Intermediate Year

Sri Lanka Law College

Law of Obligations - II

Empowers Independent Learning

Independent Law Student Movement

Reviews, responses and criticism
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1. THE NATURE OF DELICT

Definitions of delict

Voet: An offence by word / deed through which anyone is unjustifiably hurt by another whether willfully or negligently which does not fall under a contract/quasi contract.

McKerron: Breach of a duty imposed by law independently of the will of the parties bound which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in consequence of the breach.

Distinguishing delict from crime, contract and quasi contract

Delict v. Crime

- Delict is a civil wrong - not a crime
- Wrong is committed against an individual - not against society
- Object of Delict is to give compensation to the affected individuals - not prevention of the wrong
- Action which will give rise to civil and criminal proceedings - not only to a criminal proceeding

  But,
- The basis of both delictual and criminal liability is anti-social conduct
- Every crime that causes harm to an individual is also an actionable wrong which will give rise to civil and criminal proceedings

Delict v. Contract

- In contracts there is agreement between the parties - no such agreement in Delict
- In delict, there is a breach of duty arising out of a personal relationship
- Quantum of damages different

  -in delict it is determined by **Wagonmound Principle**

  -in contract, it is according to **Hadley v. Baxendale**

Delict v. Quasi Contract

In RL if a person left his property without anyone to look after it, and a stranger takes care of it, the stranger has an action against the owner for his expenses. It is a quasi contract. In quasi contracts it is not an action for damages. Obligation to return money paid under a mistake is also such quasi contract.

- In Delict basis of liability is the harm done by the defendant - undue enrichment of a defendant
- Both are created independent of the parties bound.

English Law V. Roman Dutch Law

In Roman Dutch Law delict is based on *aquilian* action and *actio injuriarum*. These 2 actions contain broad principles of action in that if a new situation should arise it may be fitted within one of the two principles.

There are exceptions which fall outside the scope of these two remedies:

i. Liability for nuisance is strict
ii. Liability for damage done by an animal is strict. (Owner would be liable)

In English Law there is no general principle. Specific torts are created for new situations by judges. (No Law of Tort, but Law of Torts).

2. CONDITIONS OF LIABILITY UNDER THE *AQUILIAN ACTION*

Roman law of delict was based on the principles of exacting a pecuniary penalty from the wrongdoer as compensation for the person wronged. Latter was compelled to accept this compensation in lieu of his right to exact vengeance.

In Roman Dutch Law, the term 'delict' is used to mean both civil and criminal wrongs but sometimes is used in the narrower sense to denote a civil wrong as opposed to criminal wrong.

McKerron,
The breach of a duty imposed by law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered from in consequence of the breach.

Modern RDL gives recognition to 2 delicts called,

1. *damnum injuria datum - aquilian action* – damage to property
2. *injuria- actio injuriarum* - injury

Thus the *aquilian action* and the *action injuriarum* are considered as the foundation of the RDL of delict. The former provides the remedy for damages to property, physical injury to a person or any other wrongful act causing pecuniary loss. The latter provides the remedy for wrongful invasion of personal rights, in respect of dignity or reputation made intentionally.

It should be noted that, where the damage to the personality results in pecuniary loss, both remedies are open to the plaintiff. *actio injuriarum* to claim damages for the insult and the *aquilian action* to claim damages for the pecuniary loss suffered.

In modern law, the plaintiff can claim both remedies in one action. *aquilian action* provides the general remedy for all types of substantial loss suffered by one as the consequences of the acts of another. The main types of *damnum injuria datum* were,

i. Damage or destruction of property
ii. Physical injury to a person and homicide

damnum injuria datum was created by statute, the *lex aquilia* and is the unlawful infringement of a person's right to life, person or property caused *dolus*, that is internationally, or *culpa*, that is negligently, which results in a pecuniary loss.

In **Cape of Good Hope Bank case,** the court stated that this action was no longer confined to cases of damage done to corporeal property but extends to every kind of loss sustained by a person in consequence of the wrongful acts of another. Here, to make defendant liable under *aquilian action*, the plaintiff would have to prove:

i. Wrongful conduct by the defendant
ii. Pecuniary or patrimonial loss to the plaintiff
iii. Fault on the part of defendant i.e.: *culpa* (negligence) or *dolus* (intent).

Wrongful Act
Conduct must be legally wrongful. That is, the defendant should not have interfered with the plaintiff's interest as they are protected by the law and to interfere would be a breach of the law. However, not all acts which cause loss or foreseeable harm are wrongful in the eyes of the law. Therefore, the question is which acts would be considered wrongful under the *aquilian action*.

The duty is negative. It means abstention from wrongdoing than a positive duty to prevent injury to others.
Professor Priyani Soyza v. Rienzie Arsacularatne
Gafoor v. Wilson

There can be no liability for mere omission. The basis of this rule is that an omission does not ordinarily involve the breach of any duty owed by the defendant to the plaintiff.

Voet,
"Only commissions and commissions coupled with omissions are actionable under the *aquilian action*, never a mere omission, unless there has been a prior positive act."

McKerron,
There are instances where an omission would cause liability:

1. Prior Conduct
2. Control of Dangerous things
3. Duty imposed by Statute
4. Relationship of the parties
5. Public Office

This principle is subject to many exceptions.

1. Prior Conduct

Liability may spring from an omission where a person, by his prior conduct has created a situation, which is capable of bringing into being a potential risk of harm to others.
In such a case the law imposes on the actor a duty to take due precautions to prevent the danger materializing and the mere failure to take which will entail liability to any person to whom the duty was owed and who is injured thereby.

S.A.R. v Estate Saunders
The defendant delivered good in a trailer and left it inside the promises for the consignee's servant to unload. After unloading the servants pushed the trailer out and placed it in the opposite side of the road to be collected the following day. During the course of the night the plaintiff's bus collided with the trailer, while traveling along the road, which was not lit. The defendant was held liable on grounds that there had been prior conduct in their part thus imposing on them a duty to ensure that the trailer, when pushed on to the road wasn't a dangerous obstruction.

Silva's Fishing Corporation Pvt Ltd v Maweza
The defendant was an owner of a fishing fleet. One morning one boat went out under the command of an employee of the defendant with a crew of 7 fishermen who weren't employees of the defendant. On their return the engine failed and drifted for several days. The board was wrecked and caused the death of the plaintiff's husband although the defendant knew of the distress he failed to take necessary steps to rescue the crew although effective rescue facilities were available.

The court had to decide whether the defendant was under the duty to rescue the crew. The crew was not mere hirers of the board but was engaging in a profit making enterprise along with the defendant and was for that purpose that the men had taken the boat out to sea.

There was prior conduct on the part of the defendant and was potentially dangerous to the crew. The court held that the defendant owed a duty of care to the deceased to provide a

reasonably safe boat and also ensure the board was safe and to sue effective rescue facilities available.

The limits of this doctrine are well brought out in the 'municipality cases'. The issue of these cases was the liability of a municipality for an accident caused by a dangerous condition on the road which the municipality was authorized but not bound to repair.

Municipality Cases

Halliwell v Johannesburg Municipality

Plaintiff was driving a horse and a cart along the street. The horse slipped on cobbles laid along the edge of the tram lines by the defendant and the plaintiff was thrown out and injured. Defendant held liable on the ground that by laying cobbles in the street which eventually could become slippery introduced a new source of danger and didn't take necessary steps to guard against the danger.

Municipality of Bulawayo v. Stewart

Defendants were held liable for laying pipes, which became exposed later with the wearing away of the footpath.

Both these cases show how the municipality was held liable for introducing a new source of danger into the roadway and their failure to take steps to guard against the danger. However there are cases in contrast.

De Villiers v. Johannesburg Municipality

A different view was expressed here. The defendant was held to be not liable for the accident caused to the plaintiff. This was held on the grounds that the plaintiff had not shown that the construction of the drain had increased the likelihood of the road deteriorating and dangerous cavities forming as a result of the use and erosion. It is evident that the mere fact that municipality carried out work in a road which may become a danger to the public in the future, imposes no duty upon it to take precautions to prevent the danger from coming into existence. The duty arises only if a new source of danger is introduced.

Moulang v. Port Elizabeth Municipality

Defendants were not held liable to the plaintiff who fell and injured as a result of turning his ankle in a hole in the pavement which the defendants contributed for public use.

In these both cases the plaintiff failed to show how such construction could increase the likelihood of road deteriorating and dangerous situations arising out of it and therefore were held not liable.

According to theses authorities it is clear that there is no duty imposed on the authorities to take precautions to prevent danger arising from the mere fact that the municipality had carried out work in a road which may become a danger to the public in the future. It only arises when the work introduced a new source of danger.

2. Control of Dangerous things

Liability is created from an omission where a person is in control of a thing, movable or immovable which unless due precaution are taken, may cause harm to others. In such circumstances the law imposes a positive duty to take necessary precaution.

Silva's Fishing Corporation (Pty) Ltd v Maweza

The defendant had control of the board through his employee: Therefore there was a continue obligation on his part to see that it remain in sea worthy condition. Leaving the crew adrift at sea was clearly in breach of its duty to the crew.

Cambridge Municipality v Millard
Plaintiff owned property adjoining the municipal street. The municipality allowed a quantity of grass to remain on the side walk alongside the property.

The grass was liable to catch fire and the municipality was aware of it. A fire broke out and the property of the plaintiff was destroyed. Plaintiff was awarded damages on the grounds that the defendants were guilty of neglect in allowing the grass to be brown.

Actual exercise of control is not necessary to render the principle applicable, the mere failure to assume control of another's property, though in breach of an undertaking to do so, will not as a general rule, give a cause of action *ex delicto*.

3. Relationship of the Parties

The relationship of the parties may give rise to a duty to take affirmative action in certain instances. An employer is clearly under the duty to procure prompt medical assistance for employee who is injured. Failure to do so would hold him liable. Likewise the Railway authorities would be liable in respect of an injury caused to passengers due to a railway accident although not resulting from negligence on the part of the administration.

Matati v Minister of Justice
It was held that the gaoler was under the duty to take due precautions to protect a detainees form unlawful assault.

Silva's case
It was not the fact that the defendant provided the board or that his employee was in control but fact that the crew was taking part with the defendant in a profit - making enterprise and was invitees of the defendant. Therefore he owed a duty to come to their assistance when the board was in distress.

4. Statute

Positive duty may be imposed by statute. The owners of machinery could be required by statute to fence off securely all exposed machinery which when in motion may be dangerous to persons.
Therefore it is evident from the exceptions discussed above that although the rule is that there is no liability for a mere omission, there exist exceptions to this rule.

5. Public Office or Calling

Positive duties are imposed upon persons occupying certain offices or carrying out calling of a public nature.

Cape of Good Hope Bank v Fisher
Court held that the Registrar of Deeds owed a duty to a creditor who had advances money in consideration of a bond when passed before him and that if he fails to do so and thereby losses preference the creditor will have action for damages.

Patrimonial Loss/ Pecuniary Loss
Patrimonial loss is loss which is capable of pecuniary or monetary assessment.

The loss may be actual in respect of property or business or it may be in respect of prospective gains. (Exception to the rule: compensation may be awarded for pain and suffering in respect of personal injuries. But the injury must be physical and not mental).

Union Govt. v. Warneke
Plaintiff's wife was killed by defendant's negligence. P brought an action for deprivation of comfort and companionship and her assistance in raising the children. Held: Loss of assistance in the care / clothing / rising of children gives rise to a delictual claim because it was possible to assess the patrimonial loss. But loss of comfort and companionship will not give rise to a claim as it cannot be assessed in pecuniary terms.

Exception to the rule, that patrimonial loss must be proved in instances where the reason for bringing the action, is not to claim compensation but rather to establish a right which is disputed. In such an instance, if the plaintiff establishes his rights, the court may grant nominal damages though he has not suffered patrimonial loss.

Fault - *Dolus* or *Culpa*

- Dolus means 'wrongful intent' and an 'international act ' has been defined as ' an act' the consequences of which were foreseen and desired ' irrespective of the motive.
- McKerron,
  The law judges a man's intentions by his conduct and presumes that the intended the natural and necessary consequences of his acts. Therefore the law ill impute to a wrongdoer, an intention he may not have possessed.

Dolus can be:

Intention:	Consequences are foreseen and desired.
Knowledge:	Knowledge of the act and its probable and foreseeable consequences. Under RDL, an absence of knowledge is a good defense but if the defendant was aware he was breaching the plaintiff's rights but *bona fide* delivered him to be justified, it is still not an acceptable defense. Absence of malice is not an excuse.
Duty to refrain:	Every person is under a duty to refrain from committing an act which would cause injury without lawful justification unless it would not be wrongful

Culpa
This is negligence and is an objective concept defined as conduct which involves an unreasonable risk of harm to others. This involves:

- Conduct which a reasonable and prudent man would not have done in the circumstances
- An omission which a reasonable and prudent man would not have done in the circumstances

Therefore in assessing negligence, the 'reasonable man' test is applied. If the defendant fails to observe the same degree of care a reasonable man would have done, he is guilty of negligence.
There are instances where a greater standard of care needs be exercised than that of a reasonable man. E.g.: Defendant is member of a particular trade or profession or possessed a special skill. Then the standard will be that of an average man in his trade / profession etc.

Bolam Test:	Reasonable man in that profession
Bolitho Test:	Reasonable and logical man in that profession

There is no negligence unless there is a duty of care to being with. Therefore to establish negligence, P needs to prove that,

-The defendant owed him a duty of care
-That he was in breach of that duty of care

i. Duty of care

Defendant must take reasonable care to avoid acts / omissions which he can reasonable foresee as would be likely to injure his neighbor.

A neighbor is a person so closely and directly affected by defendant's act that defendant ought reasonably to have them in contemplation as being so affected when he directs his mind to the act / omission (Donoghue). Not physical proximity but reasonable foresight.

Cape Town Municipality v Paine

The standard of the duty of care is the standard a reasonable man would have exercised and is determined on a case by case basis. If a reasonable man would've foreseen the danger and guarded against it them it is clear a duty of care exists.

Standard of care will be higher where it is reasonably foreseeable that a blind / deformed / disabled person would be affected.
(**Hayley v London Electricity Board**)

Situations where there is no duty' of care -

(a) Where the risk is so remote that defendant could not have reasonably foreseen it.
Bourhill v Young
Defendant was a cyclist who met with an accident with a 3rd person. Plaintiff was a bystander who suffered shock and a miscarriage. Held: the injury suffered by plaintiff was so remote that defendant could not have reasonable foreseen her as a person who would've been affected by his act.

(b) Where defendant foresees the harm but it is so trivial that a reasonable person would have still gone ahead with the act.
Bolton v Stone
Plaintiff was standing outside a cricket ground and got his head on with a ball. Previously there were only 6 similar accidents in 30 years. It was held that, risk of injury so slight and trivial that although foreseeable, was not reasonably probable. There must be sufficient probability for a reasonable man to anticipate injury so likely that he should refrain.

(c) Non physical damage (pure economic loss) though foreseeable or not, does not give rise to a duty *of* care unless a certain type of relationship exists between the parties. **Hedley Burne v. Heller**

ii. Breach of Duty of Care

Breach is the failure to employ a degree of care that a reasonably prudent man would exercise, being in the same circumstances as defendant. (Objective test)
Degree of care is assessed with the following two items in mind:

(a) The degree of risk run - if the danger belongs naturally to a thing a reasonably prudent person should be cautious in handling it. Such a person would have regard to the nature of the occupation and the work undertaken. **Hayley v London Electricity Board**

(b) Seriousness of injury risked - a reasonably prudent person would usually avoid dong a thing if he can reasonably foresee that in the event of failure and unexpected turn of events and an irreparable harm would occur. **Paris v Step Borough Council**

Onus of proving negligence is on plaintiff. Sec. 101 Evidence Ordinance "He who asserts must prove."

Plaintiff must prove on a balance of probability that,

i) D was guilty of negligence and
ii) P's injury was attributable to defendant's negligence.

Where no direct evidence of negligence is available, negligence can be inferred by facts: The available evidence must be sufficient to reasonably draw an inference. The deduction must be reasonable for it to become proof.

Wakelin v London and South Western Railway
Plaintiff's husband was found dead near a railways crossing. Engine had light on but did not whistle. No evidence as to how the deceased came to be on the railway line. No evidence that the cause of death was due to failure to whistle, Held: No sufficient facts to establish that D was liable.

Plaintiff's husband was killed by being crushed between 2 trucks on a railway siding near his factory. He had to cross siding to get to his factory. *No evidence as to how he got between trucks.* But defendant employed a man to warn people crossing the siding. Man never saw plaintiff's husband. So did not give him a warning. It was held that, facts are sufficient to infer that plaintiff's husband was injured due to defendant's negligence in failing to warn him of danger.

3. CONDITIONS OF LIABILITY IN *ACTIO INJURIARUM*

Actio injuriandi is the unlawful and malicious infringement of a person's right to his dignity, reputation or liberty. There are 2 essential elements to establish liability under actio injuriarum:

1. An act constituting an impairment of the plaintiff's personality
2. Wrongful intent (dolus) or animus injuriandi

1. Impairment of the plaintiff's personality

The interests of personality protected by the *action injuriarum* are those interests 'which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation'
Therefore the plaintiff must show that the act complained of constituted an impairment of his person, his dignity and his reputation.

Examples of such are:

1. Assaults of all kinds
2. Unjustifiable infliction of any restraint upon the liberty of another
3. Use of defamatory or insulting word concerning another
4. Malicious and unwarranted institution of criminal process against another

It is an *injuuria* to prevent a person from dealing with his own property/ using a public road or place or from exercising any public/private right.

Case laws:
Ashby v. White
To prevent a parliamentary elector from exercising his vote is a clear example of injuria.

Purshotam Dagee v. Durban Corporation
Defendants were held liable to the plaintiff, an Indian who had been forced by the conductor of one of the defendants tram cars to quit a car in which he was lawfully travelling.

Insulting to female chastity or modesty, or to accost or follow about in the street a woman for an immoral purpose is also *injuria*.
Rex v. Holiday
It is *injuria* to spy on a woman undressing through a skylight window.

Bull v. Taylor
Even the mere breach of a promise to marry may be committed in circumstances so humiliating to the plaintiff as constituting *injuria*.

Cases which has widened the scope:
Rutland v. Jordan
It was held that the plaintiff who had been constantly aggressed by the defendant asking her to submit herself to a mental institution to be treated for mental disorder, which constitute an aggression upon her dignity, was entitled to an interdict retraining the defendant from making future approaches to her again with the object of inducing her to enter a mental institution.

O'keete v. Argus Printing and Publishing Co. Ltd
Court held that although publication of a person's photograph is not necessarily an injuria, the publication is question was capable of constituting an *injuria*, as it was done without consent of the plaintiff.

Other instances of *injuria:*

1. Enter another's house/trespass against the owners will
2. Exclude a pupil from a school or student from university
3. Refuse to allow a person to stay at a hotel which he has reserved accommodation in

Injuria per Consequentias
In Roman Law, where persons stood in certain intimate relations towards one another.
E.g.: Husband and wife/ father and child – an *injuria* primarily affecting the one might be regarded as mediately (*per consequentias*) affecting the other.

Spendiff v. East London Daily Dispatch Ltd
A newspaper was sued by a widow and sons of a person whom it had referred to as a criminal.

Jacobs v. McDonald
A husband was held entitled to sue on his own behalf in respect of gross slander concerning his wife.

Banks v Ayres
The making of improper over tures in letters unwritten by the defendant to the plaintiff's wife was held to constitute an injuria to the plaintiff.

However it must be noted that not every contumelious act will ground the action. The act may constitute too trivial an impairment of the plaintiff's personality for the courts to take cognizance of.
(*de minimis non curat lex*)

Further it is not necessary that the plaintiff should have been aware that he was being subject to an indinity.

2. Wrongful intent (*dolus*) or *animus injuriandi*

The subjective element involved in the conception of an *injuria* usually termed as *animus injuriandi*.
This expression is used by Roman and RDL writers in a strict literal sense to mean simply the intention of committing an *injuria*. – The intention of subjecting another to an *injuria*.
animus injuriandi is therefore merely a species of *dolus* or wrongful intent.

Since the law judges a man's intentions by his conduct, all that the plaintiff needs to prove at the outset the existence of animus injuriandi is that the act complained of constituted an aggression upon his person, dignity, reputation and that it was intentional.

Whittaker v. Roos
It was expressed that it is sufficient that the injuries suffered by the plaintiff were inflicted by the defendant not accidently or negligently, but with deliberate intention. When an unlawful aggression has been proved, the law presumes that the aggressor had in view the necessary consequence of his conduct, i.e. he had the intention to injure the plaintiff, the *animus injuriandi*.

It is immaterial what the motive or object that the defendants had in view. It is not necessary to show any ill-will or spite the defendant had against the plaintiff.

The defendant may rebut the presumption by proving that he did not know his act would involve an impairment of the plaintiff's personality, but its possibility is narrow.
In EL and RDL the defendant might also rebut the presumption by proving that he *bona fide* believed he was entitled to commit the act.

However the rule is that a person who knowingly and intentionally invades another's rights of personality does so at his peril, it is no defense for him to plead that he bona fide believed his invasion was justified.

Justinian has stated that a person who has suffered an *injuria* is debarred from bringing an action in respect of it, if he has not, upon its commission forthwith taken it to heart.

4. GENERAL DEFENSES EXCLUDING OR LIMITING LIABILITY

According to McKerron there are five main forms of defenses available to a person against whom an action has been made in the law of delict namely,

1. Contributory negligence
2. Negligence of a 3rd person
3. *Volenti non fit injuria*
4. Necessity
5. Statutory authority

Contributory Negligence

Being one of the main forms of resistance available to the defendant in an action under delict law, contributory negligence is an instance in which the negligence of the plaintiff contributed to the damage caused to him. However Contributory Negligence cannot be set up as a defense where the damage was intentionally caused.

Quinn v. Leathern

Intention to injure the plaintiff negatives all excuses. Subject to this exception, the defense of Contributory Negligence applies to all actions *ex delicto*.

A more accurate description for the defense of 'Contributory Negligence' is 'contributory fault' especially due to the fact that negligence implies a breach of duty, where as one maybe guilty of contributory negligence even though he was under no such duty to use care.

Nance v. British Columbia Electric Ry. Co. Ltd

The defense has to prove that the injured party did not in his own interest take reasonable care of himself contributed, by this want of care, to his own injury.

In right of this it can be stated that negligence of a different degree is required to prove Contributory Negligence, in comparison to the negligence required to ground an action. The defendant must not only show that the plaintiff's conduct constituted negligence, he must also show that the plaintiff's conduct constituted negligence in that he failed to exercise due care in his own interest. This can be explained by considering the following 3 classes of cases.

1. Plaintiff under a disability such as infancy

The same degree of care cannot be reasonable expected from a child, as that expected from an adult. Therefore conduct which would amount to Contributory Negligence in the case of an adult does not necessarily amount to Contributory Negligence in the case of a child. Thus, the application of Contributory Negligence to children must always depend upon the age and personal attributes of the child, and the standard applied is therefore subjective.

Jones v. Santam

It was held that once it was established that the actions of the child amounted to Contributory Negligence had it been an adult, it should be determined whether he was capable of taking the necessary precautions against the danger in question, having regard to his age and personal attributes.

South British Insurance Co Ltd v. Smit

The court held that the plaintiffs fault must be decided on same basis as if he were an adult, has been viewed to be in much contrast with justice and good sense. Therefore the old approach where the child's age and personal attributes are considered is the preferred approach today.

2. Plaintiff entitled to assume absence of danger

A person is entitled to assume that others will act with due care in regard to his safety and is therefore not bound to take precautions against the mere possibility of negligence on the part of another.

Gee v. Metropolitan Railway

Plaintiff was entitled to recover damages for injury sustained after falling off a train through a carriage door which had been left upon negligently by defendant's servants. The fact that plaintiff could have avoid the accident examining the door handle was held to be no bar to his recovering, since he was justified in assuming that defendants had fulfilled their duty in keeping the door fastened.

But one must note that it is a question of fact and degree whether the plaintiff's assumption of absence of danger and his act, are reasonable or not.

3. Plaintiff placed in a situation of imminent peril

A person placed in a situation of imminent peril as a consequence of another's negligence cannot be held guilty of Contributory Negligence, merely because 'in the agony of the moment' he failed to teke the best course to avoid the danger.
Persons faced in moment of crisis with a choice of alternatives are not to be judged as if they had both time and opportunity to weigh the pros and cons.
This is referred to as the doctrine of sudden emergency.

Newman v. East London Town Council

If there was real danger which a reasonable prudent man, impelled by self-preservation, would naturally seek to avoid by jumping off the cart, the injury caused by his jumping out would be attributable to the excavation of the defendants.

However it is stated that this doctrine should be pushed too far. In other words it would have no effect if the effort to avoid danger was made without reasonable course or the person injured acted altogether unreasonably or where the situation was created by injured party's own negligence.

Early Approach

In early EL, RL and RDL this doctrine of Contributory Negligence was referred to as the 'all or nothing rule' that is; if there was negligence on both sides contributing to the accident, however small the blame on one side might be, neither party could recover from the other.

Butterfield v. Forrester

One person being in fault will not dispense with others using ordinary care for himself. This comes under last opportunity rule.

The harshness of the rule was mitigated by the last opportunity rule where both parties are negligent, the party which had the last opportunity of avoiding consequences of the others negligence was alone liable. This rule was formulated in the case of **Davies v. Mann** (the donkey case).

Acts of parliament have been passed to make provisions for the apportionment of damages and such acts have abrogated the commo0n law principles.

E.g.: In South Africa, The Apportionment of damages Act of 1956
In Sri Lanka, the Law Reform (Contributory Negligence and Joint Wrongdoers) Act of 1968
In England, the Law Reform (Contributory Negligence) Act of 1945

Law Reform (Contributory Negligence and Joint Wrongdoers) Act of 1968
Provisions relating to Contributory Negligence are set out Sec 3 of the act

Sec 3(1),

a. Where any person suffers damage which is caused partly by his own act and partly bu the fault of any other person, a claim in respect of that damage shall not be defeated by reason only of the fault of the claimant, but the damages recoverable in respect thereof, shall be reduced by the court to such extent as the court may deem J and E having regard to the degree in which the claimant was at fault in reaction to the damage.

b. Damage shall be regarded as having been caused by a personal fault, however the fault that any other person had the opportunity of avoiding the consequences and negligently failed to do so.

Sec 3 (2),
Where claimant is not at fault court will award total damages

3 (3),
Where one person at fault avoids liability to any other person

1. By pleading any written law prescribing period when nature of action should have been given or
2. Limiting the time within which proceedings may be taken

Such person is not entitled to recover damages.

Volenti non fit injuria
Volenti non fit injuria is a main defense to an action under law of delict. This maxim means that 'no act is actionable by a plaintiff when he has expressly or impliedly agreed to run its risk.' Or in other words, he who consented to run a risk cannot be heard to complain of injury. Here the intention of defendant is immaterial.

The maxim is used in a wider sense and is applied to cases where a person has consented to run the risk of unintentional harm, which would otherwise be actionable as attributable to the negligence of the person who caused it. E.g.: consent to run the risk of being hurt as a participant in a football match.

In order to establish this defense, the following ought to be proved by the defendant; that

1. The plaintiff was aware of the danger
2. The plaintiff fully appreciated the nature and extent of that danger
3. The plaintiff voluntarily agreed to take the risk upon him

Waring and Gillow ltd v. Sherbone
It was held that it must be clearly shown that the risk was known, that it ws realized and that it was voluntarily undertaken. Knowledge, appreciation, consent are the essential elements.

Voluntary assumption of risk does not absolve the defendant from responsibility in respect of risks which the injured party neither expressly nor impliedly consented to run. Therefore the

defense won't wait unless the circumstances show that the plaintiff voluntarily subjected himself to the risk of injury.

Mere knowledge of the danger does not in itself amount to consent. This can particularly be seen in the case of master and servant. In Smith v. baker it was expressed that a servant who knowingly works on dangerous premises or with defective equipment is not prevented from suing his master on that reason when an accident happens.

Moreover a person cannot be said to give a real consent if he acts under a compulsion of a legal and moral duty. In Haynes v. Harwood, a policeman was injured when attempting to control an unattended horse. Though he voluntarily ran the risk, he could recover damages, since he had acted under a legal or moral duty.

Farther where a risk is incident to the assertion of a righjt a person may be justified in incurring it. **Clayards v. Dethick**, plaintiff was entitled to take the risk of injury to his horse by leading it over a wrongfully dug trench by the defendant. It must be remembered that the implied consent to run the risk is hard to prove.

Dann c. Hamilton
Plaintiff accepted a lift from motorist without knowing the defendant was intoxicated. The plaintiff was injured by negligent driving of the defendant. It was held plaintiff was not barred by the defense of *volenti non fit injuria* she could recover damages from the defendant.

Lampert v. Hafer
Defendant pleaded that the plaintiff knew that the defendant was intoxicated when she had taken the seat in the defendant's car and that she was aware of the danger she was exposed to as defendant was incapable of controlling the car. Here she had impliedly consented to run the risk. Then plea was upheld.

Jameson's Minors v. C.S.A.R.
The question whether the doctrine *volenti non fit injuria* can be invoked by a defendant in an action brought not by the injured party by his dependants in respect of damages for them was answered. It was held the defense will not bar such a claim.

Limits of the maxim
This maxim has a restricted application in criminal law. 'no person can license another to commit a crime' therefore cannot be applied in criminal proceedings. The maxim cannot be set up as a defense to an action based on the area of a statutory duty. The maxim has no applicability to actions of seduction as pointed out in **Careles Estate v. De Vries**

Arguable that the injured party not only knew of the danger, but also knew of his statutory right to protection and nevertheless dispensed with the performance of the duty, he cannot subsequently complain of its breach.

<u>Statutory Authority</u>
There can be no liability for doing that which the legislative has authorized, even though it may cause harm to another. Provided an act authorized by statute has been carried out without negligence the remedy of a person who has suffered loss in consequence thereof is confined to such compensation as the legislative has thought fit by the statute.

Johannesburg Municipality v. African Reality Trust

The inquiry in each instance is whether an interference with private rights is justified. If it is, then the exercise of statutory power is limited by another consideration, namely, that it must be carried out without negligence.

Negligence of a third person

As a general rule it is no defense for the defendant plead that the negligence of a third party contributed to the damage. However there is one real exception to this rule, which is where the negligence of the 3rd person is imputable to the plaintiff. Thus then the position is the same as if the plaintiff himself had been guilty of negligence. The negligence of one person is imputable to another only in those exceptional cases in which the law holds s one person responsible for the wrongful acts of another.
E.g.: liability of a master for the wrongs of the servant.

Necessity

An act which would otherwise be an actionable wrong maybe justified on the ground that it was done to necessity, in order to avoid a greater harm. The defendant must show that there was actual presence of imminent danger and a reasonable apparent necessity of taking such action as was taken.

The necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary on others ground. It is upon this ground too, that a person may be justified for pulli9ng down houses to stop the spread of fire / throwing of cargo overboard to save a ship in a storm the / performance of surgical operation on a man rendered insensible by an accident.

But the commonest example of the principle is then right of self-defense

Gerrad v. Crowe
Held that person who has built an embankment on his land to protect incursions of flood water was not answerable to a neighbor for damage caused to his land by the diversion of water.

5. *RES IPSA LOQUITAR* – FACTS SPEAK FOR THEMSELVES

Under this maxim plaintiff establishes a prima facie case of negligence by merely proving the facts of the accident and the injury which resulted from it. (Plaintiff can prove the accident but cannot prove how it happened). Maxim is only a rule of evidence and not a principle of law. It is the kind of evidence which permits the courts to infer negligence from the mere occurrence of the accident itself. **Burne v Boadle**

Purpose of Maxim - Where it is difficult for P to know what precise acts of D led to the injury such as in situations where the means of knowing it is solely with the D. This hardship can be avoided by applying the maxim.

Scott v London and St. Katherine Bocks, plaintiff was injured when 6 bags of sugar belonging to D fell on him. It was held that the defendant is liable. Court held that plaintiff must show:

i. The thing that caused the injury was under the control of defendant.
ii. The accident is such that it will not happen in the ordinary course of things if D has used proper care.
iii. D cannot prove that the accident did not arise due to lack of care on his part.

(Maxim has no obligation where cause of accident, is not known)

Barkway v South Wales Transport Co. Ltd.
Plaintiff's husband killed in a bus accident. Evidence indicated there was a defect in the tyre and that this caused the accident. It was held that maxim not applicable. All facts must be considered as a whole in light of common experience knowledge for maxim to apply. Facts and circumstances must be unambiguous.

i. Cannot prove - accident another although be caved
ii. Accident can't be one which occurs commonly without negligence even.
iii. Maxim was inapplicable as commonly known that it could be happened without negligence.

Byrne v Boadle
Barrel of flour fell from upper floor of defendant's warehouse causing injury to Plaintiff who was walking on the street below. It was held that proof of the facts enough to apply maxim and establish negligence by defendant. How barrel came to fall in to the street is not relevant.

Roe v Minister of Health
P became paralyzed waist down after an anesthetic was injected by defendant. It was held that Maxim will apply. Injury to Plaintiff was enough as defendant could not explain how the accident happened. Defendant is negligent. In the field of Medical negligence it was doubtful as to whether the maxim applied as judge / jury would reg. med. knowledge to draw an inference as to negligence. But limited application where there is little doubt an inference should be drawn.

Cassidy v Ministry of Health
Went in with 2 stiff fingers and came out with 4 stiff fingers. At one time thought it did not. **But** now it is accepted that it applies in limited circumstances.

Arthur v Bezuidenhout
Plaintiff sued defendant for causing accident. Both vehicles were damaged and both drivers were killed. No evidence as to what caused accident. Defendant's vehicles suddenly swerved to the wrong side of the road and collided head on with P's vehicle. Steering shaft of

defendant's vehicle had broken but this was due to the impact. It was held that *res ipsa loquitur* applied. Defendant is liable for negligence.

Kuranda v. Sinclair
Motor car in which P was travelling in overturned. Defendant was driving. There was no traffic on the road. Surface of road was good. Car was in perfect condition. Defendant admitted she did not know how accident had occurred. It was held that in the absence of an explanation by D maxim applied. D was liable for negligence.

Maxim does more than casting a Provincial Burden on defendant. When the balance has been titled in one way, D cannot escape burden by adding an equal weight for each side of the scale. The depressed scale will remain down.

Moore v. Fox and Sons
Moore was employed by defendant to maintain a de-rusting tank. Tank exploded and Moore was killed. Moore's wife plaintiff sued defendant and pleaded *res ipsa loquitur*. Defendant's brought forward hypothetical explanations did not displace the prima facie case made out against defendant.

When the maxim applied the burden is on defendant to prove on a balance of probabilities that he was not negligent.

Safeena Umma v Siddick
Plaintiff, a boy was standing on a step in his house by the side of a road. Defendant had to bear the burden of disproving negligence. HELD: Maxim applies as is it not usual for a bus to collide into a house. A mere statement/ explanation, that the steering wheel broke is not sufficient to discharge the burden of defendant. It has to be proved on a balance of probability.

Disapproved Safeena Umma:
Wiiaya Bus Co. v Soysa
Burden on D is not to prove the absence of negligence. It only requires him to give reasonable explanation which would negative the inference of negligence. If D successfully discharges the burden, then P must prove actual negligence on a balance of probabilities. Then P must show:

c. The failure of the steering was due to the negligence of defendant
d. After steering gave away defendant was negligent and defendant's negligence caused the accident.

Followed Safeena Umma:
Cabral v Abevratne

6. REMOTENESS OF DAMAGES

Person is not responsible for all consequences of wrongful act. Law regards damages (injury) as too remote, to attribute to wrong doer beyond a limit. No question of remoteness arises until it has first been established that the act complained of was a *causa sine qua non* of the damage, or in other words, that but for the act the plaintiff would not have suffered damage.

Intended damages are never too remote. Defendant must answer for all consequences actually desired and intended to inflict on plaintiff.

Salmond,
Intention to injure plaintiff disposes of question of remoteness of damages
E.g.: person throws lighted cracker into crowd of people as a joke. He is liable to persons injured by explosion because he intended that cracker should explode in crowd.

Foreseeability damages not too remote
Not too remote because reasonable man would have anticipated damage. This is so even if new act intervened between original wrongful act and the consequent damager

Scott v Shepherd
Person throws lighted cracker in to crowd and foresees that another near whom it lights will throw it away and cause injury to 3rd person.

Quinn v. Leather
Intention to injure the plaintiff disposes of any question of remoteness of damages.

Damages not foreseeable and unintended but directly traceable to defendant's negligent act are proximate or remote has not been settled. 2 schools of thought as to test of remoteness:

iii. Natural or foreseeable consequences school
iv. Direct consequence school

1. Natural or foreseeable consequences school

Negligent person is liable only for consequences of wrongful act reasonably foreseen as natural and probable. Foreseeability test to determine whether person is negligent or not 4 damages claimed are proximate or remote.

Wagon Mound No. 1
D steam ship, the Wagon Mound was taking oil when a large quantity of oil spilt in to the Harbour by D's servants.
Oxy-acetylene welding work was being carried out 600 feet away. Plaintiff's manager stopped work but on being assured there was no danger of oil catching fire ordered work to be resumed. Two days- later oil caught fire and conflagration ensured causing serious damage to plaintiff's wharf and equipment. Experts showed fire not ignited due to welding operations.
In action by plaintiff for damages found:

i. Oil split through negligence of defendant
ii. Done foreseeable damage to plaintiff 's wharf
iii. Defendant didn't know or reasonably have known that it was capable of catching fire while on water.
iv. Fire although unforeseeable, direct consequence of defendant's. negligence

HELD: judgment in favor of plaintiff — full amount of damages awarded
PC: reversed decision. Foresight of reasonable man along determined responsibility.

Defendant could not foresee that oil might catch fire, therefore not liable for damages caused to plaintiff.

Wagon Mound No. 2
2 of respondents vessels were undergoing repairs in harbor. Wagon Mound on charter was taking bunkering oil from wharf. Due to carelessness of appellant's servants large quantify of oil overflowed to surface of water where it caught fir causing damage to respondents' vessels.

HELD : there would have been in the mind of a reasonable man in such situation that there was a risk of fire through continuing discharge of oil. Knowledge that such oil was difficult to ignite and would occur in exceptional situations in the circumstances may think justifiable to neglect to take steps to eliminate risk.
Damages were not too remote, respondents entitled to recover damages

Analysis of results reached in **Wagon Mound No. 1 and No. 2:**

a. Officers of Wagon Mound No. 2 regarded furnace oil very difficult to ignite on water
b. Their experience was that it very rarely happened
c. Possibility existed but actuated in exceptional circumstances not as in **Wagon Mound No. 1** that they couldn't reasonably expect to have known oil capable of setting on fire when on water.

2. Direct consequences School

Defendant is liable for all consequences flowing directly from wrongful act, irrespective of whether could have reasonably foreseen or not. Unless chain of causation linking wrongful act to damage is broken by independent, intervening cause, to which rather than to the wrongful act the consequence can be attributed.
Fact that the damage caused is not damage expected by wrong doer immaterial as long as damage can be directly traced to wrongful act and NOT to operation of independent cause, once act is negligent, fact that exact operation not foreseen is immaterial.

Re Poletnis
P charted ship to D who loaded quantity of petrol tins.
During voyage tins leaked causing considerable vapor in the hold. At the port, defendant's servants shifted tins, placed planks over hatchway. Sling containing tins were being hoisted, rope negligently allowed to come in to contact with both planks, displacing I of them. The falling plank caused a spark igniting petrol vapor, destroying the ship.

7. MALICIOUS PROSECUTION

Every person has a right to set the law in motion, but a person who institutes legal proceedings against and without reasonable and probable cause abuses that right and commits an actionable wrong.

That chief classes of proceedings to which the rule applies are malicious criminal prosecutions, imprisonment or arrest, execution against property, insolvency and liquidation proceedings and civil actions.

In order to prove malicious prosecution, plaintiff has to satisfy:

v. Defendant instituted and instigated prosecution and took an active part in aiding the conduct of the case.
vi. Defendant holds no reasonable and probable cause for persecution.
vii. Defendant acted maliciously.
viii. Prosecution ended in plaintiff's favor.

Malicious prosecution comes under *actio injuriarum*, which means criminal prosecution without reasonable cause. Defendant intended to disgrace and humiliate plaintiff impair his dignity and reputation.

1. Defendant instituted and instigated prosecution

The plaintiff has to prove that the defendant prosecuted him or that he took an active part in directing or aiding the conduct of the case.

Waterhouse v. Shields
A person is not held liable for merely giving fair statements to the police and leaving it to the latter to take appropriate steps and does nothing more to identify himself with the prosecution. But if he goes farther and actively assists and identifies himself with the prosecution, he may be held liable.

Madnitsky v. Rosenberg
Where an informer makes a willfully false statement to the police, such an informer instigates a prosecution.

Hathurusinghe v Kuda Duraya
The defendant gave untruthful information to the police but does not accuse the plaintiff. He unduly influenced the police to prosecute. Defendant told the police more information of facts known to him. He thereby made a charge against the plaintiff. Plaintiff charged with theft but acquitted. HELD: defendant set criminal law in motion against plaintiff with reasonable and probable cause. Action for malicious prosecution dismissed.

Baker v. Christiane
The test is whether the defendant did more than tell the detective and leave him to act on his own judgment.

Wijegunathilake v. Janis Appu
The defendant is regarded as the prosecutor when he files the plaint himself as a party to the criminal action. It was stated here, that the defendant has not set the criminal law in motion against the plaintiff, where the defendant is in position of a witness; he must answer the questions put to him. Statement as a witness is privileged, even if it is false, no action could be brought against him.

Setting criminal law in motion:

1. Defendant gives truthful information to police but doesn't accuse plaintiff
   Ex. Purse picked and saw in the hands of plaintiff
2. Defendant gives untruthful information but doesn't accuse plaintiff
   Ex. Purse picked vanished with thief, untruthfully says saw plaintiff with purse
3. Purse was picked and it was plaintiff who did it.

Defendant is not the prosecutor and can be sued if proved that he instigated prosecution / aided its conduct.

E.g.: Defendant tells police plaintiff committed crime. He voluntarily sets criminal law in motion. If this is the answer to preliminary inquiry of police it doesn't set law in motion.
This is because:
1. Position of witness thus must answer questions not made charge voluntarily
2. Statement of witness is privileged

No action against defendant.

2. <u>Defendant had no reasonable and probable cause to persecute him</u>

A plaintiff can establish absence of reasonable and probable cause by showing either that the defendant did not honestly believe that the institution of the proceedings was justified or that he had no reasonable grounds for such belief.

Herniman v. Smith
The duty is not to ascertain whether there is defense but whether there is reasonable and probable cause for a prosecution.

Corea v Peiris
Reasonable and probable cause are available if,

i. Defendant honestly believed there was probable cause
ii. Such belief founded on adequate ground.

1. <u>Defendant acted maliciously</u>

Brown v. Hawkes
Malice is not necessarily personal spite and ill-will but any improper or indirect motive. Thus in the wrong of malicious prosecution, malice may be defined as some motive other than a desire to bring to justice a person whom one honestly believes to be guilty.

Where there are mixed motives, court must resolve to find the dominant motive by which the defendant was actuated.

The existence of malice can be established either by showing what the motive was and that it was wrong or by showing that the circumstances were such that the prosecution can be accounted for by imputing some wrong or indirect motive to the prosecutor.

Malice maybe inferred from want of reasonable and probable cause, but it is not a necessary inference. Anger is not in itself an improper motive.

Steven v Miland Countries Railway
Malice not presumed by fact that plaintiff was acquitted.

Peiris v Marikkar

It was laid down that plaintiff was acquitted from the charge. Malice could not be presumed from that fact. Anger is not evidence of malice. Malice is the absence of probable cause.

2. Prosecution ended in plaintiff's favor

No action will lie for the malicious institution of proceedings involving the judicial determination of any question at issue between the parties, unless the proceedings have terminated in the plaintiff's favor.

For this requirement the plaintiff should not be acquitted expressly. If the charge is withdrawn or for any reason the plaintiff discharged with a definite termination in the plaintiff's favor that would be sufficient.
The quashing of an indictment for a defect in it would be a favorable termination.

If the plaintiff fails to prove one of the 4 requirements his case against malicious prosecution cannot succeed. The law here attempts to balance between two competing interests.

1. Every person has freedom to bring a wrongdoer before the law.
2. Every person has a right not to be prosecuted on a false criminal charge

8. NERVOUS SHOCK

Nervous shock at one time was not recognized as a cause of action since the courts were unwilling to accept nervous shock as a species of bodily harm.

Victoria Railway Commission v. Coultas [Privy Council]
This view was accepted by the Privy Council in this case. The plaintiff came riding a cart, stopped at a level crossing, the gates of which were closed. There was delay in the arrival of the train and the gate keeper opened the gate and invited the plaintiff to pass. Then the train thundered past her, missing her by a few inches, whereupon she suffered a violent nervous shock. The PC refused to accept that such damage was a result of the gate keeper's negligence. The reason for such was that courts feared if they gave relief to a plaintiff there would leave open a wide field of imaginary claims. However this view was never followed afterwards.

In the early cases in England and South Africa liability for nervous shock was restricted to cases where the shock resulted in physical injury illness. This principle gradually changed and now it is settled that an action for nervous shock will be available for injury by shock sustained through the medium of the eye ear without direct contact.

The impact of such nervous shock injures the nervous system, through the eye and the ear of the body, but not visible to the naked eye. If such injury causes an illness it amounts to a physical injury as any other visible physical injury.

This does not however refer to insignificant emotional shock of a short duration which has no substantial effect on the person.

Dulieu v. White
Nervous shock was established as a cause of action here. In this case the defendant negligently crashed his horse and ran through the glass front of a public house and ended up short of the place behind which the plaintiff was working. Plaintiff suffered nervous shock and suffered illness. It was held she could recover damages. Unless it was intentionally or recklessly caused, the shock must arise from fear one's own safety. *A shock by itself will not give a cause of action unless physical injury or illness followed the shock.*

Els v. Bruce
Plaintiff's wife was driving a cart containing a load of timber along a public road when defendant came up to her and threatened to have her husband arrested if she did not pay half the money for it. Plaintiff's wife suffered a nervous shock which impaired her health due to the defendant's threats and abuse.

Hauman v. Malmesbury Divisional Council
Plaintiff while driving along a public road in his motor car narrowly avoided injury from blasting operations negligently conducted by the defendant's servants close to the road. Defendant was held liable to the plaintiff, whose health was affected by the fright he received.

Nervous shock does not mean fright, agony or mere mental or emotional disturbance. A shock by itself will not give rise to a cause of action if there is no physical injury/illness which follows the shock.

Nervous shock can be caused in two ways:
1. Willful causing of shock
2. Negligent causing of shock

Willful causing of shock
If a person does an act intending to cause shock, is liable for the harm that resulted from the shock.

Wilkinson v. Downton
The defendant as a practical joke told the plaintiff that her husband has been seriously injured in an accident. As a result she fell ill of nervous shock for which the defendant was held liable.

There are two things which must be noted with regard to willful causing of shock on the case.
1. The defendant intended to cause shock to the plaintiff. No question could arise whether the defendant could have reasonably foreseen that his wrongful act caused a shock to the plaintiff.
2. The shock which the plaintiff suffered was not due to any fear of injury to her, but was due to fear of injury which she thought her husband has suffered.

Negligent causing of shock
The liability of a person who has caused nervous shock by a negligent act depends on whether he owed a duty of care to the victim of shock.
If the negligence of the defendant puts the plaintiff in fear of physical injury and if such fear results in nervous shock, the court will find no difficulty to find a breach of the duty of care owed to the plaintiff.
(**Dulieu v. White**)

Nervous shock through fear of injury to a third can take place in 3 situations:
By being a witness to an accident
By hearing the screams of the victim
By seeing a person being killed

Hambrook v. Stokes
The plaintiff's wife suffered nervous shock, when she heard the screams of her children whom started she had left at the end of the street as a result of a lorry which started going down the street. She was impaired in health due to the nervous shock and was entitled to damages.

Bourhill v. Young
P not entitled for damages as she was outside the scope of the defendant's foreseeability and thus owed no duty of care.

King v. Philips
Where a mother suffered nervous shock, it was held that the taxi driver owed a duty of care to the boy and not to the mother since she was outside the taxi driver's forseeability. However this view is criticized since there is a view that a constructive anticipation should have implied because a small child would not be left neglected without the presence of a parent.

Taxi Driver backed his vehicle almost running over a small child. Mother saw this 70 yards away and suffered NS. It was held that Taxi driver owed a duty of care to the child and not to the mother as she was outside the driver's foreseeability. (Presence of mother not known to the driver)
However, in Broadman v. Sanderson – Father and son stopped at petrol station. Father got out of Car and went to the office of the petrol station. Boy was playing outside. D knocked down the boy. P heard the child scream and suffered NS. The presence of the father in the scene was known to the driver unlike in King v. Phillips

However constructive anticipation should have been allowed in King's case as a small child would not be usually left unattended without the presence of a parent to come to its aid in case of an emergency. In the above cases shock was caused in the event of witnessing an accident. In all these cases there was some constructive anticipation. 3rd parties for whose danger the P feared were relatives. (accepted that D owed a duty of care to P) Acceptable relationships ; husband and wife, parent and child, brother and sister etc

Chadwick v. British Transport Commission
The court held that damages for nervous shock need not be confined to instances where there is fear of injury to one's self or near relatives, but it can farther be extended to strangers. E.g.: rescuers are entitled to damages for nervous shock. In this case the plaintiff, who went of his own to help people involved in a train accident suffered a nervous shock seeing casualties and was entitled to damages.

In order for the plaintiff to succeed he must prove a breach of duty towards him.
He must show that the d either intended to cause him a shock or did something which reasonably likely cause him a shock.

Plaintiff went on his own accord to help people involved in a train accident and suffered nervous shock seeing people being killed. It was held that damages for nervous shock not confined to instances where there is fear to once self or near relatives. Thus it extended to strangers. (Rescuers etc)

Sueltz v. Bottler
No cause of action for wife, for the shock she received in seeing her husband knocked down by a motor car.

Moulder v. South British Insurance Co.
Mother has no cause of action for shock received by seeing her small son get killed after collision with a passenger bus.

Other persons besides the injured person who is entitles to sue,
Husband whose wife or father whose minor child – injured – recovers damages for hospital medical expenses
Master can get damages for losing the *senses* rendered by his servant however this rule applies only to domestic servants.

9. STRICT LIABILITY – RYLANDS V. FLETCHER

In English Law the rule formulated in the case of Rylands v. Fletcher imposes strict liability upon occupies of dangerous property. Strict liability is imposition of liability where the defendant need not have intent or negligence in order to be charged and found liable of committing a minor crime or tort. All that is necessary is proving that the defendant committed the act.

Facts of Rylands v. Fletcher (1868)
Defendant, a mill owner employed independent contractor to construct a resource as a means of obtaining water for his mill. Independent contractors discovered old shafts on the site of the construction. They were unaware that these shafts led to the mines of the plaintiff on the adjoining land. The mines were hooded after the reservoir was filled with water.

Blackburn J, stated that the person who for his own purpose brings on his land, collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so is prima facie answerable for all the damage which is the natural consequences of its escape. Defendant was held liable.

In accordance with this rule if anyone brings on his land any object or substance which is inherently dangerous, he will be liable for any damage it may cause on escape and such liability will be imposed even in the absence of negligence and even if it is proved that he exercised the utmost care in preventing its escape.

Where harm to property occurred wholly on an isolated occasion, it is actionable under this rule. According to the rule, for his own purpose person who brings, collects and keeps anything likely to do mischief and if it escapes must keep it in, at this peril. It is prima facie answerable for all damages which are natural consequences of its escape.

There are 4 requirements for the application of the rule in Rylands v. Fletcher. The rule applies in instances.

1. Where there is any isolated escape
2. Where there is 'non-natural' use of land (special use bringing with it increased danger to others)
3. Where the thing likely to do mischief if it escapes, is brought and collected on the land
4. Where there is an escape of a thing like to do mischief

Richards v Lothian
The 2nd requirement mentioned above namely, 'non-natural user of land' was defined as "It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such use as is proper for the general benefit of the community." Where thing is sufficiently dangerous to be kept at man's period depends on the locality, quantity and the surrounding circumstance.

Aloysius Silva v. Upali Silva
Defendant collected dirty water from his coconut and fiber mill and this water flowed into the plaintiff's paddy field destroying it. The rule in Rylands v. Fletcher was applied in this case and held that the defendant had accumulated on his land something which was likely to do mischief if it escapes and therefore was liable irrespective of whether he was guilty of negligence or not.

Read v Lyon

- Ammunition factory in an industrial area during World War 2 was held to be natural use of land. Plaintiff was injured by explosion while in factory. It was held that the rule is not applicable because there was no escape of a dangerous thing.
- Water is harmless in itself but dangerous if it escapes in large quantities. Rule in Ryland v Fletcher applies only to things owner brings on land and collects and keeps. It excludes things already on land and includes everything likely to do mischief if it escapes. Requirement of escape is important.
- It was held in this case that *'escape'* for the purpose of applying the proposition in Rylands v. Fletcher, means escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control.

Defenses and exceptions on the Rule

1. Consent of the plaintiff

If the plaintiff has consented to the accumulation of the thing by the defendant, he has no cause of action if it escapes. Consent also involves implied consent, thus if a plaintiff was aware of the accumulation and voiced no objection he cannot later complain of any injury he may suffer. However he must have been aware that the thing 'accumulated' was unusual in character or detective or dangerous.

2. Default of the plaintiff

If the damage is caused solely by the act or default of the plaintiff he will be denied a remedy. Thus, if a plaintiff knows that there is danger of harm being caused to his land by the acts of his neighbor and by his own act render that danger more probable, he will have no cause of action.

3. Act of God

If an escape is caused, through natural causes and without human intervention in circumstances which no human foresight can provide against and of which no human presence is not to recognize the possibility then defense of act of god will apply.

4. The defendant is not liable for any injury caused is not to a non-natural user of land

E.g.: Mining operation conducted on one's premises causing floods on neighbor's mine, not due to operational defects but due to percolation of water.
Flat dwellers occupying different floors cannot complain that there is a leakage of water from a tank maintained on upper floor.

5. Act of Stranger

If the escape of the dangerous thing is caused by a trespasser or stranger the occupier of the premises is not liable under Rylands v. Fletcher. The defense was successfully pleaded in Richards v. Lothian.

Box v. Jubb

A third person emptied his tank on to a stream which fed the defendant's reservoir. Defendants were not held liable for damage caused by the overflow of their reservoir. Burden is on the defendants to show that escape of the dangerous thing was caused by a stranger.

6. Statutory Authority

The rule in RyInds v. Fletcher, may be excluded by statute and whether it is so exempted depends on the construction of the statute.

Damages caused by things which are not in their basic nature dangerous or by things which will not necessarily cause damage, if they escape doesn't entail responsibility under Ryland v Fletcher
If escape of dangerous thing caused by trespasser or stranger, the occupier of premises not liable under this rule.

Applicability of RyInds v. Fletcher in Sri Lanka
Clear that rule is inconsistent with fundamental principles of delictual liability under Roman Dutch law.

Cases which rejected this rule
Union Govt. v. Sykes
Samed v. Segutamby

Cases which followed the rule
Eastern and South African Telegraph Co. v. Town Tramways
Subaida Umma v. Wadood
Aloysius Silva v. Upali Silva

Gunaratne v. Wimalawathie
Plaintiff sued defendant, neighboring land owner, to recover damages sustained in consequence of a coconut tree falling across roof of his. Plaintiff established negligence on part of defendant, by proving that defendant was aware of dangerous condition of the tree. It was held that defendant liable for damages and rested liability upon proof of negligence.

Similarly, in **Daris Appu v. david Singho** and **Podihamy v. Jayaratne**, it was held that plaintiff must prove negligence on the part of the defendant to prove his claim.

In conclusion two approaches to question:
Dr. C.F. Amerasinghe - Rule of Ryland v. Fletcher should not be part of our law.
Dr. Mark Cooray - Puristic attitude led to resistance against incorporation of English Law principles.
English Law and Roman Dutch Law are alien systems. Where there's a *locuna* (gap) any principle near at hand and suitable should be adopted.

10. DEFAMATION

"The wrong of defamation consists in the publication of defamatory matter concerning another without lawful justification or excuse "- McKerron
Defamation can be defined as the publication of a statement with the intent of injuring a person's reputation.

At the beginning in early Roman and Roman Dutch Law, defamation was considered a species of *injuria*. Therefore it required that there be,

a. a wrongful act by the defendant
b. it should constitute an aggression upon the person, dignity and reputation of the plaintiff
c. it should be committed with wrongful intent or *animus injuriandi*

With the influence of English Law, this concept changed. Reputation is no longer considered an interest in personality alone but it is also valued as an asset of a species of property. Thus an injury to reputation can be compared to damage to property. (**Die Spoorbond v. S. A. R**)

McKerron distinguished between a defamatory statement and an abusive statement as:

- An abusive statement is not a wrong against plaintiff's reputation but is a wrong against his dignity and thus gives rise to a separate claim.
- Publication is necessary with defamation where as with an abusive statement it is not necessary.

In modern law it is not the use of the words complained of, but their publication, which is the gist of the action and the requirement of *animus injuriandi* has sunk into the background.

De Waal v. Ziervogel
All that plaintiff needs to prove at the outset is that the defendant published a defamatory concerning the plaintiff

Elements of Defamation:

1. The statement must be defamatory
2. It must refer to the plaintiff
3. It must be published
4. There must be an *animus injuriandi* on the part of the defendant

1. The statement must be defamatory
Fleming,
A defamatory statement is one which intended to lower a person in the estimation of reasonable members of society. It usually takes the form of a statement which attacks the plaintiff's moral character.
E.g.: attributing commission of a crime/imputing dishonesty, immorality or any kind of improper conduct

McKerron,
Any statement which tends to bring another into contempt or undue ridicule or which is calculated to diminish the willingness of others to associate with plaintiff less is defamatory.
E.g.: Insanity, Illegitimacy, Physical deformity

A defamatory statement does not however have to be limited to allegations against plaintiff's moral character.

McKerron,
Casting aspersions on plaintiff's professional capability or statements prejudicial to his business / employment is also defamation. In assessing whether the statement lowered the plaintiff in the eyes of the ordinary decent members of the community, the subjective attributes of the community in question must be taken into consideration.

Innuendo
A statement can be:

- *Prima facie* defamatory - In its natural and obvious sense convey a defamatory meaning
- *Prima facie* innocent - In its natural and obvious sense does not convey a defamatory meaning but could carry a hidden defamatory connotation which may be derived from reading between the lines or with extrinsic information.

Where it is *prima facie* innocent, the plaintiff must expressly and impliedly set out in his pleadings the defamatory meanings which he attributes to them. Such explanatory statement is termed as *innuendo*. The plaintiff must also allege the special circumstances which he relies upon as supporting his innuendo.

Watkins v Tudhop
Defendant said that if the municipality appointed a respectable auditor he would give the information. Held that, defamatory is as innuendo where plaintiff was not respectable or fit to be an auditor.

Where a statement is *prima facie* defamatory, the test of determining if it is defamatory is an objective one.
"*It is considered whether in the circumstance in which they were published, ordinary reasonable men to whom the publication was made would be likely to understand them in a defamatory sense*".

- Onus is on plaintiff to prove on a balance of probabilities that the test would be met.
- All surrounding circs and context must be taken into account in interpreting the statement.
- Test is objective and thus it's not a defense to say the defendant did not intend it to carry such meaning or that those who read it would interpret it differently.

Where a statement is *prima facie* innocent and where innuendo is alleged, evidence of those who read it would be admissible, unlike above, although not conclusive.

2. It must refer to the Plaintiff
Test of whether the statement refers to the plaintiff or not is an objective one and depends on what reasonable persons would believe that the words referred to 'the plaintiff'. Objective nature of the test means that the defendant's intention or knowledge is irrelevant.

In Roman Dutch Law, the defendant can plead that he did not intend to defame the plaintiff. It is a good defense if he can show that he was in no way reckless and could not have known that what he wrote might apply to the plaintiff.

With the support of statutes provided for loopholes, for those who have innocently published can avoid liability by publishing a reasonable correction and an apology. It is essential that the plaintiff be able to show that the words complained of were published. It is of such vital importance that the plaintiff must aver it in his plaint or he might render the plaint open to objection that it does not disclose a course of action.

Independent Newspapers of Ceylon v. Wickramasinghe
The plaintiff must identify himself as the person defamed, i.e. he must allege and prove that the statement complained of referred to him as an ascertained and ascertainable person.

Morgan v Odhams Press
A newspaper article alleged that the girl had been kidnapped by a gang. The girl was staying with the plaintiff at the time and several witnesses stated that they thought the plaintiff was part of the gang. It was held that the requirement that the words must refer to plaintiff was satisfied.

Hulton v Jones
Defendant published a story about a fictitious character called Artemus Jones. There was someone by that name in existence who sued for defamation and was awarded damaged. *HL upheld decision.*

Newstead v. London Express Newspaper Ltd
The defendant wrote an article about the bigamy of a man of the same name and living in the same area as plaintiff. The article was true. He argued that according to the test the article could be understood as applying to him. His claim was upheld.

Especially, where the statement refers to a group or class of person and not to a particular member, plaintiff must prove that it refers to every member of the class to be able to bring a claim.
Knupffer v. London Express Newspapers Ltd
Words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group

3. It must be published
Publication is the communication of the defamatory statement to a person other than the plaintiff. It is now settled law both in Sri Lanka and South Africa that the plaintiff must allege and prove that the statement was published by the defendant.

As the publication is of vital importance to the plaintiff's case, he must be averred in his plaint that the statement was published to a third party. Failure to do so renders it open to objection that the plaint does not disclose a course of action.

Publication does not mean that it should be made known to a large no. of people, and communication to one individual is sufficient. But the people to whom it was communicated should understand its defamatory significance and its reference to the plaintiff.

Dr. S.A. Wickramasinghe v. Matara Merchants Ltd
The averment that the leaflet in question was made and printed did not amount to the allegation that it was published, for one can make and print a leaflet without publishing it.

Grobbelaar v. News Group Newspapers Limited and Another

"Sun" published that Grobbelaar a popular football player agreed to fix matches and accepted bribes. Grobbelaar agreed to take bribes but didn't fix matches. Held that reduced damages from £ 85,000 to £ 1 (nominal) + entitled to injunction to prevent further publication

Communication between spouses:
Communication to a spouse of defamed person is publication. Defamatory statement made to own wife is not a publication. (Matter of public policy to protect communication between spouses)

Wenman v Ash
A letter to landlady by an ex-lodger complaining of petty theft by her husband amounts publication of a libel.

Different degrees of liability:

1. All Proprietors, editors, publishers and printers are liable. No one can say they didn't know because it is their duty to know contents. Proprietor is vicariously liable even if he is not negligent.
2. Sellers, distributors, librarians are mere distributors. *Prima facie* liable in ordinary course of business for libel contained in it unless he can prove all of:
    a. He did not know that it contained defamatory matter
    b. Ignorance not due to negligence on his part
    c. No reason to suspect that such contained defamatory matter
    d. Stopped circulation as soon as he became aware

Mudie's Select Library case
Proprietors of library sold and distributed book containing defamatory matter regarding plaintiff. Held: The proprietor is liable, because he overlooked a letter sent by the publisher, requesting return of the stock of books containing the libel. Roman Dutch Law on the liability of booksellers is the same as under English Law.

Defamatory matter imposed on defendant's property by unauthorized act of 3rd party:
Defendant must remove defamatory matter when he becomes aware of it and knows it to be such. If he deliberately refrains from removing or erasing it or carelessly fails to remove it he is as guilty of publication as original author.

If removal involves trouble and expense or where it is carved on the wall of the defendant's house;
Salmond: Person is not responsible
Winfield: Removing is a duty, because the damage to plaintiff's reputation caused is far greater than the trouble and expense of removing it.

Byrne v. Deane
If a person fails to remove defamatory notice affixed to premises he shall be liable for its publication.

Publication of letter by post:
Merely sending by post is not publication if addressed to person defamed and he opens. But when the letter is opened by another it is a matter of fact whether intended to be opened by 3rd person. A postcard / telegram, posted containing defamatory matter is evidence of publication.

Martin v Kemlo

Defamatory letter addressed to plaintiff sent in open envelope with a note to clerk in sealed envelope to clerk's residence. Letter read by Clerk. Defendant anticipated that clerk would read it. Therefore there was publication.

4. Defendant must have *animus injuriandi* (an intention to defame)

animus injuriandi present :

1. Act done with object to hurt another regard to his person, dignity and reputation.
2. Unlawful act done to achieve another object and aware that consequences will hurt the person, dignity or reputation.

animus injuriandi negated:

If malice is not present in the publication and serves public interest, the burden of negating *animus injuriandi* is on defendant.

ANCL v. Dr. C.H. Gunasekera

Newspaper published defamatory excerpts from an unpublished report on malpractices of the Public Health Dept. Defendant tried to prove absence of *animus injuriandi*. It didn't take defense of justification, privilege and fair comment. HELD: *Ha Al*. If circumstances of privilege absent.

Perera v. Peiris

The PC held that *animus injuriandi* was an essential element under RDL, but the presumption of *animus injuriandi* had been rebutted as the circumstances in which the newspaper published the report showed that the occasion was privileged.

Defenses to Defamatory Action

Where the ordinary meaning of the words is defamatory, the existence of *animus injuriandi* is presumed. Defendant rebuts presumption by leading evidence of external facts and circumstances showing no intention of defaming. These are principal defenses available to him.

1. Justification
2. Privilege
3. Fair comment
4. Miscellaneous defenses (addition to above)

Defendant's real defense is that he had no *animus injuriandi*. In English Law liability, strict liability arises out of publication. Liability doesn't arise if matter is justified, privileged or fair comment.

1. Justification

English Law: sufficient if statement substantially true
Roman Dutch Law: must prove substantially true + publication for public benefit

Botha v Brink

Villiers J said "if the defendant proves that the words were true he does not completely rebut the presumption of the *animus injuriandi* unless it appears from the pleading that some public benefit was to be derived from the publication. Therefore, defendant cannot rely on his defense upon the truth alone but must in his plea of justification disclose such circumstances that public benefit was to be derived from the publication of the truth.

a. Substantially true
If the statement is general, defendant has to prove particular instances to support it. He may state that he was ignorant of the defamatory matter at time of publication. He will not be bound to prove every instance.
If statement contains specific charges, defendant should prove every charge true in substance and fact.

b. Public benefit
The statement regarding integrity/competence of officials managing public / quasi judicial institutions is for benefit of public.

Graham v Ker
As the general principle the public must be aware of truth of person's character and conduct.

Chelliah v. Ferando
Kanapathipillai v. Subramaniam
Public interest is essential for defense of justification.

2. Privilege

Absolute privilege: where the communication of the matter is of such paramount importance to the public that nothing can defeat it and not even defeated by malice.
Qualified privilege: where the defendant is entitled to make a statement but only if he makes it with an honest purpose.

Balthazar v. Hulangamuwa and Another
Plaintiff was accused and found guilty of indecent assault and attempted rape. Plaintiff forced to retire from service. Defendant was sued stating that the statement made by him was false and malicious. Defendant pleased absolute privilege.
No action for defamatory statement can be made in proceedings before court even if false and malicious.
Appeal dismissed. B/c oral complaint absolute privilege as it initiated proceedings.
Presumption of *animus injuriandi* rebutted if the statement is made on a privileged occasion.

Occasions covered by absolute privilege:

i. Any statement made in Parliament by an MP in the course of debate/proceedings (67/1978 Constitution)
However, if the statement is repeated outside Parliament an action for defamation will be available.

Strauss case
Allegation made against Public Corporation by MP when he took up a matter. Minister stated his right of free speech was infringed. This matter was referred to the parliamentary Committee on privileges, which stated that the matter was covered by absolute privilege. Thus there is no action for defamation. However, parliament rejected recommendation as writing to a Minister was not proceeding before Parliament.

ii. Any statement in any Hansard of proceedings of parliament published by authority of the Parliament.

iii. Any statement made by an Officer of the state to another State Officer in course of duty.
iv. Any statement between spouses
v. Any statement made by a judge, litigant, witness or lawyer in course of and purpose of judicial proceedings.
Silva v. Balasuriya
Statement of witness was absolutely privileged in respect of statements made by him in the course of his giving evidence. The exemption from liability of a judge does not mean that a judge has a right to be malicious. It is rather a right of the public to have the independence of the judges preserved.
vi. Communications between a lawyer and a client regarding case. There is some doubt as to whether such communications are absolutely privileged or only enjoy qualified privilege.

Qualified Privilege
This arises when:

- In the discharge of some statement of public / private duty whether normal or legal or
- In conducting affairs where his interest is concerned or he has a duty to protect the interest of the person to whom statement is made

Such statements are protected if fairly warranted by the occasion and honestly made. It shouldn't be wider than the occasion demands and mustn't have improper motive. Malice destroys qualified privilege.

Reynolds v Times Newspapers Ltd and others
The issue was whether the defense applies to political discussion. Common Law allowed interference of freedom of speech confined to necessary circumstances and court could decide importance of freedom of expression by media on matters of public importance.
Factors to be considered:
i. Seriousness of allegation
ii. Nature of information and extent of public concern
iii. Source of information
iv. Steps taken to verify information
v. Status of information
vi. Urgency of the matter
vii. Comment sought from plaintiff
viii. Whether article contained a summary of plaintiff's story

Occasions attracting qualified privilege

a. Fair and accurate report of proceedings in Parliament Some footing as reports of judicial proceedings. Advantages of publicity outweigh the private injury resulting from publication. If the report is not contemporaneous it might be held that the publication was made for an improper purpose and not for public benefit. If there is an error in the report intended to give a malicious twist it would be evidence of *animus injuriandi*.

b. Fair and accurate report of judicial proceedings which are open to the public should be a fair report without bias or malice. This privilege does not attach if the proceedings take place in a closed court or where the judge had forbidden the publication.

Davith Appuhamy v. Associated Newspapers of Ceylon Ltd
Magistrate commented plaintiff's conduct amounted to child slavery. Defendant's newspaper published fair and accurate report.

Botha v. Pretoria Printing Works
A newspaper had originally published a report of certain legal proceedings in which the plaintiff had figured and had then during an election campaign a considerable time afterwards reprinted the report. The court came to the conclusion that the reprint was made maliciously and the object of injuring the plaintiff.

c. Report of Proceeding of Statutory Bodies Similar privilege attached to reports of bodies entrusted by statute to carry out public duties. Fair and accurate report of meetings on a local authority privileged.

Perera v Peiris
Accurate reproduction of Bribery Commission report privileged. Report of public meetings not privileged if speak makes defamatory statement and the newspaper reproduces it, can be sued for defamation. Under such circumstances the newspaper may take the defense of justification or fair comment. If it fails in these two defenses it becomes liable for defamation.

De Costa v. Times of Ceylon
Statement published containing innuendo with regard to plaintiff before being appointed principal. Earlier he stated students shouldn't pay facility fees and after made them pay. Plea of justification and fair comment succeeded. It was stated, that the press has no privilege which the ordinary citizen has not. Where circumstances warrant the defense of qualified privilege could be applied in political discussions.

d. Statement made in performance of duty

A statement attracts qualified privilege if made in the performance of any legal / moral duty imposed upon the person making it provided the person to whom the statement is made has a corresponding right to make it.

Situation where moral / social duty to speak exists:

a. An employer answering queries of a former employee made by a person proposing to take the servant into employment.
b. One trader answering queries of another as to the insolvency of a third person with whom the second person wishes to do business.
c. A statement is in answer to a question of a superior officer to whom he is bound to answer.
d. A defendant who volunteers a statement without being asked would be protected if a confidential / other relation created duty to speak. E.g.: Father making statement about daughter's friend.

3. Fair comment

Kemsley v Foot
Fair comment is an essential part in right of free speech. Every person has the right to comment fairly, freely and honestly on matter of public interest.

This is deliberated to protect the press in discharging its duty on commenting fully and freely on all matters of public importance.

Four conditions essential for defense

i. A matter must be a comment and not a statement of facts. If comment appears as a fact the defense applicable would be justification and NOT fair comment.

ii. All facts must be truly stated. - No fair comment if facts are false
Merivale v. Carson
when reviewing a play states it contained act of adultery defense of fair comment failed. A mere honest belief in the truth of the statement does not make the comment fair. To succeed in this defense it is necessary for the defendant in the first instance to establish the truth of the facts which the comment is based and to show that the comment is based upon those facts if fair and bona fide **De Costa v. Times of Ceylon.**

iii. The comment must be fair and bona fide
Crawford v Albu
"Fair" doesn't imply that criticism should be accepted by court or that it should be impartial or well balanced (criticism must be within prescribed limits)

A comment becomes unfair where it is used as a cloak for abuse or for making personal imputations not arising out of the subject matter. Comment is fair if it's honest and genuine and not malicious. Comment is fair even if exaggerated, extravagant or prejudiced.

iv. Comment must be on a matter of public interest
E.g.: conduct of a public servant /management of a public institute

v. Comment must not be motivated by malice

4. Miscellaneous defenses

i. Mistake

This is a good defense when the surrounding circumstances show that the defendant did not intend the statement to refer to the plaintiff.
When a fictitious name in a publication coinciding with plaintiff, if the newspaper definitely states that all characters are fictitious and did not refer to any real person, this defense may be successfully pleaded. Also an apology explaining that it was an accidental misprint and not intended to insult would probably negate the existence of *animus injuriandi*.

ii. Jests (Joke)

Voet mentioned jest as one of the defenses to an action for defamation where there is no *animus injuriandi*. The following two conditions should be satisfied:

a. Words used as a joke
b. Those were understood by the person to whom it was published as a joke

Cantley v. Van der Spaar
Defamatory letter written stating Mr. Creasey had turned Mohamedian and married Ms. Cantley.

iii. Compensatio

Words uttered were in reply to similar words used by plaintiff, defendant can plead compensatio. To succeed retaliation should not be long delayed. Where defense is pleaded it must be shown that,

a. statement was made in self defense against attack

b. necessary to establish defendant's character
c. relevant to the imputation made against defendant
d. proportional to original attack made by the plaintiff

iv. Rixa (provocation)

Statement made during quarrel and the presumption of animus may be rebutted. This is only available in action for slander. The following conditions are necessary to establish this defense:

a. Words uttered during quarrel
b. Immediately provoked by insulting language by the plaintiff
c. Defendant uttered words mere moderate and proportionate to the injury inflicted

11. **VICARIOUS LIABILITY**

A person is generally liable for his own wrongful acts, but because of a certain relationship between parties, the law makes an innocent party liable for the wrongful acts of another committed against a 3rd party.

In Roman Law a person might in certain circumstances be held liable for the wrong of his servant. This concept of vicarious liability is based on social reasons as it gives rise to effective remedy to injured persons with no recourse to any legal remedy.

Therefore, if a master and servant relationship exists, the law can hold the master liable for the wrongs committed by his domestic servants, but this must be in the. Course of carrying out some duty or service specifically entrusted to them i.e. wrongs committed in the course of their employment or within the scope of their employment.

Pollock states that he would be answerable for the wrongs of his servant or agent, not because such person is authorized by him or personally represents him, but because such person is about his affairs, and he would be bound to see that affairs are conducted with due regard to the safety of others.

Therefore, the employer must answer for the defaults of his employees, so long as they are committed in the course of the employment. -

Was B As servant at the time the wrong was committed and Was the wrong committed by B in the course of his employment, help determine whether A is responsible for a wrong committed by B.

Who is a Servant?
Any person employed to do work for another can be broadly identified as an employee.
There are two classes of employees, i.e. Servants and Independent Contractors. The important factor determining the category of employment is based on the nature and degree of control exercisable by the employer over the employee.

An Independent contractor undertakes to carry out a given piece of work. In executing the work, he uses his own discretion and is not subject to the orders of his employer. In these circumstances his employer is not liable for his wrongful acts, unless authorized by him. Thus an independent contractor is his own master. A servant on the other hand is subject to the orders and control of his employer with regard to the work and the manner in which it has to be done. Therefore, he is an employee who works under the supervision and direction of his employer. A servant therefore is engaged to obey his employer's orders while an independent contractor exercises his own discretion when carrying out his work.

This distinction is very important because an employer is liable for the negligence of his servant but not for the negligence of an independent contractor.

Gratian, J states that in distinguishing, the ultimate question was not what specific orders or whether any specific orders were given but who was entitled to give orders. This is what is called justice control or the right of control. More applicable as in the modern work, employers exercising less control over professionals. The more skilled they are.

As a general rule a person carrying on a skilled occupation as a separate business is an independent contractor. But, if he carried on a skilled occupation under a contract of service

while he's employed as part of a business and his work is done as n integral part of a business, he's servant of the owner of the business. **Performing Rights Society Ltd v. Mitchell and Booker** illustrates this point further. The defendants in this case were the proprietor of dance corporation engages dance band on the terms that the band should not play music if it involved an infringement or copyright. Furthermore agreed that the band should play 7 hours a day and paid a salary of the bandsmen.

The band played two pieces of music which infringed the plaintiffs copyright. Courts held that the defendant exercised control over the work of the bandsmen as to make them their master. This has been further discussed in the Sri Lankan case of **Perera v. Marikar Bawa**

Lord Porter in **Mersey Docks and Habour Board v. Coggins and Griffits** discussing the liability of the Crane Operator a skilled mechanic states "the question was not whether the owner did actually give orders or was capable of giving orders but whether he was entitled to give orders as to how the work should be done". The Sri Lankan court held in line with the above decision in the case of **De Silva v. Trust Co. Ltd.**

Gold v. Essex County Council it was held that a hospital authority was liable to a patient who was injured by the negligence of a radiographer in the full-time employment of the hospital. It was also stated that the liability of a hospital for the negligence of a doctor depended on the extent of the obligations undertaken by the hospital towards its patients. If the hospital undertook to provide medical treatment, it thereby undertook a personal duty of care towards its patients. If it is accused of a breach of these obligations, it cannot escape liability. This decision was followed in the Sri Lankan case of **Trustees of Fraiser Memorial Nursing Home v. Olny**.

In **Cassidy v. Ministry of Health** a hospital was held liable for the negligence of doctors and nurses employed on its permanent staff. Lord Denning stated: "where a hospital undertakes to treat a patient and calls in a surgeon and pays him, it is liable for his negligence in treating the patient. It will not be liable ONLY if the patient himself calls in the surgeon and pays him.

<u>A Servant employed by two Masters</u>
A servant may be in the employment of two masters. He could be in the general employment of one master and in the particular employment of anther. The question of whose servant he was at the time of the act complained of is a question of fact depending on the terms of the agreement between two masters and the circumstances of the particular case.

In the leading case **Mersey Docks and Habour Board v. Coggins & Griffith**, B was a skilled employee and A let out on hire a Crane together with a driver (B) to C. The contract provided that B should be a servant of C, but B was paid by A and A had the power to dismiss B. In the course of loading a ship X was injured by the negligence of B. The House of Lords held that A was the permanent employer and therefore A was vicariously liable to X. Therefore C was not liable for the negligence.

Jafferjee v. Munasinghe
The defendant lent his car and driver to A for a day to help at an election. A paid a tip of Rs. 10 to the driver. It was held that the defendant did not place the car under the control of A and was liable for the negligent driving of his driver.

<u>Liability for Casual Delegation</u>
A master is vicariously liable for the wrongful acts committed by his pro tempore servant.
Eg : if A gave his vehicle, for his purposes and injured the plaintiff by negligence.

A is liable to be sued. If A was in it at the time of the accident, prima facie it was being driven subject to his control.

Ormrod v. Crossyvilli
The owner of the car asked a friend of his to drive it from Liverpool to Monte Carlio and meet him there. The owner travelling by train intended to use the car for a motor rally and then for a holiday. The friend injured a pedestrian by negligent driving. It was held that fried was driving for the owner's purpose and therefore the owner was responsible vicariously for the friend's negligent driving.

Hewitt v. Bonvin
A father was held not liable when he proved that his car had been borrowed by his son for the sole purpose of taking the son's girlfriend home from the theatre.

Course of Employment
The master is also liable for any wrongful act committed by his servant in the course of carrying out his instructions or whilst engaged in any activity reasonably incidental thereto.

However, a master is not liable for a wrongful act done by *his* servant unless it was done in the course of OR within the scope of his employment.

A wrongful act authorized by the master or wrongful and unauthorized mode of doing some act authorized by him falls within the scope of in the course of employment.

Thus, in **Mize v. Martens** the defendant, a transport driver employed two youths to assist him in his transport service and undertook to feed them on their journeys. He was held liable for the damage caused by a fire, which was lit for the purpose of cooking their meal, and negligently allowed to spread. The lighting of the fire was an act incidental to their job and therefore within the scope of their employment.

Bischoff Embroidery South Africa (Pvt) Ltd v S.A.R
A contrary view was held. It was held that the lighting of a fire by a 'bantu' laborer in order to cook some food was an act done for his own benefit and not incidental to his employment.

The master is responsible for the acts actually authorized by him and he is also liable for acts which he has not authorized if they may be regarded as modes, although improper modes of doing them.

Rickets v. Thomas
The Conductor drove a bus with the Driver beside him. An accident was caused due to the negligent driving of the Conductor. Court held that the master was liable not for the Conductor's negligence but for the negligence of the driver in permitting the Conductor to drive, the act of the Driver in allowing an unauthorized person (the Conductor) to drive was the mode of carrying out his employment therefore the master was held liable.

Beard v. London General Omnibus Co.
The defendant was held not- liable for the collision caused by the negligence of the bus conductor who drove the bus in the absence of the driver. The conductor was clearly acting outside the course of his employment in the above instance. Henceforth the master was held not liable.

Wrongful acts of the servant in the course of his employment, although forbidden by the master falls within the scope of vicarious liability,

Limpus v London General Bus Co. Ltd
Master had given instructions to his driver not to race with or obstruct other buses. The driver disobeyed these instructions and caused an accident. It was held that the defendant was liable because the prohibition was only about the mode of driving the bus. Wills, J giving his decision stated that the law casts upon the master liability for the acts of the servant committed within the scope of his employment and the law is not so futile as to allow the master by giving instructions to his servant to escape from liability.

A master may be held vicariously liable for willful wrongful acts of the servant. McKerron and Salmond have expressed two contrary views in this regard.

McKerron,
For a willful wrongful by a servant on his own behalf and for his own benefit, the master is not liable because in such a case the servant is acting on his own business and for his own purposes.

Salmond,
as long as the act is within the servant's scope of employment, the master is liable for all frauds committed by the servant, whether the act was for his benefit or for the benefit of the master.

Lloyd v. Grace Smith & Co.
A decision to McKerron was given here. A solicitor's clerk cheated a lady who came to get some advice regarding the sale of her property. It was held that the master was liable for the clerk's fraud although the master did not benefit from it.

There are many ways in which a master could be held vicariously liable for the wrongful acts of his servant. It has to be proven however, that the servant was in the employment of the master at the time the act was committed and that the act was committed within the scope or during the course of his employment. Furthermore a master could also be held vicariously responsible for an act committed by a servant which is incidental to the act of employment and also for an improper mode of carrying out his employment.

12. SEDUCTION

Seduction under Roman Dutch Law
McKerron,
Seduction, in both its ordinary and legal sense, implies a leading astray and a man who has seduced a girl is liable to compensate her in damages for the loss of her virginity and the consequent impairment of her marriage prospects.

An action for seduction is believed to have originated from the customs of Germans and the Canons of the church.

Roman Dutch law writers refer to seduction as an *injuria* but strictly speaking it is not founded on *injuria*. Because seduction implies consent on the part of the woman, and where is consent there can be no *injuria*. Therefore the action must be regarded as an action *sui generis*.

1. Elements of the wrong :
   There are three elements in an action for seduction.
   i. Sexual intercourse between the parties
   ii. Plaintiff must have been seduced.
   Amarasinghe states that once it is proved the sexual intercourse took place, there is a presumption that the woman consented due to defendant's seduction. The fact that she consented does not rebut the presumption neither does the fact that she was older. Presumption may be rebutted if there is proof that plaintiff was the seducer or that she received remuneration for sex. In the latter case, it must showed proof that she bargained away her virginity for a price. The mere fact that she received money or presents or that he took advantage of her poverty is not an indication that there was no seduction.
   iii. Plaintiff was a virgin prior to seduction (**Lucinahamy v Diashamy**).
   If unmarried then there is a presumption that she was a virgin and the burden of proof is on the defendant to prove otherwise (**Smith v. Swart**).

2. Remedy
   Once seduction has been proved, the defendant has the option of either:
   - Marrying the plaintiff
   - Paying her compensation

   If he has promised to marry her, then the remedy is specific performance. But our courts have no power to order it (**Abeydeera v. Podisingho**). Therefore it is questioned in Sri Lanka as to whether the defendant has this option. In South Africa too, the position is less certain.

3. Proof
   Onus is on the plaintiff to prove that sex took place. If defendant denies it then she has to corroborate her statement with evidence. Once it has been established, there is a presumption that she was seduced.
   It is a matter of law in the modern day.

   Grange v Perera/Joseph v. de Silva
   It was stated the corroboration must be:
   - Evidence as to the fact or state of their relationship or conduct of the parties which leads to the conclusion sex would have taken place

- Evidence as to the conduct or action on the part of the defendant which constitutes an acknowledgement by him that his relationship with plaintiff was such that sex would have taken place

Somasena v. Kusumawathie
Mere opportunity for misconduct is not by itself corroboration of seduction.

4. Defences
   i. Under Sri Lankan Law if the plaintiff knew that the defendant was married, she is barred from bringing an action for seduction (**Meenachchi v. Shanmugam**). In South Africa however, a plaintiff can bring despite defendant being married (**Bensimon v. Barton**). Obviously, only remedy available in such an instance is the compensation.
   ii. The defendant could be deprived of the option of marrying plaintiff in several ways.
      - Where the plaintiff married before the action is filed, she forfeits her right to damages unless she can show that the defendant prevented himself from marrying her by refusing to do so or by marrying someone else.
      - Since defendant has the option of paying damages or marrying the plaintiff, if he offers her marriage and she refuses, she also forfeits her right to damages. However if defendant offers merely to avoid paying damages or in such circs that reasonably plaintiff cannot be able to accept she may still recover damages.
   iii. Plaintiff may forfeit her right to maintain an action, where she continues to have intercourse with the defendant instead of immediately severing her association with him. Bur continued sex with other men did not bar the claim of the plaintiff.

5. Damages
   If the defendant cannot or will not marry the plaintiff, he must pay her damages. According to Amarasinghe, damages consist of two elements.
   i. Compensation for loss of marriage prospects patrimonial and sentimental aspect.
   ii. Compensation for purely patrimonial loss arises from consequential loss and paternity.

Loss of marriage prospects:
- Basis of paying damages for loss of virginity appears to be to provide her with a dowry which she may use to attract a future husband.
- Quantity will depend on the age, circumstances and social standing of the plaintiff.
  - Damages are more for a school teacher than a maid.
  - When a rich man seduced a maid, the damages less as it would encourage immorality.
- It will also depend on the reluctance shown by the plaintiff and the steps defendant took to overcome it. If plaintiff showed no resistance damages will be reduced.
- If the plaintiff and defendant had a relationship where defendant owed a duty of care of sorts, then damages will be aggravated. E.g.: plaintiff is a patient – defendant is doctor/plaintiff is young - defendant much older.

Pure patrimonial loss:
- Consequential loss and damages arising out of paternity.
- Burden of proof is on the plaintiff to prove damages.

- Defendant can be claimed for expenses in connection with pregnancy, funeral expenses and maintenance of the child.

6. Conclusion :
   This delict was accepted in Roman Dutch Law given the inherent weakness in females which deserved protection. In today's society it's debatable as to whether this is still the position.
   Additionally, an analysis of case law shows a sexism and concept of women which is not acceptable to women in today's society. The law on seduction also demonstrates class consciousness which is not acceptable in an egalitarian society. E.g.: the social factors considered in assessing damages.
   Many countries, including United Kingdom, have abolished the law on seduction as it was felt that is serves no purpose in today's society. Simply it is unnecessary and irrelevant.

Seduction in English Law

In English Law, Seduction is regarded as an aspect of interfering with the relationship of master and servant. The father is regarded as the master, since he is the head of the household and on the view that the daughter render services to him, she is regarded as the servant, of which he was deprived by seduction.

In English law no action lies at the suit of the girl herself and it lies at the instance of an employer. However the father has no remedy if the daughter is under an exclusive contract to serve another, since,

1. He is not the master of his daughter
2. She is rendering service to another

The plaintiff must prove that he was entitled to the services of the girl at the time she was seduced. A father is deemed for this purpose to have a legal right to services of an unmarried minor daughter if she is not under a contract to serve some other person.

Hepps v. Magg

Plaintiff's daughter was rendering service to some other and was seduced in a vacation. It was held that father has no right to claim damages as the master.

Terry v. Hutchinson

19 year old girl was returning home after being terminated from her employment and was seduced on the way.
It was held that her intention was to go to her parents as her employment was terminated therefore father regained his ability to file an action against the seducer.

Where the girl is over 18 and not under an exclusive contract with another, proof must be given to prove actual service to the father. The plaintiff must show loss of service, damages including expenses of the girl's illness and birth of child if any, in addition to the value of the services lost. If the seduction injured the plaintiff's honor and feelings, the court normally award exemplary damages.

13. REMEDIES

Remedies for delict are either Extra Judicial or Judicial. Extra judicial remedies are remedies by way of self-help, i.e. by taking the law into one's own hands. Judicial remedies are remedies by way of action at law.

The general rule is that no one is entitled to take the law into their own hands. However there are situations where this can be justified.

- Necessity may justify a person having to recourse to self-help to obtain redress
- Victim of a wrong is entitled to help himself by his own act where the law cannot help him in time to prevent him suffering irreparable injury.
  E.g.: When a trespasser steals fruit, the owner of land can expel him and take back the fruit. Person may enter upon another's land to abate a nuisance which threatens immediate injury to persons or property.

But in every such case the right of the party is subject to the rule that no greater force must be used or damage done to the property, than is necessary for the purpose in hand.

Judicial remedies for a delict are of 2 chief kinds,

1. Damages
2. Interdicts

Damage is the normal remedy for every kind of civil wrong. It can be divided into the following categories

1. Real and Nominal Damages
2. Patrimonial and Sentimental Damages
3. General and Special Damages
4. Accrued and Prospective Damages
5. Contemptuous Damages
6. Exemplary Damages

1. Real and Nominal Damages

Damages are said to be real where they are awarded as compensation for the actual; loss suffered. If it is clear that some loss has been suffered however small or difficult of assessment it maybe, the damages awarded in respect of it are real and not nominal. It intends to represent full and adequate compensation for the plaintiff's injury.

Damages are said to be nominal where they are awarded not by way of compensation for any actual loss suffered, but merely by way of recognition of some legal right vested in the plaintiff and violated by the defendant.

E.g.: Trespass on land is actionable without proof of actual damage. Nominal damages can sometimes loosely denote to mean a small or trifling sum awarded as compensation to the plaintiff, who has clearly sustained some damage but is unable to prove the extent of it.

2. Patrimonial and Sentimental Damages

Sentimental damages are damages awarded as solatium for wounded feelings or for mental pain or suffering. However the wrong complained of should constitute injuria to award damages. Patrimonial damages are damages awarded as compensation for calculable pecuniary loss sustained by the plaintiff in consequence of the wrong complained of.

3. General and Special Damages

General Damage is such loss as the law will presume to be a natural or probable consequence of the defendant's act. Since general damages are presumed it is sufficient to allege it generally

and the defendant is not entitled to demand particulars of it. Special damages are a loss arising out of the special circumstances of the case and therefore will not be presumed. Therefore special damages must be specially alleged and claimed, so that plaintiff may have due notice of the nature of the claim or plaintiff will not be entitled to lead evidence of it at the trial.

4. Accrued and Prospective Damages

Prospective damage, i.e.: damage which in the ordinary cause is like to accrue – as well as damage which has actually accrued should be included by the plaintiff in his claim.

5. Contemptuous Damages

Nominal damages must be distinguished from contemptuous damages. This type of damages are awarded to indicate that the court has formed a law opinion of the plaintiff's legal claim. E.g.: for action of defamation contemptuous damages maybe awarded, where the words used of and concerning the plaintiff is defamatory but the court holds that the plaintiff is a aman of worthless character.Award of contemptuous damages does not carry with it the costs of the action where as it does in nominal damages.

6. Exemplary Damages

Exemplary damages are damages awarded to punish the defendant in an exemplary manner. The types of damages may be regarded as a spieces of moiral or sentimental damages. They were intended not only as compensation for the infringement of a right, but also as an expression of disapproval by court of the highhanded or arrogant manner in which the defendant infringed the plaintiss's right and outraged his privacy, dignity or feelings. The amount awarded would be partly compensatory and partly punitiuve. But RDL rejects that punitive part.

Brooks v. Bernard – accepted exemplary damages as peculiar to EL

<u>The Measure of Damages</u>

This means the standard or the method of calculation by which the quantum of damages is to be assessed.

Calculation or assessment of damages - Aquilian action - Prospection loss or loss of profits

This is the method of calculation by which the amount of damages is to be assessed.

actio injuriarum

There is no approximate standard of money value. It depends on individual judges' opinion guided by amounts awarded in similar cases of the past. Where *injuria* is clear, substantive damages will be given.

In contrast it is a mitigating circumstance if the defendant proves that the defamatory imputation was withdrawn and due apology was made or the words used of the plaintiff are in fact true and the plaintiff is a person of a low character or the words were spoken under provocation.

The action for injuria in RDL is on action to recover damages for sentimental loss and the plaintiff is not required to prove his damages. The assessment of damages is in the discretion of court. In ordinary cases the damages awarded will be substantial and in proportion to the circumstances of the *injuria*.

Botha v. Pretoria Printing Works Ltd

The court may also take into account any aggravating circumstances.

E.g.: If the defendant persistently repeated the words complained of Black v. Joseph

If the defendant unsuccessfully tried to prove that the words uttered of the plaintiff were true. On the other hand it is a mitigating circumstance which will reduce the amount of damages if the defendant proves that the words used of the plaintiff are true in fact or the plaintiff is of low character or that the words spoken were under provocation.

aquilian action
Damages are awarded as compensation for patrimonial loss, measured by pecuniary loss, actual or prospective sustained by the plaintiff. Can get damages for present value as well as value it could have had if the act had not been committed.

General rule is that damages must be assessed at the date of the wrong and subsequent events unconnected therewith must be disregarded. Under this action damages are awarded as compensation for proportional loss and the plaintiff must prove his damage.

Mathew v. Young
The object of the award of damages in this action is to put the plaintiff in the position he would have been monetary wise if not for the defendants wrongful act.

The only exception to the rule is the allowance of compensation for pain and suffering in actions for personal injury the plaintiff has a duty to minimize damages and cannot recover damages unnecessarily of unreasonably incurred.

Damage to property
1. Actual loss

The measure of such loss is the difference between the present value of the plaintiff's property and the value it could have had if the wrong had not been committed.

2. Prospective loss or loss of profits

If the thing damaged is a machine or vehicle used in the business of the owner, the damages recoverable include loss of income due to the loss of vehicle or machine.
W. H. Bus Co Ltd v. Smaranayake
Gaffoor v. Wilson and Others

Shrog v. Valentine
If the owner of the vehicle claims damages for loss of income due to the fact that he has been deprived of the mean of earning livelihood, he should lead evidence of his average daily income and the time taken for the vehicle to be repaired.

Damages for personal injury
The plaintiff can claim compensation for it.

1. The plaintiff may recover medical, hospital or other expenses incurred by him in connection with the injuries. And entitled to compensation for loss caused to his business by his absence from it.
   Sandler v. Wholesale Coal Suppliers Ltd

2. Disfigurement, pain of mind and body, loss of health and; loss of expectations of life.
   Chintadevi v. Glacio Ltd

3. The plaintiff can claim compensation for future expenses in connection with the injuries and in case of permanent injuries for the loss of future income.
   Harris case

14. NEIGHBOUR PRINCIPLE

The mere negligence on the part of a person in doing or omitting to do something, 'Negligence in the Air' as i commonly referred to is not sufficient to establish liability. Similarly, the fact that damage is suffered, by itself is not sufficient to found a claim. The vital legal link in establishing liability is the duty of care, lying upon the person whose negligence is impaired towards the person who claims damages. This relationship is the essence of the legal conception of a duty of care.

The concept of duty of care was elaborated in the celebrated case of **Donoghue v. Stevenson** in which the 'Neighbor Principle' was formulated by Lord Atkin. Thus neighbor principle is important for determining the duty of care.

In this case, a friend of the appellant purchased a battle of ginger-beer in a cafe. The bottle was made of dark opaque glass and the appellant had no reason to suspect that it contained anything but pure ginger-beer. It was opened in her presence and some contents were poured into a tumbler. After the appellant drank what was in the tumbler the remainder was poured into it and that contained a snail in a state of decomposition. The appellant suffered from shock and sever gastroenteritis. There was no privity of contract between the appellant and the manufacturer of ginger-beer and she sued the manufacturer for damages on the tort of negligence. It was held that a manufacturer of products owed a duty to the consumer to take reasonable care that the product is free from defect likely to cause injury to health. Lord atkin in this case described the person to whom this duty of care is owed as the neighbor in law.

In answering the question, '*To whom should a person owe a duty?*' he referred to the commandment in the Christian bible which states '*Thou shalt love thy neighbor as thyself*'. That is to say, the rule that you are to love your neighbor becomes a law; you must not injure your neighbor. So according to him a 'neighbor in law' is a person who is so closely and directly affected buy my act, that I ought reasonable to have them in contemplation as being so affected when I am directing mu mind to the acts or omissions which are called in question.

There are three elements in the principle. They are;

1. Proximity; persons closely and directly affected by the act or omission
2. Foreseeability ; injury which can reasonably be foreseen as likely to the class of persons stated above
3. Standards of care; reasonable care to avoid the injury as foreseen

Proximity here transcends more physical nearness and encompass or persons or property directly and intimately connected. It is properly used to exclude any element of remoteness, or of some interfering complication between the want of care and the injury suffered.

The House of Lords in **Borhill v. Young** was influenced by the general principle of duty of care laid down by Lord Atkin in **Donoghue v. Stevenson**, in deciding the issue of duty of care in a nervous shock. In this case a claim for damages in respect of nervous shock suffered by a person not directly involved in a motor accident, failed on the premise that the errant motor cyclist owed no duty of care to the victim of shock, as the victim was not in close proximity to the defendant, and thus the defendant could not reasonably foresee that his action of riding the motor cycle negligently affect the victim.

15. NOTABLE CASES

- **Priyani Soysa v. Rienzi Arescularatne**
- **Samitha Samanamali v. BMICH (DC Case)**
- **Abeysundere v. Abeysundere**

Nervous Shock

Victoria Railway Commissioner v. Coultas
Dulieu v. White
Els v. Bruce
Hauman v. Malmesburg Divisional Council
Wilkinson v. Downton
Hambrook v. Stokes
King v. Phillips
Chandwick v. British Transport Commission

Seduction

Bensimon v. Barton
Lucinahamy v. Disahamy
Smith v. Swart
Joseph v. De Silva
Grange v. Perera
Somasena v. Kusumawathie
Abeydeera v. Podisingho
Terry v. Hutchinson

Malicious Prosecution

Waterhouse v. Shields
Madnitsky v. Rosenburg
Hatrhurusinghe v. Kuda Duraya
Baker v. Christiane
Wijegunathilaka v. Janis Appu
Herniman v. Smith
Glinski v. McIver
Corea v. Peiris
Brown v. Hawkes
Peiris v. Marikkar

Rylands v. Fletcher

Richards v. Lothian
Aloysius Silva v. Upali Silva
Read v. Lyons
Box v. Jubb
Transco PLC v. Stockport MBC
Goonaratne v. Wimalawathie
Darlis Appu v. David Singho
Podihamy v. Jayaratne
Subaida Umma v. Jayaratne

Defamation

Die Spoorbond v. S. A. R.
De Waal v. Zierrogel
Watkins v. Tudhop
Independent Newspaper of Ceylon v. Wickramasinghe
Hulton v. Jones
Newstead v. London Express Newspaper Ltd
Knupffer v. London Express Newspaper Ltd
Dr. S. A. Wickramaratne v. Motor Merchants Ltd
Maudies Select Library Case
Martin v. Kemlo
John Fernando and AG v. Satharasinghe
Perera v. Peiris
Claude Perera v. Arasu
Associated Newspapers of Ceylon Ltd v. Guy de Silva
Independent Newspapers Ltd v. Wijeratne

Contributory Negligence

Quinn v. Leathern
Nance v. British Colombia Electric Ry Co. Ltd
Jones v. Santam
South British Insurance Co Ltd v. Smith
Gee v. Metropolitan Railway
Newman v. East London Town Council
Butterfield v. Forester

Volenti non fit injuria

Warring and Gillow Ltd v. Sherbone
Smith v. baker
Haynes v. Harwood
Clayards v. Dethick
Dann v. Hamilton
Lampert v. hafer
Jamesons' Minors v. CSAR
Careles Estate v. de Vires

Dangerous Chattels

Colman v. Danbar
Donoghue v. Stevenson
Union Govt. v. Matthee
Homes v. Ashford

Actio de pauperize

O' Calaghan v. Chaplin
Ceylon Ice and Cold Stores v. Bandaranayake
De Zoysa v. Punchirala
Thwarties v. Jackson
Namasivayam v. Heenbanda
Hermie v. Hoffman

Res ipsa loquitar

Scott v. London and St. Katherine Docks Co
Barkway v. South Wales Transport Co. Ltd
Byrne v. Boadle
Gordon v. Mathies Estate
Kurunda v. Sinclair
Hamilton v. McKinnon
Wije Bus Co. v. Soyza

Aquilian action

S. A. R. v. Estate Saunders
Halliwel v. Johannesburg Municipal
Municipalm of Bulawaya v. Stewart
De Viller v. Johannesburg Municipal
Silvas Fish
Cambridge Municipality v. Millard
Matati v. Minister of Justice
Silvas Case
Cape of Good Hope Bank v. Fiscler
Union Govt. v. Warneke
Blyth v. Birmingham Waleworks Co
Palsgraf v. Cong Island Railway Company
Bourhill v. Youing

Remoteness of damages

Wagan Mound
Smith v. Leach Brain
Scott v. Slepard
Guinn v. Leathern