LAW OF TORTS

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Introduction

The law of torts provides for pecuniary compensation for injuries to person and property recoverable by the process of law. Swayed by the notion of security, it co-relates wrongful act to the harm which it causes, and exhibits different scales of evaluation at different levels for some kinds of harm call for liability independent of one's fault while other kinds create liability only for intentional or negligent wrong-doing. Ordinarily, it tries to shift the loss from the 'victim' to the person who inflicted it on him, but at times, it looks to a third party to shoulder liability, like social insurance for wrongs which are inevitable incidents of modern social living like accidents on roads and in industrial establishments.

Etymologically, in opposition to right or straight, tort signifies conduct which is crooked, tortious, *i.e.* not straight or right. As a special branch of law, tort has been defined variously by different writers by varying their emphasis upon its constituent elements. Winfield puts the notion of duty in the forefront when he says that "tortious liability arises out of breach of duty primarily fixed by the law: this duty is towards persons generally and its breach is redressible by an action for unliquidated damages". Salmond gives preference to the idea of wrong and defines 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 contract, or breach of trust or other equitable obligations. All the definitions, more or less, emphasise three elements (1) act or omission in violation of law (2) legal injury or legal damage (3) legal remedy by way of unliquidated damages.

Tort differs from crime as it is redressed by compensation or damages and not by punishment or fine though the same wrong may be a tort as well as a crime concurrently. Tort differs from breach of contract as the rights and duties arise, in case of contract, from the agreement and are enforceable against the parties concerned. Breach of contract may be redressed by liquidated damages. Tort, on the other hand, arises from a duty imposed on

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persons in general and is redressible by a suit for unliquidated damages. Tort, as a common law wrong is different from the wrong of breach of trust which is breach of an obligation recognized in equity.

In the law of torts motive and malice play a minor role. If the act does not inflict legal injury, it will not give rise to tortious liability even though it is accompanied by malice or improper motive. However, in some torts, malice is a necessary ingredient.

Origin and historical development

The substantive law of torts in England arose out of the forms of common law procedures. It had its origin in royal writs issued by the Chancery. In theory, the writ could not be availed of in felonies but in practice it was available in every case excluding that of murder if words charging a felony in a complaint were omitted. In the beginning, the procedure in writ of trespass was having both civil and criminal aspects but in due course civil action for trespass proceeded on different lines from criminal trespass which involved indictment for felony or misdemeanour. Again, at first, the action of trespass was available for injuries which were direct, forcible and immediate, and did not cover indirect and consequential injuries, but later on, these injuries became actionable by the writ of trespass on the case or action on the case by virtue of statute called *consimili cassu* in 1285, and in course of time the procedure in action on the case became distinct from the action of trespass and thenceforward the line of development was clear. In the later part of the 19th century, prior to the Judicature Acts, the fields of tort was strewn with different forms of action having their own procedural variations which were finally unified by the Judicature Acts. Because of this historical development, we see substantive law secreting itself in procedure and the question has been raised whether this should be called the law of tort or the law of torts. According to Salmond, it is law of torts, *i.e.*, constellation of certain specific and limited wrongs recognized by law in course of history and every plaintiff can only avail of the limited 'pigeon-hole' categories to classify wrong against him and the doctrine *ubi jus ibi remedium* is not applicable to find remedy for every type of wrong. Judges too, feel great difficulty in creating new torts and in applying a rule to a novel case.

The other school makes a study of law of torts as an objective science, as something unique among the systems of law and social sciences which makes use of court's power to award damages for regulation of social relations. In other words, emphasis is not put upon procedure but on general principles and exceptions to them which are applicable to the several species of tortious liability. Today, different torts are seen as having certain broad features in common and are enforced by the same kind of legal procedure. One school emphasizes the procedural aspects and asserts that

forms of action still rule from their graves. The other looks for rationalization and optimism whereby judges can create new torts on the basis of general theory. Looked at form the formalistic and procedural point of view, law of tort is merely law of torts as judges rarely create new torts but from a broader and dynamic viewpoint tort is only a general theory of law of wrongs, and judges on the basis of this theory have been overcoming difficulties from time to time providing remedies in novel cases. One theory asserts circumscription, the other enlarges frontiers; one is sceptic and records dissatisfaction for limited developments, in other gives contentment and exudes optimism. But both are mere variations of attitude and chosen methods of study of a lawyer on the one hand and of a student of law on the other. The lawyer needs to emphasise more the formal branch but the student or the theorist stresses the underlying general principles.

Main currents of the law of torts

The main currents which are irrigating the area of torts are: (1) interest in security (2) interest in freedom of action. Our interest in security requires that a person who has suffered damage as a result of the activity of another must be compensated by the latter irrespective of his fault, while the protection of freedom of action dictates that the wrong-doer can be compelled to pay only if his activity was intentionally wrongful or negligent. Primitive law emphasized security, and liability was strict because the moral quality of the agent was not considered. Owing to the moral influence of the institution of the Church, intention became the basis of law of torts to a great extent. Nineteenth-century England exhibited this moral advance adequately and the notion was found suitable for the industrialists in the era of industrial revolution. It was used to disown the responsibility for industrial mishaps and accidents. But in the twentieth century, we are again reverting to the notion of security, *i.e.*, liability independent of mental fault, because harm caused by man's failure to take care by exercising caution cannot be completely avoided, because loss of life and infliction of injury have become an indispensable part of industrial life. It seems that industrial activity or enterprise itself is responsible for them. In these circumstances, some social scientists are proposing distribution of loss on society by means of social or collective insurance discarding the doctrine of 'fault' in many spheres of activity. The early law of tort was concerned with the protection of landed interests through the action of trespass. It also gave protection against personal injury, *i.e.*, injury to person as well as his reputation. This was done to keep peace in society which was an avowed purpose of criminal law. The urbanization and industrialization of a later period has shifted the emphasis from conduct endangering interests in land to conduct which causes injury, *i.e.*, negligence which is a modern tort *par excellence*. Again, we must broaden the concept of negligence to "comprise not only the character

of the wrongs but the character of the activity or situation or life as such." Thus a wider perspective is needed.

Reception of law of torts in India

After English traders set foot on Indian soil they were authorized to exercise judicial powers to govern their servants, *i.e.*, servants of the East India Company according to the laws of England. By the Charter of 1726, both common law and statute law of England, were introduced as they stood in 1726. By the Charter of 1774, the Supreme Court at Calcutta was established and it applied English law to all persons residing within its jurisdiction. Outside the Presidency town, the personal law of the parties was administered in matters like adoption, inheritance, succession, marriage and religious endowments. In other cases, courts were required to apply the doctrine of justice, equity and good conscience. In case of torts, the courts tried to follow the rules of common law based on equity, justice and good conscience. Any deviation from English law was made only where its application was not considered proper.

After the establishment of High Courts by the Act of 1861, no major change has taken place and even after India became independent, the *status quo* has been maintained by providing for the continuance of existing law in article 300 of the Constitution.

One of the important variations from English law of torts, we find in 'felonious torts'. In England, if a person injured by an act which amounts to felony, the plaintiff is not allowed to sue in tort unless the felon is brought before the court. Action in tort will not proceed but will be stayed in such a case. The Madras High Court does not follow the common law rule while Calcutta and Bombay High Courts do. In the moufussil, the common law rule does not prevail and institution of criminal proceedings is not necessary for bringing a civil suit though on the same facts a serious criminal offence is also made out.

Joint tort-feasors

All persons who aid, or counsel, or direct or join in the committal of a wrongful act, are joint tort feasors. This can arise in the case of an agency, vicarious liability or in a circumstance where two or more persons join together to commit a tort. They are jointly and severally liable for the whole damage resulting from the tort. The position before the Law Reform (Married Women and Tort-feasors) Act, 1935, was that a judgement against one joint tort-feasor even though remained unsatisfied was a good defence to an action against any other joint tort feasor in respect of the same tort. Section 6 of the Act modified this position. This was later replaced with modification by section 6 of Civil Liability (Contribution) Act, 1978. The law

now is that a judgement recovered against one tort feasor, if unsatisfied does not bar a subsequent action against any other tort-feasor irrespective of whether he was a joint tort-feasor or one of the several tort-feasors causing the same or indivisible damage. The second action is not limited to the sum for which the judgement was given in the first action. But the plaintiff is barred from going to the court if the judgement received in the first action has been satisfied. The Supreme Court of India in *Khushro S. Gandhi* v. *N.A. Guzdar*[1] held that in order to release all the joint tort feasors the plaintiff must have received full satisfaction.

Regarding the contribution between the wrong doers, the original rule in England was known as the rule in *Merryweather* v. *Nixon.*[2] It stated that in the case of joint tort-feasors, the one tort-feasor who paid the full amount of damages for the wrongful act could not claim contribution from the others. The Law Reform (Married Women and Tort-feasors) Act, 1935,[3] removed this disability and allowed joint tort-feasors to recover contribution. The Law Reform (Husband and Wife) Act, 1962, has further changed and law in this regard to the effect that when a spouse sues a third person the latter can claim contribution from the other spouse who was a joint tort-feasor.

Here again the practice of Indian courts varies, though modern trend seems to be in favour of following the principle of the Law Reform (Married Women and Tort-feasors) Act, 1935 of England; yet the common law rule declared in *Merryweather's* case is invoked and contribution is disallowed where parties knew of the court considered that they ought to have known that they were committing a wrongful act. In *Yagnanarayana* v. *Jagannadha Rao*[4] the High Court of Madras disallowed such contribution. Allahabad and Nagpur High Courts have held that the rule in *Merryweather's* case does not apply in India. In *Baldeo Tewari* v. *Harbans Singh*[5] after discussing its earlier decisions, the Patna High Court came to the conclusion that the doctrine of non-contribution between joint tort-feasors is not completely ruled out. Against the argument that the right to contribution is based on the principle of justice and the burden should be borne by all the joint tort-feasors is in conformity with the 'justice, equity and good conscience' the Kerala High Court held that the doer of the act knew or is presumed to have known that the act he committed was unlawful as constituting either a civil wrong or a criminal offence, there is neither equity nor reason nor justice that he should be entitled to claim contribution from the other tort feasors.[6]

1. AIR 1970 SC 1468 at p.1474.
2. *Merryweather* v. *Nixon* (1799) 8 T.R. 186.
3. Now section 1 of Civil Liability (Contribution) Act, 1978.
4. (1931) M.W.N. 667.
5. AIR (1963) Pat. 227.
6. *M/s Dedha & Co.* v. *M/s Paulson Medical stores* AIR 1988 Ker. 233.

It is urged that the law regarding felonious tort and joint tort feasors needs to be modernized on the lines of English statutes either by the Supreme Court or the Indian Parliament.

Foreign torts

In the matter of foreign torts, the principles of English law are that it is triable in English Courts, provided that the wrong is actionable both in England and the country where it is committed. The English courts have no jurisdiction to try a case to recover damages for a trespass to land situated abroad. In India this position is followed and an action for trespass or other wrongs as to immovable property, committed outside India, does not lie in the Indian courts. In case of personal wrongs or other wrongs as to movable property an action will lie if the defendant resides in India provided that the wrong complained of is illegal according to the law of the country where it was committed and the law of India where the action is brought.

Doctrine of *actio personalis moritur cum persona*

This maxim states that a personal right of action dies with the person. According to Holdsworth, the maxim was originaliy introduced to prevent actions, which had a penal nature, *e.g.*, trespass and its brood from being brought after the death of the wrong-doer against the wrong doer's representatives.[7] He is of the opinion that the words of the maxim were wrongly applied to cases of death of the injured party disabling legal representatives of the person wronged from maintaining a suit at common law for wrongs committed to the person wronged in his life-time, to trespass to goods and land when damage was done in the life-time of the person wronged and to causing death of the person wronged. According to *Baker* v. *Bolton*,[8] the death of human being could not be complained of as an actionable injury, for trespass could not be actionable in case of death of the injured party. Trespass was said to be merged in felony, as in early history the writ of trespass replaced the remedy of appeal in wrongs other than felonies, though in practice it was available for felonies also. Thus the old doctrine of merger of tort in felony continued in case of homicide but disappeared in the case of other felonies.

In *Baker* v. *Bolton* it was held that if there was some intervening period between the wrongful act and the death, damages could be recovered for loss of society or services upto the moment of death. In *Rose* v. *Ford*[9] it was

7. The Supreme Court of India has also made a similar observation in *Official Liquidator of Supreme Bank Ltd.* v. *P.A.Tendolkar* (1973) 1 SCC 602 at p. 615.
8. (1808) 1 Camp. 493.
9. (1937) AC 826.

further held that if the injury was caused owing to the negligence of the defendant the legal representatives could sue for damages for the benefit of his estate for the "loss of deceased's expectation of life".

According to the common law rule there cannot be an action in tort against executors or administrators of the deceased wrong-doer in cases of trespass, false imprisonment, assault, battery, malicious prosecution, slander, fraud and negligence. But it was held in *Phillips* v. *Homfray*[10] that in cases where property, or its proceeds, or value of property belonging to another have been appropriated by the wrong-doer and added to his own estate or moneys, the estate will be liable to the extent it has been augmented.

In England, the Law Reform (Miscellaneous Provisions) Act, 1934 declared that all causes of action subsisting at the time of a person's death will survive for or against his estate subject to an exception of defamation (but if the damage is caused to deceased's property the action will survive).[11]

The combined effect of the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934 as amended by the Law Reform (Limitation of Actions) Act, 1954, is that an action against the deceased person's estate cannot be maintained unless the proceedings are already pending at the date of death, *e.g.*, the writ has been actually issued, or the suit has been filed within six months after the grant of probate or letters of administration.

The Fatal Accidents Act 1976 (which consolidates the earlier Acts from 1846 to 1959) have further imposed liability against the wrong-doer for financial loss suffered by dependants[12] of the deceased owing to his death by a wrongful act, neglect, or default of the wrong doer. The Employers Liability Act, 1883, makes provision for compensation for death, at the suit of legal representatives of workmen. Compensation Acts from 1925 to 1943 allow compensation to the dependants of deceased workman, in cases where the workmen dies of injury which, if he had survived, would have given a claim for compensation. After 1982 the spouse of the deceased or the parents if he was unmarried may claim a fixed sum as damages for bereavement.[13]

In India, analogous legal enactments like the Indian Succession Act, 1865 (repealed and replaced by the Act of 1925), the Legal Representatives

10. (1883) 24 Ch D 439 (1883) 24 Ch. D 457.
11. Previously there were three more exceptions in addition to defamation. They were seduction, inducing one spouse to leave or remain apart from the other; and right of action for adultery. These were abolished by the Law Reform (Miscellaneous Provisions) Act, 1970.
12. The list of dependants has been enlarged by the Administration of Justice Act, 1982.
13. At present this sum is 7500 pounds as per the Damages for Bereavement (Variation of Sum) Order, 1990.

Suits Act 1855, and the Fatal Accidents Act 1855 have been passed. Section 306 of the Indian Succession Act 1925, provides that all rights to prosecute any action existing in favour of a deceased person survive to his executors except in the case of (1) defamation, assaults (as defined in the Indian Penal Code), and (2) personal injuries not causing the death of the party. The confusion regarding the meaning of personal injury as to whether it is only a physical injury or all 'injuries generally' was clarified by the Supreme Court in *M. Veerappa* v. *Evelyn Sequeira.*[14] The court held that " Personal injuries" does not mean " injuries to the body alone but all injuries to a person other than those which cause death and the expression is to be read *ejusdem generis* with the words 'defamation' and ' assault' and not with assault alone. When as a result of personal injury a person dies, the cause of death does not abate. But death occured years after the injuries were received was held to have been caused by injuries if they materially contributed to the death by directly hastening or accelerating it and the chain of causation does not break.[15]

The Supreme Court in various cases has held that the maxim do not apply to actions based on contract or where the tort feasors estate had benefited from the wrong done; to suits for eviction under the Rent Control Acts;[16] and to Industrial disputes under sections 2A and 33C(2) of the Industrial Disputes Act, 1947.[17]

In *Debradun M.E.T. Co.* v. *Hansraj*[18] this 'barbarous' doctrine has suffered adverse comments as it has led to inequitable results and because it was realized that there was no need to apply the English doctrine when courts were expected to administer rules of justice, equity and good conscience. The legislature has enacted laws which continue to be deficient and wanting in many respects. For example, the Legal Representatives' Suits Act, 1855 covers only torts committed by the deceased person during the year preceding his death, and the Succession Act prevents the application of the maxim in cases of defamation, assaults and personal injuries not causing the death of the party. Because of these exceptions the maxim has not been abrogated completely. Further, legal representatives, other than executors and administrators, are outside the section and certain classes of action are expressly excluded from the operation of the section.

Important general defences

In every action for tort, certain defences are open to the defendant:

14. AIR 1988 SC 506.
15. *Klaus Mittelbachert* v. *The East India Hotels Ltd.* AIR 1997 Del 201 at p.231.
16. *Pukhraj Jain* v. *Mrs.Padma Kashyap* AIR 1990 SC 1133 at p.1136. See also *Nasseeban* v. *Surendra Pal* AIR 1996 Raj 91.
17. *Rameshwar Manjhi* v. *Management of Samgramgarh Colliery* AIR 1994 SC 1176.
18. AIR 1935 All. 995.

1. *Volenti non fit injuria*

When a person has consented to the commission of a wrong in the nature of a tort, then he cannot subsequently sue for it. The maxim applies only to: (a) intentional acts which, otherwise, are tortious; (b) cases where plaintiff runs the risk of harm which would otherwise be actionable. The maxim does not apply to such unlawful acts as no consent, leave or licence can legalise, nor does it apply where there is a breach of a statutory duty. It will also not apply where the defendant has been responsible for a dangerous situation and the plaintiff takes the risk to save persons involved in it. Again, the maxim cannot be applied where defendant is negligent.

2. *Inevitable accident*

Inevitable accident is that happening which could not have been prevented by the exercise of ordinary care and skill of a reasonable man.

3. *Act of God*

Accident which is purely the result of natural calamities and forces of nature like storm, earthquake, land-slide, flood etc.

4. *Statutory authority*

If the act is sanctioned by an Act of the legislature, the defendant is not liable.

5. *Act of state*

An act of state is an act done in exercise of sovereign power by any representative of the state. The act should previously be sanctioned or subsequently ratified by the sovereign authority, and must be directed against some person who is not a citizen of the state at the time of the act. It is difficult to conceive of an act of state as between a sovereign and its subject. If government justifies its act under colour of law that act can never be an act of state; its legality and validity must be tested by municipal law and in municipal courts. In England, the doctrine of act of state applies to acts committed outside Her Majesty's Dominions, and further, it is necessary that the injured party should be an alien. The defence of act of state does not apply in the case of a resident alien because he has the same protection of law as citizen has.

The doctrine of act of state has drawn adverse comments and has practically ceased to be effective in India and elsewhere. Its theoretical basis lies in the formalistic approach wherein the creator of law is not bound by law. However, in practice the major effect of the doctrine was merely procedural. The Crown in England is now sueable under the Crown

Proceedings Act, 1947. In India, this doctrine was mainly used as weapon to secure annexation of territory by the East India Company, and to oust the jurisdiction of municipal courts. Now that India is a free country and former princely states have joined the Indian union and have become an integral part of it, and citizens of these states have become Indian citizens, they can file suits for claims and the government cannot defend itself by pleading the doctrine of act of state. In *Virendrasingh* v. *State of U.P.*[19] the court held that a grant of land made by a former Indian prince could not be resumed without legislative sanction. The plea of act of state as a defence was of no avail. Even in certain matters which are not justiciable according to article 363 of the Constitution, the plea of act of state was not allowed. Yet the Supreme Court has declared that the doctrine proceeded on a just balance between acquired rights of the private individuals and economic interests of the community and hence refused to reject this doctrine. Subba Rao has called for a halt to this doctrine in his dissenting opinion as it enforces the imperialistic notion of 'might is right'. In *Usman Ali Khan* v. *Sagarmal*[20] the Supreme Court went to the extent of treating Privy Purse as a political pension. In another case it put pre-merger covenants beyond the jurisdiction of courts. This doctrine which ousts the jurisdiction of courts has no rational basis either in international or in constitutional law. Modern India should break away from this common law fetter in the interest of justice and fair development of law.

Apart from the defences mentioned above, there are certain acts done by some persons which are not actionable and operate as complete defences. Thus judicial officers, by virtue of the provisions contained in the Judicial Officers' Protection Act 1850 of India are immune from liability for any act done in the discharge of their judicial duties. Similarly persons and bodies such as universities and colleges exercising quasi-judicial powers are not liable if they observe the rules of natural justice and follow the particular statutory or conventional rule. A public officer is not liable for any act done by him in enforcement of any sentence or process of law or in maintenance of peace provided he had lawful authority to do so. Persons exercising parental or quasi parental authority to correct a child are not liable for use of force or restraint provided they act in good faith and in reasonable and moderate manner.

Parties in an action for tort

As the law of tort was grounded in procedure, it had imposed many restrictions upon parties to sue and be sued. With the progressive development of law many of these restrictions have been falling off and the law on the subject has been rationalized to a great extent.

19. AIR 1954 SC 447.
20. AIR 1965 SC 1798.

Indian law, on the whole, follows the English law of tort in the matter of disabilities of parties to sue and be sued. However, mention may be made of the capacity of married women to sue and be sued. At common law, in England, the married women had certain disabilities to sue in torts as husband and wife were considered as one person in the eye of the law. Therefore, the wife could not sue her husband for a tort, nor could a husband sue his wife. The Married Women's Property Act, 1882, introduced an exception in favour of the wife under which the wife could sue her husband in an action for the protection and security of her separate property as if she were unmarried. Drastic change was introduced in England by the Law Reform (Husband and Wife) Act, 1962, by which the common law doctrine was abandoned and either spouse may now sue the other in the same manner as if they were not married. As regards third persons the common law rule obtaining in England was that a married woman could not sue or be sued without joining her husband as a party. The law was altered by the Law Reform (Married Women and Tort-feasors) Act, 1935, under which she can now sue and be sued by third persons, as if she were a *feme sole.* The wife can sue the principal even if the husband committed a tort against her as an agent.

In India, the common law rule that husband and wife constitute one person in the eye of the law, does not prevail and married women can sue and be sued. Hence a Hindu, a Sikh, a Jain, or a Muslim woman can sue or be sued in respect of her separate property. Her husband need not be made a party. As regards Christians the English common law is applied. This anomaly was removed to an extent by the Married Women's Property Act, 1874 after which the married women to whom the Act applies can sue and be sued alone. Article 14 of the Constitution embodies a guarantee against arbitrariness and unreasonableness by the application of which marriage has no effect on the rights and liabilities of either of the spouses in respect of any tort committed by either of them or by a third party. Even though in England spouses can sue each other for committing a tort,[21] in India, it seems neither spouse can sue the other for personal wrongs like defamations, assault *etc.*

Damages

The idea of damage is an important constituent of tort. Damage, in order to be actionable, must not be remote and must not be due to independent act of third party. Further damage is not co-extensive with the loss suffered. At times, the damages allowed can be contemptuous or meagre because the court thinks that the action should not have been brought. Courts can also allow mere nominal damages where it appears that the plaintiff has not

21. *Church* v. *Church* (1983) 133 NLJ 317.

suffered substantial loss and wants merely to vindicate his legal rights. Substantial damages are allowed in order to compensate the plaintiff for the wrong suffered. Such damages correspond to a fair and reasonable compensation for the injury. Exemplary damages are excessive and vindictive. They are awarded when the object of the court is to deter the wrongdoer as well as to warn the public. The Supreme Court[22] said that "the amount awarded must not be niggardly since the law values life and limb in a free society in generous scales". The sum awarded must be fair and reasonable by accepted legal standards.

Damages claimed by the plaintiff may be general which are assessed by the court and are presumed by law. Special damages are claims for expenses actually incurred or some loss actually suffered. Many torts are not actionable if special damage is not suffered. Some of the major areas in which damages are awarded by the Indian courts in tort are motor accidents,[23] medical negligence,[24] constitutional torts[25] *etc.*

The characteristic remedy in the law of torts is damages but the plaintiff may also demand restitution and can pray for injunction. There are also extra-judicial remedies. They are private or self-defence, recaption of goods, re-entry, abatement of nuisance, distress and distress damage feasant.

Discharge of torts

The right in tort can be discharged in cases of death of parties, acquiescence, accord and satisfaction, recovery by judgment and by operation of statutes. They are subject to various qualifications.

Classification of torts

All torts can be classified into three broad categories: (1) malfeasance or wrongs which are unlawful acts and are actionable *per se* and do not require proof of negligence; (2) misfeasance or improper way of doing the acts which cause damage. This happens when one's action is the result of negligence; (3) Non-feasance or wrongs of omission. A suit does not lie for them unless statute imposes a duty to perform the act in question.

According to Pollock, the law of torts deals mainly with three types of wrongs: (1) personal wrongs, (2) wrongs to possession and property and (3)

22. *General manager, Kerala State Road Transport Corporation* v. *Mrs. Susamma Thomas* AIR 1994 SC 1631, p.1632.
23. Motor Vehicles Act, 1988.
24. See cases like *Dr. Jacob George* v. *State of Kerala* (1994) 3 SCC 430 and *State of Haryana* v. *Santra* AIR 2000 SC 1888.
25. See cases like *Rudul Shah* v. *State of Bihar* AIR 1983 SC 1086; *Bhim Singh* v. *State of J&K* AIR 1986 SC 494; *Nilabeti Behra* v. *State of Orrissa* AIR 1993 SC 1960 *etc.*

wrongs both to person and property. Personal wrongs are essentially wrongs affecting safety and freedom and person and include assault, battery, wrongs against family relations like seduction and enticing away of servant, wrongs affecting reputation like defamation, malicious prosecution *etc.* The general characteristics of these wrongs is that they are either willful or wanton wrongs. The act is either intended to do harm or is done with reckless indifference.

Wrongs against property include trespass to land and goods, conversion, infringement of copyright or trade mark *etc.* It will be seen that in wrongs against property the mental element of deliberation or reckless indifference is not important. Neither the intention to violate nor the knowledge of the wrongdoer that he is violating other's right is necessary. Thus wrongful dealings with another's goods makes one liable even though he was acting under a reasonable belief that he had lawful authority.

Wrongs against both property and person include nuisance, negligence and breach of absolute duties imposed on the occupiers of land *etc.* Here the liability arises from the ancient rules of common law or from the modern development of the tort of negligence. In these torts wilfulness or recklessness is not always necessary. In cases of absolute duties the wrongdoer is liable even when he took absolute care.

Liability for the wrongs of others

The maxim *Qui facit per alium facit per se* states that he who does an act through another is deemed in law to do it himself. But the important phrase is "act through another" and if there is no connection of "through" one cannot be held liable for the act of another. Liability can also arise by ratification or abetment of special relationship. The liability arises out of a special relationship like master and servant; owner and independent contractor; and also exists in cases of principal and agent, company and directors, firm and partners. How far one is liable is a question of law as well as fact. It does not mean that an agent is liable to any one. The principal can recover money he has paid as damages for the wrongful act of his agent. In the case of partners, The Partnership Act, 1870 of England and the Indian Partnership Act, 1932 make them liable jointly and severally if the firm is liable.

The doctrine of vicarious liability centres on the relationship of master and servant though it has been extended to other relationships. The master is liable for only those acts, which are committed by the servant during the course of employment.

Vicarious liability of state

Ever since the reception of common law in India, the doctrine of sovereign

powers has not been congenial to Indian conditions. This is borne out by the diverse trends of judicial decisions on the point of vicarious liability of state for torts of its servants. In England, the passing of Crown Proceedings Act of 1947 has reduced this doctrine to a historical curiosity and has equated the state with a private employer in a large measure. But Indian legislatures, right from the Act of 1858 to 1935, carried forward the previous state of law and the Indian Constitution, by article 300, has permitted the continuance of the same legal regime.

The discord in judicial attitude is due to the anomalous status of East India Company in legal theory. In law, the East India Company could not be called sovereign, as they were mere traders and not conquerors. Practically, the company functioned like a sovereign. This dubious position of the East India Company is underlined in the *P. and O. Steam Navigation Company* case[26] which is considered the basic authority on the point. Barnes Peacock, C.J., here failed to be logical when, on the one hand, he admitted that the East India Company had not been a sovereign body and, on the other, he expressed the view that there were no good reasons why the doctrine of sovereign immunity should not apply in India. The learned Chief Justice came to the conclusion that the East India Company was not liable for acts done in the exercise of sovereign powers, but it was liable for acts which were not done in the exercise of sovereign powers. Accordingly, he held that injury to the horse of a carriage caused by workmen of the company employed in the government dockyard made the company liable because the repairing of ships belonged to the category of non-sovereign acts.

Sinha C. J., in *State of Rajasthan* v. *Vidyawati*[27] felt no difficulty in holding that the driver of a government jeep who negligently knocked down a pedestrian while driving back from the workshop made the state liable in tort vicariously. He also expressed the view that the law applicable to India in respect of torts committed by a servant was very much in advance of common law even before the enactment of Crown Proceedings Act of 1947, of England, and since the time of the East India Company, government has been liable in tort and the doctrine of sovereign immunity was not applicable to India. Further, adoption of this feudalistic doctrine ran counter to the republican character of the Indian state and its adherence to the notions of socialistic pattern of society and the welfare state.

In *kasturilal and Ralia Ram* v. *State of Uttar Pradesh*[28] where gold seized from the appellants was misappropriated by a head constable of police, in charge of the *malkhana,* who fled away to Pakistan with it, it was held that

26. *P & O. Steam Navigation Company* v. *The Secretary of State for India-in Council* (1861) 5 Bom. H. C. Appendix p.1.
27. (1963) 1 SCJ 307: AIR 1962 SC 933.
28. AIR 1965 SC 1039.

powers given to the police to arrest, to search and seize property are conferred on specific officers by statute and in the last analysis are sovereign powers and, therefore, state was not liable in tort. Gajendragadkar C.J. in this case, relied on the distinction made by Barnes Peacock C.J. between acts done in exercise of sovereign powers and acts done in exercise of non-sovereign powers. In *Kasturilal's* case a clear instance of distinction between sovereign acts and non-sovereign acts was discernible because police establishment clearly pertained to the sovereign functions of the state. On this basis, in *State* v. *Tulsiram*,[29] the state was held not liable for wrong warrants issued by the judicial officer, as judicial act belongs to the category of sovereign powers.

But *Vidyawati's* case belongs to the category of marginal cases. It is theoretically very difficult to distinguish sovereign functions from non-sovereign functions. In *Union of India* v. *Sugrabai*[30] transporting a machine from a military workshop to the school of artillery was held not to be in the exercise of sovereign powers. The State was held not liable for wrong warrants issued by the judicial officer, as judicial act belongs to the category of sovereign powers. Similarly, in *Satyawati Devi* v. *Union of India*[31] the use of an air force vehicle in carrying hockey and basketball teams was held not to be in the exercise of sovereign powers. Again, in *Smt. Jasso's* case[32] a military truck carrying coal from a depot to army general headquarters building was not considered an act in exercise of sovereign powers; while supplying meals to military personnel on duty was held a sovereign act in *Union of India* v. *Harbansingh*[33] and in *Secretary of State* v. *Cockcraft*[34] maintenance of roads, particularly, military roads, was held to be a sovereign function. In these decisions their logic fails to convince us.

The *Vidyawati* case almost discarded the doctrine of sovereign immunity but *Kasturilal's* case has again given it a firm footing. In the light of modern theory and practice of statecraft it is as difficult as it is futile to distinguish between sovereign and non-sovereign acts. Even though the *Kasturilal* rule is yet to be overruled its authority has been undermined and much of its efficacy as a binding precedent has been eroded.[35] In *State of Gujarat* v. *Memon Md*,[36] and *Smt Basava Kom Dyamogonda Patil* v. *State of Mysore*[37] the court held to the effect that the seizure of the property by a government servant is a clear entrustment of property to the government and the

29. AIR 1971 All 162.
30. 70 Bom. LR 212.
31. AIR 1967 Delhi 98.
32. *Union of India* v. *Smt. Jasso* AIR 1962 Punjab. 315.
33. AIR 1959 Panjab 39.
34. AIR 1915 Mad. 993.
35. *State of Andhra Pradesh* v. *Chella Ramakrishna Reddy* AIR 2000 SC 2083 at 2090.
36. AIR 1967 SC 1885.
37. AIR 1977 SC 1749.

property must be returned to the original owner after the necessity to retain it ceases. But in spite of these decisions the Gauhati High Court in *State of Assam* v. *Nizamuddin Ahmed*[38] reiterated the *Kasturilal* rule. This absence of policy shows a confused judicial mind in India. In France, the state can be held responsible even in the absence of fault. The German Civil Code also has gone beyond the principle of the fault of the state. English Law has equated state with private employer by the Crown Proceedings Act to a great extent.

Friedman has rightly pointed out that "a bad legal theory has been perpetrated that has obscured the understanding of greatly changed functions and methods of modern government" and has wrongly preserved the misconceived legal criterion of distinction between governmental and proprietary functions.

Doctrine of common employment

The law of tort has, from time to time, succumbed to the doctrine of freedom of contract and it is only by legislation that it has been able to regain its independence. By the doctrine of common employment which was enunciated by Lord Abinger in *Priestley* v. *Fowler*,[39] the employer, at the outset of the industrial era, could disown the responsibility for the harm caused by one employee to another employee in an industrial establishment. The doctrine of 'course of employment' was not made applicable here but it was thought that there was an implied contract of servants to take risks of the negligence of one's fellow-servants. The master could not be held responsible in the absence of express contract to indemnify the employee in such a case. It was said that employment being a contract, the parties were not bound by the general law in this regard and their liability in matters within the field of contractual relations could not be deemed to arise outside the terms of contract.

Ever-increasing industrial accidents and mishaps forced the legislators to throw overboard the doctrine of common employment. But this was done by piece meal legislation. The Employer's Liability Act of 1880 provided a number of exceptions to the application of the doctrine. The Law Reform (Personal Injuries) Act, 1948 finally abolished the doctrine.

In India, there was no legislative interference till 1938. Even with the passing of the Employer's Liability Act of 1938 it was not finally buried. The doctrine was applied by Allahabad and Calcutta High Courts. Nagpur and Bombay High Courts have held that the doctrine of common employment did not apply. Stone, J., in a Nagpur case observed that the rule was an unsafe guide and there was no justification for following it when the English

38. AIR 1999 Gau. 62.
39. (1837) 3 M & W I.

law has disowned it. The Privy Council in *Governor General in Council* v. *Constance Zena Wells*[40] held the view that the doctrine was applicable in India though in a limited sense. However, by the Employer Liability (Amendment) Act, 1951, a new section, 3A, has been inserted by which the doctrine has been completely set at rest. The provisions of the Personal Injuries (Compensation Insurance) Act, 1963, impose on employers a liability to pay compensation to a workman who has sustained personal injuries and provide for insurance of employees against such eventuality.

Wrongs to Person

Trespass to person

Trespass, which got its start in England with the writ of trespass in the 13th Century, is the parent of many torts developed there from through 'trespass on the case'. At first, trespass was a direct and forcible injury to person, land or goods. Intention was a necessary element of the wrong, but intention meant committing the wrong voluntarily. The wrong was intentional even if the wrongdoer did not know that the property belonged to another. But it was not trespass where a man was forced into the land of another. 'Force' was merely a phrase of pleading which was later dropped but the word 'direct' retained its importance and distinguished 'trespass' from 'trespass on the case'. When the damage was indirect or consequential, action could be brought only on *case* as action of trespass dealt with only direct injuries. After the abolition of forms of action when the procedural differences became immaterial, the wrongs which developed from trespass acquired their separate names, and trespass proper held a limited field in the law of tort i.e. trespass to person, to land and to goods.

Battery

The idea of security of person, *i.e.*, freedom from every kind of violence and bodily injury, is at the root of trespass to person which has three aspects; battery, assault and false imprisonment. Battery consists of touching another person hostilely or against his will, however, slightly. If the violence is so severe as to deprive a person of any member of his body or of any sense serviceable to him in a fight, it amounts to mayhem. The damages, in that case, will be greater than those awarded in case of battery. Battery corresponds to 'use of criminal force' according to section 350 of the Indian Penal Code. As no bodily harm is necessary, even slight touching of another in anger is battery. The law here does not distinguish between different degrees of violence because it wants to prohibit it at the very first stage. The use of force may be direct, as in the case of slapping or pushing, or indirect,

40. (1950) 1 M.L.J. 176.

when some object is brought into contact with the defendant, as in the case of setting a dog, throwing something, spitting on face *etc.*, and includes applying force to some object which is already in physical contact with the plaintiff, as is in the case of overturning the carriage in which plaintiff is seated, upsetting ladder, on which one is standing, whipping the horse one is riding upon etc. What is necessary is that the wrongful act must involve physical contact. So throwing of water does not constitute battery if water does not fall upon the plaintiff. The other element to constitute battery is hostile intent. Force must be intentional and without any lawful justification. Accordingly, pushing of another in a crowd is no battery if it is not deliberate; nor will accidental touch be considered wrongful; but a mere tap given on the shoulder to effect arrest is battery when the arrest is unlawful. For the same reason, causing another to be medically examined against his will constitutes battery as much as a forcible removal of a spectator from the theatre.

Assault

An assault has been defined by Underhill[41] as an attempt or offer to apply force to the person of another directly or indirectly, if the persons making the attempt or offer causes the other to believe on reasonable grounds that he has the present ability to execute his purpose.

Assault is, then, an unaccomplished or inchoate battery.

In *Padarath Tewari* v. *Dulhim Tapesha Kueri*,[42] it was held that the procedure of the court where it ordered the arrest of defendants for not producing a lady was illegal and that an internal medical examination of a lady, if not voluntarily submitted by her, would amount to assault and battery.

Section 351 of the Indian Penal Code defines assault as:

> Whoever makes a gesture or any preparation, intending or knowing it to be likely that such gesture of preparation will cause any person to apprehended that he who makes that gesture of preparation is about to use criminal force to that person, is said to commit assault.

In English law, according to the Offences against the Person Act, 1861, a certificate from two justices of the peace that the offence has not been proved or that it has justification or that it appears to be a trifling and needs no punishment, would absolve the party from all further civil or criminal liability for the same cause. But in India, a civil court is not bound by the decision of a criminal court. A plea of 'guilty' can be considered by a civil court for the purposes of evidence but the decision of a criminal court can

41. Arthur Underhill, *A Summary of the Law of Torts*, 9th ed., 1911.
42. AIR 1932 All 524.

in no case be considered as evidence in a civil action. As such, a sentence of fine by a criminal court is no bar to a civil suit for damages. Further, costs incurred in a criminal prosecution cannot be recovered as damages for assault.

False imprisonment

False imprisonment consists in

> total restraint for some period, however short, upon the liberty of another without sufficient lawful justification. The restraint may be either physical or by mere show of authority.[43]

As mentioned above, this tort is covered by the definition of criminal assault under English law but the Indian Penal Code calls it wrongful confinement.

Two elements which constitute this tort are that: (1) the imprisonment is without lawful justification and (2) it is caused by the defendant or his servant during the course of employment. It will not constitute false imprisonment where a person enters a place under some contract or a license, and is prevented from going out as per terms and conditions of contract; or when facilities for going out are not provided as they have not been contemplated by the parties concerned. Hence if a guardian is not allowed to take his ward out of the school for some days because he has not paid the dues; or when a minor is not allowed the facilities of lift before the time is over, it will not constitute false imprisonment.

Imprisonment may be caused by the defendant or his servant, but it cannot be said that judicial officers like magistrate, causing arrests, are the agents of the complainant and are liable for false imprisonment. But the case is otherwise with a police officer who act as a ministerial agent of the complainant and causes unlawful arrest. He is liable for false imprisonment, if he does not act under the authority of law. Lawful arrest, under the Code of Criminal Procedure of India, would not constitute the tort of false imprisonment.[44]

The tort of false imprisonment is, in essence, only an infringement of a person's right to freedom of movement granted by law, which is a prerequisite of all civilized living. This freedom is inherent in article 21 of the Indian Constitution when it declares that:

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

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43. *Supra* note 41, p. 253.
44. The relevant sections of Cr. P.C. are, ss. 41 to 60 of chapter V.

By article 22 it has been made obligatory that a person under arrest should know the grounds of his arrest as soon as possible and should be produced before the nearest magistrate within 24 hours and should not be kept under custody any longer without an order of remand from the magistrate.[45] The frequent instances of police atrocities in India prompted the apex court to issue certain guidelines in *D. K. Basu* v. *State of West Bengal*[46] to be followed in all cases of arrest. The court held that failure to comply with the instructions would entail not only departmental action but also punishment for contempt of court. The Indian Constitution provides for writs like *habeas corpus*, which may be resorted to by the petitioner. An Indian judge who orders arrest or imprisonment without having jurisdiction to do so is protected by the Judicial Officers Act of 1850 provided he believes, in good faith, that he has jurisdiction to do so. The Act also gives protection to ministerial officers of the court, who execute lawful warrants and orders of the court. But if the warrant is unlawful or irregular at the outset no such protection is given.

Statutory protection, usually in a lesser degree, is given to executive officers. The Preventive Detention Act of 1950 gives immunity to officers if the arrest or detention is effected in good faith and in pursuance of the Act. But if the statute is declared *ultra vires* the executive officer may be sued for false imprisonment.

In India, according to section 43 of the Code of Criminal Procedure, 1973 a private person may also arrest any person who, in his view, commits any non-baliable and cognizable offence or when the offender is a proclaimed offender. But if the private person fails to follow the after arrest procedure as prescribed in section 43 he can be prosecuted for the offence of wrongful confinement under section 342 of IPC. But in England a private person can arrest not only when someone is committing felony or a breach of peace, but also when such person has reasonable suspicion of a felony, provided that felony has been committed. A private person can be held liable in such a case when he cannot show that felony had actually been committed or when it cannot be shown that he had reasonable grounds to suspect that the person so arrested had committed that felony.

The notion of false imprisonment is a notion of restraint, in "some limits", defined by will or power exterior to our own. In *Maharani Gurucharan Kaur Nabha* v. *Province of Madras*[47] where Maharani of Nabha was not allowed to leave for Madras by train, it was held that the offences of wrongful restraint and confinement are offences against human body and cannot be said to have been committed if a person is not himself restrained or confined but the liberty of going in conveyance in which he wishes to go

45. See also s. 50 Cr. P.C. 1973.
46. (1997) 6 SCC 642.
47. AIR 1942 Mad. 539.

or of taking the direction which he wishes to proceed is denied to him. In *Kader* v. *Alagar Swami*[48] it was held that a sub-inspector of police who exceeded and abused his authority by getting an under-trial indoor patient in a hospital handcuffed and chained to a window bar like a ferocious animal was liable to pay damages. It was not necessary to prove malice or motive.

In India the tort of trespass to person relating to assault, battery and false imprisonment is not very common. From statistics collected up to 1965 it appears that out of 613 cases only 13 fell under this category of torts. In the cases that came before the Supreme Court seeking justice in instances of battery, assault, wrongful confinement by the police officers from 1950 to 2005, damages were awarded to the victims.[49] The court said "An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment the damages are large and represent a solatium for mental pain, duress, indignity, loss of liberty and death."[50]

It will be appropriate to make a brief mention of 'gheraos' in India, whereby a person or persons in authority are detained for varying periods by a group of persons whose motive is to compel the person or persons 'gheraoed' to grant certain concessions. Obviously, such an action, by a combination of persons, amounts to conspiracy and false imprisonment. In *Jay Engineering Works* v. *State of West Bengal*[51] Sinha, C. J., defines it as a physical blockade of target either by encirclement or forcible occupation. Benerjee, J., held the view that it is an encirclement and by itself it is not an offence but may become so if it is accompanied by something more, *i.e.*, other crimes. However, no legal difficulty can be felt in regarding it as the tort of false imprisonment. Nevertheless, its recognition as tort has to transverse the considerations of legislative and judicial policy. It seems that the law of tort is only a branch of wrongs to individuals in contradiction to group or class wrongs, and it is more so in the industrial area. Statutory enactments and judicial precedents have been constantly carving out exceptions, with the result that industrial law today is more and more insulated from the general trends of civil and criminal law.

The juristic mind of today is not disturbed by the recurrence of the incidents of *gherao* because one is prone to admit it as an industrial or social tonic for regularizing industrial or other social class relations and as an emerging expedient extra-legal device for settlement of industrial disputes.

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48. AIR 1965 Mad. 438.
49. For example see *Saheli* v. Union of India (1990) 1 SCC 422; *Punjab and Haryana High Court Bar Association* v. *State of Punjab* (1996) 4 SCC 742; *Ravinder Kumar Sharma* v. *State of Assam* (1999) 7 SCC 435.
50. *Saheli* v. *Union of India* (1990) 1 SCC 422.
51. AIR 1968 Cal. 407.

Gherao as tort, then, is yet to be born and baptized by judicial decision or statutory enactment in this country where tort incidence is very low.

Wrongs affecting reputation

Defamation

As civilized man considers his honour and reputation more valuable than even his physical safety he is ready to put his life at stake for them. Injuries to these, more often than not, endanger the placid pace of life and every legal system has, of necessity, to deal with them. Hindu law punished the defamer but never thought of compensating the defamed person as the Roman and English law did. In England, defamation was concerned with spiritual matters to be dealt with by the church at first, but with centralization of justice in the 12th century together with the waning influence of the church, common law courts began to treat it as a mundane matter remediable by the ordinary courts. With the invention of the printing press and the arrival of the radio which enlarged the power of the word to disturb social order as well as to interfere with private rights, defamation emerged as one of the most important violations of rights under civil as well as criminal law.

The tort of defamation is committed by publication of a false statement, which lowers a man's reputation and esteem in the judgment of right-thinking members of society, or it causes others to avoid his company. Publication or communication of the false statement must be made to a third person, other than the husband or wife of the author of the false statement. Every repetition of such statement is itself defamation afresh. It is obvious that the third person, to whom defamatory statement is published, must know the import and significance of such statement. Further the victim of defamation must know that the statement refers to him.

Defamation in permanent form is called 'libel' and includes written statement, typed or lithographed material, raised letters, pictures, photograph, cinema film, caricature, statue, effigy, wax model *etc.* Slander is defamation in transitory form, which may be exemplified by verbal speech, nod, wink, shake of head, smile, hissing and finger language of the deaf and the dumb and so on. By section 166 of the Broadcasting Act 1996 of England, broadcasting, both radio and television are treated as libel if it is meant for general reception. In 'libel', according to the English law, plaintiff need not prove special damage as it is defamation *per se* but in case of slander, with some important exceptions, the plaintiff must prove special damage. This difference, though illogical, is attributable to the peculiar historical development, for civil libel is the legacy of the Star Chamber where it was not necessary to prove special damage. Libel, which was

punished as criminal wrong, was also actionable *per se* whereas slander was taken over by the King's Court from ecclesiastical courts and was actionable on the case where proof of special damage was needed.

If words are not defamatory in their natural meaning, as they are understood, but are so in their special sense or in their latent or secondary meaning, it is the duty of the plaintiff to aver so by including an explanatory clause in the plaint to that effect. In the absence of such averment the plaintiff is not allowed to lead evidence on the point.

Law of defamation – libel and slander

In India, libel and slander are both criminal wrongs. Slander, as tort, is actionable *per se* in the same way as libel is. The English rule, which treats slander actionable only on proof of special damage, is not grounded in reason and equity and is only the creation of historical development. As the same historical factors did not operate in India, slander is here actionable *per se*. This looks reasonable in the light of the fact that slander, in India, is a criminal wrong also, whereas in England it is only a civil wrong. In the presidency towns, where English law as it stood in 1726 was applied, the English rule made its way. The High Court of Calcutta accordingly held that in the city of Calcutta an imputation of unchastity was not actionable *per se*. This common law rule was, however, abrogated in England by the enactment of the Slander of Women Act, 1891. The High Courts of Bombay and Madras asserting themselves as courts of equity while administering equity, justice and good conscience did not endorse this view and never considered that the English rule was introduced there. Again, when adultery is classified as a criminal wrong in India it was only proper if its imputation was made actionable in India. Further, it would have been absurd to allow man to recover for imputation of adultery (as it is an offence against the husband) and disentitle the woman from doing so.

Indian decisions relating to slander mainly cover four types of cases, *viz.*, cases of vulgar abuse, imputation of unchastity, imputation of crime and aspersions on caste.

The majority of Indian courts have held that verbal abuse is not actionable but the Bombay High Court in *Kashiram* v. *Bhadu*[52] has laid down that vulgar abuse is actionable *per se*. This lone ruling has not been followed by other courts which see a clear distinction between abusive language causing insult by uttering 'sala', 'haramzada', 'soor', 'baperbeta', and other abusive words which are defamatory in the sense that they expose the man to ridicule or humiliation. If one tells of a woman what she is not legally married wife and has been turned out from various places, it clearly amounts

52. 7 B. H. C. (A.C.) 17.

to defamation. As already pointed out, there is a conflict of views in Presidency High Courts as regards imputation of unchastity. As regards aspersions on caste the Oudh Chief Court has held that to say to a high caste woman that she belongs to a low caste is slander and is actionable *per se*. But to say that 'prayaschitta' is obligatory because the marriage had been out of caste, does not constitute slander as no loss of caste is imputed.

Defences

A number of defences or justifications are available in a case of defamation. Truth of the statement is a complete defence.[53] But the statement must be true in all its parts and as a whole. The motive behind making such a statement is not important. The statement can also be justified as a fair comment on a matter of public interest, *e.g.*, political issues, conduct of ministers or other officials of government, and about management of public or religious institutions. The defence of absolute privilege can be taken as regards statements made in the course of parliamentary, judicial, executive or military courts proceedings and this defence is available, even when statement has been made maliciously. Fair and accurate statements contained in the report of such proceedings are also absolutely privileged.

The privilege is qualified when one makes a statement under the pressure of some social, moral or legal duty. Such a statement will make the person liable only when it is proved that it has been made maliciously and without any motive to perform the duty. The common law would make a person liable even if he did not intend to defame any person. Section 4 of the Defamation Act of 1996 allows the publication of a correction, tendering of an apology and offering of reasonable amount of compensation, which may constitute a defence in an indirect way.

According to English law, counsel's words are absolutely privileged, if they are spoken with reference to and in course of inquiry or trial, irrespective of motive or malice behind the utterance. The Madras High Court is of the same view, but according to the Bombay High Court, the language of an advocate is justifiable so long as it has reference to his instructions, evidence on record or proceedings. It will not make him liable even if it has been used to hurt the feelings of another or is devoid of all solid foundation. The Patna High Court holds the same view. The Allahabad High Court has held that if counsel makes remarks which are entirely uncalled for, and which do not further the interest of his client or do not amount to execution of his professional duty, he can be made liable. The former Nagpur High Court has held that there is no absolute privilege in case of a statement made by a witness from the witness box. The rule of English law which treats such statements as absolutely privileged has not

53. For example see *Reynolds* v. *Times Newspapers* (1999) 4 All ER 609, p. 614 (HL).

been followed to its full extent. Similarly, the Calcutta High Court has deviated from the rule of common law that statements made in affidavits and pleadings are absolutely privileged and has held in *Giribala Dassi* v *Pran Krishto Ghosh*,[54] that if the statement in the affidavit is wholly irrelevant to the inquiry to which the affidavit is related, it will make the person liable in defamation. In another case, the High Court similarly held that defamatory statements made in pleadings are not absolutely privileged. In a later case, Mookerjee J., of Calcutta High Court made the observation that in civil suits parties ought to enjoy the same privilege as under the English law.

Next only to malicious prosecution and negligence, defamation is the popular resort of tort litigants in India.

Deceit or fraud and misrepresentation

Wrongful intention is not so important in other torts as it is in the tort of deceit. This tort consists in "leading a man into damage by wilfully or recklessly causing him to believe and act upon falsehood". To constitute fraud there must be some statement. Mere non-disclosure of a fact is not fraud save in certain exceptional cases where it is necessary to disclose material facts. So is the case in proposals of insurance where defendant is obliged to disclose facts. The tort of fraud involves a statement of fact and not merely of opinion. Knowledge of truth is more important than a belief in its truth so the tort is actionable against one when he recklessly disregards the truth rather than when he carelessly ignores it. It is also necessary to prove that plaintiff suffered damage by acting upon untruth. If the defendant believes in the truth of the statement, there cannot be fraud even when he has no reasonable grounds to believe so. The plaintiff must prove actual fraud and no amount of negligence can amount to fraud.

In *United Motor Finance Co. Ltd* v. *Addison and Co.*[55] it was held that

> If a person makes a statement to another which he knows to be untrue and he does so with a view to induce such another to enter into contract there is sufficient basis for action of deceit provided the person to whom the statement is made relies upon the false statement.

In a number of cases, it has been held, that suspicion cannot be accepted as proof of fraud, and fraud must be proved by cogent evidence. Again, it has also been held that if parties are not honest the court should decline to help them. In *Hari Prasad Jaiswal* v. *Union of India*,[56] where a postman was induced to deliver a money order to a person who was not the

54. (1903) 8 C.W.N. 292.
55. AIR 1937 P. C. 21.
56. AIR 1959 M. P. 389.

payee, it was held that it was no defence for an action for deceit that the postman had other means of knowledge available to him.

According to the Companies Act, 1956, in India promoters of companies are liable for false statement in prospectus in a number of instances.

As fraud is a criminal wrong also resort to this tort has a very low frequency in India.

Malicious prosecution

The tort of malicious prosecution has the highest frequency in Indian tort litigation, and from 1914 to 1965, the cases of malicious prosecution came to 184, while the total number of tort cases was 613. This tort, which covers more than 25% of tort litigation, got established in England in its modern form in 1699 in *Savile* v. *Roberts*[57] and is accredited to Holt, J.

According to Underhill,[58] the tort of malicious prosecution consists in "instituting unsuccessful criminal proceedings maliciously and without reasonable or probable cause," which causes actual damage to the party prosecuted, as a natural consequence of the prosecution complained of. The damage is the gist of the offence but it may also be presumed and need not be proved. This tort balances two competing principles, namely, the freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent persons. Though the tort arises out of unsuccessful criminal proceedings, and does not apply to malicious civil proceedings it is committed the moment the defendant has launched criminal proceedings against the plaintiff, *i.e.*, when the defendant has set in motion judicial process against the plaintiff and was actively instrumental in bringing about the criminal proceedings.

The plaintiff need not prove that he was acquitted but he has to prove that the proceedings terminated in his favour. If proceedings are *ex-parte* it will not be treated as terminating in his favour. The phrase 'absence of reasonable and probable cause' has reference to the mind of a discreet man, and if the defendant takes care to have adequate information of facts, honestly believes in the truth of his allegation, and facts are such that a *prima facie* case is made out, it would certainly be inferred that defendant's conduct is reasonable. It is quite obvious that the action for malicious prosecution cannot succeed if criminal proceedings are pending. For the success of the action, there should be either acquittal or dismissal of the complaint. In answer to the question who is the prosecutor, the Indian courts look to the whole circumstances of the case and conduct of the complainant before and

57. (1698) 1 Ld Raym. 374.
58. *Supra* note 41, p.133.

after making the charge; taking notice of the persons who took active part in the prosecution and did *pairvi* by producing witnesses and doing all things necessary for the success for the prosecution, even going to the extent of influencing the police after lodging the complaint *etc.* If the defendant does nothing more than giving information to the police of theft at his shop, laying suspicion upon the plaintiff, and does not take active part in the proceedings, he cannot be called the prosecutor.

As regards the question of suffering damage, the courts have to see whether proceedings have reached a stage at which damage to plaintiff begins to result. Some action, by judicial authority, must take place either by way of issuing summons or issuing warrant of arrest. If the plaintiff is produced in the court twice and is being taken to jail publicly it has been held that the case has reached the stage where action for malicious prosecution would lie. If the complaint is not followed by any issue of process or notice, it does not amount to malicious prosecution. Further, if the person complained against voluntarily incurs the risk of attending the inquiry, arising out of the complaint, the complainant is not liable for consequences.

As regards the meaning of 'malice' in India, it has been construed as an improper or indirect motive, *i.e.*, some motive other than a desire to vindicate public justice or private right. Malice need not be a feeling of enmity, spite or ill will or spirit of vengeance but it can be any improper purpose which motivates the prosecutor, such as to gain a private collateral advantage. Mere indignation or anger does not negative the existence of the proper purpose because securing prosecution of offenders is a rightful purpose. If charge is false to the knowledge of the complainant he will be liable. Recently in *Bank of India* v. *Lekshmi Das*[59] the Court reiterated the Indian position that in malice absence of a *probable and reasonable cause* must be proved.

Maintenance and champerty

The law of maintenance and champerty was not made applicable to India even in presidency towns. Here people did not make commerce of litigation and it was not considered a public evil and something contrary to public policy. But if the agreement is unconscionable for the parties and inequitable for the borrower, and if it is not made with good and *bona fide* object of assisting a just claim for which reasonable compensation is only demanded but motive for indulgence is to harass or to gamble, it amounts to a tort. Bad motive must be proved to make it actionable. Therefore, it is the duty of the court to decide whether maintenance is merely for acquisition of some interest, or resorted to as an instrument of disturbing the peace of

59. (2000) 3 SCC 640.

families, of becomes a mean of gambling or is activated by corrupt or improper motives and designs. In the former case it is not a wrong in India.

Conspiracy

A conspiracy is an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is harmful towards another person, or to carry out an object not in itself unlawful by unlawful means[60]. It may consist in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means.

The number of the tort of conspiracy reached the high court level is very less in India.[61] In medieval England there was a system of state's regulation of labour and prices. The workmen and their leaders were punished for criminal conspiracy if they made demands for higher wages. There were laws against combinations. When persons combined to pervert the ends of justice they were liable for tort of conspiracy if damage was caused. Later on, statutes gave protection to labourers by the Conspiracy and Protection of Property Act of 1875 and the Trade Disputes Act of 1906.

The tort of conspiracy is committed when two or more persons combine in such a way that their conduct amounts to criminal conspiracy which is a punishable wrong. Special damage must be proved to make it actionable. It is also necessary that the defendant must have done something in pursuance of conspiracy. The action cannot lie for acts, which are not unlawful. According to the Indian Penal Code, if two or more persons agree to do or cause to be done an illegal act or an act which is not illegal by illegal means, they are said to have conspired. Section 43 of the Code defines 'illegal' as "applicable to everything which is an offence or which is prohibited by law; or which furnishes ground for a civil action." Hence persons can be made liable for tort of conspiracy if they combine to commit assault, libel, trespass, *etc.*

In India, after the adoption of the Trade Unions Act, 1926, trade union workers and leaders are immune from civil and criminal proceedings when there is a trade dispute. But by the Industrial Disputes Act, 1947, where in certain cases the trade union and its officials are not allowed to act, they can be held liable for civil action of conspiracy.

Nervous shock

An action in tort also lies for nervous shock and bodily illness caused by it. The reason is that the control and functioning of body depends upon

60. Per Lord Brampton in *Quinn* v. *Leathem* (1901) AC 495 (528).
61. From the year 1914 to 1965 only five times, the tort of conspiracy reached the High Court level in India. Tort litigation about deceit, adultery, seduction and inducement for breach of contract is still less.

nervous system and the shock to nervous system may render a person incapable to perform ordinary functions and as such it can be equated with bodily injury. But when bodily illness or disorder does not follow the nervous shock, it is not actionable.

The tort of nervous shock covers two classes of cases: (1) intentional wrongdoing; and (2) negligence on the part of the defendant. Law holds the wrong doer liable if his wrong comes under the former class, but as regards the second category of offenders, the trend of authority is to the effect that a mere on-looker on or near the road cannot complain of shock when he sees the accident from a safe distance without any possibility of harm to himself. It is expected that persons of normal sensitiveness will endure noise and collision or a sight of injury to others.

The first case of 'nervous shock' was reported to have taken place in England, in 1888, when one Miss Coultas[62] claimed damages on account of nervous shock she received owing to the opening of railway gates by the level crossing keeper negligently. She escaped death by inches when the train thundered in. As a result of shock to her nerves she fell seriously ill. The Judicial Committee of the Privy Council disallowed damages particularly because they did not want to establish a new precedent. It was also not possible for them to establish a connection between the shock and the resultant physical injury, as knowledge on the subject in those times was deficient. Subsequently, in 1897, with the decision in *Wilkinson* v. *Downton*,[63] the English courts refused to follow the *Coultas* case and started awarding damages. Since then nervous shock has established itself as a tort.

In India, the tort of nervous shock has been recognized and is actionable, if it is caused by fear, though there may not be actual physical impact. The action arises out of breach of ordinary duty to take reasonable care to avoid inflicting injuries followed by damage. In *Halligua* v. *Mohan Sundaram*,[64] the plaintiff who was travelling in the defendant's taxi became unconscious when it collided with the tram car. After regaining consciousness, she found herself bleeding badly from the nose and mouth and could not stretch her hands and her finders became stiff. It was held that bodily injury is not only that which is externally visible but includes shock to nervous system by which a person is rendered incapable to pursue ordinary activities of life, and action will lie if such injury is directly attributable to negligence.

All emotional excitements and disturbances are not actionable. In *Deep Chand* v. *Manak Chand*[65] it was held that mental worry is not actionable. It is too trivial to be considered an injury in the legal sense. In *Governor General in*

62. *Victorial Railway Commissioners* v. *Coultas* (1888) L.R. 13 A.C. 322.
63. (1897) 2 Q B 57.
64. AIR 1951 Mad. 1056.
65. AIR 1939 Nag. 154.

Council v. *Surajmal*[66] in a railway accident where a sentinel coach, in which plaintiff was travelling, collided with a stationery goods train. Plaintiff's eye and thigh were bruised and slight scratch did occur on the right side of the face. According to the doctor, the injury would have taken 10 days to heal up. It was held that a person of normal fortitude would get only slight shock for such a minor accident, and large percentage of people will think nothing of it in which no one but plaintiff was injured. To a normal healthy man it is just a temporary and passing shock. Bose, J., observed that a carrier of passengers is not bound to foresee and protect against injurious result that happen only to a person of particular sensitiveness. More recently the courts in India have been more generous in awarding damages for nervous shock. The mental agony caused by the acts of public authorities;[67] and hospital authorities[68] has been held to have caused nervous shock and damages were awarded. As of now the settled legal position in India is that the body is controlled by its nervous system and if by reason of an acute shock to the nervous system the activities of the body are impaired and it is incapacitated from functioning normally, there is clear "bodily injury" and entitled to damages.

Wrongs to Property and Possession

Trespass to land

Trespass was once a synonym a tort, but today it is related more to land. It occupies a fourth position in Indian tort-litigation. Trespass is wrongful interference with land which is in the possession of the plaintiff. The act which constitutes trespass is wrongful entry on the land in the possession of the plaintiff or remaining on such land, or placing any object on it or throwing any object on it or constructing a projection in air space over the land of another, or doing anything on it without lawful justification. Trespass is mainly a wrong against possession, and is available at times against the owner himself. No special damage need be proved, but in the absence of actual damage the plaintiff is likely to get only nominal damages.

In England, the landlord who has delivered the possession of land to his tenant cannot sue in trespass unless it is injurious to his reversionary interest. The principle is based on the ground that the landlord has parted with his interest during the term of tenancy. This rule is not applicable in India, at least in cases of tenures because tenures here, in many cases, are of partnership and the landlord shares the produce with the cultivators. According to English law, entry under the process of law is not trespass. But in India, if a *nazir* or sheriff opens a defendant's house to execute civil

66. AIR 1949 Nag. 256.
67. *Lucknow Development Authority* v. *M.K.Gupta* AIR 1994 SC 787.
68. *Spring Meadows Hospital* v. *Harjot Ahluwalia* JT 1998 (2) SC 620.

process against his person or goods when the outer door is closed or locked it may amount to trespass. This is true even when the defendant is evading such execution. This privilege only extends to a man's dwelling house or outer house or any office annexed to the dwelling houses but not to the building which is at some distance from dwelling house and is not a part of it, not does it apply to his workshop. In English law the extra-judicial remedy of distress damage feasant is available, *i.e.*, the right of retaining the thing that caused damage till the defendant pays compensation. It is doubtful if there is any right in the nature of distress damage feasant available in India. But according to the Cattle Trespass Act, cattle can be impounded if they have committed trespass. There is also an action for waste, *i.e.*, doing some lasting damage to freehold, for example, damaging and destroying houses, gardens, trees, or other corporeal hereditaments, which causes loss to a person who has remainder or reversionary right in them and thereby causing loss to his inheritance. In India a tenant who is a permanent lessee cannot cause excavation which results in substantial damage to the property leased. But if one is a grantee of the permanent tenure of an agricultural land, he has all the right with regard to the underground, unless there is express reservation to the contrary. The actions of waste are generally brought against Hindu widows who have only life interest in their husbands' property. But with the adoption of the Hindu Succession Act, 1956, a Hindu widow has right of inheritance and as such these actions can no longer be maintained.

In England the right of 'undisturbed privacy' has not been recognized by law. A new window, overlooking the grounds of another, may cause annoyance to the neighbour and may also diminish the value of that property. But English law does not consider it an injury. In India the right of privacy can be acquired by custom or permission though it cannot be created by prescription. It is grounded in the oriental custom of secluding women. The Indian Easement Act also gives recognition to such a right. In England, the right of ferry across the river is purely a creation of royal grant or prescription. In India, it is treated as immovable property.

In *Sri Iswar Gopal Jew* v. *Globe Theatres Ltd.*[69] it was held that an action for trespass cannot be assigned and such an owner cannot bring an action for trespass committed before he became the owner. In *Dadabhai Narsidas* v. *Sub-Collector, Broach*[70] Melvil, J., pointed out that in an action for wrongful ejectment, English law will direct the defendant to prove title, if plaintiff can show undisturbed and peaceable possession. But English rule should not be extended to India. The law in India requires that in an action of ejectment, the plaintiff should always prove title. The reason is that the law of India gives remedy which is not available in England when one is disposed. It was

69. AIR 1947 Cal. 200.
70. ILR (1881) 5 Bom. 370, 387.

held by the High Court of Bombay in *Bandu* v. *Naba*[71] that a rightful owner who dispossesses another cannot be treated as a trespasser except as provided by section 9 of the Specific Relief Act, 1877. It was held in *Lillu* v. *Anhaji*[72] that possession actually taken by a person having a right to it is not the less effective as perfecting his title by reason of an irregularity in taking it. Subsequent ouster will give rise to a new cause of action. In *Hillaya Sabbaya* v. *Narayanappa* it was laid down that the true owner of property has a right to retain possession even when he obtained it from a trespasser by unlawful means.

Trespass to goods

Taking goods wrongfully out of one's possession or forcibly interfering with goods of another is an actionable wrong which is called trespass to goods. If the goods of the plaintiff are wrongfully detained when he is entitled to immediate possession, the wrong is called 'detinue'. But if the defendant converts the goods of the plaintiff for his own use and thereby deprives him permanently or for an indefinite period the use of those goods, the defendant has committed the wrong of 'conversion'. Trespass to goods differs from trespass to land in one important aspect that wrongful intention or negligence is not necessary for trespass to goods.

"Conversion is available when good so referred are taken or detained or destroyed or delivered to third persons or they are dealt with in a manner adverse to plaintiff or inconsistent with the use of possession of them." The exercise of dominion over goods and a consequent unjustifiable denial of plaintiff's title amount to conversion. If this is not so, the act may merely constitute trespass to goods. Thus, for example, if one deposits his suitcase in a cloakroom and the attendant challenges the ownership and does not return it, he commits the wrong of conversion. But on making a demand for it, the attendant throws the suitcase so that it is damaged, the wrong will amount to trespass to goods. Conversion is also actionable by one who has immediate right to possess the goods. This action emerged in the 15th century and has superseded trespass to goods and detinue because of its advantageous procedure. The wrong of detinue is committed when one does not deny the property right of another but refuses to return the goods. Thus, if one refuses to return another's book till the examinations are over, he is liable in detinue and not in conversion.

Wrong to Person and Property

Negligence

The tort of negligence has been called the modern tort *par excellence* and is

71. (1890) 15 Bom. 238.
72. 13 Bom. L.R. 1200.

the major source of tort litigation in India and elsewhere. Only malicious prosecution surpasses it in the quantum of cases which have reached High Court level in this country.

Negligence, according to Underhill,[73] consists in omission to do something which a prudent and reasonable man would do, or doing something which a prudent and reasonable man would not do, and is actionable whenever, as between the plaintiff and the defendant, there is a duty cast upon the latter not to be negligent and there is a breach of this duty which causes damages to the plaintiff. In its subjective sense, negligence is absence of intention, in its objective sense it is an act in contravention of duty to take care towards somebody. In practice, both these aspects coincide. Even though the existence of a duty situation is decided on the basis of existing precedents, it is now well accepted that new duty situations can be recognised due to the continuing influence of social, economical and political considerations.[74]

Thus in *Donoghue* v. *Stevenson*[75] a broader concept of duty has been laid down. In has been observed "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". Neighbour is one who is affected by the negligent act. He is one who must be in contemplation when the mind is directed to the negligent act. This proposition is the high watermark in the extension of the duty to take care. However, courts are conscious of its dangers and in *King* v. *Phillips*[76] it was held that the taxi-driver did not own any duty of care to the plaintiff, who was standing some 80 yards away in a building, to avoid causing nervous shock to her by seeing the probable danger to her child being run over by his taxi.

Damage caused by negligent act must not be remote. The test applied was the test of directness. If the act of the defendant was negligent, the consequences of the act having direct or physical connection would not be considered remote. This was so held in *Re Polemis and Furness etc. Co.*[77] However, in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.*,[78] the *re Polemis* decision was adjudged as bad law by the Privy Council and the test of directness was rejected. It was held that the damage of the kind was not foreseeable by a reasonable man and, therefore, damage was held to be remote. Here the test of foreseeability[79] was applied. In *Doughty*

73. Arthur Underhill, *A Summary of the Law of Torts*, 9th ed., 1911, p. 167.
74. *Jay Laxmi Salt Works (P) Ltd.* v. *State of Gujarat* JT 1994(3) SC 492, p. 502.
75. (1932) A C 562 .
76. (1953) I. QB 429.
77. (1921) KB 560.
78. (1961) A C 388.
79. The duty of forseebality was expanded in cases like *Hedley Byrne & Co Lta* v. *Heller and partners Ltd.* (1964) AC 465 (HL) and *Home Office* v. *Dorset Yacht Co. Ltd* (1970) 2 All ER 294 (HL).

v. *Turner Manufacturing Co. ltd.*,[80] the principle laid down by *In re Polemis* was disapproved.

The standard of care applied is that of a reasonable and prudent man. This is a question of fact to be adjudged by the court, looking to the circumstances of the case, and different kinds of duties can be imposed upon different classes of persons.

Duties of owner and occupier of land

If a person brings on his land and collects and keeps there anything likely to cause mischief if it escapes, he 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. This rule was laid down in *Rylands* v. *Fletcher*,[81] where water collected in reservoir escaped into the mines of the defendant and caused damage even though there was neither willfulness nor negligence. This is called the rule of strict liability. The *Rylands* v. *Fletcher* rule is being enlarged every day. It is not only limited to water but has covered gas, electricity, vibration, sewage, explosives, noxious gas, heaps of soils, dangerous animals, yew tress etc. In *A. G.* v. *Corke*[82] it was applied to human being also. The Court of Appeal in *Perry* v. *Kendricks Transport*[83] was of the view that it applied both to personal injuries and damage to property. *Rylands* v. *Fletcher* in the case of land, and *Donoghue* v. *Stevenson*, in other cases, have stretched the law so much towards social responsibility that counter currents of learned opinions have started against it and exceptions have been recognized. The strict liability rule has been accepted by Indian courts, but in many cases, it has not been applied specially in cases where irrigation tanks are maintained either by custom or under statutory authority. In *Bomanji Mancherjee* v. *Mohommed Ali Hazi Ismail*[84] the rule was held to be inapplicable, as in that case water escaped from a house which consisted of floors one above the other and some of which were let out. There, accumulation of water was thought to be necessary and water was stored for natural purposes. This exemplifies one of the exceptions to the rule as the rule applies only to non-natural use of land. In *Dhanal Soorma* v. *Rangoon Indian Telegraph Association*[85] where the employee of the company died of electrocution owing to the defect in electric installation although reasonable steps were taken to mend the defect, it was observed by the court that the time had come to consider the bringing of electricity upon land as

80. (1969) QB 58.
81. (1868) L. R. 3 H. L. 330.
82. (1933) Ch. 89.
83. 1956 All. E. R. 154.
84. (1905) 7 Bom. L. R. 713.
85. AIR 1935 Rang. 401.

reasonable because of its domestic and other uses. As such the court did not follow the *Rylands* v. *Fletcher* rule. In *East India Distilleries* v. *P. F. Mathias*[86] the facts were that fire broke out accidentally because of alcohol storage by the lessee. Negligence could not be proved against the lessee. Here also the rule of strict liability was not followed. At same time the Supreme Court of India to meet the ends of social justice had even gone to extent of applying the rule of strict liability to a case of motor vehicle accident.[87]

In *M.C. Mehta* v. *Union of India*[88] a more stringent rule of strict liability was laid down by the Supreme Court where any of the exceptions available to strict liability is not applicable. The court called this duty as *absolute and non-delegable.* When this rule of liability was applied court could order exemplary damages and larger and more prosperous the enterprise, the greater must be the compensation payable. Even though doubt was raised as to whether this rule was an *obiter*[89] by the Supreme Court it was later clarified to be a *ratio* in *Indian Council of Enviro Legal Action* v. *Union of India.*[90] The *M.C. Mehta rule* was later applied in *Jay Laxmi Salt Works Ltd.* v. *State of Gujarat*[91] in which case the court did not base its reasoning that this was a non natural use of land but awarded compensation for violation of public duty and negligence.

The duty of care is also different to different persons who come upon the premises; to trespassers, the occupiers need not exercise reasonable care. The occupier must avoid creating danger to the safety of trespassers. Traps should not be laid to punish intruders in a cruel manner, nor any act done in reckless disregard of the presence of the trespasser. Licensee is a person who enters on premises by virtue of permission by the occupier. It is the duty of the occupier to keep the premises free form traps for licensees. As regards invitees, occupiers cannot be negligent and must exercise reasonable care to keep the premises safe for them. Invitee is a person who enters on land for some purpose in which he has common interest with the inviter. These concepts received formulation in 1867. According to Lord Denning, the law relating to invitees and licensees was in swamps and he pleaded for the abolition of distinctions as regards duty of occupier towards invitees and licensees. To him, it seems strange that "a householder should owe a higher duty to a tradesman or canvasser who comes to receive orders than to one who comes as a guest whom he invites to dinner". According to him there should be the imposition of a general duty on the occupier to take care

86. AIR 1928 Mad. 1140.
87. *Kusuma Begum (Smt.)* v. *The New India Assurance Co. Ltd.* AIR 2001 SC 485.
88. (1987) 1 SCC 395.
89. *Charan Lal Sahu* v. *Union of India* AIR 1990 SC 1480.
90. AIR 1996 SC 1446.
91. (1994) 4 SCC 1.

irrespective of the fact whether the person who enters on land is an invitee or a licensee.

In England the Occupiers Liability Act, 1957 has abolished the distinction between an invitee and a licensee which existed under the common law rules. The Act lays down that an occupier of premises owes the same duty of care to all his lawful visitors to see that the visitors will be reasonably safe in using the premises.

In India, the law about licensees and invitees has been considered at par with English Law, and Indian judges have been making fine distinctions between the duties of occupiers of land towards licensees, invitees and trespassers. In *Cherubin Gregory* v. *State of Bihar*[92] the appellant left naked electric wire across the passage of his latrine without giving any warning to prevent entry of intruders. Mst. Madilen who managed to go into the latrine happened to touch it, received a shock, and died soon after. It was contended that the deceased was a trespasser and the electric light, at some distance, at daybreak constituted warning. It was observed that a trespasser was not to be considered an outlaw and the occupier has no right to inflict injury upon him by indirectly doing something on land the effect of which, to his knowledge, is likely to cause harm to a trespasser. In England, setting of spring guns to shoot trespassers is wrongful and makes one liable for damages. There is a little difference between spring guns and naked live wire in the present case. An occupier is not allowed to do wilfully acts with deliberate intention to cause harm.

The duty of care varies according to the nature of the work and profession. An innkeeper of a common inn is bound to provide for lodging and entertainment at a reasonable rate if he has accommodation. He must guard goods with due diligence. In India, the liability is governed by the Indian Contract Act. The Hotel Proprietary Act, 1956 of England retains the rule of absolute liability. A doctor must use care as it is expected of him. Solicitors are liable if they are negligent in their work. If children commit trespass, the duty of occupier is not to injure them intentionally and lay traps for them. A railway company is bound to keep gates closed with trains pass along. They are liable if they fail to do so or if they invite persons to cross railway lines. In case of dangerous goods like explosive materials, the liabily is absolute while in case of domestic fire one is not liable without proof of negligence. According to the statute of 1774 of England there is not liability in case of accidental fire. In India there is so such corresponding statute. Persons dealing with poisonous drugs are bound to exercise more than ordinary care. Gas companies are bound to exercise more than ordinary care. Persons who install or use dangerous machinery are obliged under many legislative acts to observe proper precautions. Directors of

92. AIR 1964 SC 205.

companies are bound to show more than ordinary care towards their shareholders. Common carriers are liable for loss or injury to goods even when there was no negligence except in cases where the loss was caused by act of God or King's enemies or inherent defects in the goods carried. The manufacturer of an article of food, medicine *etc.* is liable to the ultimate purchaser to take reasonable care that the goods sold are free from defects.

As regards dangerous animals the liability is absolute in the case of those which are dangerous by nature; but as regards those which are not dangerous, the owner is liable when he knows their vicious nature. An owner is liable for their trespass and damage caused consequently. Owners of dogs and cats are not responsible for fleeting trespass. In *Ganda Singh* v. *Chunilal Shah*[93] the defendant was held liable for the injury caused by his horse which was known to him to be vicious though no negligence was proved. Elephants have been considered to be dangerous in some cases but in others they were held out to be dangerous in view of their employment in many tasks in this country.

The defences which may be relied upon by the defendant in an action for negligence are:

1. He may deny that he owed any duty to the plaintiff;
2. He may deny that he has failed to take such care as a reasonable person would take;
3. He may plead contributory negligence on the part of the plaintiff.

Contributory negligence is negligence on the part of the plaintiff and is an act or omission which constitutes negligence. In such a case, in common law, if plaintiff's negligence was proved, he was not allowed to recover any damages. But the party who had the last opportunity to avoid the harm, accident or mishap, by taking ordinary care, could be held liable for loss. Therefore, a defendant cannot take the plea of contributory negligence of plaintiff successfully if he had the last opportunity to avoid the harm. According to this rule, the party whose negligence was earlier in point of time, altogether escaped the responsibility and the other whose negligence was subsequent, was held liable even though the resulting damage was a consequence of negligence of both the parties. It was in effect a device to render ineffective the defence of contributory negligence and was evolved by the judges for that purpose. Now, in England the Law Reform (Contributory Negligence) Act, 1945, has made it possible to split the blame and to apportion damages accordingly. There is now no need to look to the last opportunity which has given rise to 'verbal refinements, logical chopping, and pointless microscopical research'. Though it has practically been thrown out from the field of English law by the passing of the Law

93. AIR 1916 Cal. 877.

Reform (Contributory Negligence) Act, 1945, theoretically it still subsists and views differ whether the rule of last opportunity survives or not. Lord Denning considers this doctrine to be devoid of any value.

In India, there is no such legislation by which damages can be apportioned according to the respective portion of responsibility for the damage caused. In this country, at first, the plea of contributory negligence was not considered. But later, the plea began to be considered. In *Kota Transport Ltd.* v. *Jhalawar Transport Services Ltd.*[94] where the plaintiff's bus was damaged owing to rash and negligent act of the driver of the defendant's bus, one of the questions to be considered was whether contributory negligence could be successfully pleaded. It was held that where it is shown that there was negligence on the part of the plaintiff which contributed to the accident the plea of contributory negligence may be available notwithstanding the defendant's negligence.

In *Nani Bala Sen* v. *Auckland Jute Co., Ltd.*[95] a proposition analogous to the rule regarding burden of proof in criminal jurisprudence was laid down. It was observed that if the court finds itself unable to discover to what extent the negligence of the plaintiff or that of the defendant contributed to bring about the accident, the defendant is entitled to succeed for *in pari delicto potior est conditio defendentis.*

It is urged that the law on the point be rationalized by the legislature and brought at par with English statutory law.

Nuisance

The word nuisance is a French word and conveys the generic idea of harm as the word tort conveys. But it has a special meaning in English law. It has civil as well as criminal aspects. As a criminal wrong, common or public nuisance was punishable from early times. As civil redress the assize of nuisance and an action on the case for nuisance were available to people as a general remedy for different kinds of injuries when no other suitable remedy was available.

Nuisance, according to Winfield, is an unlawful interference with one's use or enjoyment of land or of some right over or in connection with it. Examples of nuisance are disturbing noise, bad smelling fumes, polluting water, overhanging trees, vibrations, sparks, *etc.* Whether there is in fact nuisance or not has to be judged from the point of view of time, place, and other circumstances. Malice, as an improper motive, cannot turn a lawful act into an unlawful one. But the doing of something which may, on the very face of it, be treated as nuisance for it endangers or disturbs normal

94. AIR 1960 Raj. 224.
95. AIR 1925 Cal. 893.

conditions of social living, that is, where it violates the principle of live and let live may amount to malice. Public nuisance dealt by criminal law is not actionable in tort unless the damage suffered by the plaintiff is a "particular damage other than and beyond the general inconvenience and injury suffered by the public." Private nuisance is a wrong against a private person exclusively. The action of nuisance being a wrong to property as well as to person is available only to the occupier of the property. Further, nuisance must not be momentary but must continue for some time and there must be some give and take in the affairs of life; hence an accidental injury is not nuisance.

Nuisance basically is an interference with the comfort of occupiers of land but every interference is not actionable nuisance if the conduct of the defendant is not unreasonable. Some minor discomforts which are parts of the social life in crowded cities, have to be endured, and looking to circumstances of time, place and persons they may not be regarded as nuisance by courts. When personal discomfort is caused by the conduct of the defendant court can afford to take a lenient view of the matter, but if loss to property is caused by the conduct of the defendant, the court is not likely to take a lenient view. Further, the standard of comfort varies from place to place and one is not expected to be hyper-sensitive to smells, noise and other inconveniences.

Nuisance is of two kinds: Public Nuisance and Private Nuisance. A person is guilty of public nuisance who does any act, or is guilty of n illegal omission, which causes any common injury, danger or annoyance, to the public or to the people in general who dwell , or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. In India under section 91 of the Civil Procedure Code, 1908, the Advocate General, or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit though no special damage has been caused, for a declaration and injunction or for any other relief. Private nuisance is the using or authorising the use of ones property or of any thing under ones control, so as to injuriously affect an owner or occupier of property by physically injuring his property or affecting its enjoyment by interfering materially with his health, comfort and convenience. The specific remedy for private nuisance is damages. In the alternative, or in addition, injunction can be asked for. The defendant has also the extra-judicial remedy of abatement of nuisance by himself.

The law on nuisance has not undergone any major change. Both the notions of annoyance and harm are still vague. The doctrine of *volenti non fit injuria* does not apply to one's going and residing at noisy locality. That the nuisance is caused in the public interest is no good defence. In the field of private nuisance some developments have taken place. In *Seleigh-Denfield* v.

O'Callaghan,[96] it has been laid down that nuisance arising at the premises where the defendant had power to control, makes him liable even though he does not create the nuisance provided he had knowledge or means of knowledge and power to prevent. It has also been held in the *Elevenist Syndicate case.*,[97] that employer would be liable for nuisance caused through the act for which independent contractor has been employed to perform that act or work. In cases of highway nuisance, usually the highway authorities are not liable for non-feasance but the United Kingdom High Way Miscellaneous Provisions Act, 1951, has introduced liability even for the failure to maintain a highway. Mukherjee, J., has urged that such legislation should also be passed in India looking to the deteriorated condition of highways in this country.

Tort-litigation in India, in relation to nuisance, has not been as much as it has been in the case of malicious prosecution, negligence and defamation but is enough to emphasise its importance. In *Janki Prasad* v. *Karavat Hussain*,[98] the right to worship and take out processions was considered not to be absolute. It was held that it was subject to the order of public authorities, and limitations could be imposed by civil courts on the exercise of such right on the ground of preventing nuisance. In *Municipal Committees of Saugor* v. *Nilkanth*[99] it was observed, that though establishment or maintenance of slaughter houses for butcher's meat is *per se* an offensive trade, it depends mainly on the place in which it is located. In *Jawand Singh* v. *Mahomed Din*[100] it was held that plaintiffs were entitled to obtain injunctions and defendants had no independent right to blow conches or beat drums especially when, it was done maliciously with the sole purpose of annoying the plaintiffs in their religious observances and ceremonies. In *Dhannalal* v. *Thakur Chittor Singh Mehtab Singh*[101] it was held that abnormal noise produced by floor mill materially impaired the physical comfort of the occupants of B's house and as such amounted to nuisance.

Epilogue

The English common law of torts, with its feudalistic, medieval lineage has been bodily lifted from its native soil and transplanted in India. Its doctrines or crown immunities and privileges, priority of crown debts, protection against actions in tort and contract have been applied to Indian conditions by judges whose knowledge was confined chiefly to the common law.

96. (1940) A.C. 880.
97. *Matania* v. *The National Provincial Bank and the Elevenist Syndicate* (1936) 2 All E.R. 633.
98. AIR 1931 All. 674.
99. AIR 1915 Nag. 79.
100. AIR 1919 Lahore 6.
101. AIR 1950 M.P. 240.

As the law of torts started on the course of its journey from a purely agricultural society where land and its tenures were the bases of social organization, tort-litigation revolved round immovable property and its possession. In spite of the industrial revolution people "steeped in traditions of landlord-society looked with suspicion at the new industrial society". The rule in *Rylands* v. *Fletcher* looks askance at the non-natural user of land to include ordinary use of land or such use as is proper for the general benefit of the community.

Similarly, with changing concept of state and its functions, the relation of law and state needed re-statement. In Great Britain Crown Proceedings Act, 1947, has made advances according to the changed conditions in the area of governmental liability due to increased trading activity of the state. In India, the law on governmental liability is striking varying and discordant notes in the absence of legislative action. It is desirable that judges should forsake the old and exotic theories and evolve doctrines based upon utility and public policy.

Lord Denning has shown the balance sheet of the law of torts. As regards personal injuries the law has undergone 'radical metamorphosis'; (1) contributory negligence has sought recognition and blame-worthy plaintiffs can now recover damages though damages may be reduced in proportion to their fault; (2) the doctrine of common employment has ceased to protect the employer; (3) the joint tort-feasor has no right to recover contribution; (4) doctrine of last opportunity has lost all its importance.

In hospital cases vicarious liability is seeking its justification in the theory of "part and parcel" of organization and the control test is going progressively to the background. Lord Denning has recommended the abolition of artificial distinction between invitees and licensees and has proposed the imposition of duty to exercise reasonable care towards them. Risks of injury in industrial activity is borne out by national insurance. The Workmen's Compensation Acts are putting the contractual theory more and more in the background. The area of personal wrongs has been widened by concepts and approaches like infringement of privacy.

Much of the law of torts is stagnant and is in shallow waters. As yet a wife in England cannot sue for any injury to husband which deprives her of his society. The parent is not allowed to sue for the injury suffered by the child if it is so young that it cannot perform any service to the parent. In cases of malicious prosecution, useless controversy is waged about malice in law and malice in fact. In defamation, problem of classification is presented because of new means of communication. Doctrine of special damage of slander and libel *per se* engenders more confusion than in ministers to utility as this distinction is due to historical development and is not warranted by reason. The tort of conspiracy has lost all its usefulness, when people in order to further their economic interests are allowed to combine and form

unions. The old tort of deceit has re-established itself in company law jurisprudence, where deceit misleading prospectus has become a tort and is potent enough to seek new extension. According to Holmes, in the law of torts, mental element of intention is still the governing principle in various forms of liability and the law of torts still abounds in moral phraseology.

The received English law, and more especially law of torts, has not fared well with the Indian conditions of life, and as such it has not been able to sent its roots deep into the recesses of the Indian soil.

Various factors are responsible for hampering its luxuriant growth.

Cultural factors: Spirituality has been the dominant note of Indian culture. 'Dharma' has for its objective the attainment of temporal welfare through spiritual well-being. In India, high regard is paid to 'duty which puts the concept of 'rights' in the shade. In the absence of any assertion of right, the violation of duty could only draw objective penal sanctions. Here the negative mental element of negligence finds difficulty in securing recognition. Negligence which is the typical modern tort was not recognized by the *Dharamasastras.* Further the wrongs of trespass to person, conversion, defamation and other injuries to family relationship did not made people liable in civil action. Such heritage as that of English law where injuries were classified and priced was not available to Indian juristic thinkers. It was the duty of the king to award damages but the aggrieved party had not right to demand them. Damages were awarded only when there was actual damage. Non physical harm was not recognized for the purpose of awarding damages. Obviously, damages were ordinary and compensatory. The category of vindictive or exemplary damages could not be built into the structure of tort. The doctrine of injury without damage could not have been formulated.

This explains why the Indian mind is more attuned to criminal redress, and filing of civil action for assault, battery, mayhem, false imprisonment, *etc.*, rarely finds favour with Indian litigants today when those acts are already punishable as crimes. The tort of malicious prosecution which is only a mode of revenge for criminal prosecution is resorted to by the victorious party as the spoils of victory and the largest number of cases of torts are those of malicious prosecution where the plaintiff wants merely to teach a lesson rather than to repaid his injury.

Now the Indian mind in this industrial age is dislodging itself slowly from its habitual abode and the tort of negligence is likely to surpass malicious prosecution in the context of a multitude of industrial establishments and ever increasing road and rail traffic with their high accident potential.

Psychology of fear: Again courts have been identified with the power of government which had vested in invaders and as such these institutions

could not inspire much confidence but scare people through fear. The greater part of the people take pride in the fact that they never saw the threshold of a law court. They are very slow in realizing that the court is an effective third party which can give redress to their wrongs and is potent enough to award them damages for wrongful condue towards them. Many disputes which would have developed the legal doctrine in torts are settled out of court because of this psychology of fear.

Nature of civil and criminal redress: The difference in the nature of civil and criminal redress is also responsible for paucity of cases in torts. In cognizable offences the party has simply to lodge first information report and the police prosecute the offenders generally. Private complaints in criminal cases are few in number. Similarly, people are reluctant to file civil suits where the cost of litigation has to be borne by them. Before the Britishers established their courts or remodeled old ones, administration of justice was free, *i.e.*, courts did not charge court-fee for dispensing justice. The court fee was imposed by the British government in India and this mode of justice has proved a costly affair as many honest litigants were dissuaded by this measure and litigation because a game of the prosperous few. The fifth Law Commission has already drawn attention to this state of things. Also owing to rampant poverty in the country neither can the litigants demand adequate compensation nor is the court inclined to award substantial damages.

Lack of reporting: According to Ayer, all types of tort are in plentiful occurrence in India; but these cases are rarely reported; first, they are settled out of court and secondly many cases are decided in lower courts and for want of records of these decisions we infer that there is scarcity of tort litigation in India. Many of these cases are finally determined in lower court and do not reach the High Courts level. Among the limited number which go to the High Court only some are actually reported. On this analysis, the lack of tort litigation is only so in appearance and not in reality.

Suggested Readings

1. B. S. Sinha, *An Introduction to the Law of Torts through Indian Cases*, 1965.
2. C. Kameshwar Rao, *Law of Negligence*, 1968.
3. J. P. Gupta, *Treatise on the Principles of the Law of Torts*, 1965.
4. Law Commission, *First Report on the Liability of the State in* of India *Tort*, 1956.
5. P. S. Atchuthan Pillai, *Principal of the Law of Tort*, 5th ed., 1972.
6. R. L. Anand and L. S. Sastri, *The Law of Torts*, 3rd ed., 1967, revised by C. Kameswar Rao.

7. R. Ramamoorthy, *Law of Malicious Prosecution and Defamation*, 1976.
8. Ratanlal R. & D. K. Thakore, *English and Indian Law of Torts*, 20th ed., 1973.
9. S. M. Hasan, *Tort Law of Liability for Personal Injuries*, 1962.
10. S. Ramaswamy Iyer, *The Law of Torts*, 7th ed. by S. K. Desai and Kumud Desai, 1975.