4. Besides negligence, there are some other categories which are still struggling for admission, on the recommendation of some Judges and scholars. These categories are labelled by *Salmond* as 'Emergent Torts', while *Winfield* (11th Ed., pp. 523 *et seq.*) calls them 'Doubtful Torts'. The progress of all of these categories not being uniform, it would be useful to deal with them separately.

A. Invasion of Privacy

At English common law, there is no independent tort for which a person can recover damages for his sentiments for invasion of his privacy, unless he can establish that such invasion constitutes any one of the recognised torts. Thus, it would be actionable if it constitutes—trespass[21], defamation[22], nuisance[23], infringement of copyright.[24]

But American law has developed ahead of English law in recognising invasion of privacy as an actionable wrong under particular circumstances where English law as yet offers no remedy, e.g., interception of telephonic or other conversations, publication of a person's photograph without his or her consent, (irrespective of defamation or infringement of copyright). There

---

20. *Salmond* (17th Ed., p. 34). [Winfield classifies them as 'Doubtful Torts' (11th Ed., pp. 524-529)].
21. *Bernstein* v. *Skyways*, (1978) 1 Q.B. 479.
22. *Dunlop Co.* v. *Dunlop*, (1921) 1 A.C. 367 (H.L.).
23. *Kruse* v. *Johnson*, (1898) 2 Q.B. 91; *Hubbard* v. *Pitt*, (1976) Q.B. 142.
24. *Williams* v. *Settle*, (1960) 1 W.L.R. 1072.

has, accordingly, been a current of thought in England whether the invasion of personal privacy, of itself, should not be actionable.

B. Abuse of Statutory Administrative Power

At common law, remedy by way a prerogative writ (e.g., *mandamus, certiorari or prohibition*) or declaration or injunction may be available, in proper cases, where a public authority has wronged an individual by an abuse of his statutory power, being *ultra vires*, malicious or negligent.

But under the law of torts, no damages could be recovered by the injured person from the public authority or the State. In *David* v. *Abdul Cader*[25], the Privy Council (in a case from Ceylon) has made an observation that where a licensing authority has *maliciously* cancelled a person's cinema licence, "it might give rise to an action for damages in English law". A direct decision from an English Court recognising such tort is yet to come, since Privy Council made the observation[25] in a case where the law applicable was not English law, but Roman-Dutch law.

C. Breach of Confidence

There is no doubt that a misuse of confidential information would be actionable where it constitutes any of the recognised torts, e.g., breach of contract.

The question is, where there is no contract that the confidential information should not be disclosed to a third party or the defendant was unaware that he was making use of confidential information, should the defendant still be liable in damages on the principle of a quasi-contract or the equitable principle that the defendant cannot be allowed to take an unfair advantage of the plaintiff? [See p. 211, *ante*].

In some recent cases, the answer has been suggested in the affirmative.[26] The British Law Commission has proposed legislation creating a statutory tort of breach of confidence. In view of all these developments, *Winfield* (p. 528, *ibid.*) has included 'Breach of confidence' in his list of 'doubtful torts'.

25. *David* v. *Abdul Cader*, (1963) 1 W.L.R. 834 P.C.

26. *Seager* v. *Copydex*, (1967) 1 W.L.R. 923; (1969) 1 W.L.R. 809, *Fraser* v. *Evans* (1969) 1 Q.B. 349 (*361*).

Index

Acts:
English:
Administration of Justice Act, 1933, 63
Animals Act, 1971, 195
Betting and Lotteries Act, 1934, 185
Common Law Procedure Act, 1852, 209
Coal Mines Act, 1911, 186
Crown Proceedings Act, 43, 44
Dogs Act, 1906, 197
Employer's Liability Act, 1880, 35
Law Reform (Married Women and Tortfeasors) Act, 1935, 39, 42, 68
Law Reform (Husband and Wife) Act, 1962, 42
Law Reform (Contributory Negligence) Act, 162
Law Reform (Personal Injuries) Act, 1948, 36, 170
Married Woman's Property Act, 1882, 41
National Insurance (Industrial Injuries) Act, 1946, 36
Occupier's Liability Act, 1957, 201, 205
Partnership Act, 1890, 38
Trade Disputes Act, 1906, 50
Trade Disputes and Trade Unions Act, 1927, 50
Workmen's Compensation Act, 1925, 35
Law Reform (Contributory Negligence) Act, 1945, 61

Acts:
Indian:
Indian Carriers Act (III), 1865, 171
Indian Railways Act (IX) of 1880, 171
Easements Act, 1882, 8
Employers' Liability Act, 1938, 37
Fatal Accidents Act, 1855, 8, 79, 82
Patents and Designs Act, 1911, 8
Sale of Goods Act, 1930, 8
Specific Relief Act, 1963, 8, 139
Workmen's Compensation Act, 1923, 8
Partnership Act, 1932, 39
Employees' State Insurance Act, 1948, 38
Guardians and Wards Acts, 1890, 47
Indian Trade Unions Act, 1926, 50
Judicial Officers' Protection Act, 1850, 53

Breaches of statutory Duty:
nature of the wrong, 174
statutory power and statutory duty, 184
distinction between, 184
when give rise to action for damages, 185
burden of proof, 187
common law liability in cases of statutory duty, 188

Breaches of duties of insuring safety:
nature of these duties, 189
liability for debtorious things:
the rule in *Ryland* v. *Fletcher*, 190
exceptions to the rule in, 191
things naturally, 191
on the land Act of God, 191
the act of stranger, 192
common benefit, 193
legal authority, 193
consent of the plaintiff, 193
the above rule distinguished from nuisance, 193
liability for animals, 194
injury by dangerous animals:
liability for, 196
animals naturally ferocious, 196
animals tame by nature, 197
liability for specially dangerous things:
things inherently dangerous, 198
liability for fire, 198
domestic fire 198
non-domestic fire, 199
liability for fire-arms:
other dangerous chattels, 199
posionous drugs, 199
extension of the principle in *Donoghue* v. *Stevenson*, 200
liability for dangerous premises:
duty of occupier of premises towards persons entering on it, 201
under common law, 201
duty of occupier in respect of invitees, 201
scope of the Rule in *Indermaur* v. *Dames*, 202
limitations of the Rule, 202
duty of occupier in respect of persons, 203
liability of occupier to bare licencees, 203

under occupiers' liability Act, 1957, 205
duty of the occupier toward trespassers, 206
when he himself created a danger on his land, 207
where there is something on his land which causes an allurement of children, 207

Common Carriers:
liability of, 170
of goods, 170
of land, railways, omnibuses, 170
scope of Indian Carriers Act III of 1865 and Railways Act, 1879 and 1890, 171
carriage of Goods by Sea Act, 1925, 171
by Air Act, 1972, 171
difference in the applicability of Carriers Act and Railways Act, 171
principles of liability under the two Acts after amendments in 1949 and 1961, 172

'Common Carrier' other than Railway:
liability of, 172
definition of, 172
ingredients of, 172
distinguished from a private carrier, 172
true test of, 172–73
general principle of liability of, is that of 'insurer of goods', 173
presumption of negligence of the carrier of his employees, 173
riders to the principle of liability, 173
two categories of liability:
negligence or criminal conduct, 173
for loss or damage to the goods, 173
onus of proof against negligence or criminal conduct is upon the Carrier, 174

Common Carriers of passengers:
under English common Law:
what is 'passenger', 180
reasonable care to carry passenger safely–this duty is independent of contract, 180
degree of liabillity–distinction between carrier of passenger, 180
rules as to the degree of care to carry passenger, 180
under the Indian Railways Act:
prior to 1943, application of English Common Law, 181
s. 82A of the amended Railways Act—provisions of—to pay compensation in all cases of death, or injury by an accident, 181
Railway liability to pay compensation in all cases of accident, irrespective of negligency or wrongful act railway made insurer for passenger, 182
limits to Railway liability, 182
liability for passenger's luggage, 182
limits to, as laid down by s. 75, 183
liability of innkeepers, 183

Consequences of an act:
direct, 13
natural, 13
probable, 13
limit of probability, 14
foreseeability, 14
reasonable foresight, 14
test of foreseeability, 16

Contract:
and quasi-contract, 3

Damage:
what is, 9
damnum and injuria, 10
distinguished from damages, 10
foreseeability of consequence, 14, 15
remoteness of, 17

Damages:
ordinary, real or substantial, 63
nominal, 63
exemplary, vindictive or punitive, 64, 108
general and special, 65, 108
compensatory, 108
measure of: for personal injury, 80
for causing death, under the Fatal Accidents Act, 81–83

Defamation:
a note on Criminal Law of, 110
defences to an action for, 96
general conditions of, 92–95
libel and slander: (A) England, 90–91; (B) India, 91
malice in an action of, 104
of a corporation, 106
summary of the Indian law of the civil wrong of, 109–10
what is, 89–90
justification, 96–97
fair comment, 97–98
privilege, 98
absolute privilege, 99–100
qualified privilege, 100–04
fair comment distinguished from justification and qualified privilege, 104–06
damages, 106–09

General exceptions to:
judicial act, 51
excused act, 51
act of State:
England, 51; India, 52
judicial acts:
England, 52–53
India, 53–54
authorities of necessity, 54–55
statutory authority, 55–56
inevitable accident, 56–57
inevitable mistake, 57
exercise of common rights, 57–58
leave and licence: volenti non fit injuria, 58–61
private defence or self-defence, 61

Inevitable accident:
not prevented by the exercise of ordinary care, caution and skill, 56
England:
negligent acts not free from liability, 57
no defence where there is a duty of insuring safety to others, 49
Exercise of common rights in an ordinary manner, 57
Leave and Licence:
waived and abandoned rights cannot be enforced, 58
non-enforceability of rights voluntarily abandoned or waived, 58
consent alone is not enough, just cause required, 59
accidental harm and negligence, 59
mere knowledge not consent, 59
express and implied agreement, 60
assumption of risk, 60
private defence:
use of force in self-defence, must be proportionate to apparent urgency, 61
excludes active assertion, 61

Immunity of the State:
for tortious acts of public servants:
England, 35, 43
at common law, under the Crown Proceedings Act, exceptions, 35
India:
heads of the State, Art. 300 of the Constitution, under the Govt. of India Acts, 44
Injury to comfort, 147

Intention:
and malice, 12
and negligence, 14

Judicial acts
England:
exemption of judge from civil liability for public benefit, 52
India:
judicial duty, 53
immunity of superior and inferior courts, 53
not to extend to ministerial acts, 53
quasi-judicial acts:
protection from civil liability when natural justice, statutory or conventional rules are observed, 54
Executive acts:
when exempted and when not, 51
Parental and quasi-parental authority, 54
using force in good faith, 54
Authorities of necessity, 54
Statutory authority:
absolute authority, action for acts done negligently, 55
conditional authority, 55

Liability:
General principles of, 9
applicability of, 9
general conditions of, 9
physical and mental, 9
damage and wrongful intent, 9
damnum and injuria, 10
damage and damages distinguished, 9
absolute, 15, 23
breach of absolute duty imposed by law, 23
for inevitable accident, 15
for inevitable mistake, 16
vicarious, 16, 23
for wrongs committed by others, 16, 23
joint and several, 23
asise in two ways:
authorising or ratifying the wrong, 23
in relation to wrongdoer, 23
specific authority—authority to commit a tort—principal and agent, 23
for breach of specific legal duties, 16
mala prohibita and mala in se distinguished, 16
for consequences, 16
direct, natural and probable, 17
previous or subsequent ratification, 26
authority by relation:
master and servant, 26
to a third person; principle of, 26
for injury by servant to a stranger, 26
to a fellow servant, 26

course of employment, 26–33
who is a servant, distinguished from independent contractor, 28
test of control, 28
applied to borrowed servants, 29
natural consequence of an act done by servant with ordinary care, 30
servant's want of care or negligence, 30
excessive or mistaken execution, 31
wilful wrong, done within the sphere of employment, 32
breach of:
prohibitions
of the first class, 32
of the second class, 32
fraud of the servant, 32
in course of service, 32
committed for the master's benefit, 33
for acts of independent contractors, 33
exceptions to general rule, 34
duty to take care, 34
reasonable care and skill, 34
of government for torts committed by its servants, 35
'vice in the work', 34
collateral negligence, 34
'insuring safety', 35
to a servant for wrong done by another servant, 35
the doctrine of common employment, England: at common law, 35, 37

Libel:
firms and partners, 38

Malice:
actual, 12
express, 13
cases of:
malicious prosecution, malicious defamation, conspiracy, 21
in fact, 13
in law, 13

Maxims:
damnum sine (or absque) injuria, 10, 58
injuria sine damno, 11
actus non facit reum nisi men sit rea, 10
ubi jus ibi remedium, 10
'a man is presumed to intend the natural consequences of his act, 17
novas actus interveniens, 19
volenti non fit injuria, 27, 36, 38, 58–61, 149, 137
qui facit per alium facit per se, 24, 27
per se, 24, 27
omnis ratihabitio retrotrahitur et mandato priori acquiparator, 26
respondeat superior, 27
scienti non fit injuria, 59
res ipsa loquitur, 165
Mens rea, 12
two alternative forms of, and negligence and wrongful intent, 14
exceptions, 13

Negligence:
what is, 152
duty to take care, 152
absence of due care, 154
actual damage caused by, 157
contributory, 60, 158
of children, 163
doctrine of identification, 163
burden of proof in action of, 165
liability of master towards servant, 167
liability of common carriers:
carriers of goods, 170
carriers of passenger, 171
liability of innkeepers, 183

Nuisance:
actionable, conditions of, 147–50
defences, 150
liability of landlord and tenant for, 150–51
liability of occupier for, on premises, 151
Obstruction of air, 147
Obstruction of light, 145
England, 145
India, 145

Personal disabilities:
partial and apparent exceptions:
incapacity to sue, 41
incapacity to be sued, 41
who cannot sue:
England: alien enemy, 41
India: alien friends, 41
husband and wife:
England, 41
India, 37, 42
child in the womb, 42
corporation, 42
foreign State, 43
bankrupt, 43
Who cannot be sued:
personal immunity of the head of the State, 43
England, 43; India, 43
Public Officials:
England, 46; India, 47

foreign sovereigns and ambassadors;
England, 47; India, 47
Infants:
liability for torts, 47
Lunatics:
liability in torts, 49
Corporations:
liability for torts, 49
Trade Unions:
England, 50
India, 50

Privilege (see under 'Defamation')

Railway, as carrier of goods :
what is a, 174
definition of, 174–75
liability of, 174, 175
general principles of, 175
prior to 1961, 175
s. 73 of the Railways Act as substituted in 1961, 175
principles laid down in s. 73, 176
s. 74: ordinary tariff and specially reduced rate:
railway risk rate and owner's risk rate, 177
no compensation in absence of negligence or misconduct of Railway, 177
delay or detention entails liability, 177
delay prima facie proof of misconduct or negligence, 177
s. 76F, provisions of, 177
disclosure by the Railway, 177
articles of special value and liability, 178
s. 77B, provisions of, 178
s.77C, provisions and limited application of, 178
s. 76A, liability for 'deviation of route', 179
s. 76B, liability for 'wrong delivery', 179
s. 78A, burden of proof, for delay, loss, destruction, damage, deterioration or non-delivery, 179

Remedies:
classes of, for Torts, 62
damages 62–65
measure of damages, 64–65
general and special damages, 65
injunctions, 65–66
specific restitution of property, 66
joint wrongdoers, 66–71
contribution between joint wrongdoers, 67–69
effect of death of parties:
(A) England, 69–70; (B) India, 70
the extra-judicial remedies, 71–72

Tort or torts:
a civil wrong, 3
analysis of, 3
definition of, 3
distinguished from crime, 4
nature of, 4
classification of, 21
Group A, 21
Group B, 21
Group C, 22
Winfield's classification of, 22
an infringement of a private common law right in rem, 4
merger of, in felony, 4
distinguished from breach of contract, 5
distinguished from contract, quasi-contract, 5
actionable per se, 12
actionable on proof of special damage, 12
a wrong independent of contract, 6
appropriate remedy for,
an action for unliquidated damages, 7
Winfield's definition of, 8
law of, in India, 8

Tort and Contract:
borderland between, 209
torts founded on contract, 209
case of concurrent liability, 210

Vicarious liability:
(See under Liability)

Wrongs affecting domestic relations:
seduction, 86
interference with domestic relations, 86–88

Wrongs affecting personal safety and freedom:
trespass to the person, 75
defence, 75–76
assault and battery, 76–77
bodily harm and nervous shock, 77–78
death:
(A) England, 78–79
(B) India, 79–80
measure of damages for personal injury, 80–81
measure of damages for causing death, under the Fatal Accidents Act:
(A) England, 81
(B) India, 81–83
false imprisonment, 83–84
Justification:
(A) England, 84
(B) India, 84–85

Other standart Text Books

DURGA DAS BASU

EQUITY, TRUSTS AND SPECIFIC RELIEF

6th Edition

A.R. BISWAS

TEXT BOOK OF JURISPRUDENCE

H.K. SAHARAY

LEGAL AND CONSTITUTIONAL HISTORY

KAMAL LAW HOUSE
CALCUTTA