

NOTES ON

LAW OF TORTS

including

Law of Consumer Protection

&

Compensation under the Motor Vehicles Act

by

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RADHA KRISHNA BUILDINGS
 GANDHARIMAN COIL ROAD, STATUE
 THIRUVANANTHAPURAM - 1
 PHONE : 0471- 2327390
 Mobm : 9446580443

Rs. 160/-

PUBLISHED

BY

APARNA PUBLICATIONS

AJITHABHAVAN, KULASEKHARAM,
 THIRUVANANTHAPURAM - 13, PHONE : 9446580443

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(Law of Consumer Protection & Compensation under Motor Vehicles Act)

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Part - I Law of Torts

Topic-I Introduction

The term law refers to a set of 'rules of conduct' which are to be followed by the people living in a society in their mutual intercourse and in their relation with the State. These rules of conduct may be contained in the legislations, precedents, custom or conventional laws (agreements between parties). The laws enacted by the legislature of the State is called 'legislation'. The law declared by the judiciary of the State is called 'precedent'. The rules of conduct which are voluntarily followed by the people is called 'custom'. The rules of conduct made by the people in their agreements are called 'conventional laws'.

The laws of a State can broadly be classified into two categories. They are (i) the Civil Law and (ii) the Criminal Law. The Civil Law declares some rights and liabilities of persons. They are enforced by the Civil Courts. The Civil Justice aims to enforce the rights as such. If a person's right is violated by another person, the aggrieved person can approach the civil court and the civil court will try to enforce the rights as such. If it is not possible to enforce the rights as such, the civil court will award compensation to the aggrieved person. The Criminal

Law prohibits certain acts and omissions of persons and prescribe punishments for violating such prohibited acts and omissions. The Criminal Court punishes the offender for violating the criminal law. The Criminal Justice aims to punish the wrong-doer.

The law of torts is a branch of the civil law. This branch of law is administered by the civil courts. This branch of law has been developed in England through the judicial precedents. In India this branch of law is not yet fully developed. The Indian courts generally follow the English principles, though they are not bound to follow the English principles. The Indian courts are free to make necessary changes in the English principles to suit the Indian condition.

Topic - II Definition of Tort

The word 'Tort' has been derived from the Latin term *tortum* which means to twist. Etymologically, the word 'tort' signifies a crooked act or a wrongful act. The word 'tort' implies a conduct which is not lawful or straight but twisted, crooked or unlawful. It means a legal wrong or an unlawful act.

Several authorities have defined the term tort. The following definitions given by authorities on this subject are noteworthy.
Salmond

"A tort is a civil wrong for which the remedy is an action for damages and which is not exclusively the breach of contract or breach of trust or breach of merely equitable obligation".

Fraser

"It is an infringement of a *right in rem* of a private individual giving a right of compensation at the suit of the injured party".

Section 2 (m) of the Limitation Act, 1963

Tort means a civil wrong which is not exclusively a breach of contract or breach of trust.

Winfield

"Tortious liability arises from the breach of a duty primarily fixed by the law : this duty is towards persons generally and its breach is redressible by an action for unliquidated damages".

The essential features of a tort which appear from the above definitions are the following:

- (i) A tort is a civil wrong
- (ii) The tortious liability arises from breach of a duty.
- (iii) The duty should be one imposed by the law..
- (iv) The tortious liability would not arise from breach of a contract, breach of a trust or breach of an equitable obligation.
- (v) The remedy for the person aggrieved by a tort is that of unliquidated damages i.e., the court will assess the amount of compensation.

A tort is a civil wrong and the injured party can institute a civil proceeding (suit) against the wrongdoer (tortfeasor) and claim unliquidated damages. When a claim for unliquidated damages is made, the court will assess the amount of compensation.

Topic - III What are the Essentials of a Tort ? or

Explain the maxim "*Injuria sine damno and Damnum sine Injuria*"

The plaintiff who claims compensation from the defendant for a tort should establish the following three essential conditions

- (i) There must be a *wrongful act or omission* on the part of the defendant.

- (ii) The wrongful act or omission should have caused *legal damage* (*violation of right*) to the plaintiff.
- (iii) There should be *Legal remedy* in the form of an action for damages.

(I) Wrongful Act or Omission

In Law of Torts, the defendant will be held liable only if he has done a wrongful act or omission. It is to be proved that the defendant has done some act which he was not expected to do, or he has omitted to do something which he was supposed to do. The defendant should have violated the duty fixed by law.

Example

(a) 'A' is under a duty not to defame 'B' or any other person. If 'A' publishes a defamatory statement against 'B', the act of 'A' is a wrongful act and is a tort. 'B' can claim compensation.

Glasgow Corporation v. Taylor (1922)1 A.C. 44

The defendant corporation, which maintained a public park, failed to put proper fencing to keep the children away from a poisonous tree. A child plucked and ate the fruit of the poisonous tree and resulted in his death. The court held that the corporation was liable for such omission (negligence).

Municipal Corporation of Delhi v. Subhagwanti (AIR 1966 SC 1750)

A Clock Tower was in the control of Municipal Corporation of Delhi. It failed to keep the clock tower in proper repairs and resulted in the falling of the same and death of a number of persons. It was held that the Corporation was liable for its omission (negligence) to take the due care in the matter.

The wrongful act or omission must be against law. If there is only

moral wrong, there is no tortious liability. To illustrate this point, take the following examples.

- (i) 'A' failed to help a starving man. It is only a moral wrong. No tortious liability arose from his omission. It is because there is no duty on A to give food to a starving man.
 - (ii) 'A' who knows swimming failed to save the life of a drowning child. It is only a moral wrong and there arises no liability. It is because there is no duty on A to save the life of a drowning man.
- If it is proved that there was legal duty to help the starving man, or to save the life of a drowning man, then tortious liability may arise.

(II) Legal Damage (Violation of Right of the Plaintiff)

(Injuria sine damno; Damnum sine Injuria)

Injuria sine damno (Injury without damage or violation of right without damage or loss)

Under law of torts, the defendant would be liable only when he by his positive act or omission to act has violated the right of the plaintiff. Tortious liability arises only when there is a breach of duty owed to the plaintiff, i.e., when there is a violation of the right of the plaintiff. If there is no violation of legal right, there can be no action under law of torts. If there is violation of legal rights, the defendant is liable to pay compensation to the plaintiff even though the plaintiff has not suffered any loss. This principle is expressed in the maxim "*Injuria sine damno*" (*injury without damage*). *Injuria* means infringement of a right conferred by law on the plaintiff. *Damnum* means loss or damage. *Injuria sine damno* means violation of a legal right without causing any harm, loss or damage to the plaintiff.

Ashby v. White [(1703) 2 Lord Raym 938]

The plaintiff was a qualified voter at a parliamentary election. He was not allowed to cast his vote by the defendant, a returning officer. No loss was suffered by such refusal because the candidate for whom the plaintiff wanted to vote won in spite of the wrongful act of the defendant. The court applied the maxim *Injuria sine damno* and held that the plaintiff is entitled to nominal damages.

Bhim Singh v. State of J&K (AIR 1968 S.C 494)

The petitioner, a Member of Legislative Assembly of State of Jammu & Kashmir, was wrongfully detained by the police while he was going to attend the Assembly session. He was not produced before the Magistrate within 24 hours. As a consequence of this, the member was deprived of his Constitutional right to attend the Assembly session and his fundamental right to be produced before the Magistrate within 24 hours. The Supreme Court awarded to him Rs. 50,000/- by way of consequential relief.

Thus, where there is *Injuria* (i.e., infringement of right), the plaintiff is entitled to damages or compensation even though the plaintiff has not actually suffered any damage or loss. The maxim *Injuria sine damno* embodies this principle.

Damnum sine injuria (Damage or loss without violation of right)

Under law of torts, the defendant is not liable if there is no violation of right of the plaintiff even though his act has resulted in damage or loss to the plaintiff. Where there is no violation of a legal right, no action can lie in a court of law even though the defendant's act has caused some loss or harm or damage to the plaintiff. This principle is expressed by the maxim *Damnum sine Injuria*. It means that a damage without the violation of a legal right is not actionable in a court of law.

Gloucester Grammar School case (1410) Y.B. Hill 11 Hen

The plaintiff was conducting a grammar school. The defendant opened a new school next door to the plaintiff's school. Majority of the students left the plaintiff's school and joined in the defendant's new school. This resulted in loss to the plaintiff. The plaintiff claimed compensation from the defendant. The court held that the plaintiff had no cause of action against the defendant because it was only a case of *damnum sine injuria* (damage without violation of legal right). There was no duty on the part of the defendant that a school should not be started near the plaintiff's school.

Mogul Steamship Co. V. Gregor Gow and Co. (1892) A.C. 25

The plaintiff and defendants were owners of ships and engaged in the business of carrying tea. In order to drive the plaintiff out of this field the defendants associated together and reduced the freightage. The plaintiff was also forced to reduce the freight to compete with the defendants. This resulted in heavy loss to the plaintiff. The plaintiff filed a suit and claimed compensation from the defendants. The Court held that there was no violation of right of the plaintiff and hence the defendants were not liable to compensate the plaintiff.

Mayor of Bradford Corporation v. Pickles (1895) A.C 587

The defendant had a piece of land which he offered to the Bradford Corporation for sale. The offer was not accepted. This infuriated the defendant. The Corporation was supplying water to a village from wells on its own land. The wells were fed by an underground stream passing underneath the land of the defendant which was on a higher level. The defendant began to dig deep on his own land. The underground water was thus impounded by him on his own land and was prevented from reaching the Corporation's wells. The object of the defendant was to compel the corporation to buy his land at his own price. The Corporation sued the defendant for an injunction to restrain him from digging and claimed compensation.

The House of Lords held that since the defendant was exercising his lawful right he could not be made liable even though the defendant acted maliciously.

Thus a legal act, though motivated by malice, will not make the defendant liable. The plaintiff will get compensation only if he proves to have suffered loss as a result of violation of his right by the act of the defendant.

(iii) Remedy by way of Compensation

In order to succeed in a tort case, the plaintiff should establish that a civil action is available for damages. It should be the main remedy. Other remedies such as injunction should only be additional remedy. Where the claim for damages is the secondary remedy, the wrong, though civil in nature, is not a tort.

Topic - IV Relevance of 'Evil Motive' or 'Malice'

The general rule is that 'evil motive' or 'malice' or 'ill-will' is irrelevant in the law of tort. Tortious liability arises when a defendant has committed a breach of his duty. So long as there is no breach of duty, there is no liability in law of tort. Even if the plaintiff suffered loss or damage from the malicious act of the defendant, the plaintiff cannot recover compensation from the defendant unless the plaintiff shows that legal right has been violated. Thus bad motive or malice is, as a general rule, irrelevant in the law of torts.

This is well illustrated by the decision of the House of Lords in **Mayor of Bradford Corporation v. Pickles (1895)**. The facts of the case were as follows:

The defendant had a piece of land which he offered to the Bradford Corporation for sale. The offer was not accepted. This infuriated the

defendant. The Corporation was supplying water to a village from wells on its own land. The wells were fed by an underground stream passing underneath the land of the defendant which was on a higher level. The defendant began to dig deep on his own land. The underground water was thus impounded (or collected) by him on his own land and was prevented it from reaching the Corporation's wells. The object of the defendant was to compel the corporation to buy his land at his own price. The corporation sued the defendant for an injunction to restrain him from digging in his land and for compensation.

The House of Lords dismissed the action brought by the corporation holding that the bad motive or malice of the defendant is immaterial in considering whether his act is a legal wrong or not.

Exceptions to the General Rule

There are certain exceptional circumstances under which the malice or evil motive becomes relevant in determining liability under the law of torts. They are the following.

- (i) In the torts of deceit, conspiracy, malicious prosecution and injurious falsehood, one of the essentials to be proved by the plaintiff is malice on the part of the defendant.
- (ii) In a case of defamation, when qualified privilege or fair comment is pleaded as a defence, motive becomes relevant.

Topic - V Distinction between Tort and Crime

Tort is a civil wrong and the wrongdoer is liable to pay compensation to the plaintiff. A crime is an act or omission in violation of law which prescribes punishment.

There is a common element both in tort and crime, namely, the

violation of a general duty which a person owes to the public. Except this resemblance there is clear distinction between tort and crime. The following are the differences between tort and crime

1. Tort is considered to be a private wrong . Crime is considered to be a public wrong.
2. In the case of tort, the aggrieved person himself has to file a suit. In the case of crime, the prosecution proceedings against the accused are normally initiated at the instance of the State eventhough the victim is an individual.
3. In the case of tort, the plaintiff can compromise with the defendant at any time and withdraw the suit. In the case of crime except in exceptional cases(section 320 of Criminal Procedure Code, 1973 which gives a list of compoundable offences and the persons by whom particular offences are compoundable) law does not permit a settlement of criminal case between the wrongdoer and aggrieved party.
4. In the case of tort ends of justice are met by awarding compensation to the injured party. In the case of crime, on the other hand, the wrongdoer is punished. The idea of awarding compensation to the injured party under civil law is to make good the loss suffered by him. The punishment under criminal law protects the society by preventing the offender from committing further offences and deterring him and other potential offenders from committing wrongs.
5. In the case of a crime the death of the accused puts an end to the prosecution. Criminal liability is not transmitted to the legal representatives of the offender. A tort feasor's legal representatives, however, can be sued except when the tort is defamation, assault or personal injury not causing death (section 306 of the Indian Succession Act,1925).

Topic - VI

Distinction between Tort and Breach of Contract

The following are the differences between tort and breach of contract

- a) Tort is a civil wrong. A contract is an agreement enforceable by law.
- b) A breach of contract results from the breach of duty undertaken by the parties themselves. A tort, on the other hand, results from the breach of such duties which are not undertaken by the parties themselves but which are imposed by law.
- c) In tort, the duty is imposed by the law and is owed to persons generally. Such a duty is called *duty in rem*. In a contract, the duty is self-imposed and arises from agreement between parties. The duty is owed to a specific individual, i.e., the other contracting party. Such a duty is called a *duty in personam*.
- d) In contract, the parties may fix the amount of compensation by agreement. Such damages is called *liquidated damages*. In tort, damages are always unliquidated and the amount payable by way of compensation is not predetermined and the Court is at liberty to award such sum at its discretion as it thinks just.

Topic -VII

Pigeon Hole Theory (Law of Tort or Law of Torts)

Or

"There is no law of tort; there is only law of torts", (Salmond)

Discuss

Or

"All injuries done to another person are torts unless there is some justification recognised by law", (Winfield) Discuss,

A tort is a private wrong arising from the breach of a duty imposed by the state. The State impose duties of various kinds. For instance, there is a duty not to cause bodily harm to another; a duty not to slander and a duty not to enter upon the land of another without his permission and so on. The breach of these duties give rise respectively to the torts of trespass to person, defamation, trespass to property and so on. There are thus a large number of torts. In the nature of things there need be no connecting thread running through all these wrongs. For this reason it is said that there is no law of tort as such and there is only a law of torts. This is called the Pigeon-hole theory of torts. It is so called because each tort is supposed to occupy one "Pigeon-hole" as it were and there is no connecting link with the rest.

Salmond was a strong supporter of this theory. According to him, the liability under this branch of law arises only when the wrong is covered by any one or the other nominate tort. There is no general principle of liability and if the plaintiff can place the wrong in any one of the pigeon-holes, each containing a labeled tort, he will succeed. If there is no Pigeon-hole in which the plaintiff's case could fit in, the defendant has committed no tort.

Winfield is an opponent to this theory and according to him, all injuries done to another person are torts unless there is some justification recognised by law. This theory of Winfield opposed to the Pigeon-

hole theory. According to him, if a person injure his neighbour, the injured can sue the wrongdoer in tort whether the wrong happens to have a particular name like assault, battery, deceit, slander, or whether it has no special title at all; and the wrongdoer shall be liable if he cannot prove lawful justification. Thus, Winfield is an opponent of the Pigeon-hole theory.

One important consequence of the Pigeon-hole theory is that no new tort can be recognised i.e. a novel situation causing injury cannot lead to a new tort. It is true that courts are reluctant to recognise new torts. But to assert that the categories of torts are closed would not be correct. Further we can define tort as such without reference to any specific tort. This itself shows that we can have a general law of tort. Thus the Pigeon-hole theory is unsound.

Topic-VIII

General Defences

If the plaintiff proves in an action for a specific tort the existence of all the essentials of that tort, the defendant would normally be liable for the same. The defendant can, however, avoid his liability by taking plea of some defences. There are some special defences which are peculiar to some particular specific torts, for example, in an action for defamation the defences of privilege, fair comment or truth are available. The following are some of the general defences.

1. *Volenti non fit Injuria* (Defence of Consent)

The maxim *volenti non fit Injuria* means that a person who has consented to suffer a harm has no remedy in law. If the plaintiff has voluntarily consented to suffer some harm, he is not allowed to complain for that and he has no remedy in tort.

When you invite somebody to your house, you cannot sue him for trespass. Similarly you cannot sue a surgeon for battery after submitting to a surgical operation. It is because you have consented to these

acts.

Consent to suffer the harm may be express or implied. When consent is given by words, oral or written, it is express consent. The implied consent can be inferred from the conduct of the parties. For example, a player in the games of cricket or football is deemed to be agreed to any hurt which may be resulted in the normal course of the game. Thus a player in a game of cricket or football has no right of action if he is injured while the game is played lawfully. So also, spectators to cricket or football or hockey matches or at motor races are presumed to undertake the risks which may reasonably be expected to occur at such meets.

Hegarty v. Shine L.R. 4 Irl. 288 (1878)

The plaintiff was infected by her paramour with a venereal disease. He had concealed from her of the disease. She sued him for assault and battery. The Court held that she was a consenting party and thus not entitled to claim compensation.

Regina v. Clarence, 16 Cox C. C. 511 (1888)

It was held that a husband could not be convicted of a criminal assault upon his wife for having intercourse with her while to his knowledge he was infected with venereal disease, though she was ignorant of his condition.

Hall v. Brook Lands Auto Racing Club, (1932) 1 KB 205

The plaintiff was a spectator at a motor car race which was held at Brook lands on a track owned by the defendant company. During the race there was a collision between two cars. One of which was thrown among the spectators and resulted in injury to the plaintiff. It was held that the plaintiff impliedly took the risk of such injury and the defendant was not liable.

Wooldrige v. Summer (1963) 2 Q.B. 43

The plaintiff a photographer, at a horse show was injured by a galloping horse ridden at the show by the defendant. The court held that

the defendant not liable as it is a case of *volenti non fit injuria*.

Knowledge does not necessarily imply assent (Scienti non fit Injuria)

It is to be noted that the maxim *volenti non fit injuria* applies only when there is consent to suffer the harm. It does not apply when there is only knowledge of any danger. Mere knowledge of an impending danger does not amount to consent of the plaintiff. This principle is contained in the maxim *scienti non fit injuria*. A pedestrian walking through the street may have knowledge of danger resulting from road accidents. That knowledge of danger cannot be treated as consent to suffer the harm. If such a pedestrian is injured in a road accident, the defendant (driver of the vehicle) cannot take the defence of *volenti non fit injuria*.

Smith v. Charles Backer and Sons (1891) A.C. 325

The plaintiff was employed as a gangman in the defendant's stone quarry. By means of a crane, the defendant used to swing stones over the quarrymen heads. The plaintiff was aware of this practice. One day, the plaintiff sustained injury when a stone fell on him. The defendant put up the plea of *volenti non fit injuria*. The court held that it is a case of *scienti non fit injuria* and not *volenti non fit injuria*. Thus the defendant was held liable to pay compensation.

South Indian Industrial Ltd. V. Alamaru Ammal (1932)

The plaintiff was a workman employed by the defendant. The defendant adopted a method of breaking up cast iron by dropping a heavy weight on pieces of iron from great height. A piece of iron flew off and hit the plaintiff. The plaintiff claimed compensation. The defence of consent was held to be not available since it was a case of *scienti non fit injuria*.

Limitation to the Maxim (Rescue Cases)

The defence of *volenti non fit injuria* is not available when the plaintiff has consented to suffer the harm in rescue cases. In spite of the fact that the plaintiff has consented to suffer the harm, he may still be entitled to his action against the defendant in rescue cases. Rescue cases form an exception to the application of the doctrine of *volenti non fit injuria*.

Hynes v. Harwood (1935) 1 KB 146

The defendant's servants left a two horse van unattended in a street. A boy threw a stone on the horse and they bolted in the direction of some children. To prevent harm to the children a police constable, who was on duty, managed to stop the horse, but in doing so he himself suffered serious personal injuries. It being rescue case, the defence of '*volenti non fit injuria*' was not accepted and the defendants were held liable.

2. Inevitable Accident

Accident means an unexpected injury. It is inevitable accident if the unexpected injury could not have been foreseen and avoided in spite of reasonable care on the part of the defendant. Inevitable accident is a good defence if the defendant can show that he neither intended to injure the plaintiff nor could be avoided the injury by taking reasonable care.

The defendant can avoid his liability by pleading the defence of Inevitable accident, if the following conditions are satisfied:

1. The defendant should have done an act.
2. The act of the defendant should have resulted in injury to the plaintiff
3. The defendant should not have expected such injury.
4. The defendant could not have foreseen such injury
5. The defendant could not avoid such injury in spite of reasonable care on his part.

6. The defendant should not have intended to cause such injury to the plaintiff.

Brown v. Kendal (1850) 6 CUSH [60 Mass] 292

The dogs of plaintiff and defendant were fighting on the road. While the defendant was trying to separate them, the stick accidentally hit the plaintiff in his eye and resulted in injury. The court held that the injury was resulted from a pure accident and for which no action could lie against defendant.

Nitro-Glycerine case (1872) 15 Wallace 524

The defendants, a firm of carriers, were given a wooden case for being carried from one place to another. The contents of the box were not known. Finding some leakage in the box, the defendants took the box to their office building to examine it. While the box was being opened the Nitro-Glycerine case in the box exploded and the office building, belonging to the plaintiff, was damaged. It was held that since the defendants could not reasonably suspect that the box contained Nitro-Glycerine they were not liable for the damage caused by the accident.

Stanley v. Powell (1891) 11 Q.B 86

The plaintiff and the defendant, who were members of a shooting party, went for pheasant shooting. The defendant fired at a pheasant, but the shot from his gun glanced off an oak tree and injured the plaintiff. It was held that the injury was accidental and defendant was not liable.

3. Act of God (*Vis Major*)

An act of God is an inevitable accident resulting from natural causes such as heavy rainfall, storms, tempests, earth quake etc. Act of God is a good defence in tort litigation. In order to establish this defence, the following conditions are to be satisfied:

- (I) There must be working of natural forces without human

Intervention

- (ii) The working of natural forces should have resulted in injury to the plaintiff
- (ii) The occurrence must be extraordinary
- (iii) The occurrence must be one which could not be anticipated by the defendant
- (iv) The occurrence must be one which could not be avoided by reasonable care on the part of the defendant.

Nichols v. Marshland (1876) 2 Ex. D. 1

The defendant created some artificial lakes on his land by damming some natural streams. Once there was an extraordinary rainfall, stated to be the heaviest in human memory. As a result of this, the embankments of the lake broke down. The rush of water washed away four bridges belonging to the plaintiff. The suit was brought in respect of this damage. It was held that the defendant was not liable since the damage was the result of Act of God.

Kallulal v. Hemchand (1958)

The wall of a building collapsed on a day when there was a rainfall of 2.66 inches. That resulted in the death of plaintiff's two children. The court held that the defendant could not take the defence of Act of God in this case as that much of rainfall during the rainy season was not something extraordinary. Such a rainfall ought to have been anticipated and guarded against. The defendant was, therefore, held liable. Thus if the rainfall is a normal one which could be expected in a certain area, the defence of Act of God cannot be pleaded.

4. Private Defence

Law permits use of reasonable degree of force to protect one's person or property and this right is called right of private defence. There is no liability for acts done in defence of one's person or property. The force used must be proportionate to the danger apprehended and should not be excessive. What force is necessary depends on the circumstances

of each case.

Bird v. Holbrook (1823) 4 Bing 628

The defendant has put up spring guns in his garden without fixing any notice about the same and a trespasser was seriously injured by its automatic discharge. It was held that the plaintiff was entitled to recover compensation as the force used here was greater than the occasion demanded.

Ramanuja Mudali v. M. Gangan, (AIR 1984 Mad. 103)

The defendant, a land owner had laid some live electric wire on his land as a sort of defence. While the plaintiff passed through the defendant's land at 10 p.m. to reach his own land, he received a shock from the wire and sustained injuries. The defendant had given no visible warning about such wire. He was, therefore, held liable for the injuries caused to the plaintiff.

Herbert Richard v. Munisami (1950)

The defendant raised potato crop in his field. To protect the potatoes from damage by trespassing pigs, he laid traps in some places near the hedge. The plaintiff's cow fell into one of these traps and was injured. He sued for damages. The defendant claimed the defence of private defence of his property from trespassing animals. The right of private defence was accepted by the court and held that the defendant was not liable as the force used to protect the property was reasonable.

5. Mistake

The general rule under law of torts is that the mistake of fact or law is not a defence. Thus if I take away your umbrella, honestly believing that is my own is tort of trespass to goods.

In **Basely v. Clarkson, (1681 3 Lev.37)**, it was held that entering the land of another thinking that to be one's own is tort of trespass to land.

In **Consolidated Co. v. Curtis** (1894) 1 QB, 'X' had authorised an auctioneer to sell his goods by auction. The auctioneer sold the goods by auction and paid the money to X. He honestly believed that the goods belonged to X. The true owner instituted civil proceedings and claimed compensation for the tort of conversion. The court held that the auctioneer was liable even though he acted under a mistaken belief.

6. Necessity (*Necessitas non habet legem* -Necessity has no law.)

If the defendant has done an act or inflicted a harm under necessity to prevent a greater harm, he is not liable for the tort. The defence of necessity has its origin from the maxim *necessitas non habet legem*. The maxim means necessity has no law.

In **Mouse's Case** (1609) 12 Rep.63, the defendant had thrown goods overboard a ship to reduce its weight for saving the ship and persons on board the ship. The defendant was held to not liable for tort of conversion

In **Manby v. Scott** (1672), 1 Levins, 4, it was held that the law of necessity dispenses with things which otherwise are not lawful to be done.

In **Couturier v. Hastele** (1856) 5 HLC 673, the defendant, a master of a ship, sold perishing cargo without permission of the owner. It was held that he is not liable for tort of conversion as he has done it to avoid greater harm to the cargo.

In **Cope v. Sharpe** (1891) 1 K.B. 496, the defendant entered into the land of plaintiff to prevent the spread of fire to the neighboring land over which the defendant's master had shooting rights. As the act of defendant was to prevent real and imminent danger, it was held that the defendant was not liable for trespass.

In **Leigh v. Gladstone** (1909) 26 T.L.R. 139, a hunger striking prisoner was feeded forcibly to save his life. In an action for battery, forcible feeding

was justified as an act of necessity.

It is to be noted that to get justification under the head necessity, the interference should be reasonably necessary. If there is no real necessity, the defence of necessity would not be available.

In **Kirk v. Gregory** (1876) 1 Ex D 55, the defendant was sister-in-law of "A". After death of A the defendant removed some jewellery from the room where A's body was lying to another room thinking that to be a safer place. The jewellery was stolen from there. It was held that the interference was not reasonably necessary; and hence the defendant was liable for conversion.

In **Carter v. Thomas** (1891) Q.B. 673, the defendant entered into the land of the plaintiff to extinguish fire. In fact the firemen were working at that time. The defendant was held to be liable for trespass to land, as the entry was unwarranted.

7. Statutory Authority

If the defendant has acted under statutory authority (under the authority of legislation), he is not liable to compensate the plaintiff, even though the plaintiff has sustained loss or injury. However the plaintiff can claim compensation provided under the statute.

Thus if a railway line is constructed through your property, you can claim compensation for land acquisition as provided in the acquisition law. If the railway line is constructed in front of your house, it may cause nuisance in different forms such as noise, vibration, smoke etc. Further due to these incidental harms value of your property may be reduced considerably. You cannot seek any relief for this type of incidental harms.

In **Vauhan v. Taff Vale Rail Co.** (1860) 5 H and N 679, the defendant was running trains under statutory authority. Sparks from a passing railway engine set fire to the plaintiff's woods on the adjoining land. The suit of the

plaintiff was dismissed. It was held that when the legislature has sanctioned the use of a particular thing, and it is used for the purpose for which it was authorised, the sanction of the legislature carries with it this consequences, that if damage results from the use of such thing, the party using it is not responsible.

In **Hammer Smith Rail Co. Brand** (1869) LRHL 171, the plaintiff was owner of some property adjoining a railway track. The value of the plaintiff's property had diminished considerably due to the noise, vibration and smoke caused by the running of trains. As the railway track was constructed under statutory authority and the damage was necessarily incidental to the running of the trains, the defendants were held to be not liable.

7. ***Ex turpi causa non oritur actio* (Plaintiff the Wrongdoer)**

If the plaintiff has sustained injury from his own wrongful acts, he cannot claim compensation from the defendant. In other words, if the harm is the result of plaintiff's own wrongful acts, the defendant can take the defence of *ex turpi causa non oritur actio*. The maxim means 'from an immoral or illegal cause no action arises'. It is to be noted that the harm should have arisen out of the plaintiff's own act and the harm should not be resulted from the tortious acts of defendant.

If the plaintiff and defendant have committed tortious acts and the plaintiff has sustained injuries, he can still claim compensation from the defendant. This principle can be identified from the decision in **Bird v. Holbrook**(1828) 4 Bing. 628. In this case the plaintiff, a trespasser over the defendant's land was entitled to claim compensation for injury caused by a spring gun set by the defendant in his garden without warning or notice.

Topic -IX Doctrine of Vicarious Liability

The general rule under law of torts is that normally a person will be liable only for his own wrongful acts. He will not be liable for tortious acts of another. But under special circumstances a person may become liable for the wrongful acts of another. Such liability is called vicarious liability. In order to fix liability upon a person for the wrongful acts of another, there should exist a certain kind of relationship between them and the wrongful act should in a certain way be connected with that relationship.

In law of torts, the master(employer) is vicariously liable for the wrongful acts of his servant. The vicarious liability of a master for the wrongful acts of his servant is based mainly on two maxims. They are as follows:

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

Master's responsibility for his servant's act has its origin in the maxim '*Qui facit per alium facit per se*' The maxim means 'one who has done an act through another will be deemed to have done it himself'. If I engage a servant to drive my car and an accident results due to the negligence of my servant, it will be deemed that I myself have driven the car. Master will be responsible for all authorised acts of his servant. Their liability is joint and several. Thus when the servant commits a tortious act, the master and servant will be jointly and severally liable for the same.

(2) *Respondeat Superior*

Another maxim which supports the liability of master for the acts of his servant is *respondeat superior*. The maxim '*respondeat superior*' means 'let the principal be liable'. This maxim puts the master in the same position as if he had done the act himself. The liability of master

and servant is joint and several as they are considered to be joint tortfeasors. The reason for the maxim *respondeat superior* seems to be the better position of the master to meet the claim because of his larger pocket.

In order to be a master liable for the acts of his servant, the following two essentials are to be present.

(1) **The tort should be committed by Servant and not an independent contractor.**

A **Servant** is a person employed by another to do work under the '*directions and control*' of his employer. Though a master or employer is liable for the acts of his servant, he is not vicariously liable for the acts of an **Independent contractor**. It is because an independent contractor is not subject to the control and supervision of his employer. He undertakes certain work and regarding the manner in which the work is to be done, he is his own master and exercise his own discretion. If I engage a driver for my car, he is my servant and if an accident happens while he is driving, I can be made liable. But suppose I am travelling in a taxi and an accident happens. I am not liable as the driver of the taxi is not my servant. He is an independent contractor.

Morgan v. Incorporated Central Council, (1936)

The plaintiff visited the defendant's premises. He fell down from an open lift shaft and got injured. The defendants had entrusted the job of keeping the lift safe and in proper order to certain independent contractors. It was held that for this act of negligence on the part of the independent contractors in not keeping the lift in safe condition, the defendants could not be held liable.

Vicarious Liability of Hospital Authorities for the tortious acts of doctors, nurses etc.

The liability of Hospital Authorities for the tortious acts of its servants can be studied by examining the following decisions.

(1) **Hiller v. St. Bartholomew's Hospital (1909)**

In this case, one important question arose was whether the Hospital authorities liable for the wrongful act of a doctor. A servant is one who is under the general control of the master. A doctor rendering professional service (e.g. performing an operation) is not under the control of Hospital authority though he is paid by it for his services. Applying this principle, it was held that the hospital authority was not liable for the negligence of the doctor.

(2) **Lindsey County Council v. Marshall (1937)**

In this case, the plaintiff was admitted in the room of a hospital. In that room another patient suffering from puerperal fever was admitted and discharged. The plaintiff was admitted in the same room without disinfecting it. The plaintiff was not warned of this fact. He also caught that fever. It was held that the Hospital authority (i.e., County Council) was liable.

(3) **Cassidy v. Ministry of Health (1951)**

In this case, the plaintiff came to the Hospital for treatment of two fingers of his hand. Owing to the carelessness of the Doctor who performed an operation all the fingers became useless. It was held that the hospital authority was liable. In such a case, the Doctor is regarded as a 'Servant' on grounds of Public Policy. Then the principle of '*respondent superior* (let the master answer) become applicable.

(4) **Joseph @ Pappachan and Others v. Dr. George Moonjely and others (1994 (1) KLJ 782)**

In this case, one Marry died as a result of negligent performance of

the Post Partum Sterilization (P.P.S) operation. The court held that the persons who run a hospital are liable for the negligence of their staff as anyone else employs others to do his duties for him.

The trend in recent cases is to make the Hospital Authority liable even for the professional negligence of the doctors employed by them.

Lending a servant to another person

When master lends his servant to another person and the servant commits a tort against the plaintiff while working with the person to whom he is lent, the question is who is to be considered the master. In order to ascertain the answer to the question, certain decisions are to be considered first.

Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool) Ltd. (1947)

The Harbour Board owned a number of mobile cranes and had employed skilled workmen as the drivers of the cranes. It was usual for the board to let out the mobile cranes, each driven by the skilled driver employed by them. Mr. 'S' hired a crane together with a driver for loading a ship. Due to the negligence of the driver, while loading a ship 'X' was injured. The House of Lords held that the Harbour Board, who was the general and permanent employer of the driver, was liable to 'X'. Mr. 'S' was not liable even though at the time of the accident, the driver was loading for Mr. 'S'. The reason for the decision was that although at the time of the accident, Mr. 'S' had immediate control over the crane-driver, in so far as he could direct him to pick up and move a particular cargo but that alone could not make him liable. They had no power to direct how the crane was to be operated. Thus the question of liability depends on many factors and the important consideration is - Who has the power to direct as to how the work is to be done.

Annamalai Timber Trust Limited v. Trippunithura Devaswam (1954)

Two mahouts who were in charge of an elephant belonging to the Devaswam. The A.T. Trust Limited had taken the elephant with two mahouts attached to it from the Devaswam under a contract of lease for a period of one year for the purpose of timber work on a rental basis and the two mahouts were under the control and in the service of the A.T. Trust Limited for the period of lease. The elephant died in consequence of the grossly negligent act of the mahouts in beating it when it refused to drag two heavy logs. The Devaswam filed a case against the A.T. Trust for compensation. The A.T. Trust limited contended that the negligent mahouts should be deemed to have been the servants of their permanent employer, the Devaswam. But the contention was rejected and the defendants, A.T. Trust Limited, were held to be liable. It is because the company had direct control over mahouts and they could have given direction as to the way in which the work was to be done.

2. The tort should have committed in the Course of Employment

A master is not responsible for a wrongful act of his servant unless it is done in the 'Course of employment'. The master will be vicariously liable for (1) authorised acts of the servants and (2) authorised acts done in an unauthorised way. A master will be liable for the acts of servants even if he had acted contrary to the directions issued by the master provided the servant was employed in the course of business of the master.

Illustrative decisions

1. Ricketts v. Thos Tilling Ltd. (1915)

D was owner of an omnibus. At the end of a journey, the omnibus had to be turned round for the next journey. The driver of the bus allowed the conductor to drive the bus. An accident occurred owing to the conductor's negligence and that resulted in injury to P. P claimed compensation. The court held that when the driver allowed the conductor to drive the bus on his master's business, he did the master's work in

a negligent way. The accident thus occurred in the course of employment of the driver. So the master was vicariously liable.

2. Mackean v. Rayno Brothers Ltd. (1942)

X was the workman of D. 'D' directed 'X' to go to a particular place by taking C's lorry. X proceeded on his journey by using a private car instead of D's lorry. While driving negligently car collided and killed P's husband. P filed a suit against D claiming compensation for the negligent act of 'X' on the principle of vicarious liability. The court held that the workman was doing an *authorised act in an unauthorised way*. The act of the workman was within the scope of his employment and D is vicariously liable as the master of X.

3. Century Insurance Co. v. Northern Ireland Road Transport Board, (1942)

A's servant, the driver of a petrol lorry, while transferring petrol from the lorry to an underground tank, struck a match to light a cigarette and threw it on the floor. This resulted in a fire and an explosion causing damage to B's property. B filed a suit against A for the negligent conduct of his servant. The court held that though the driver lighted the cigarette for his own comfort, yet it was a negligent method of conducting his work. The act being in the course of employment, A was liable for the driver's negligence.

4. London Country Council v. Catternoles Garage Ltd. (1953)

'X' was a garage hand. He was forbidden to drive vehicles but it was part of his duty to move them by manhandling. One day X driven a vehicle to move it and resulted in injury to P. P files a suit against the owners of Garage for the wrongful act of X. The court held that the Garage owners were liable as X was doing an *authorised act in an unauthorised way*.

Deviation or Private Frolic

A master becomes liable for his servant's torts only when they are committed in the course of employment. Suppose I ask my driver to go to the railway station to meet a friend of mine and to drive him home. On the way an accident happens owing to the driver's negligence. I am liable to answer for it vicariously. This is so even if for going to the station he does not follow the usual path but makes a deviation. The deviation is only in doing the master's business and it will not affect the master's liability. But if the driver instead of going to the station, picks up some of his friends and drives them in the car to various places for their entertainment, he is on a frolic of his own. For any accident caused by his negligence while he is on such a separate journey, I cannot be held liable in tort as it cannot be regarded as tort committed in the course of his employment.

Twine v. Beans Express (1915)

A was the driver of B's car. A gave a lift to his friend 'C' contrary to the order of B. The friend was aware of such order. Owing to A's negligent driving, there was an accident and C was killed. C's widow claimed compensation from B. The court held that C was a trespasser in the circumstances. B owed no duty towards him. Further, A was on a private frolic (i.e., his act was for his own benefit and not for master's benefit). In giving lift to C, the driver was not acting in the course of employment. So, B, as master, was not liable.

Sitaram v. Santanprasad.(1966)

A taxi owned by Sitaram was in the custody of the driver. The driver one day allowed the cleaner to drive the taxi to enable him (the cleaner) to take a driving test. While it was being driven by the cleaner, an accident occurred and resulted in injury to the plaintiff. The plaintiff filed a suit to recover damages from the owner of the taxi.

The driver was negligent in allowing the cleaner to drive. The cleaner was negligent in undertaking to drive. But to make the master

liable, the negligence must have occurred *in the course of the servant's employment*. In delivering the car to the cleaner to enable him to take a driving test, the driver was not acting in the course of his employment as driver. The cleaner was not acting in the course of the master's employment, because he was on a *frolic of his own* (on his own business to take driving test). This was not an unauthorised mode of doing an authorised act. So the owner of the taxi was held to be not vicariously liable.

Doctrine of Common Employment

A master against whom compensation is claimed for torts of his servant could plead the doctrine of common employment when the person claiming damages was also his servant. According to this doctrine one servant cannot claim damages from his master for the negligence of a fellow-servant. It is known as the rule in *Prestley v. Fowler* (1837). This rule has been abolished in England by the Law Reform (Personal injuries) Act, 1948.

The doctrine of Common Employment as defence to the masters liability for the torts of his servants was modified in India by the Employers Liability Act, 1938. Under this Act, the employer's liability may be enforced by the servant injured by the act of a fellow servant provided the act in question was done by the fellow-servant in the normal performance of his duties or in obedience to the instruction of the employer or other authority to whom power is delegated by the employer.

Topic - X

Capacity of State to Sue and be Sued in Tort

Or

Vicarious Liability of State for the Tortious Acts of its Servants

Or

Rex non potest peccare (King Can Do No Wrong)

Tortious act refers to a wrongful act for which the remedy is unliquidated damages. State is a legal person. It has no physical or mind. It has certain rights and obligations. State can act only through human beings. State performs its functions through its servants. If the servants of the State commit tortious acts in the course of their employment, the question of vicarious liability of the state would arise. Under the principle of vicarious liability, master will be liable to pay compensation to the aggrieved person for the wrong act of his servants.

If a person commits tortious act against the state, the state can always sue him and claim compensation for tort.

In England, the general rule was that the crown was not vicariously liable for the tortious acts of its servants. The maxim *Rex non potest peccare* (King can do no wrong) was applicable in England. In 1949, the Crown Proceedings Act was enacted by the British Parliament and the vicarious liability of the State for the tortious acts of its servants was fixed.

In India, even before the coming into force of the Constitution, state was held to be vicariously liable for the tortious acts of its servants. In *P & O Steam Navigation Co. V. Secretary of State* (1860) it was held that state was vicariously liable for the negligence of its servants who are engaged in Non-sovereign functions of the state. If a servant who is engaged in the Sovereign function of the State commits a tortious

act, the state was held to be not vicariously liable.

In *Secretary of State v. Cockraft* (1915), the Plaintiff was injured by the negligent leaving of a heap of gravel on a military road maintained by the Public Works Department over which he was walking. A suit for damages against government was held to be not maintainable because the maintenance of roads, particularly of a military road, was one of sovereign functions of the Government.

Articles 294 (b) and 300 of the Constitution fix the tortious liability of the Union of India and State Governments. By virtue of these Articles the liability will be the same as that of the Dominion of India and the Provinces before the commencement of the Constitution. Thus State is vicariously liable for the tortious acts of its servants only if they are engaged in non -sovereign functions of the government. If the servants who are engaged in the sovereign functions of the Government commit a tortious act, the state is not vicariously liable.

In *State of Rajasthan v. Vidhyavathi* (1962), a jeep was owned and maintained by the State of Rajasthan for the official use of the Collector of a district. The driver of the Jeep had negligently driven the vehicle while he was bringing it back from the workshop after repairs and a pedestrian was knocked down. He died and his widow sued the driver and State for damages. A Constitution Bench of the Supreme Court held that the State was vicariously liable for the rash and negligent act of the driver.

In *Kasturilal v. State of U.P* (1965), the Police arrested K under suspicious circumstances and recovered from him some gold ornaments. A crime case was registered against him for possessing stolen property. The gold ornaments recovered from him was kept in Police Custody. K was prosecuted and acquitted by the Court. K claimed gold ornaments. It was found that the gold ornaments were misappropriated by Head Constable and he fled to Pakistan. K claimed compensation from the

state for loss of his property due to the negligence of the police authorities. The Supreme Court held that state was not vicariously liable for negligence of its servants who are engaged in sovereign functions.

In *B.K.D. Patil v. State of Mysore* (1978), some gold ornaments were stolen from the House of B and the police arrested the thief and recovered the gold from him. It was kept in the Police Custody as per the direction of Court. Subsequently court directed the police to give the gold ornaments to B. It was found that the gold ornaments were stolen from police custody. B claimed compensation for negligence of police authorities from the state. The Supreme Court held that State was vicariously liable.

In *A.K. Khodwa v. State of Maharashtra* (1996 (1) KLT SN 34. P.27), it was held that running hospital is a welfare activity undertaken by the Government but it is not an exclusive function or activity of the Government so as to be classified as one which could be regarded as being in exercise of its sovereign power. Running of a hospital, where members of the general public can come for treatment, cannot be regarded as being an activity having a sovereign character. This being so, the state would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees. The court held that the State is vicariously liable for damages for the death due to the negligence of a doctor employed in a Government Hospital.

In *State of Haryana v. Santra* (2000) 5 SCC 182, a poor lady already having seven children offered herself for complete sterilisation operation at Government hospital. Subsequently she conceived and gave birth to a female child. It happened because her left fallopian tube was not operated. It was held to be a negligence of the doctor who conducted the operation. The court held that the State is vicariously liable for the negligence of its doctors in performing sterilization operation. The Court held that the state is liable to pay damages to the lady for bringing up

the unwanted child.

In **Railway Board v. Chandrima Das** (2000 (1) K L T 655)(SC), Hanuffa Khatoon, came from Bangladesh, was gang raped by some employees of the Railway in 'Yatri Niwas' at Howrah Railway Station. The Supreme Court held that running of Railway is a commercial activity (non -sovereign function) and the employees of the Union of India who were deputed to run the Railways if commit an act of tort, the Union Government is vicariously liable in damages to the person wronged by these employees. The Court awarded an amount of Rs. 10 lakhs as compensation.

Topic -XI **Liability of Minors for Tort**

A minor is a person who has not completed the age of eighteen years. If a tort is committed against him, he can claim compensation from the tort-feasor. If he wants to file a suit during minority, he has to institute the suit through his next friend. He can also file a suit after attaining majority for the tort committed against him during minority.

Claim for Pre-natal injuries

The question whether a child is entitled to compensation, if he had been born disabled because of the injury caused to it before birth as a result of the tortious act of the defendant was considered by the Canadian court in the case of **Walker v. G.N. Ry co of Ireland** (1891) L.R. Ir. 69

In the above case, a pregnant mother travelled in the defendant's train was injured in an accident. The accident was resulted due to negligence of the defendant. The child was born alive but he was disabled. The child claimed compensation. The court held that the defendant was not liable to pay compensation for two reasons. Firstly, the defendants did not owe any duty to the plaintiff as they did not know

about his existence; Secondly, the medical evidence to prove the plaintiff's claim was very uncertain.

In **Montreal Tramways v. Levelice** (1933), the Supreme Court of Canada allowed an action by a child born with club- feet, two months after an injury to its mother by the negligence of the defendants.

There are no English or Indian decision on this point. Majority of the writers on the subject are in favour of the view that an action for Prenatal injuries should be recognised if the act of the defendant can be considered to be tortious.

In England, **Congenital Disabilities.(Civil Liability) Act, 1976** was passed to make this point clear and the Act recognises an action in case of children born disabled due to some persons fault. The salient features of the Act are summarised below:

- (i) An action is allowed if the child is born alive, but disabled.
- (ii) Damages for loss of expectation of life of such a child can be claimed, provided the child lives for at least 48 hours after his birth.
- (iii) Contributory negligence of the parents can be pleaded as a defence in such an action.
- (iv) Liability towards the child can be excluded or restricted by a contract made with the parent of such a child.
- (v) The act permits an action not only for an injury to a child in the mothers womb, but also for acts prior to that. It permits an action for an occurrence which affected either parent of a child in his or her ability to have a normal, healthy child.
- (vi) An action for injury to the child is permitted even against child's mother, if the harm to the child is caused when she is guilty of negligent driving of a motor vehicle. In view of this fact there is compulsory insurance of all motor vehicles against 'Third party' Risk's such an action against the mother would virtually mean an action against the insurance company. An action even against the

father could be justified when the father assaults his pregnant wife and thereby causes injury to the unborn child.

A similar legislation in India is necessary to protect the interest of children.

Capacity to be Sued

Under law of torts, minority is not a defence. A minor is liable in the same manner and to the same extent as an adult, for tort committed by him. As you know, under the law of contract, no action can be brought against a minor as his agreement is void ab initio. Under Criminal law also a child below seven years of age cannot be held liable for any offence as he is presumed to be *doli incapace* (incapable of doing a wrongful act). Between the age of 7 and 12 years a child is not liable unless he had attained sufficient maturity of understanding to judge the nature and consequences of his conduct on the occasion. The law of torts does not make any distinction on the basis of age. Thus a child of seven years could be sued for trespass like a person of full age. However, if the tort is such as requires a special mental element such as deceit, malicious prosecution or conspiracy, a child cannot be held liable for the same unless sufficient maturity for committing that tort can be proved in his case.

Liability of parents for children's torts

The general rule is that a parent or a guardian cannot be made liable for the torts of a child. There are two exceptions to this rule.

They are:

- (i) If the child acts as an agent or servant of his father, the father is vicariously liable.
- (ii) When the father himself, *by his own negligence*, affords his child an opportunity to commit a tort, he is liable.

Bebee v. Sales (1916)

The father supplied an air-gun to his son, aged 15 years. Even after some complaints of mischief caused by the use of the gun, he allowed the gun to remain with the boy, who, thereafter accidentally wounded the plaintiff. The father was held to be liable.

Topic - XII

Tortious Liability of Insane Persons

If a tort is committed against an insane person, he can claim compensation from the tort-feasor. During the period of insanity, he cannot directly institute the suit. He can institute the suit only through his next friend.

Insanity is not a defence to tortious liability. If 'A' attacks and injures 'B', B can recover damages though 'A' may be insane. The fact that 'A' is immune from criminal liability is irrelevant.

If a particular state of mind is an essential ingredient of a particular tort, the non-existence of such state of mind may be shown by proof of insanity. To this extent, insanity has a limited scope as a defence in the law of torts.

In *Ramangulu v. Mullackal Devaswam (1975)* the appellant (defendant) entered in a temple with shoes and broke the idol. The temple authorities sued for damages. The defendant pleaded insanity as a defence. It was held that the defendant is liable in damages for insanity is not a general defence in tort. However, if a particular tort requires a particular kind of mental element (e.g. Malice), insanity may negative that ingredient of tort, because an insane person does not know the nature of what he is doing or that what he is doing is wrong.

Topic -XIII **Liability of Teachers**

A School Master has quasi parental authority. This disciplinary authority is supposed to have been delegated to him by the parents or guardian. So he can punish the student corporally. This is not assault if the following conditions are satisfied.

- (i) The punishment should be moderate;
- (ii) The master should not be actuated by malice;
- (iii) The punishment should not be contrary to the regulations or customs of the school.

These principles were laid down in **Mansels v. Griffin** (1908) 1-K B 160.

Topic -XIV **Joint Tort-feasors**

When a tort is committed against a person by two or more persons, they may be either independent tort-feasors or joint tort-feasors.

Independent Tort-feasors

Independent tort-feasors act independently and without any common intention but concur to produce a single damage. There is no concerted action on the part of independent tort-feasors.

Example

'A' and 'B' are drivers of two cars. The cars were coming from opposite direction. Due to the negligence of both the drivers, the vehicles collided and a pedestrian was crushed between two cars. Here 'A' and 'B' are independent tort-feasors.

The liability of the independent tort-feasors is *not joint but only several* and therefore, there are as many causes of action as the number

of tort-feasors. Under such a circumstance, since they are severally liable an action against one of them is no bar to an action against the other.

Joint tort-feasors

Two or more persons are said to be joint tort-feasors when the wrongful act, which has resulted in a single damage, was done by them not independently of one another but in furtherance of a common design. For example, if A and B, with a common design, jointly stone C's cow, they will be deemed to be joint tort-feasors. Parties cannot be joint tort-feasors unless they have mentally combined together for some purpose.

Persons having certain relationship are also treated as joint tort-feasors. The common examples of the same are: Principal and Agent, Master and his servant and the partners in a partnership firm. If an Agent does a wrongful act in the scope of his employment for his principal, the principal can be made liable along with the agent as joint tort-feasor. Similarly, when the servant commits a tort in the course of employment of his master, both the master and servant are liable as joint tort-feasors. In the same way, for the wrongful act done by one partner in a partnership firm, in the course of performance of his duties as a partner, all the other partners in the firm are liable along with the wrongdoer.

The liability of joint tort-feasors is *joint and several*. The plaintiff has a choice to sue any one of them, some of them, or all of them in an action. Each one of them can be made to pay the full amount of compensation. Thus, for the wrong done by the agent, both the principal and the agent are jointly and severally liable. Even though the actual wrongdoer is the agent, if the plaintiff so elects, he may sue the principal for the whole of the damage.

Composite Tort-feasors

The courts in India have not followed the distinction between joint and independent tort-feasor, as recognised in England. When two or more persons are responsible for a common damage, whether acting independently or jointly, they have been termed as composite tort-feasors. The liability of composite tort-feasors is *joint and several*. No one of the tort-feasors is allowed to say that there should be apportionment, and his liability should be limited to the extent he is at fault. The judgment against the composite tort-feasors is for a single sum without any apportionment in accordance with the fault of various tort-feasors, and the plaintiffs can enforce the whole of his claim against any one of the defendants, if he so chooses. The defendant who has paid more than his share of the liability may claim contribution from the other defendants.

In *Karnataka State Road Transport Corporation v. Krishnan* (1981), two passenger buses brushed each other in such a way that the left hand, of two passengers travelling in one of these buses were cut off below the shoulder joint. It was held that the drivers are composite tort-feasors and both the drivers are jointly and severally liable to pay the compensation.

Contribution between Joint Tort-feasors

The liability of joint tort-feasors is joint and several. Thus the plaintiff has a right, if he so chooses, to make only one of the joint tort-feasors to meet the whole of his claim. The question which generally arises is that if one of the several tort-feasors has been made to pay not only for his own share of responsibility but for others as well, how far he can ask others responsible with him to contribute for their share of responsibility. For example, if A and B have equal share of responsibility in a tort which they committed against X, and A has been made to pay a sum of Rs. 10,000 to fully compensate X for the loss suffered by him, can A sue B to recover a contribution of Rs. 5000 from him? In *Merry Weather v. Nixon* (1789) 8 T.K. 186 it was held that under such a circumstance A

cannot sue B for contribution.

The rule in *Merry weather's case* has been abrogated by the Law Reform (Married Women and Tort-feasor) Act, 1935. Now a tort-feasor, who has been made to pay more than his share of damages, can claim contribution from the other joint tort-feasors for their share of the wrong.

The amount of contribution which a tort-feasor has to pay will depend upon his responsibility for the damage. If, for instance out of the two joint tort-feasors, A and B, who are equally responsible for the wrong, A has been made to pay damages for the whole of the loss, he can claim equal i.e., 50% of contribution from B. But, if it is found that their responsibility for the wrongful act was not equal, say A's fault was 75% and B's 25%, A can claim only 25% contribution from 'B'.

Topic - XV

Assault, Battery and Mayhem

Assault

Assault is an act of the defendant which caused to the plaintiff reasonable apprehension (fear) of infliction of a battery on him by the defendant. The wrong of assault will be completed, when the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to inflict 'battery' (unjustifiable force) against the plaintiff.

The following are the essentials of assault

1. The defendant should have done an act.
2. The act of the defendant should have resulted in an apprehension in the mind of the plaintiff that the defendant would inflict battery.

The essence of assault is putting a person in reasonable fear of an immediate battery. The wrong consists in an attempt to do the harm. Thus when 'A' raises his stick at the face of B and threatens him a blow

with it, he has committed the offence of assault by creating a reasonable apprehension of danger to his body and life. To shake one's fist on a man's face is assault. If the person shaking the fist is at a great distance, so that no fear is caused to the other, there is no assault. Even pointing a loaded gun at another behind his back is not assault because no apprehension of danger is thereby caused. On the other hand, even pointing an unloaded gun at another within his sight is assault.

Stephen v. Myers (1830)

The plaintiff was the chairman of a Parish meeting. The plaintiff ordered the defendant to leave the meeting. In Protest of this, the defendant advanced to the chairman with clenched fist saying that he would pull him out of the chair. The defendant was stopped by the church warden, who sat next to the chairman. The plaintiff filed a suit against the defendant for the tort of assault. The court held that the defendant was liable for the wrong of assault. It is because had the defendant not been stopped, he would have carried out his threat and that would have been a battery. The act of the defendant had put the plaintiff in reasonable fear of an immediate battery.

R.V. St George (1846)

The defendant pointed an unloaded pistol at the plaintiff. The plaintiff filed a suit claiming compensation for assault. The court held that pointing an unloaded pistol would amount to the wrong of assault. What is required to complete the wrong is reasonable apprehension of an immediate battery.

Battery

Battery is the intentional application of force to another person without any lawful justification. In assault, there is reasonable apprehension of a battery. Battery is the actual application of physical force. Thus, touching another person without his consent is technically a bat-

tery. The essence of battery is the actual application of force.

The wrong of battery consists in intentional application of force to another person without any lawful justification.

The following are its essential requirements:

- (i) The defendant should have used force.
- (ii) The force should be used without any lawful justification.

Use of Force

The defendant should have used force to the plaintiff. Even though the force used is very trivial and does not cause any harm, the wrong is still constituted. Physical hurt need not be there. Least touching of another in anger is a battery. The force may be used with the use of stick, bullet or throwing of water or spitting on a man's face or making a person to fall down by pulling his chair.

Innes v. Wylie (1844)

A policeman unlawfully prevented the plaintiff from entering the club premises. It was held that mere passive obstruction could not be considered as the use of force and there was no assault or battery.

Without Lawful Justification

In order to constitute the wrong of battery, the use of force should be without any lawful justification. If two or more persons meet in a narrow passage, and without any violence or design of harm, one touches the other gently, it will be no battery. But if either of them uses violence against the other, it will be a battery. Thus touching a person in a friendly way to draw his attention to something is not battery.

Pratap Daji v. B.B & C.I Ry. (1875)

The plaintiff entered a carriage on the defendant's railway but by

oversight failed to purchase a ticket for his travel. At an intermediate station he asked for a ticket but the same was refused. At another place he was asked to get out of the carriage since he did not have a ticket. On his refusal to get out, force was used to make him out of the carriage. In an action by him for battery it was held that the use of force was justified as he, being without a ticket, was a trespasser. The defendants were held to be not liable.

Assault and battery are distinct and independent torts. There may be an assault without there being a battery, e.g. throwing stone at another on whom stone does not actually hit. There may be battery without there being an assault e.g. throwing stone upon a person from his back without his knowledge and the stone actually hit on his body.

Problem

A pulled the chair of B when he was about to sit and B fell down. What is the tort committed by A?

A is liable for assault and battery. When B was failing to ground there was assault and when B actually fell down, the wrong of battery was completed.

Mayhem

If, as a result of battery, a person is deprived of a bodily member useful in a fight, the tort is called Mayhem. Among the personal injuries not causing the death of a person, the most serious injury is called 'Mayhem or Maim'. An action for mayhem is maintainable only when a bodily member useful in fight is lost. Thus, if it is not a fighting limb, which has been deprived of, the action would not be for mayhem, but only for battery.

It has been held that the loss of feet, hands, legs, fingers or even castrating a person would give rise to an action for mayhem, while the

cutting of the ears, or the nose would amount to disfigurement and not the loss of fighting limb and therefore, gives rise only to an action for battery. Heavier damages would be awarded for Mayhem than for battery.

Topic - XVI False Imprisonment

When the defendant, without any justification, restrains or prevents the plaintiff from moving in any direction, the defendant is said to have committed the wrong of false imprisonment. False imprisonment is a restriction of freedom of movement. In order to constitute the wrong of false imprisonment, the restriction should be total, (i.e., in all directions) and unlawful.

In an action for false imprisonment the plaintiff must prove the following:

1. The defendant has totally restrained the plaintiff's freedom of movement.
2. The act of the defendant should be without any lawful justification.

(i) Total restriction of freedom of movement

In order to succeed in a case of false imprisonment, the plaintiff should prove that there was restriction of movement *in all directions*. If the plaintiff was free to move in any direction, and was only prevented from proceeding in one particular direction, then it will not be considered as the wrong of false imprisonment.

Bird v. Jones (1845)

The defendant wrongfully enclosed part of the public footpath on Hammersmith Bridge and put seats on it for the use of spectators of a boat race on the river and charged fee for admission to the enclosure. The plaintiff insisted on passing along this footpath and climbed over

the fence of the enclosure without paying the charge. The defendants prevented him from proceeding in that direction but told him that he may go back in to the carriage way and cross to the other side of the bridge if he so desired. He refused and remained in the enclosure for half an hour. In an action brought by the plaintiff against the defendants claiming damages for false imprisonment, the defendants were held not liable. It is because the restriction was not total but only partial.

The defendant will be liable for the wrong of False Imprisonment when he imposes a total restraint upon the liberty of the plaintiff without lawful justification. The defendant will be liable even though the period is very short. If a man is restrained, by a threat of force, from leaving his own house or an open field there is false Imprisonment. Detention may be even on a highway, or in a moving object like bus or a train. The total restraint results in false imprisonment, however short its duration may be.

(ii) The detention should be unlawful

In order to constitute the wrong of false imprisonment, it is necessary that the restraint should be total and *unlawful or without any justification*.

Rudul sah v. State of Bihar (1983)

The petitioner was acquitted by the court in 1968 but was released from the jail in 1982. i.e., 14 years after the acquittal. The Supreme Court awarded a sum of Rs. 35000/- as compensation as an interim measure, without precluding the petitioner from claiming further compensation. Thus, if a person is not released from jail after his acquittal but is continued to be detained thereafter, the detention cannot be considered to be lawful. The defendant will be liable for false imprisonment.

Bhim Singh v. State of J&K (1986),

The petitioner was an M.L.A. of the J&K Assembly. He was wrongfully detained by the Police in order to prevent him from attending the

Assembly session. The act of arrest was considered to be mischievous and malicious and the Supreme Court considered it to be an appropriate case for granting exemplary damages amounting to Rs. 50,000.

Remedies

i) Action for Damages

Whenever the plaintiff has been wrongfully detained, he can always bring an action to claim damages.

ii) Self Help

A person is authorised to use reasonable force in order to have an escape from detention instead of waiting for a legal action and procuring his release thereby. This is a remedy which is available to a person while he is still under detention.

iii) Habeas Corpus

Any person who is detained unlawfully may file a petition for writ of habeas corpus for his release. Such a writ may be issued either by the Supreme Court under Article 32 or by a High Court under Article 226 of our Constitution. By this writ, the court directs the detaining person to produce the detained person before the court and justify the detention. If the court finds that the detention is without any just or reasonable ground, it will order that the person detained should be immediately released.

Topic -XVII

Defamation

The reputation of a member of society is a valuable asset for him and it deserves protection at the hands of law. The good name one bears in society is one's reputation. Reputation of a person refers to the opinion of others about him. A person's own opinion about himself is not his reputation. Defamation is injury to the reputation of a person and is a tort as well as a crime.

According to Winfield, "Defamation is the publication of statement which tends to lower a person in the estimation of right thinking members of society generally or which tends to make them shun or avoid that person".

Thus if 'A' falsely says of a respectable young lady 'B' that she had been raped by X against her consent, there is no moral discredit attached to her arising out of this statement but nevertheless other suitable young men hearing this statement may hesitate to marry her. They may shun or avoid her from society and so the statement of 'A' is a defamatory one.

Libel and Slander

In England, Defamation is of two kinds: 'Libel' and 'Slander'.

'Libel' is a representation made in some permanent form. It is addressed to the eye. A defamatory statement in writing or printing is considered to be a libel.

'Slander' is the publication of a defamatory statement in a transient form. Thus it is addressed to the ear as regards the mode of publication. A defamatory statement by spoken words is a Slander.

Youssoupoff v. Metro Goldwyn Mayer Pictures Ltd. (1934)

The question for consideration of the court was whether a talkie film is a libel or slander. The film is a visual presentation in pictures on the screen. So being addressed to the eye it is libel when the matter is defamatory. With regard to the speech which is synchronised with the photographic reproduction, the court held that the speech which is synchronised with the photographic reproduction forms part of one complex and thus that also amounts to libel.

The matter recorded on a gramophone disc is addressed to the ear and the defamatory matter amounts to slander.

Under English law, the distinction between libel and slander is material for two reasons:

- (i) Under criminal law, only libel has been recognised as an offence. Slander is not an offence.
- (ii) Under the law of torts, libel is always actionable *per se*, i.e., without proof of any damage. Slander, as a general rule, is actionable only on proof of special damage.

But under the following four circumstances a slander also is actionable *per se* i.e., without any special damage.

- a) If there is imputation of criminal offence to the plaintiff.
- b) If there is imputation of an infectious disease to the plaintiff. For example AIDS
- c) If there is imputation that a person is incompetent, dishonest or unfit, in regard to the office, profession, trade or business carried on by him.
- d) If there is imputation of unchastity or adultery to any woman or a girl.

In England, libel is a crime as well as tort but slander is only a civil wrong.

In India, criminal law does not make any such distinction between libel and slander. Both libel and slander are criminal offence under the Indian Penal Code (Sec. 499) and also tort. Both libel and slander are actionable in civil courts in India without proof of special damage. In other words, both libel and slander are actionable *per se*. In England, libel is actionable *per se* but slander, except in certain cases, is not actionable *per se*.

Essentials of Defamation

The plaintiff who claims compensation for the tort of defamation should prove the following essentials:

1. The words must be defamatory

The statement of the defendant must be defamatory. The Statement of the defendant is defamatory if it tends to injure the reputation of the plaintiff. If the publication of a statement tends to lower a person in the estimation of right thinking members of the society generally, the statement is a defamatory one. The defamatory statement can be made in different ways. It may be oral, in writing, printed or by the exhibition of a picture, statue or effigy or by some conduct.

A statement, picture or the exhibition of a statue is defamatory if it tends:

- (i) to excite adverse opinion or feeling of other persons against the plaintiff;
- (ii) to prejudice the plaintiff's private character or credit;
- (iii) to injure the plaintiff in his calling, profession, business or trade;
- (iv) to cause the plaintiff to be feared, shunned, disliked or avoided by the neighbours, friends and others; or
- (v) to degrade the plaintiff in the estimation of the right thinking members of the society generally.

Ramdhara v. Phulwati Bai (1969)

The defendant made an imputation that the plaintiff, a widow of 45 years, is a keep of the maternal uncle of plaintiff's daughter-in-law. The court held that the imputation is not a mere vulgar abuses but a definite imputation upon her chastity and thus constitute defamation.

Parvathi v. Mannar(1995)

The court held that mere hasty expression spoken in anger, or vulgar abuse to which no hearer would attribute importance would not be actionable. To say of a man that he is a rascal, a rogue (dishonest man) or a thief is normally defamatory. But if same words are uttered in the course of a street brawl no reasonable person will take them literally. They are treated as vulgar abuse and would not be actionable.

Innuendo

The statement made by the defendant may *prima facie* innocent and not defamatory. But because of some latent or secondary meaning, it may be considered to be defamatory. In such a case, the plaintiff must expressly and explicitly set forth in his pleadings the defamatory sense which he attributes to the statement. Such an explanatory statement is called innuendo.

Example

A statement is published by a newspaper that the daughter of 'X', the Chief Minister, gave birth to a child on an auspicious day. At first blush it may appear to be an innocent statement. But suppose X has only one daughter who is unmarried, the statement, if untrue, would naturally hurt the feelings of the girl's parents and send the girl into hysterics. This is because of the innuendo, which the statement carries that the daughter of 'X' has led an immoral life. When the innuendo (Secondary meaning) is proved the words which are not defamatory in the ordinary sense may become defamatory.

Cassidy v. Daily Mirror News Paper Ltd. (1929)

A newspaper published a photograph with the following words underneath : "The engagement of Mr. Corrigan with Miss X is announced"

In fact Mr. Corrigan had authorised the publishers to publish the photograph with the announcement of the engagement. The publishers did not know of the existence of the plaintiff, the lawfully wedded wife of Mr. Corrigan.

Mrs. Corrigan, the plaintiff, filed a suit against the Newspaper owners for the libel. Her innuendo was that *her friends believing the newspaper report thought that she was not really legally married to Mr. Corrigan and that she was cohabiting with him in immoral relationship.*

The defendants were held liable by a majority of the Court of Appeal. The statement, though *Prima facie* innocent, was capable of such a defamatory meaning in those circumstances.

Trolly v. J.S. Fry & Sons Ltd. (1931)

Trolly, the plaintiff, was an amateur golf champion. The defendant firm of chocolate manufacturer had published a caricature of the plaintiff with a packet of their chocolates protruding from his pocket as an advertisement of their goods.

The plaintiff filed a suit against the defendant claiming compensation for defamation. The innuendo of the plaintiff was that *the advertisement caused the people to believe that the plaintiff had prostituted his status for gain and reward.* Further, by the advertisement he had suffered his credit and reputation. The court admitted the innuendo and held that the defendant were liable for defamation.

Morrison v. Rithie & Co. (1902)

The defendants in good faith published a mistaken statement that

the plaintiff had given birth to twins. The plaintiff had been married only two months back. Though the statement *prima facie* is not a defamatory one, the court held that the defendant were liable as the statement resulted in defamation to the plaintiff.

2. The words must refer to the plaintiff

In order to succeed in an action for defamation, the plaintiff must not only prove that the words are defamatory but also they refer to him. He must identify himself as the person defamed.

Hulton & Co. v. Jones (1910)

A newspaper published a humorous sketch. It referred to the activities of a fictitious character, Artemus Jones, described as Church Warden at Pockham. The sketch made out that Jones was leading a double life that of a respectable man in England and that of a rake in France where Artemus Jones could be seen at gay parties 'with a woman, who is not his wife, who must be you know-the other thing'.

A London Barrister named Artemus Jones brought the suit for damages on the ground that his friends had understood the article in question as referring to himself and that he was accordingly defamed. Neither the author nor the Newspapers proprietor had this gentleman in mind, still it was held that the plaintiff was entitled to recover damages. Thus if the words published are taken to be referring to the plaintiff, the defendant will be liable and it will be no defence that the defendant did not intend to defame the plaintiff.

Newstead v. London Express Newspaper Ltd. (1939)

The defendant published an article stating that "Harold Newstead, a Camberwell man" had been convicted of bigamy. The story was true of Harold Newstead, a Camberwell barman. The action for defamation was brought by another Harold Newstead, a Camberwell barber. As the words were considered to be understood as referring to the plaintiff, the defen-

dants were held liable.

The above two decisions created a lot of hardships for many innocent authors, printers and publishers because the fact that they were innocent in publishing the statement did not save them from liability. In order to mitigate the situation, the Defamation Act, 1952 was passed in England.

The Defamation Act, 1952 now provides a procedure by which an innocent publisher can avoid his liability. The procedure to be followed is detailed below:

The defendant should publish a suitable correction and an apology as soon as possible after he came to know that the words published by him were considered to be defamatory to the plaintiff.

T.V. Ramasuba Iyer v. A.M.A.Mohideen (1972)

The defendant had published a news item in their daily "The Dinamalar", dated 18th February 1961, stating that a person from Tirunelveli, who was exporting scented Agarbathis to Ceylon, has smuggled opium into Ceylon in the form of Agarbathis. The report further stated that the said person had been arrested in Ceylon and brought to Madras after the opium was found in some of the parcels.

The plaintiff who carried on the business of manufacturing scented Agarbathis and exporting them to Ceylon brought an action against the defendants alleging that the publication of the statement had resulted in his defamation. The defendants pleaded that they were not aware of the existence of the plaintiff and they did not intend to defame him. Moreover, they further stated that on coming to know that the alleged defamation has resulted as a consequence of their publication of the news items, they had published a correction in their issue of 14th May 1961 stating that the news item in question did not refer to the plaintiff.

The Madras High Court after referring to the English authorities and also the Defamation Act, 1952 came to the conclusion that the English case of *Hulton and Co. v. Jones (1910)* wherein majority of the Court of Appeal and the House of Lords had stated that innocent publisher of a defamatory statement was liable, was against justice, equity and good conscience, and the same is not applicable in India. Moreover, the English law had been altered by section 4 of the Defamation Act 1952, by which the publisher of innocent but defamatory statement can avoid his liability. It was, therefore, held that in India there was no liability for the statements published innocently. The defendants in the present case were, therefore, not liable.

Defamation of a class of persons

When the statement refer to a group of individuals or a class of persons, no member of that group or class can sue unless he can prove that the words referring to him.

East wood v. Holmes (1852)

A man wrote "that all lawyers were thieves". In this case, the court held that no particular lawyer could maintain an action unless there was something to point to the particular individual.

Knuppffer v. London Express Newspaper Ltd. 1944

The defendant published an article in a Newspaper adversely commenting on the activities of an association. If the statement was written of a named individual, it would have been a defamatory one. The association had a very large membership in other countries but at the branch of the United Kingdom, there were only 24 members. The plaintiff who resided in England was the active head of the association of the U.K. Branch. It was contended that the article reflected on him personally. The defendant contended that the article was an attack on the general character and activities of the association and not on the plaintiff.

It was held by the House of Lords that when the defamatory words are written or spoken of a class of persons, it is not open to a member of that class to say that words were spoken of him unless there was something to show that the words referred to the plaintiff as an individual and therefore the defendants were not liable.

Dhirendra Nath v. Rajat Kanti Bhadra (1970)

It was held that when an editorial in a Newspaper is defamatory of spiritual head of a community, an individual of that community does not have a right of action.

In short, where the defamatory statement is directed to a class of persons, no individual belonging to the class is entitled to say that the words were written or spoken of himself unless there is some reference to the plaintiff. But if the statement is directed to a limited class or group such as partnership firm, trustees, tenants of a particular building, the words could be said to refer to each member and any one of them will be entitled to sue for defamation.

Defamation of a dead person

Defaming a deceased person is not actionable in tort. But in criminal law, the defamer is liable if the statement would hurt the feeling of the members of the family or near relatives of the deceased (See section 499 of the Indian Penal Code, 1860).

3. The statement must be published

The defendant should have published the defamatory statement. "Publication" means making known the matter to some person other than the plaintiff. If a person writes a defamatory matter of the plaintiff and puts it into his own pocket or locks it in his drawer, he is not responsible for defamation, because there is no publication.

Pullama v. Hili (1891)

The court held that the dictating of a letter to one's typist is a publication.

Brya noton Finance Ltd. v. Devires (1975)

The court deviated from its old decision and held that dictation to a typist is not publication.

The publication must be to a third person that is to any person other than the defamer and the defamed.

Arumuga Mudaliar v. Annamalai Mudaliar (1966)

Two persons jointly wrote a letter containing defamatory matter about the plaintiff and sent the same to the plaintiff by registered post. The court held that there was no publication by one tort-feasor to the other as there could be no publication between joint tort-feasors.

Sadgrove v. Hole (1901)

The defendant sent to a third person a post card containing defamatory statement relating to the plaintiff. The name of the plaintiff was not written on it. The third party unacquainted with the circumstances could not realise to whom it referred. It was held that there was no publication because the post card passed through the hands of the postman or other person which was not sufficient for publication.

Mahendar Ram v. Harnandan (1958)

In this case, the defendant sent a defamatory letter in Urdu to the plaintiff. The plaintiff did not know Urdu and therefore asked some other person to read it and tell him the contents. The plaintiff brought an action for defamation against the defendant. The court held that the defendant is not liable in this case so long it is not proved that the defendant knew that the plaintiff was unable to read the letter in Urdu and therefore he will have to ask someone else to read it for him.

Communication between Husband and Wife

The communication of a defamatory matter from the husband to the wife or vice versa is no publication as in the eyes of law husband and wife are one person.

M.C. Varghese v. T.J. Ponnen (A.I.R. 1970 SC 1876)

In this case, T.J. Ponnen wrote a number of letters to his wife, Rathi, containing some defamatory imputations concerning Rathi's father, M.C. Varghese. Rathi passed on those letters to her father. The father-in-law launched prosecution against his son-in-law, complaining of the defamatory matter contained in those letters.

Ponnen contended that the letters addressed to his wife are not admissible in evidence by virtue of section 122 of the Indian Evidence Act. The Kerala High Court admitted the contention and held Ponnen was not liable.

On appeal, the Supreme Court reversed the decision of the High Court and held that if the communications between the husband and wife have fallen to the hands of a third person, the same can be proved and Ponnen was liable.

Defences

In an action for defamation, there are three main defences available to a defendant. They are the following

(i) Justification or Truth

The truth of the defamatory matter is complete defence in an action for defamation. The defence of truth is available even though the publication was made maliciously. The defence is available even if the statement is substantially true.

Radheshyam Tiwari v. Eknath (1985)

In this case, the defendant published in the Newspaper a series of articles against the plaintiff, a Block Development Officer, alleging that the plaintiff had issued false certificates, accepted bribe and adopted corrupt and illegal means in various matters. In an action for defamation, the defendant could not prove the facts published by him were true and, therefore, he was held liable.

The Defamation Act of 1952 of England has enacted that if there are several charges and the defendant is successful in proving the truth regarding some of the charges only, the defence of justification may still be available if the charges not proved has not materially injure the reputation.

(ii) Fair Comment

The second defence to an action for defamation is that of fair and *bona fide* comment. Comment is a statement of opinion on facts. It is the right of every member of the public to express his opinion on a matter of public interest. But the expression should be fair. Thus the rule is that if a statement is a fair comment on a matter of public interest, it is not actionable.

(iii) Privilege-Absolute or Qualified

Statements made on certain occasions are privileged. They are protected without enquiry into the question whether they are true or not. Such privilege is either absolute or qualified. When it is absolute, even if the statement is made maliciously out of improper motives, the person defamed can have no remedy. In qualified privilege, the statement is protected only if it was made without malice.

Absolute Privilege

Absolute privilege is recognised in the following cases.

(a) Statements made in legislatures

Statements made by members of the legislatures are absolutely privileged and they are not liable for defamation. Outside the legislature, of course, their statements enjoy no such immunity.

(b) Statements made in judicial proceedings

A question put by the counsel to the witness in the examination or an answer by the witness or a judgement of the court may contain a defamatory matter. However they are not liable for defamation.

(c) State communications

Statements made by one official of state to another in the discharge of official duties are absolutely privileged for reasons of Public Policy.

Qualified Privilege

Qualified privilege can be claimed in respect of the following statements made honestly and without malice

- (i) Fair and accurate reports of the proceedings of the legislature.
- (ii) Fair and accurate reports for judicial proceedings open to the public.
- (iii) Fair and accurate reports of public meetings in newspapers.
- (iv) Statements made in pursuance of a legal, social or moral duty. Information given by a person about his former servant's character to a prospective employer comes under this category. Communication between principal and agent, lawyer and client etc, also enjoy qualified privilege.

Topic - XVIII Deceit or Fraud

When a person knowingly makes a false statement of fact, with an intent to induce another to act upon it and when the other suffers damage by acting upon the same, the former is said to have committed the tort of deceit or fraud.

In an action for deceit, the following essentials are required to be proved

- (i) The defendant must have *knowingly* made a *false statement or representation*.
- (ii) The defendant should have made it with the intent that the plaintiff should act on it.
- (iii) The plaintiff must have induced to act upon it.
- (iv) The plaintiff must have sustained damage or loss.

In order to make the defendant liable for fraud, there must be a false statement of fact. The representation may be oral or written or through conduct. If a person who is not really an advocate, goes to a court of law with the lawyer's gown on, and acts as an advocate thereby receiving remuneration from illiterate clients, he will be liable for deceit.

R. v. Barnad (1837)

A person put on a cap and a gown, without having right to do so, to create an impression that he was a member of the University, in order to obtain goods on credit. It was held that such conduct had amounted to fraud.

To constitute fraud, the defendant should make a *positive false statement of fact*. A mere nondisclosure of the truth or mere silence to certain facts does not ordinarily amount to fraud.

Sree Krishna v. Kurukshetra University (1976)

Sri Krishna, who was a candidate for the LL.B examination of the Kurukshetra, was short of the required attendance. He did not mention this fact in the application form filled by him for the examination. Neither the Head of the Department nor the University authorities could discover this fact, as they did not make proper scrutiny of the form. It was held by the Supreme Court that there was no fraud by the candidate and the University had no power to withdraw his candidature on that ground.

Ward v. Hobbs (1878)

The seller sold pigs which were suffering from typhoid fever. He was aware of this fact but did not disclose this defect to the buyer. He, however, mentioned that the pigs were being sold "with all faults". The disease was conveyed to the other pigs of the buyer also and many of them died due to that. The court held that there was no false statement on which the buyer could be deemed to have relied, and he had purchased the pigs "with all faults", i.e., at his own risk and therefore, the seller was not liable for fraud.

In order to make the defendant liable the representation must be made with the knowledge that it is false or without believing in its truth. If the defendant honestly believed that the statement is true, there can be no deceit. The leading case on this point is *Derry v. Peek* (1889). The facts of the case were like this:

The Directors of a company issued a prospectus stating that the company had the right to run trams by steam power. In fact the company could run the trams by Horse power and the consent of the Board of Trade was required to run them by steam power. The Directors honestly believed that the consent of the Board of Trade was only a formality and had submitted plans for obtaining such consent. The plaintiff purchased shares in the company on the faith of the representation contained in the prospectus. The Board of Trade refused to allow the company to run trams by steam power and ultimately the company had to be

wound up. The plaintiff brought an action for damages on the ground that the statement in the prospectus was fraudulent. The House of Lords held that the defendants were not liable for fraud, because they honestly believed in the truth of the statement made by them.

Topic -XIX

Negligence

'Negligence' is the breach of duty to take care. It is considered as a separate tort. Negligence as a tort is "the breach of a legal duty to take care which resulted in damage to the plaintiff."

In re Ramlila Maidan Incident [(2012)5 SCC1], the Supreme Court gave the following definition to the word negligence. " "Negligence" is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury".

In an action for negligence, the plaintiff has to prove the following essentials:

- (1) The defendant should have owed a duty of care
 - (2) The duty of care must be owed to the plaintiff
 - (3) The defendant should have committed a breach of duty to take care
 - (4) The plaintiff should have suffered damage as a result of the negligence.
- (1) **The defendant should have owed a duty of care**

In an action for negligence, the plaintiff should establish that the defendant had a legal duty to take care to the plaintiff. A mere moral, religious or social duty to take care is not sufficient. The plaintiff has to establish that the defendant owed to him a specific *legal duty to take care*.

Donoghue v. Stevenson (1932)

A company manufactured ginger beer. The beer was put in an opaque bottles which were sold to retailers. "A" purchased a bottle from the retailer and gave it to his lady friend. She poured some of the contents in a tumbler and consumed the same. When the remaining contents of the bottle were poured into the tumbler, the decomposed body of a snail floated out with the ginger beer. She had a shock and fell ill. She filed a case claiming compensation against the manufacturer for negligence.

The House of Lords held that the manufacturer owed a duty to take care that the bottle did not contain noxious matter, and that he was liable for the breach of that duty. The duty of manufacturer to take care is to the ultimate consumer.

Grant v. Australian Knitting Mills Ltd. (1936)

The defendants were manufacturers of swimming suit. They despatched the swimming suits in paper packets to retailers. The plaintiff bought one packet and used for swimming. She contracted a skin disease by the use of this suit. The cause was traced to the use of a certain chemical in the process of manufacturer. The question was whether the manufacturer was liable to the ultimate user.

The Privy Council held that since the defect existed at the point of manufacture itself, there was breach of a duty owed to the ultimate user and upheld the tortious liability of the manufacturer.

Ishwar Devl v. Union of India (1969)

One Sham Lal Malik, the deceased boarded one bus when the same arrived at the bus stop. Just when he had placed his foot on the foot-board of the bus and had not yet gone in, the conductor rang the bell and the driver started the bus. The driver made an attempt to overtake another stationary bus so closely that the deceased got squeezed be-

tween the two buses and sustained serious injuries which ultimately resulted in his death. In an action by the widow of the deceased, it was held that both the driver and the conductor were rash and negligent in not taking proper care of the safety of the passengers.

Dr. Lakshman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole (1969)

The Supreme Court held that a medical practitioner has the following duties when a patient consult him for treatment.

- (i) A duty of care in deciding whether to undertake the case;
- (ii) A duty of care in deciding what treatment to give; and
- (iii) A duty of care in the administration of the treatment.
- (iv) A breach of any of the above mentioned duty of care gives a right of action for negligence to the patient.

In the above mentioned case, the son of the respondent, aged about 20 years, met with an accident which resulted in fracture of his left leg. He was taken to the appellant's hospital for treatment. The appellant doctor with the help of three attendants used excessive force for pulling the injured leg of the patient. He then put this leg in plaster of Paris splints. The doctor did not give an anesthesia to the patient. The severe pain in pulling the leg resulted in shock causing the death of the patient. The doctor was held guilty of negligence by the Supreme Court.

Municipal Board, Jaunpur v. Brahm Kishore (1973)

The defendant had dug a ditch on a public road. The plaintiff who was going on his cycle in the night could not observe the ditch in the darkness, fell into it and was injured. The defendant had failed to provide light, danger signal, caution notice or barricade to prevent such accidents and was therefore held liable.

Dr. T.T. Thomas v. Elisa, (1987)

The plaintiff's husband was admitted as an inpatient in a hospital

for complaints of severe abdominal pains. It was diagnosed as a case of acute appendicitis, requiring immediate operation to save the life of the patient. The doctor failed to perform the operation and the patient died after two days. It was held that the doctor was negligent in not performing the emergency operation, and was liable for the death of the patient. Thus the failure to perform an emergency operation to save the life of a patient amounts to doctor's negligence.

In **State of Andra Pradesh v. Ranganna and Others** (AIR 2014 Hyd. 22), placenta was not removed manually by the doctor even after 30 minutes after delivery of a child, which resulted in death of a lady. It was held that according to the settled medical procedures, when placenta was retained even after 30 minutes after delivery of a child, the recognised procedure to be followed is to remove the placenta by manual procedure. Failure to remove placenta manually by doctor is a clear omission (negligence) and it is against the recognised methods of removal of placenta by the medical sciences. Rupees one lakh was awarded as damages for medical negligence.

2. The duty of care must be owed to the plaintiff

The plaintiff must prove that the defendant owed a duty of care to the plaintiff. When the defendant owes a duty of care to a person other than the plaintiff, the plaintiff cannot sue even if he has been injured by the defendant's negligent act.

Bourhill v. Young (1942)

The plaintiff, a fishwife, elighted from a tramcar and while she was engaged in removing the fish basket from the driver's platform, a speeding motor cyclist passed on the other side of the tramcar collided with a motor car and was killed. The fishwife did not see the motor cyclist or the accident but she heard the noise of the collision. Later, after the motorcyclist's dead body had been removed, she approached the spot and saw the blood left there. In consequence, she sustained nervous shock and after one month gave birth to a still born child. The plaintiff

filed a suit claiming compensation against the executor of the deceased motor cyclist. It was held that the defendant was not liable because the motor cyclist did not owe any duty of care towards the fishwife and he was not negligent towards her.

(3) The defendant should have committed a breach of duty to take care

In an action for negligence, the plaintiff must prove that defendant committed a breach of duty to take care. Breach of duty here means non-observance of due care which is required in a particular situation. If the defendant has not acted like a reasonably prudent man, there is breach of duty.

Glasgow Corp. v. Taylor (1922)

A public garden was under the control of the defendant corporation. In the garden, there was a poisonous tree. The fruits of the tree looked like cherries. A child aged seven ate those fruits and died. It was found that the shrub was neither properly fenced nor a notice regarding the deadly character of the fruit was displayed. It was therefore held that the defendants were liable for breach of duty of care.

Bolton v. Stone (1951)

The plaintiff was standing on a highway near a cricket ground. A batsman hit a ball, which went over a fence seven feet high and seventeen feet above the cricket pitch and struck the plaintiff at a distance of 100 yards from there. The ground was being used for about ninety years and no such injury had occurred earlier. The House of Lords considered that the likelihood of injury to persons on the road was so slight that the cricket club was held not to be negligent in this case.

Haley v. London Electricity Board (1964)

The plaintiff, a blind man, was walking carefully with a stick along a pavement in a London suburb on his way to work. The servants of the defendants, London Electricity Board, dug a trench on the pavement and

in its front they put a handled hammer. The head of the hammer was resting across the pavement while the handle was on a raising two feet above the ground. The plaintiff tripped over the obstacle, fell into the trench and was injured.

In an action for damages against the Electricity Board, it was found that there were 285 blind persons registered in that area. The hammer gave adequate warning of trench to persons with a normal sight, but it was insufficient for blind persons. Under these circumstances, the House of Lords held that since the city pavement was not a place where a blind man could not be expected, not providing sufficient protection for him was negligence for which the defendants were held liable.

Bhagwat sarup v. Himalaya Gas Co. (1985)

The plaintiff booked replacement of a cooking gas cylinder with the defendant. The defendant's delivery man brought a cylinder into the plaintiff's house. The cap of the cylinder being defective, he tried to open it by knocking at the same with an axe. This resulted in damage to the cylinder and leakage of gas therefrom. Some fire was already burning in the kitchen and the leaking gas also caught fire. As a consequence of this fire, the plaintiff's daughter died, some other family members received severe burn injuries and some property inside the house was also destroyed by fire. It was held that the defendant's servant was negligent in opening the cylinder and the defendant was liable for consequences of such negligence.

Kerala State Electricity Board v. Suresh Kumar (1986)

A minor boy came in contact with overhead electric wire which had sagged to 3 feet above the ground. He was electrocuted and received burn injuries. The Electricity Board had a duty to keep the overhead wire 15 feet above the ground. The Board was held liable for the breach of its statutory duty.

In Kerala State Electricity Board and Another v. Minor Vinoy (Died) and Others (2014 (1) KHC 467 (DB) : 2014 (1) KLJ 727 : 2014 (1) KLT 901, a 16 year old boy came into contact with live electric line lying in the bush on the ground when he was walking along with his friends through a paddy field. That was on 12-06-1998. He was taken to the Hospital. He had lost his power of speech. He could not stand or even attend to the calls of nature without the help of by-standers. After a continued treatment, he died on 30-12-2000. Trial Court awarded an amount of Rs. 3,45,000/- with interest as compensation. The Electricity Board preferred an appeal. It was held the High Court that considering the pain and suffering the victim had undergone and the mental agony of the parents, loss of love and affection, expenses on account of employing by-standers, travelling expenses, funeral expenses, loss of amenity, loss of care and protection, the compensation awarded by the lower court cannot be held as unreasonable. The appeal was dismissed.

(4) The plaintiff should have suffered damage as a result of the negligence.

In order to be liable for negligence, the defendant's breach of duty must cause damage to the plaintiff. The plaintiff has also to show that the damage thus caused is not too remote a consequence of the defendant's negligence.

Topic -XX

Res Ipsa Loquitur

(The accident itself talks for the negligence of the defendant)
(Burden of Proof of Negligence)

In an action for negligence, the plaintiff has to prove not only that the defendant owed a legal duty of care to him but also that he committed a breach of that duty. The burden of proof lies on the plaintiff.

The general rule is that the plaintiff has to prove the negligence on the part of the defendant. However, under certain circumstances, the plaintiff need not prove that the defendant was negligent. When the accident explains only one thing i.e., that the accident could not ordinarily occur unless the defendant had been negligent, the law raises a presumption of negligence on the part of the defendant. The negligence of defendant would be inferred from the facts on the basis of the maxim '*Res ipsa loquitur*', which means 'the thing speaks for itself'. Then the burden of proof is shifted from the plaintiff to the defendant and the defendant has to prove that he was not negligent. If the defendant fails to give any satisfactory explanation to rebut the presumption of negligence, he will be liable.

Byrne v. Boadle (1863)

A barrel of flour fell on the head of the plaintiff from the second floor of the defendant's warehouse. In such a case, the plaintiff need not prove anything more because the facts themselves raise a presumption that the defendant was negligent. Here the burden of proof of negligence shift from the plaintiff to the defendant and the defendant has to prove that he was not negligent.

Municipal Corporation of Delhi v. Subhagwanti (1966)

A clock tower, situated opposite to the Town Hall in the main bazaar of Chandni Chowk, Delhi, collapsed and as a result of this, a num-

ber of persons died. The clock tower belonged to the Municipal Corporation of Delhi and was exclusively under its control. It was 80 years old but the normal life of the structure could be 40-45 years. In these circumstances, the Supreme Court held that the fall of the Clock Tower tells its own story in raising an inference of negligence on the part of the defendant. Since the defendants could not prove absence of negligence on their part they were held liable.

Mangila v. Parasram (1971)

A boy of seven who was answering the call of nature by the side of the road was struck down by a passenger bus coming on the wrong side of the road. The boy met with instantaneous death. The court applied the doctrine of *Res ipsa loquitur* and held that the defendant was liable.

Kannur Rowther v. Kerala State Road Transport Corporation (1975)

A passenger was waiting to catch a bus in the bus stand. He was knocked down while a bus was reversed by the driver and conductor. Since the driver and conductor who were expected to take extreme care and caution, could not explain the manner in which the plaintiff was knocked down, the maxim *res ipsa loquitur* was applied and the defendants were held liable.

Krishna Bus Services Ltd. V. Smt. Mangil (1976)

A passenger bus at a curve on the road overturned causing instantaneous death to a passenger. The Supreme Court applied the maxim *res ipsa loquitur* and the defendants were held liable. The court observed thus: "buses in sound roadworthy condition driven with ordinary care do not normally overturn". At the time of the accident, the bus was overloaded and was driven even at the curve at the rate of 30 miles per hour. In these circumstances, a presumption of negligence could be drawn and the maxim was applied as against the driver.

Karnataka State Road Transport Corporation v. Krishna (1981)

Two buses brushed each other in such a way that the left hands of two passengers travelling in one of these buses were cut off below the shoulder joint. It was held that the accident itself speaks volumes for the negligence on the part of drivers of both the vehicles. The doctrine of *res ipsa loquitur* was applied and in the absence of any satisfactory explanation, the defendants were held liable.

In **Ashis Kumar Mazumdar v. Alshi Ram Batra Charitable Hospital Trust (2014) 9 SCC 256 : AIR 2014 SC 2061**, the plaintiff /appellant admitted as an indoor patient in the respondent Hospital on 27-10-1988 and lodged in a room on the third floor was running high fever and was in a delirious state. In the night intervening 31-10-1988 and 1-11-1988, at about 2.20 a.m., the plaintiff's sister, staying with him in the room, had noticed the absence of the plaintiff from the room, promptly informed the staff nurse on duty and a search was conducted to trace out the plaintiff and a security guard found the plaintiff lying on the ground floor of the Hospital and at a distance of 50 yd (1 yard = 3 feet) from a point immediately below the window of the plaintiff's room. The plaintiff suffered multiple fractures of lumbar vertebrae with complete dislocation of the spinal cord and despite treatment became a paraplegic i.e. 100 % disabled below the waist.

A suit claiming damages was filed by the plaintiff for negligence of the defendant /respondent. The defendant (Hospital Trust), in its written statement, took the stand that the Hospital had permitted the plaintiff's sister to stay in the room as an attendant and that the plaintiff had himself jumped out of the window of his room despite the presence of his sister and denied the allegation of negligence and absence of due care on its part.

The courts below applied the principle of *res ipsa loquitur* to cast the burden of proving that there was no negligence on the defendant Hospital and held the defendant liable for negligence and failure to take

due care of the plaintiff who was an indoor patient in the Hospital.

The Supreme Court confirmed the decision of the lower court and observed as follows:

The maxim *res ipsa loquitur* applies to a case in which certain facts proved by the plaintiff, by themselves, would call for an explanation from the defendant without the plaintiff having to allege and prove any specific act or omission of the defendant. The principal function of the maxim is to prevent injustice which would result if the plaintiff was invariably required to prove the precise cause of the accident when the relevant facts are unknown to him but are within the knowledge of the defendant. The maxim would apply to a situation when the mere happening of the accident is more consistent with the negligence of the defendant than with other causes.

Duty of a hospital is not limited to diagnosis and treatment but extends to looking after safety and security of patients, particularly, those who are sick or under medication and therefore can become delirious and incoherent.

Topic - XXI Contributory Negligence

A person injured by the negligence of another cannot make a complaint, if he too was negligent and thus contributed to the causing of damage to himself. In other words, if the plaintiff by his own want of care, contributed to the damage caused by the negligence of the defendant, he is considered to be guilty of contributory negligence. This is a defence available to the defendant. The defendant has to prove that the plaintiff has failed to take reasonable care of his own safety and that was a contributing factor to the harm ultimately suffered by the plaintiff.

Butterfield v. Forrester (1809)

'A' negligently left a pole across a road and blocked it. 'B' was coming on a horse at excessive speed tripped over it and fell down. The court held that 'B' could not recover damages as he was also negligent in riding the horse at an excessive speed. He was held to be guilty of contributory negligence.

The Last Opportunity Rule

In common law, the contributory negligence on the part of the plaintiff was considered to be a good defence and the plaintiff could not recover any damages from the defendant. This rule worked a great hardship for the plaintiff. Because for a slight negligence on his own part, he may lose his action against a defendant whose negligence may have been the main cause of damage to the plaintiff. Thus the courts have modified the common law relating to contributory negligence by introducing the "Last Opportunity Rule". According to this rule, the person, who is charged with contributory negligence, may still recover damages, if he can show that in spite of his contributory negligence, the other party had the last opportunity of avoiding the accident by taking ordinary care.

In *Davis U. Mann* (1882), the court applied the last opportunity rule and held the defendant liable. The facts of the case were like this:

The Plaintiff fettered the forefeet of his donkey and left it in a narrow highway. This was negligence on his part. The defendant was driving his wagon driven by horses too fast. It negligently ran over and killed the donkey. The plaintiff filed a suit claiming compensation. It was contended that the defendant was not liable because the plaintiff had been guilty of contributory negligence. It was held that the defendant was liable as he had the last clear opportunity of avoiding the accident by reasonable care.

British Columbia Electric Co. v. Loach (1916)

The driver of a wagon, in which the deceased was seated negligently, brought the wagon on the level crossing of the defendant's tramline without trying to see whether any tram was coming on the line. A tram which was being driven too fast, caused the collision and resulted in the death of a passenger in the wagon. It was found that the tram which caused the accident was allowed to go on the line with defective brakes. Had the brakes been in order, the tram could have been stopped and the accident avoided. The personal representatives of the deceased brought an action against the Tramway Company. The defendants pleaded the defence of contributory negligence. It was held that they could not plead the defence of contributory negligence because they had the last opportunity to avoid the accident which they had incapacitated themselves by running a tram with defective brakes. Thus they were held liable.

The Last Opportunity Rule was also found to be very unsatisfactory as the party whose act of negligence was earlier altogether escaped the responsibility and whose negligence was subsequent was made wholly liable even though the resulting damage was the product of the negligence of the parties.

In order to mitigate the hardship resulting from the application of 'contributory negligence' and 'Last Opportunity Rule', the Contributory Negligence Act, 1945 was passed in England. By virtue of the provisions of this enactment, now a person who suffered damage as a result partly of his own fault and partly of the fault of any other person can claim damages. But the damages recoverable shall be reduced to such extent as the court thinks just and equitable after considering the claimant's share in the responsibility for the damage. Thus if both the plaintiff and the defendant are equally responsible for the damage, the compensation amount will be reduced by fifty percent.

Indian Law as to Contributory Negligence

In India, the plea of 'Contributory negligence' is available as a defence. We have no central legislation corresponding to the Contributory Negligence Act, 1945 of England. But the Kerala Legislature has passed in Kerala Torts (Miscellaneous Provisions) Act, 1976: (The full text of the Act is given at the end as appendix -1) By virtue of Sec. 8 of the Kerala Act, there is provision for apportionment of liability in case of contributory negligence. The provision is similar to the one contained in the English Act of 1945.

Though there is no central legislation, in various cases which have come before various High Courts in India, the doctrine of apportionment of damages has been followed and contributory negligence has been considered as a defence to the extent the plaintiff is at fault.

Subhakar v. Mysore State Road Transport Corporation (1975)

The plaintiff-claimant was going on a bicycle. He suddenly turned to the right side of the road. He was hit by the defendant's bus. He fell down and got injury to leg necessitating hospitalization for about 2 ½ months. It was held that both the parties had equally contributed to the accident by their negligence and, therefore, the compensation payable to the claimant (plaintiff) was reduced by 50%.

Rural Transport Service v. Bezium Bibi (1980)

The conductor of an overloaded bus invited passengers to travel on the roof of the bus. The driver swerved (change direction suddenly) the bus to the right to overtake a car. Taher Singh, who was travelling on the roof, was hit by the branch of a tree. He fell down and got serious injuries and later succumbed to his injuries. In an action by the mother of the deceased, the Calcutta High Court held that there was negligence on the part of the conductor and driver of the bus and on the part of the deceased. There was contributory negligence on the part of the deceased because he took the risk of travelling on the roof of the bus. The compensation payable by the defendant was reduced by 50%.

Satbir Singh v. Balwant Singh (1987)

There was a head on collision between a motor cycle and a truck coming from the opposite direction. It resulted in injuries to the motor cyclist and the death of the pillion rider. The negligence of the motor cyclist was found to be to the extent of 2/3rd and that of the truck driver to the extent of 1/3rd. The amount of compensation payable to the motor cyclist was reduced by 2/3rd i.e., the extent to which he was guilty of contributory negligence.

Contributory Negligence of Children

Contributory negligence, as a general rule, is not a defence if the plaintiff is a child. There cannot be a contributory negligence on the part of children because a child cannot be expected to be as careful for his own safety as an adult and in such a case a plea of contributory negligence cannot be availed.

Motais Costa v. Roque Augustinho Jacinto (1976)

A child of about 6 years, while trying to cross a road, was knocked down by a motor cycle resulting in severe injuries. The suit for compensation was tried to defend by the plea of contributory negligence on the part of the child. The court rejected the defence of contributory negli-

gence and held the defendant liable.

Children In custody of Adults

In **Oliver v. Birmingham and Midland Omnibus Co.** (1933), a child of four years was in the care of his grand-father and was crossing a road along with him. Suddenly the defendant's omnibus came there and the grand-father, being frightened by the omnibus, left the child in the middle of the road and himself jumped off the road. The child was struck by the defendant's omnibus and injured. The suit was filed on behalf of the child. The defendant pleaded contributory negligence from the part of the grand-father. The court held that though the grand-father of the child was guilty of contributory negligence, the child was entitled to recover compensation from the defendants.

Topic -XXII **Occupier's Liability for Dangerous Premises**

In law of torts, an occupier of dangerous premises or structures owes an obligation to the persons who enter those premises or structures. The obligation is in respect of their personal safety and the safety of their property. In the modern world, persons living in towns, harbor area and industrial centers will have to go to a shop, ship, factory house or vehicle or appliances connected with them like a lift or a gangway. The person who is in charge of such premises and appliances should necessarily under some sort of duty towards entrants. The person responsible for the safety of the entrants is he who is in actual possession of them for the time being, whether he is the owner or not.

The nature of occupier's obligation varies according to the kinds of persons who may come to the premises or structures and they can be classified into two categories. They are:

- (1) Lawful Visitors
- (2) Trespassers

(1) Occupier's Liability towards Lawful Visitors (Contractors, Invitees and Licensees)

The expression "Lawful Visitors" include a contractor (a person who enters in a building or premises on the basis of a contract), an invitee and a licensee.

A person who enters into a building after paying fees or consideration is called the "contractor". A person who entered into a stadium after paying the admission fee to witness a horse race or cricket match is an example of contractor. An "invitee" is a person who enters into the premises without paying fee or consideration. However there will be a common interest in the visit of that person. A person entering into a shop for purchasing some goods is an example of invitee. A licensee is a person who enters into the premises for his own benefit with the permission of the occupier.

The occupiers of premises are under a duty to see that the lawful visitor is not injured due to the defect or dangers in the premises. The occupier should see that the visitor will be safe in using the premises. The occupier has a duty to give due warning of any defect or concealed danger in the premises of which he is aware. He is not liable for any defect which could not have been discovered by reasonable care and skill.

Francis v. Cockerell (1870)

The plaintiff paid for admission to a grandstand to witness a horse race. The grandstand was collapsed and she was injured. The grandstand was erected by an independent contractor. However, the defendant was held liable on the ground that the occupier is liable for defect or danger in the premises.

Maclean v. Segar (1917)

A paid guest in a hotel was injured in a fire due to the defective

construction of the premises. The occupiers were held liable. The court observed that "when the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually agreed purpose, the contract between the parties contains an implied warranty that the premises are safe for that purpose. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care and skill. But subject to this limitation, the defendant is liable to the contractor (entrant) for the lack of care of himself or of his servants or that of an independent contractor".

Fairman v. Perpetual Building Society (1923)

The plaintiff went to stay with her sister in a building owned by the defendant and let out to the sister's husband. The defendant were in possession of the common staircase. Owing to wearing away of the cement, there was a depression, in one of the stairs. The plaintiff's heel was caught in the depression. She fell from there and got injured. In an action against the defendant, it was held that the danger was obvious and could have been observed by the plaintiff and the defendants could not be made liable for the same.

Weighall v. Westminster Hospital (1936)

A mother visited her son in a hospital where he was lying as a paying patient slipped upon a highly polished floor cover and was injured. It was held that she was an invitee and she could recover damages.

Stowell v. Railway Executive (1949)

The plaintiff went to a railway terminus, belonging to the defendants, to meet his daughter and her family who were arriving there by train. When he walked along the platform at which the train had arrived, looking into each compartment for his daughter, he slipped on an oily patch, which he had not seen, and fell down. He sustained injury as a result of this and claimed damages.

The court held that the plaintiff was an 'invitee', as the plaintiff by assisting with the luggage of the passenger whom he had come to meet would hold to clear the platform and thus the defendant had an interest in the plaintiff's entering into the station. The oily patch was an 'unusual danger' in the circumstances because the plaintiff could not be expected to be looking out on the ground at every step and he was entitled to expect that the platform would be free from obstruction. The plaintiff was taking reasonable care for his own protection and the defendants were held liable.

Pearson v. Coleman Brothers (1948)

An infant girl, aged 7, who had entered the circus premises after purchasing ticket to see the show, was injured by a lion when she crawled under the lion's tent to relieve herself. The circus authorities had not provided a lavatory for visitors and hence she had to go an apparently secluded place. The court held that she was entitled to recover damages as a contractor, invitee or licensee.

Slade v. Battersea and Putney Management Committee (1955)

A wife went to the hospital to see her husband lying dangerously ill. She sustained serious injuries as a result of slipping on the polished floor of the hospital. It was held that the visit by a wife in a hospital where her husband was undergoing treatment was a matter of material interest to both the wife and the hospital authorities and therefore the plaintiff was an invitee and hence entitled to compensation.

(2) Occupier's Liability to Trespassers

A trespasser is one who wrongfully enters on land in the possession of another and has neither right nor permission to be on land. Towards the trespasser, the occupier has no duty to take reasonable care for his protection or even to protect him from any concealed danger. The trespasser comes on to the premises at his own risk. The occ-

cupier is liable only if there is some act done with the deliberate intention of doing harm to the trespasser.

Neither the occupier nor any other person should intentionally inflict personal injury on a trespasser either by direct violence, or by indirectly doing on the land with the intention of injuring the trespasser.

Deane v. Clayton (1817)

In this case, the court held that an occupier can fix broken glass pieces or spikes on the top of a boundary wall as a protective measure to keep off a trespasser.

Bird v. Halbrook (1828)

The defendant placed spring guns on his land and a trespasser not knowing of the spring gun was shot and injured. It was held that he could recover damages.

General Central Rly v. Bates (1921)

A Policeman entered the house of 'A' at night suspecting that someone was committing theft. He fell into a pit in the compound. It was held that he could not recover damages from the occupier of the house because he is only in the position of a trespasser to whom no duty is owed by the occupant.

Topic -XXIII

Rule of Strict Liability

Or

Rule in Rylands v. Fletcher

A person would normally be liable for his negligence. But there are certain circumstances under which a person may be held liable for some harm even though he is not negligent in causing the same. In those cases the liability of the defendant is not based on the 'fault' or 'negligence'. Thus the law under such circumstances recognises 'no fault' liability.

The House of Lords in **Rylands v. Fletcher (1868)** laid down the rule recognising "no fault" liability. The facts of the case were like this:

The defendant (Rylands) employed an independent contractor to construct a reservoir on his land. In the course of the work, the contractor came upon old shafts and passages on Ryland's land. They communicated with the mines of plaintiff (Fletcher), a neighbour of Ryland's. The contractors did not block them up and when the reservoir was filled, the water from it burst through the old shafts and flooded Fletchers mines and that resulted in damage to the plaintiff. Fletcher sued Rylands for compensation. The House of Lords held that the defendant liable though the defendant was not at fault.

It was held that "If a person for his own purposes collects and keeps on his land anything likely to do mischief by its escape, he does so at his own peril and is answerable for all the damage which is the natural consequence of its escape". This is the 'rule of strict liability'.

The rule laid down in **Rylands v. Fletcher (1868)** is generally known as the **Rule In Rylands v. Fletcher** or the **Rule of Strict Liability**.

In order to apply the 'Rule of Strict Liability', the following conditions should be satisfied:

- (i) Some *dangerous things* must have been brought by the defendant on his land.
- (ii) The collection of the things must be *non-natural use of the land*.
- (iii) The things thus brought by the defendant on his land *must have escaped*.
- (iv) The thing so escaped *should have caused damage to the plaintiff*.

Crowhurst v. Amersham Burial Board (1878)

There was a poisonous tree on the defendant's land. The branches of that poisonous tree overhung to the plaintiff's land and the plaintiff's cattle ate the leaves of the same and was poisoned. The defendant was held liable for the escape of dangerous thing. Keeping poisonous trees on the land was held to be non-natural use of the land and the defendant would be liable for the escape of the vegetation and natural consequences of the same.

Ponting v. Noakes (1894)

The plaintiff's horse intruded over the boundary and nibbled the leaves of a poisonous tree in the defendant's land. The court held that there was no escape of vegetation in this case and the defendant was not liable.

The rule in *Ryland v. Fletcher* will be applicable only when the defendant uses the land for non-natural purpose. The question whether the use of the land is natural or non-natural will depend very much upon the time and locality of each case. Winfield classically explained the

situation by giving the following illustration:

"If I light a fire to burn rubbish on a calm day in the middle of my field, that is natural use of my property. But if I light a fire in my garden very near to the boundary and at a distance of one yard to my neighbour's haystack on a windy day that is non-natural use of land and if harm ensues, I am liable".

Noble v. Harrison (1926)

The court held that planting or keeping trees (non-poisonous) on one's land is natural use of land and the keeper is not liable for the escape of the same. In this case a branch of a non-poisonous tree growing on the defendant's land which overhung on the highway suddenly broke and fell on the plaintiff's vehicle passing along the highway. It was held that the defendant could not be made liable under the rule in *Ryland v. Fletcher*.

Bolton v. Stone (1951) (Cricket Ball Case)

The court held that playing cricket on a stadium was only a natural use of land and the escape of cricket ball without any negligence on the part of the defendant would not attract liability under the rule of strict liability.

T.C. Balakrishna Menon v. T.R. Subramanian (1968)

It was held that the use of explosives in a maidan (open ground) even on a day of festival is a non-natural use of land. In this case, an explosive substance (Minnal Gundu) instead of rising into the sky vertically and exploding there, ran at a tangent and fell amidst the crowd and exploded. It resulted in serious injuries to the respondent.

One of the question for consideration before the Kerala High Court was whether the appellants, who had engaged an independent contractor to conduct the exhibition of fire works, would be liable. The court held that use of explosive was a non-natural use of the land and the

appellant who has brought the explosive through a contractor would be strictly liable for the damage resulted from the escape of such a dangerous substance.

Exception to the Rule

The following are the exceptions to the rule in *Rylands v. Fletcher*

1. Natural use of land

The rule in *Ryland v. Fletcher* is applicable only for non-natural use of land. Where the land is used for natural purpose, there is no application of strict liability rule.

2. Plaintiff the Wrongdoer

If damage caused by escape is due to the plaintiff's own default, the rule in *Rylands v. Fletcher* has no application. If the plaintiff suffers damage by his own intrusion into the defendant's property, he cannot claim compensation for the damage caused.

Ponting v. Noakes (1894)

The plaintiff's horse intruded into the defendant's land and ate the leaves of a poisonous tree there and died. The defendant was held not liable. The rule in *Rylands v. Fletcher* did not apply to this case for another reason also i.e., there was no escape.

3. Act of God

Where the escape of mischievous thing has been unforeseen and because of supernatural forces without any human intervention, the defence of Act of God can be pleaded.

Nechols v. Marsland (1876)

The defendant created artificial lakes on his land by damming up a natural stream. Because of an extraordinary rainfall, heaviest in the human memory, the stream and the lake was filled with water and the pressure of water had broken the embankment constructed for artificial

lake. The embankment was sufficiently strong for an ordinary rainfall. The rush of water down the stream washed away the plaintiff's four bridges. The plaintiff brought an action to recover damages for the same. There was found to be no negligence on the part of the defendants. It was held that the defendants were not liable under the rule in *Rylands v. Fletcher* because the accident in the case had been caused by an Act of God.

4. Consent of the plaintiff (*Volenti non fit Injuria*)

Where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule in *Ryland v. Fletcher* does not arise. Such a consent is implied where the source of danger is for the 'common benefit' of both the plaintiff and the defendant.

Carstair v. Taylor (1871)

The plaintiff hired the ground floor of a building from the defendant. The upper floor of the building was occupied by the defendant himself. Water stored on the upper floor leaked without any default or negligence on the part of the defendant and injured the plaintiff's goods on the ground floor. As the water had been stored for the benefit of both the plaintiff and the defendant, it was held that the defendant not liable.

5. Act of a third party

If the harm was caused due to the act of a stranger, who is neither the defendant's servant or agent nor the defendant has any control over him, the defendant will not be liable under the rule in *Ryland v. Fletcher*.

Richard v. Lothian (1913)

Some strangers blocked the waste pipes of a wash basin which was in the control of the defendants and opened the tap. The overflowing water damaged the plaintiff's goods. The defendants were held not liable.

6. Statutory Authority

An act done under the authority of a statute is a defence to an action for tort. The defence is also available when the action is under the rule in *Ryland v. Fletcher*.

Green v. Chelsea Waterworks Co. (1894)

The defendant company had a statutory duty to maintain continuous supply of water. A mine belonging to the company burst without any negligence on its parts, as a consequence of which the plaintiff's premises were flooded with water. It was held that the company was not liable as the company was engaged in performing a statutory duty.

Statutory authority cannot be pleaded as a defence when there is negligence: (*Northern Utilities Ltd. v. London Guarantee & Accident Co. (1936)*)

Topic -XXIV

Rule of Absolute Liability

(Rule in *M.C. Metha v. Union of India*)

The rule of absolute liability was propounded by the Supreme Court of India to provide a law to afford the change in society. The society is ever-changing and the law cannot afford to remain static. Law should keep pace with changing socio-economic norms. If a law on the past did not fit in the present context, the court should evolve a new law.

The rule of Absolute Liability propounded by the Supreme Court is an extension of Rule in *Rylands v. Fletcher*.

The rule of absolute liability was propounded by our Supreme Court while deciding the case *M. C. Metha v. Union of India (1987) 1 S.C.C. 395*. The facts of the case were like this:

On 4th and 6th December, 1985 some leakage of oleum gas occurred

from Shriram Foods and Fertilizers Industries in the city of Delhi. As a consequence of this leakage, one advocate practising in the Tis Hazari Court had died and several others were affected by the same. The action for compensation was brought through a writ petition under Article 32 of the Constitution by way of Public Interest Litigation. It was in the mind of the court that just an Year earlier there was a disaster in Bhopal when MIC gas had leaked from one of the plants belonging to Union Carbide, resulting in the death of at least 2500 persons and creating various kinds of ailments, generally serious to lakhs of others. The court found that victims of the leakage of dangerous substances like that could not be provided relief by applying the rule of strict liability laid down in *Rylands v. Fletcher*. This was so, mainly because of the various exceptions to that rule, whereby the defendant could avoid his liability. For instance, when the escape of gas was due to the act of a stranger or Act of God, the defendant was not liable under the rule.

In this background, the Supreme Court held that it was not bound by the rule of English law formulated in a different context in 19th century, and evolved a new rule, the rule of 'Absolute Liability'.

According to this rule, when an enterprise is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons, it owes an absolute and non-delegable duty to ensure that no harm results to anyone due to such activity. The enterprise must be absolutely liable to compensate for such harm and should not be allowed to avoid liability by pleading that it was not negligent. It was further held that the rule of Absolute Liability is not subject to any of the exceptions to the rule in *Ryland v. Fletcher*.

Since the payment of compensation could be awarded by the filing of a suit in an ordinary court rather than through a writ petition, the Supreme Court directed that these organisations who had filed this petition, may file actions on behalf of the sufferers of the leakage of Oleum

gas, in appropriate Court within 2 months and claim compensation on their behalf.

Topic -XXV

Liability for Keeping Animals

Or

Scientier Rule

The tortious liability of a person for the damage caused by his animals depends upon the nature of the animal. In order to fix liability upon the defendant, the animals are divided into two categories. They are

- (a) Animals *ferae* nature i.e., animals dangerous by nature
- (b) Animals *mansuetae* nature i.e., animals harmless by nature

Monkeys, elephants, bears, tigers, lions and gorillas have been considered to be generally dangerous to mankind and are therefore, placed in the category of animals *ferae* nature. In the case of animals *ferae* nature, scienter (i.e., the knowledge as to its dangerous nature) is conclusively presumed and the person having their control will be liable for the damage caused by their escape even without any proof of negligence on his part.

Animals like horses, camels, cows, dogs, cats are considered to be *mansuetae* nature (harmless) and the person having their control is not liable for damage done by them, unless it can be proved that the particular animal in question had a vicious or savage propensity and the person having its control had the knowledge (scienter) of the same. This is the Scientier Rule.

Hudson v. Robberts (1851)

The defendant's bull was irritated by the red hand-kerchief which the plaintiff was wearing and it attacked the plaintiff while he was walking along the highway. This bull had shown this tendency earlier

also and the defendant had knowledge of the same. The defendant was held liable.

Buckle v. Holmes (1926)

The defendant's cat entered the plaintiff's land and it killed thirteen pigeons of the plaintiff. The court held that the cats are animals *mansuetae* nature and the defendants not liable because of two reasons:

- (i) There was no vicious propensity peculiar to this cat.
- (ii) The defendant had no knowledge of the viciousness of the cat.

Sycamire v. Ley (1932)

The defendant's dog was in a car which was parked at the beach. The glass shutters were down but the dog broke the shutters and bit the plaintiff. The court held that the defendant was not liable since he had taken precaution by closing the shutters. In this type of cases the plaintiff can succeed only if the rule of scienter is applied. In that action it is necessary to prove that the defendant was aware of the dog's vicious propensity.

Pearson v. Coleman Brothers (1948)

An infant girl, aged 7, who had entered the circus premises after purchasing ticket to see the show, was injured by a Lion when she crawled under the lion's tent to relieve herself. The circus authorities had not provided a lavatory for visitors and hence she had to go an apparently secluded place. The court held that she was entitled to recover damages as the injury was caused by a Lion which is of *ferae* nature.

Behrens v. Bertram Mills Circus Ltd. (1957)

The defendants operated a circus and a circus-trained Burmese elephant was frightened by the barking of a small dog. The elephant ran after the dog towards a booth and knocked down the booth. The plaintiff was inside the booth. The plaintiff was not injured physically but re-

ceived a considerable shock and had to be confined to bed for a week. The court held that the elephant is an animal ferae nature. The animal was not acting viciously but out of fright. Even then the court held the defendant liable for the damage caused by the elephant.

If the plaintiff has been bitten by the defendant's dog, he can succeed in his action, only if he can prove that the dog had earlier shown this tendency to attack mankind and the defendant had the knowledge of the same. By the Dogs Act, 1906, proof of scienter is dispensed with in England in the case of injury done to cattle or poultry by the dog without proof of the dog's mischievous propensity, or owner's knowledge of the same or even without proof of negligence on his part. The rule of scienter still continue to govern the liability for all other kinds of harm caused by the dog.

Liability for Cattle Trespass

Under common law, the owner of cattle may also be liable if his cattle commit trespass on the land of another person. The liability in such a case is strict and the owner of the cattle is liable even if the vicious propensity of the cattle and the owner's knowledge of the same are not proved. There is also no necessity of proving negligence on the part of the defendant. The liability for cattle trespass is strict, scienter or negligence on the part of the owner of the cattle is not required to be proved.

The term cattle includes bulls, cows, sheep, pigs, horses, asses and poultry. But cats and dogs fall outside this category and there cannot be cattle trespass by dogs and cats.

Ellis v. Loftus Iron Co. (1874).

The defendant's horse kicked and bit plaintiff's mare through the wire fence which divided their properties. This damage could not have been caused without the horse's body having crossed the boundary. There was cattle trespass and the defendant was held liable without any

proof of knowledge of the vicious nature of the horse or negligence on the part of the defendant.

Theyer v. Purnell (1918)

The defendant's sheep trespassed on the plaintiff's land. The defendant's sheep was infected and that communicated to the plaintiff's sheep. Even though the defendant did not know about the infection of his sheep, he was held liable for loss to the plaintiff which was considered to be natural consequence of the trespass.

Topic - XXVI

Remoteness of Damage

When a tort is committed, the question of defendant's liability arises. The consequences of a wrongful act may be endless or there may be consequences of consequences. For example, a motor cyclist negligently hit a child and he succumbed to his injuries. On hearing of this news, the father of the child died of heart attack and the mother of the child who was pregnant suffered nervous shock and became chill. She gave birth to a still born child after two months. The question is can the motor cyclist be liable for all these consequences?

In the above illustration, he is only liable for those consequences which are not too remote from his conduct. A defendant cannot be made liable for all the consequences which followed his wrongful act. A person is liable for those consequences which are not too remote from his wrongful act.

There are two main tests to determine whether the damage is remote or not. They are (i) test of directness and (ii) test of reasonable foresight.

1. Test of Directness

According to the test of directness, a person is liable for all th

direct consequences of his wrongful act, whether he could have foreseen them or not; because consequences which directly follow a wrongful act are not too remote.

2. Test of Reasonable Foresight

According to the test of reasonable foresight, if the consequences of a wrongful act can be foreseen by a reasonable man, they are not too remote. If those consequences could not be foreseen by a reasonable man, they are considered to be remote. Thus if I commit a wrong, I will be liable only for those consequences which I could foresee. I am not liable for those consequences which could not have been foreseen.

Smith v. London and South Western Railway Co. (1870)

The railway company was negligent in allowing a heap of trimmings of hedges and grass near a railway line during dry weather. Spark from the railway engine set fire to the material. Due to the high wind the fire was carried to the plaintiff's cottage which was burnt. The defendants were held liable even though they could not have foreseen the loss to the cottage. The court applied the test of directness.

Re Polemis and Furness, Whity & Co. (1921)

In this case, the defendants chartered a ship. The cargo to be carried by them included a quantity of Benzine and Petrol in tins. Due to leakage in those tins some of their contents collected in the hold of the ship. Owing to the negligence of the defendant's servants, a plank fell into the hold. It resulted in a spark and consequently the ship was totally destroyed by fire. The owners of the ship were held entitled to recover the loss nearly 2,00,000 pounds being the direct consequence of the wrongful act although such a loss could not have been reasonably foreseen. In this case also the test of directness was applied to fix liability upon the defendant.

The Wagon Mound Case (Overseas Tankship (U.K) Ltd. v. Morts Dock and Engg. Co. Ltd. (1961)

In this case, the test of directness was held to be incorrect and was rejected by the Judicial committee of the Privy Council. It was further held that the test of reasonable foresight is the better test to determine whether the damage is remote or not.

The facts of the case were like this:

The Wagon Mound, an oil burning vessel, was chartered by the defendants, Overseas Tank ship Ltd., and was taking fuel oil at Sydney port. At a distance of about 600 feet, the plaintiff, Morts Dock Company, owned a wharf, where the repairs of a ship including some welding operations were going on. Due to the negligence of defendant's servants a large quantity of oil was spilt on the water. The oil which was spread over the water was carried to the plaintiff's wharf. About 60 hours thereafter molten metal (metal made liquid by heating at a very high temperature) from the plaintiff's wharf fell on floating cotton waste, which ignited the fuel oil on the water and the fire caused great damage to the wharf and equipment. It was also found that the defendant could not foresee that the oil so spilt would catch fire.

The trial court applied the rule of directness and held the defendant liable. The Supreme Court of the New South Wales also followed the *Polemis rule* and held that the defendant was liable for the fire.

On appeal, the Privy Council held that *Re Polemis* was no more good law and reversed the decision of the Supreme Court.

Bourhil v. Young 1948

The plaintiff, a fishwife while getting out of a tramcar heard of an accident but could not see the same as she was about 50 feet away from the scene and her view was obstructed by the tramcar. In the accident, which had occurred, a negligent motorcyclist had been killed. After the body of the motorcyclist had been removed, the fishwife happened to

go to the scene of the accident and saw the blood on the road. As a result of the same she suffered nervous shock and gave birth to a still-born child.

The House of Lords held that the deceased could not be expected to foresee any injury to the plaintiff and, therefore, he did not owe any duty of care and as such his personal representatives could not be made liable. The court applied the test of reasonable foresight to fix liability.

Topic - XXVII **Nervous Shock**

The wrongful act of the defendant may not always cause physical injury to the plaintiff. Sometimes the wrongful act of the defendant may cause nervous shock and mental chill to the plaintiff. Nervous shock is now considered to be a tort and liability for this wrong is well established. A person can claim compensation for personal injury caused by a nervous shock through what he has seen or heard.

Wilkinson v. Downton (1897)

The plaintiff suffered nervous shock and got seriously ill on being told falsely, by way of practical joke, by the defendant that her husband had broken both the legs in an accident. The court held that the defendant was liable.

Dulleu v. White and Sons (1901)

The defendant's servants negligently drove a horse van into a public house and the plaintiff, a pregnant woman, who was standing there behind the bar, although not physically injured, suffered nervous shock, as a result of which she got seriously ill and gave premature birth to a still born child. The defendants were held liable.

Hanbrook v. Stokes Bros. (1925)

The defendant negligently left his motor lorry unattended and with

its engine running at the top of a steep and narrow street. The lorry started by itself and ran violently down the hill. Mrs. H., who had just left her children immediately below a point where the street made a bend, saw the lorry rushing round the bend. She was terrified for the safety of her children. Almost immediately afterwards the bystanders told her that one of her children had been injured. In consequence of her fright and anxiety, she suffered nervous shock which eventually caused her death. Her husband sued for the loss of her services and recovered damages for the shock and mental pain suffered by his wife and consequent illness resulting in her death.

Bourhill v. Young 1948

The plaintiff, a fishwife while getting out of a tramcar heard of an accident but could not see the same as she was about 50 feet away from the scene and her view was obstructed by the tramcar. In the accident, which had occurred, a negligent motorcyclist had been killed. After the body of the motorcyclist had been removed, the fishwife happened to go to the scene of the accident and saw the blood on the road. As a result of the same she suffered nervous shock and gave birth to a still-born child.

The House of Lords held that the deceased could not be expected to foresee any injury to the plaintiff and, therefore, he did not owe any duty of care and as such his personal representatives could not be made liable. The court applied the test of reasonable foresight to fix liability.

Dooley v. Cammell Laird and Co. (1951)

The plaintiff, the driver of a crane, suffered nervous shock when he saw that by the breaking of a rope of the crane its load fell into the hold of a ship where some men were at work. The rope had broken due to the negligence of the defendants and they were held liable to the plaintiff.

Mrs. Halliqua v. Mohan Sundaram (1951)

The plaintiff was travelling by a taxi. The taxi collided with a tramcar

on account of the negligence of the driver of the taxi. The plaintiff sustained a nervous shock and was incapacitated for normal activities. The court held that the plaintiff was entitled to damages for nervous shock.

Topic - XXVIII

Malicious Prosecution

Malicious prosecution is an abuse of legal machinery. If the defendant has made a false criminal complaint to the magistrate with malicious intention against the plaintiff and the plaintiff was acquitted of the charges at the end of the prosecution, the plaintiff can file a suit against the defendant and claim compensation for malicious prosecution.

If A has made a false report to the police against B and the police arrested B and took him into custody, A cannot be sued for false imprisonment since the deprivation of B's liberty was not caused by A. But if he had made a false complaint to a magistrate, he may be sued for malicious prosecution.

In a suit for malicious prosecution, the plaintiff has to prove the following:

- (i) The plaintiff should be previously prosecuted by the defendant. This means that the defendant should have filed a criminal case against the plaintiff in a court and prosecuted him of false criminal charges. Institution of civil proceedings does not give rise to the tort of malicious prosecution. Institution of bankruptcy and liquidation proceedings, however, can give rise to the tort of malicious prosecution.
- (ii) The prosecution should have ended in favour of the plaintiff. If the plaintiff was acquitted, this condition would necessarily be satisfied. Even if, for instance, the prosecution was withdrawn, this condition would be sufficiently satisfied.

(iii) The prosecution should be malicious.

(iv) The prosecution should have been launched without reasonable and probable cause. This condition is satisfied, when it is shown that the defendant did not honestly believe that there were grounds for the prosecution.

This principles were laid down in *Arbath v. North Eastern Rly. Co.* (1886). The facts of the case were like this:

There was a collision between two trains owing to the negligence of the railway authorities. There were many casualties. A, one of the passengers threatened the authorities with a suit for recovery of damages in respect of the injuries sustained as a result of that accident. His wounds were certified by a Doctor B. The railway authorities paid heavy compensation to A on the strength of the doctor's certificate. Later on they came to know that really A was not injured, that A and B conspired to secure damages from the railway company and that in pursuance of this conspiracy, B inflicted the injuries on A with A's consent. They made enquiries, which confirmed these suspicions. Thereupon they prosecuted B for conspiracy to cheat the Railway Company. The evidence before the court was not sufficient to convict B. B was given the benefit of doubt and was acquitted. Thereupon B sued the Railway Company for damages for malicious prosecution.

The prosecution was not launched without reasonable and probable cause. There was honest belief in the charge though it was unsuccessful. Hence the action for malicious prosecution was dismissed.

Nagendra Nath Ray v. Basanta Das Bairagya (1929)

There was a theft in the defendant's house. The defendant informed the police that he suspects the plaintiff. The plaintiff was arrested by the police but was subsequently discharged by the magistrate as the final police report showed that there was no evidence connecting

the plaintiff with the theft. In a suit for malicious prosecution, it was held that it was not maintainable because there was no prosecution at all as mere police proceedings are not the same thing as prosecution.

Dattatraya Pandurang Dater v. Hari Keshav (1940)

The defendant lodged a first information report to the police regarding the theft at his shop naming the plaintiff, his servant, as being suspected for the theft. After the case was registered, the police started the investigation. The plaintiff was arrested and remanded by a magistrate, to police custody. On investigation, the police could not find sufficient evidence against the plaintiff and at the instance of the police, the bail bond was cancelled and the accused i.e., the plaintiff in the instant case was discharged. Thereafter the plaintiff sued the defendant for malicious prosecution. It was held that the essential element for such an action that the plaintiff had been prosecuted by the defendant could not be established. The defendant had done nothing more than giving information to the police and it is the police who acted thereafter. The defendant could not be deemed to be the prosecutor of the plaintiff.

Bolandanda Pemmayya v. Ayeradara (1968)

The defendant filed a complaint before the Sub-Inspector of Police alleging that the plaintiff had committed theft of cardamoms and fish-traps. The sub-inspector recorded the statements of both the plaintiff and the defendant and also made a search of the plaintiff's house. He then made a note on the complaint that it was false and filed it. The plaintiff filed a suit against the defendant to claim damages for malicious prosecution. It was held that mere filing of a complaint before the police, where such complaint is recorded to be filed in that office only and no judicial authority is set in motion as a consequence of such complaint does not amount to prosecution. The suit of the plaintiff was, therefore, dismissed.

T.S. Bhatta v. A.K. Bhatta (1978)

The defendant filed a false complaint against the plaintiff before a

magistrate. It was dismissed and the defendant moved the Sessions Judge in revision. He got himself examined as a witness in Session's trial. He also got himself impleaded in the criminal revision before the High Court. It was held that the defendant was the real prosecutor and was liable for malicious prosecution.

In **Joseph George v. K. John** (2014 (1) KHC 648 : 2014 (2) KLJ 308), it was held by the Kerala High Court that a plaintiff in a suit for malicious prosecution can succeed only on proof of four points viz. (1) that he was prosecuted by the defendant; (2) that the prosecution ended in the plaintiff's favour; (3) that the defendant acted without reasonable and probable cause and (4) that the defendant was actuated by malice.

Topic -XXIX Nuisance

When the defendant unlawfully interferes with the plaintiff's use and enjoyment of land without actual trespass, the defendant is liable for nuisance. A nuisance is an unlawful interference, otherwise than by a direct act of trespass, with a person's use or enjoyment of land. The interference may be by way of noise, vibrations, heat, smoke, smell, fumes, water, gas, electricity, excavations or disease producing germs etc.

Nuisance should be distinguished from trespass. Trespass is a direct physical interference with the plaintiff's possession of land through some materials or tangible objects. In nuisance, there is interference with a person's use or enjoyment of land. Such interference with the use or enjoyment could be there without any interference with the possession. For example, a person by creating offensive smell or noise on his own land could cause nuisance to his neighbour. A trespass is actionable *per se*, but in an action for nuisance, special damage to the plaintiff should be proved.

Public Nuisance and Private Nuisance

Nuisances are divided into two classes, Public and Private. A public nuisance is one, which affects the public and is an annoyance to the general public. Public nuisance is a crime. A private nuisance is a tort. A public nuisance may also be a tort if special damage is thereby caused to a private individual, over and above the general damage caused to the public. A private nuisance is one which injures a private person exclusively. A public nuisance injures the public at large or recognisable sections of the public. A public nuisance causing special damage to an individual is to that extent liable to be treated as a private nuisance.

In order to sustain a civil action in respect of a public nuisance, proof of special and particular damage is essential. The proof of special damage entitles the plaintiff to bring a civil action for what may be otherwise a public nuisance.

Wilkes v. Hunger food Market Co. (1835)

There was obstruction to the highway. This was a public nuisance. The plaintiff showed that many of his customers could not come to his shop on account of this obstruction. This was special damage in his case and so he could sue in tort for the nuisance.

Campbell v. Paddington Corporation (1911)

The plaintiff was the owner of a building in London. The funeral procession of King Edward VII was to pass from a highway just in front of the plaintiff's building. An uninterrupted view of the procession could be had from the windows of the plaintiff's building. The plaintiff accepted certain payments from certain persons and permitted them to occupy seats in the first and second floor of her building. Before the procession, the defendant corporation constructed a stand on the highway in front of the plaintiff's building to enable the members of the corporation and its guests to have a view of the procession. This structure obstructed the view from the plaintiff's building. Because of the obstruction, the plaintiff was deprived of the profitable contract of letting seats

In her building. She filed a suit against the corporation contending that the structure on the highway, which was a public nuisance, had caused special loss to her. It was held that she was entitled to claim compensation.

Essentials of Private Nuisance

A Private Nuisance is a civil wrong and thus essentially a tort to property. In order to constitute the tort of nuisance, the following essentials are required to be proved:

- i) The plaintiff is the occupier of the landed property
- ii) The defendant has by his acts caused unreasonable interference with the use or enjoyment of land.
- iii) The interference has caused damage to the property or discomfort to the plaintiff.

St. Helen's Smelting Co. v. Tipping (1865)

Fumes from the defendant company's works damaged plaintiff's trees and shrubs. Such a damage being an injury to the property, it was held that the defendants were liable.

Christie v. Davey (1893)

The Plaintiff was a Music Teacher. He was living in the adjoining room of the defendant's room. The defendant was irritated by considerable amount of music lessons by the plaintiff. The defendant maliciously caused discomfort to the plaintiff by hammering against the part wall, beating of trays and whistling. The court granted an injunction against the defendant, as the noise which were made in the defendant's house were not of legitimate kind. They were considered to be excessive and unreasonable. They were made deliberately and maliciously for the purpose of annoying the plaintiff.

Hollywood Silver Fox Farm Ltd. V. Emmett (1936)

The plaintiff Hollywood Silver Fox Farm Ltd. had the business of

breeding silver foxes on their land. The vixen of these animals are extremely nervous during the breeding season and if they are disturbed by any loud noise, they may not breed during that season and may miscarry or kill their own young ones. The defendant maliciously caused guns to be fired on his own land with a view to cause damage to the plaintiff by interfering with the breeding of vixen. Even though the firing took place on defendant's own land over which the defendant was entitled to shoot, the court held that the plaintiff was entitled to injunction and damages.

Stoakes v. Brydges (1958)

The defendant used his telephone by way of retaliation for a grievance and persistently called up the plaintiff to vex, disturb and harass him. The court held that the defendant liable for nuisance.

Topic -XXX

Trespass to Land

Possession is an important right recognised in law. Possession is *prima facie* evidence of ownership. The possessor of a thing is presumed to be the owner of that thing. Any one who wants to establish his ownership for that thing, should prove his title by adducing evidence.

Any unjustifiable intrusion by one person upon the land in the possession of another will constitute the wrong of trespass. In other words, trespass to land refers to interference with the possession of land without lawful justification.

Ellis v. Loftus Iron Co. 1874

A slight crossing of the boundary is sufficient to constitute trespass. "If the defendant places a part of his foot in the plaintiff's land unlawfully, it is in law, as much a trespass as if he had walked half a mile along it":

To throw stones upon one's neighbour's premises is a wrong of trespass. Thus it could be committed either by a person himself entering the land of another person or doing the same through some material object e.g., throwing of stones on another person's land. It is also a trespass to place anything on or in land in the possession of another, as by driving a nail into his wall or placing rubbish against his wall.

Trespass is a wrong against possession rather than ownership. Therefore, a person in actual possession can bring an action even against the true owner though his possession was wrongful.

Trespass is actionable *per se* and the plaintiff need not prove any damage for an action of trespass.

Even an honest mistake on the part of the defendant may be no excuse and a person may be liable for trespass, when he enters upon the land of another person honestly believing that to be his own.

Trespass ab Initio

When a person enters certain premises under the authority of some law and after having entered there, abuse that authority by committing some wrongful act there, he will be considered to be a trespasser *ab Initio* to that property. Even though he had originally entered into the property lawfully, the law considers him to be trespasser from the very beginning and presumes that he had gone there with that wrongful purpose in mind. The plaintiff can, therefore, claim damages not only for the wrongful act which is subsequently done by the defendant but even in respect of original entry which is now considered to be trespass.

In order to be a trespass *ab Initio*, the person entered under authority must have done some, *positive act of misfeasance* (i.e., *doing of a wrongful positive act*). Mere *non-feasance* (*omission to do something*) is not sufficient to be liable for trespass *ab Initio*.

Six Carpenters case (1610)

Six carpenters entered an inn and there ordered for some wine and bread. After having taken the same, they refused to pay for that. They had done no act of misfeasance and mere nonpayment being only non-feasance, there was held to be no trespass *ab initio*.

Ellas v. Pasmore (1934)

The defendants, certain police officers entered the plaintiff's premises to make a lawful arrest. There they removed certain documents without having any lawful authority for that, which was, therefore, an act of misfeasance. By their act of misfeasance, their presence there had not become wholly unjustified because the arrest, i.e., the lawful purpose, had yet to be accomplished. As such they were held trespassers only with regard to the documents which they had seized and not trespassers *ab initio* to those premises.

Remedies

The following are the remedies available if a person's possession has been disturbed by a trespass.

1. Re-entry

Where a person's possession has been disturbed by a trespasser, he has a right to use reasonable force to get trespass vacated. Ousting a trespasser by a person having a lawful right to do so is no wrong.

2. Suit for ejectment

A person who has been dispossessed of certain immovable property, without due course of law, can recover back the property by filing a suit for recovery of possession.

3. Action for Mesne Profit (pronunciation - mean profit)

Apart from the right of recovery of land by getting the trespasser ejected, a person who was wrongly dispossessed of his land may also claim compensation for the loss which he has suffered during the period

of dispossession. An action to recover such compensation is known as an action for mesne profits. Mesne profits refer to the profit taken by the defendant during the period of his wrongful occupancy.

4. Distress Damage Feasant

The right of distress damage feasant authorise's a person in possession of land to seize the trespassing cattle or other chattel and he can detain them until compensation has been paid to him for the damage done.

Vaspor v. Edward (1701)

This right can be exercised when the trespassing animal or chattel is within the property. There is no right to follow the thing after it has gone out of those premises or to recover them after the owner has taken them away.

Boden v. Roscoe (1894)

The court held that an occupier of land was entitled to detain a pony, which after trespassing had kicked his filly (young female horse), until compensation for the damage done was paid.

Topic -XXXI

Trespass to Goods

Trespass to goods is a wrongful interference with the possession of goods. It consists in direct physical interference with the goods which are in the possession of the plaintiff without any lawful justification. It may take innumerable forms such as throwing of stones on a car, shooting birds, beating animals, infecting animals with disease or killing a dog by giving it poisoned meat.

Trespass to goods is actionable *per se*, that is, actionable without the proof of any damage. A trespass to goods is an interference with

possession and as such any one in lawful possession of goods can bring an action against the trespass. He need not be the owner of the goods.

Topic -XXXII

Detinue

Where the defendant wrongfully detains the goods belonging to the plaintiff and refuses to deliver the same on lawful demand, the plaintiff can recover the same by bringing an action for detinue. It is an action for the recovery of goods unlawfully detained by the defendant. If the original possession is lawful but subsequently the goods are wrongfully detained by the defendant an action for detinue can be brought. Thus, if a bailee refuses to deliver the goods after the bailment is determined he is liable in detinue. In such an action, the defendant has to either return the specific chattel or pay its value to the plaintiff.

Banshi v. Goverdhan (1976)

The defendant took a cycle on hire from the plaintiff. He had not returned the same. He was held liable to pay to the plaintiff the estimated value of the cycle, i.e., RS. 300 under the action for detinue.

Topic - XXXIII

Conversion (Trover)

If the defendant, wilfully and without any justification, deals with the goods of the plaintiff in such a manner that the plaintiff is deprived of his use and enjoyment, he is liable for Conversion or Trover. The following are examples of Conversion.

- (1) Refusing to deliver the plaintiff's goods without lawful justification.
- (2) Putting the goods of the plaintiff to one's own use or consuming them.
- (3) Transferring the goods to a third party

- (4) Destroying them or damaging them in a way that they lose their Identity
- (5) Dealing with the goods in any other manner which deprives the plaintiff to its use and possession.

Richardson v. Atkinson (1723)

The defendant draw out some wine out of the plaintiff's cask and mixed water with the remainder to make good the deficiency. He was held liable for the conversion of the whole cask as he had converted part of the contents by taking them away and the remaining part by destroying their identity.

Fouldes v. Willoughby (1842)

The plaintiff embarked his horses on the defendant's ferry boat for crossing the river. Some dispute having arisen between the plaintiff and the defendant before the boat started, the defendant asked the plaintiff to remove his horses from the boat. On his refusal, the defendant put the horse off on to the highway. The plaintiff himself declined to get down and he was carried across the river. The plaintiff brought an action contending that the defendant's act had amounted to conversion. It was held that the defendant's act might have been trespass to the horses, it did not amount to conversion.

Moorgate Mercantile Co. Ltd. V. Finch (1962)

The defendant used the plaintiff's car for transporting uncustomed watches. The car was seized and forfeited by the customs officials under the customs and excise Act, 1952. Forfeiture of the car was held to be the natural and probable consequence of the defendant's act and he was deemed to have intended the same and as such the defendant was liable for conversion.

Roop Lal v. Union of India (1972)

Some Military Jawans found some firewood lying by the river side. They thought that the wood being unmarked, probably belonged to the

Government and they had every right to take away the same. They took away the wood in the military vehicle for campfire and fuel. The wood was belonged to the plaintiff. In an action against the Union of India for the tort of conversion committed by its servants, it was held that the Union of India was liable to compensate the plaintiff for the loss and the facts that the Jawans did not intend to commit the theft did not absolve the state from its liability.

Topic -XXXIV

Malicious Falsehood (Slander of Title and Slander of Goods)

If the defendant makes a false statement with malicious intention regarding the title or quality of goods of the plaintiff, he is liable for Malicious Falsehood. The statement should have affected the pecuniary interest of the plaintiff. The statement should be made to a third person.

Rateliff v. Evans (1892)

The defendant made a malicious statement that plaintiff's business has been closed down, which resulted in pecuniary loss to the plaintiff, because the natural consequence of that is the loss of his customers. It was malicious falsehood, and the court held that the defendant liable for the same.

Important forms of this wrong are *slander of title* and *slander of goods*.

In *slander of title*, there is a false and malicious statement about a person's property or business. For example, a false assertion that the defendant has a lien over the plaintiff's goods or he has a better title than that of the plaintiff is slander to title.

In *slander to goods*, the disparaging statement relates to the goods. For example, allegation of defects in the goods manufactured by the

plaintiff. The obvious effect of such statement is to depreciate the value of plaintiff's goods.

Topic - XXXV

Passing Off

In the business world, it is quite possible that a person may manufacture some goods and use the same name or adopt same getup for those goods with the object of creating a belief in the mind of the public that the goods are of another person. It is in effect making duplicate goods.

The defendant is liable for the tort of "Passing off" under the following circumstances:

- (1) If the defendant has used the same or similar name for his product as that of the plaintiff, with the object of creating a belief in the mind of the public that the goods are of the plaintiff.
- (2) If the defendant has made goods with same getup to that of the plaintiff, with the object of causing a belief in the mind of the public that they are of the plaintiff's goods.

The purpose of this tort of passing off is to protect commercial goodwill and to ensure that people's business reputation are not exploited by another person.

Reddaway v. Bemtham Hemp Spinning Co. (1892)

If the defendant's goods are so marked, made-up, or so described by them as to be calculated to mislead ordinary purchasers and to lead them to mistake the defendant's goods for the goods of the plaintiff's, the defendant is liable for Passing Off.

White Hundson & Co. Ltd. v. Asian Corporation Ltd. (1964)

The plaintiff's medicated cough sweets were being sold in the Singapore market under the name 'Hacks', in red cellophane wrappers. Many of the customers for the product could not read English and they were in the habit of asking for them as, "red paper cough sweet".

The defendants also started selling their cough sweets in red wrappers although under a different name, 'Pecto'.

It was held that the customers, because of similar packing, were misled in taking the defendant's product for that of the plaintiff's and the plaintiff was entitled to an injunction against the defendant.

Ellora Industries v. Banarsi Dass and Brothers (1980)

The plaintiff, Banarsi Dass and Brothers were the registered proprietors of the trade mark 'ELORA' in respect of watches, time pieces, clocks and their parts. They had been selling clocks under this trade name since 1955.

The defendant manufactured time pieces with the trade mark "Gargon". Printed on the dial of the time pieces. On the card board container containing the time piece was printed "ELORA INDUSTRIES GARGON (PUNJAB)". The defendant adopted it as their trading style in 1962.

The plaintiff brought an action requesting for an injunction to restrain the defendants from using the mark 'ELORA' or any other similar mark which, they contended, is similar to their registered trade mark and to prevent them from passing off their goods as the goods of the plaintiffs. It was held that the plaintiff was entitled to the injunction because it was a clear case of passing off and also of infringement of the plaintiffs registered trade mark.

Kala Niketan, Karol Bagh, New Delhi (plaintiff) v. Kala Niketan, G-10 (Basement) South Extension Market-1, New Delhi (Defendant) (1983)

The plaintiff was carrying on business of selling sarees under the name 'Kala Niketan' in Karol Bagh, New Delhi for more than 20 years. He had spent a lot of amount on advertisement and had achieved a goodwill in the market, and the business turnover was in several lakhs.

The defendant adopted the same trade name 'Kala Niketan' and started his business in sarees in South Extension Area, New Delhi. In an action for injunction, it was held that the defendant's act was calculated to deceive or cause confusion and injury to the business reputation of the plaintiff's business and therefore, the plaintiff was entitled to permanent injunction. The act of the defendant amounted to the tort of Passing Off.

**Topic -XXXVI
Effect of Death of Parties in Tort**

Or

Discuss the maxim "Actio Personalis Moritur cum Persona"

According to the Common Law rule of England, a personal action (the action in tort) dies with the parties to the cause of action. This rule is contained in the maxim "*Actio personalis moritur cum persona*", which means that a personal cause of action dies with the person. So the death of either the plaintiff or the defendant in a suit claiming compensation for a tort comes to an end of the suit. The legal representatives of the deceased could not sue or be sued for any tort committed against or by the deceased in his lifetime.

The above stated general rule was not applicable if someone, before his death, had wrongfully appropriated the property of another person. The law did not allow the benefit of that wrongfully appropri-

ated property pass on to the legal representatives of the deceased. The person entitled to the property could bring an action against the legal representatives of the deceased and to recover such property or its value.

In 1934, the Law Reform (Miscellaneous Provisions) Act was passed in England. This enactment made changes in the common law rule. By virtue of this enactment, the death of either parties to a suit does not result in end of the suit. The cause of action would survive to the legal representative of the deceased except in the case of action for defamation in which the cause of action comes to an end on the death of either parties.

In India, the maxim 'Actio Personalis Moritur Cum Persona' has no application. This would be clear from section 306 of the Indian Succession Act, 1925. The effect of that section is that in tort, death of the victim of defamation, assault or personal injuries which have not caused the death, puts an end to tortious liability. Liability in regard to other torts can be enforced by the legal representatives of the injured party.

Problem

A published a libel affecting B. Examine the effect of B's death (i) after the said publication; (ii) after filing the suit and (iii) after decree.

A published a libel injuring B's reputation, B can sue for damages. If he dies before filing suit, his legal representatives cannot sue for damages. If B sues and dies before decree, the suit abates (comes to an end) and cannot be continued by B's legal representatives. If B dies after obtaining a decree, the legal representatives can realise the fruits of the decree.

Topic - XXXVII

How far Causing of Death Is Actionable in Tort ?

It is a well established principle of common law that causing of death is not a tort and the legal representatives of the deceased person cannot claim compensation from the person who caused the death. However, if there is any statute providing for compensation for the death caused, the legal representative of the deceased can claim compensation.

Baker v. Bolton (1808)

The defendant was the owner of a stage coach in which the plaintiff and his wife were travelling. The coach met with an accident due to the negligence of the defendant. The plaintiff was injured and his wife who sustained injuries succumbed to her injuries after a month. The plaintiff sued for damages.

He was awarded damages for-

- (I) The injuries suffered by him;
- (II) Loss of service of his wife from the time of hurt till the date of her death

He could not recover nothing for loss of her service after her death. In a civil court, the death of a human being cannot be complained of as an injury. This principle is known as rule in *Baker v. Bolton*. Hence the gibe "It is cheaper to kill than to maim".

¹There are various statutes in England making provision for compensation on the death of a person. The examples are the Coal-mining (Subsidence) Act, 1957 the Carriage by Air Act, 1961, The Carriage by Railway Act, 1972 the Carriage of Passengers by Road Act, 1974, the Merchant Shipping Act, 1979 and the Fatal Accidents Act, 1976. An action for compensation for death caused is permitted only on the basis of various statutes.

Indian law on the subject is not much different from that in England. An action for compensation is permitted only on the basis of various statutes. The Fatal Accidents Act, 1855, the Employees Compensation Act, 1923 and the Motor Vehicles Act, 1988 are statutes dealing with compensation on the death of a person.

By virtue of the Fatal Accidents Act certain defendants can bring an action for compensation on the death of a person. By virtue of the Act, whenever the death of a person causes loss to the representatives, the person at fault has to compensate them. The dependants recognised under the Act are wife, husband, parent and child. Brothers and sisters are not legal representatives within the meaning of the Fatal Accidents Act.

Topic -XXXVIII Foreign Tort

Suppose 'A', an English man, comes to India and when he is in India, 'B', a French man, commits assault and battery against him. When 'A' files a case against 'B' in England claiming compensation, the case is based on a foreign tort. Thus a foreign tort is a tort which is committed abroad, i.e., the cause of action regarding which has arisen abroad.

When a suit is filed in a country, claiming compensation for a tort committed in a foreign country, the question normally arising is which law should be applied to decide the rights and liabilities of the party. There are three theories to give answer to above questions. They are:-

1) Theory of *Lex Fori*

The theory of *lex fori* is of German origin. It was advocated by Savigny in 1849. According to this theory, when a case comes before a court claiming compensation for a tort committed in a foreign country, the court should apply the law of the forum for deciding the rights and liabilities of the parties. The fundamental defect of this theory is that a

defendant would be liable if his act is actionable according to the *lex fori* although it is quite innocent according to the law of the country where the act was committed. Moreover, if the *lex fori* is the sole law, the plaintiff will select a country to file suit which is most favorable to him and this may encourage what is called 'Forum Shopping'.

2) Theory of *Lex Loci Delicti Commissi*

According to this theory, the liability for tort is to be governed by the law of the place where the tort was committed. As a general rule, application of '*lex loci delicti commissi*' will not bring about unjust result. However mechanical application of *Lex Loci Delicti Commissi* may bring unjust result. For example, an English man had illicit sexual intercourse with the wife of another English man in India. According to the Indian law, the alleged wrong is not a tort but only a crime. If the aggrieved English man files a case in England, the English Court will dismiss the suit by applying the Indian Law. It may result in injustice. Thus this theory is also not a sound theory.

3) The proper Law of Tort

This theory is evolved in America due to the drawbacks of the theories of *Lex Fori* and *Lex Loci Delicti commissi*. According to this theory, the law to be applied is that country's law with which the act complained of has most significant connection. The proper law of tort (Law to be applied) is that country's law with which the alleged wrong has most real and substantial connection.

In *Babcock v. Jackson* the American court applied the theory of proper law of tort for selection of *lex causa* and applied New York law to decide the dispute.

The facts of the case were like this:

The plaintiff was a gratuitous passenger in the defendant's motor car. They were both domiciled in the state of New York. They went to Canada on a week-end trip. The Plaintiff was injured in the state of Ontario due to the negligent driving of the defendant. According to the theory of *lex loci delicti commissi*, the drivers have no liability towards

gratuitous passengers. The New York Court applied the theory of proper law of tort and selected New York Law since the tort has most real and substantial connection with New York. The connections considered by the court are: The plaintiff is domiciled in New York. The car was registered in New York. According to the New York Law, a gratuitous passenger can also claim compensation from the negligent driver.

Modern English Law

The modern English Law is a sort of compromise between the competing claims of *lex fori* and *lex loci delicti commissi*. In order to find out the English Law for the selection of law to be applied for deciding a case related to a foreign tort, one has to study three cases decided by English courts. They are:-

1) Phillips v. Eyre (1870)

Phillips, an English man, filed a suit in England against Eyre (an English man) claiming compensation for assault and false imprisonment alleged to have committed in Jamaica. Eyre was Governor of Jamaica. In order to suppress rebellion (insurrection), Marshall law was declared in Jamaica. Phillips who visited Jamaica was arrested and imprisoned for some time. Thereafter he was released. Eyre who ceased to be Governor of Jamaica came back to England. Then Phillips filed the suit. The defendant Eyre appeared in the court and raised a defence that his acts in Jamaica in the process of suppressing rebellion is exempted from liability by an Act of Indemnity passed by Jamaican Parliament. While deciding this case the English court laid down the following principles :

- a) In order to file a suit in England for a wrong alleged to have been committed abroad, the wrong must be actionable in England.
- b) The act must not be justifiable by the law of the place where it was done.

In this case, the defendant's act is justified by Jamaican Law.

2) Machado v. Fontes (1897)

The defendant published a defamatory matter in libel form in Brazil. The plaintiff filed a suit in England claiming compensation. According to Brazilian law, libel is only a crime and not a tort. The defendant contended that his act is not a tort according to *lex loci delicti commissi*. The English court held that the alleged wrong is actionable in England and the defendant's act has no justification in *lex loci delicti commissi* and thus the defendant is liable to pay compensation.

This decision was severely criticised by Jurists. The decision in Machado v. Fontes has been over-ruled by the House of Lord's decision in Boys v. Chaplin.

3) Boys v. Chaplin (1971)

The plaintiff (Boys) and the defendant (Chaplin) were British Service Men stationed in Malta. The plaintiff was injured in Malta due to the negligent driving of Chaplin. According to Maltese Law the plaintiff could recover 53 pounds as compensation. But according to English Law, the plaintiff could recover 2000 Pounds as compensation. The House of Lords while deciding this case declared the following principles.

- a) An Action brought in England on a foreign tort will fail unless the conduct complained of is actionable as a tort by English domestic law.
- b) There should be civil liability according to *lex loci delicti commissi*. If there is only criminal liability, the action will fail (Rule in Machado v. Fontes is over-ruled)
- c) The act must not be justifiable by the law of the place where it was done.

If all the above conditions are satisfied, the foreign tort is actionable in England and in assessing the liability (amount of compensation) the English Law will be applied by the English courts.

Topic -XXXIX

Heart Balm Tort

- (i) Breach of Contract to Marry, (ii) Criminal Conversation and
- (iii) Alienation of Affection

(i) Breach of Contract to Marry

Breach of promise to marry or heart balm is a common law tort. It was also called breach of contract to marry.

From medieval times until the early 20th century, in England, a man's promise of engagement to marry a woman was considered a legally binding contract. If the man were to subsequently change his mind, he would be said to be in "breach" of this promise and subject to litigation for damages. The woman who was aggrieved by the breach could claim compensation from the man who had withdrawn from his promise. It is to be noted that if the woman had withdrawn from her promise, the man who was aggrieved could not raise any claim. A woman had prerogative to change her mind.

A breach of promise to marry suit required a legally valid marriage engagement. Promises made by people who had not reached the age of majority could be broken at any time, without penalty. So also the promise made by a married person (e.g., conditional upon the death of the current spouse), so long as the other party knew that the person was married at the time, could be broken at any time, without penalty. Similarly, an engagement between people who were not legally permitted to marry (e.g., because of consanguinity laws) was invalid.

Valid engagements could be broken without penalty by either party upon discovery of significant-and-material-facts, such as previously unknown financial state, bad character, fraud, too-close blood relations, or the absolute physical or mental incapacity of the betrothed. Impotence,

sterility, criminality, and alcoholism also formed valid reasons to end an engagement.

Some of the original theory behind this tort was based on the idea that a woman would be more likely to give up her virginity to a man if she had his promise to marry her. If he seduced her and subsequently refused to marry, her lack of virginity would make her future search for a suitable husband more difficult or even impossible.

In awarding compensation the courts take into account:

- (i) Expenses incurred on the expectation of a marriage, such as property transferred or wedding expenses.
- (ii) Emotional distress and the woman's reduced opportunity for a future marriage.

Damages were greatly increased if the couple had engaged in pre-marital sexual intercourse.

Changing social morals have led to the decline of this sort of action. Most jurisdictions, at least in the English-speaking common law world, have become increasingly reluctant to intervene in cases of personal relationships not involving the welfare of children or actual violence. Many have repealed all laws regarding such eventualities whereas in others the statute allowing such an action may technically remain on the books but the action has become very rare and unlikely to be pursued with any probability of success.

(ii) "Criminal Conversation" or "Seduction"

At common law, criminal conversation, commonly known as crim. con., is a tort arising from adultery. The tort of criminal conversation seeks damages for the act of sexual intercourse outside marriage, between the spouse and a third party. Each act of adultery can give rise to a separate claim for criminal conversation. It is similar to breach of

promise, a tort involving a broken engagement against the betrothed, and **alienation of affection**, a tort action brought by a deserted spouse against a third party.

Initially, criminal conversation was an action brought by a husband for compensation for the breach of fidelity with his wife. The tort was abolished in England in 1857, and Ireland in 1976. It still exists in parts of the United States, but the application has changed. At least 29 states have abolished the tort by statute and another 4 have abolished it judicially. The tort is still recognized in a number of states in the United States, although it has been abolished either legislatively or judicially in most.

Suits for criminal conversation reached their height in late 18th and early 19th-century England, where large sums, often between £10,000 and £20,000, could be demanded by the plaintiff, for "debauching" his wife.

These suits were conducted at the Court of the King's Bench in Westminster Hall, and were highly publicised by publishers such as Edmund Curll and in the newspapers of the day. Although the plaintiff, defendant, or the wife accused of the adultery were all not permitted to take the stand, evidence of the adulterous behaviour was presented by servants or observers.

A number of very sensational cases were heard in the second half of the 18th century.

In **Grosvenor v. Cumberland** (1769), Lord Grosvenor sued the King's brother, the Duke of Cumberland for crim. con. with his wife. He was awarded damages of £10,000.

In **Worsley v. Bisset** (1782), Sir Richard Worsley lost his case against George Bisset, after it had been found that Sir Richard had

colluded in his own dishonour, by showing his friend his wife Seymour Dorothy Fleming naked in a bath house.

In 1796, the Earl of Westmeath was awarded £10,000 against his wife's lover, Augustus Bradshaw.

(iii) Alienation of Affection

At common law, 'alienation of affection' is treated as a tort. It is an action brought by a **deserted spouse** against a **third party** alleged to be responsible for the loss of love and affection between the spouses. The tort of alienation of affection is similar to the tort of 'criminal conversation'. In an action for alienation of affection, the plaintiff (wife or husband in a marriage) can claim compensation from a third party who is responsible or instrumental for disrupting her or his marriage, by alienating her or his spouse's affection, companionship, including marital obligations. An action for alienation of affection does not require proof of extramarital sex.

A suit claiming compensation for 'alienation of affection' can be instituted against a third person who has actively encouraged the other spouse to desert the plaintiff-spouse.

To succeed in an alienation claim, the plaintiff has to show that:

- (1) After the marriage there existed love and affection between the spouses in some degree.
- (2) The spousal love was alienated and destroyed.
- (3) The defendant's malicious conduct contributed to or caused the loss of affection.

It is necessary to show that the defendant intentionally engaged in acts which resulted in loss of affection. The liability arises only if there is any active participation, intention or encouragement on the part of the defendant. The acts which led to the loss of affection must be wrongful, intentional, calculated to entice the affection of one spouse away from the other.

In order to establish alienation of affection, it is not necessary for the plaintiff to prove that there exist an adulterous relationship between the defendant and the other spouse. It might be a defense that the defendant was not the active and aggressive seducer. If defendant's conduct was somehow inadvertent, the plaintiff would be unable to show intentional or malicious action.

Criminal conversation is a similar tort, arising from adultery, in which a married person would sue the person with whom his or her spouse had cheated on the marriage. Alienation of affection is a tort against a third party who encouraged the adultery, or who was otherwise responsible for the breakdown of the marriage.

In **Pinakin Mahipatray Rawal v. State of Gujarat** (2013 (3) KHC 810 (SC), the Supreme Court of India has made following observations on the heart balm torts:

Alienation of affection by a stranger, if proved, is an intentional tort. It is the Intentional Interference in the marital relationship by a third party with intent to alienate one spouse from the other. Alienation of affection is known as "Heart Balm" action. Anglo-Saxon common law on alienation of affection has not much roots in this country. The law is still in its nascent stage.

Both the spouses in a marriage have a valuable interest in the married relationship, including its intimacy, companionship, support, duties, affection, welfare of children etc. Anglo-Saxon based action against third parties for the tort of alienation of affection is intended to preserve marital harmony by deterring wrongful interference, thereby to save the institution of marriage.

In India, if the marital relationship is strained, and the wife lives separately due to valid reasons can lay a claim for maintenance against the husband. If a third party is instrumental for disrupting her marriage, by alienat-

ing her spouse's affection and companionship, she can also proceed against the intruder into her matrimonial home and claim compensation. Though such a claim can be raised by the deserted wife against the intruder, such suits are rarely found in India.

The husband who has been deserted by the wife at the instance of a stranger can also lay such a claim against the intruder. Such suits are very rare and uncommon in India.

Topic -XL Remedies Available with Respect to a Tort

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

(1) Judicial remedies

Judicial Remedies are granted by the court in an action (i.e., suit) filed by the injured party against the wrongdoer.

Judicial remedies which are available for redressing torts fall under three-headings: They are:

(A) Damages

The first kind of judicial remedy is damages. The word 'damage' must not be confused with the word 'damages'. These two words are not equivalent terms. Damage means and includes loss of money, comfort, health, property of the like. The term 'damages' is not the plural or "damage". It means the money compensation claimed by the injured party and awarded by the court. In a tort litigation, the injured party can claim unliquidated damages and the court will assess and award the compensation.

(B) Injunction

An injunction means an order of the Court :

- (i) restraining a person from doing, continuing or repeating a wrongful act or
- (ii) enjoyning (commanding) him to do some positive act which will put an end to a wrongful state of things created by him, or which will discharge his legal obligation.

In the former case, the injunction is said to be '*prohibitory*', whilst in the latter it is called '*mandatory*'.

A mandatory injunction is an order requiring the defendant to do some positive act for the purpose of putting an end to a wrongful state of affairs created by him, or otherwise in fulfillment of his legal obligation, e.g., an order to pull down a building which he has already erected resulting in an obstruction of the plaintiff's lights.

Likewise, an injunction may be temporary (or interim), i.e., for a specified period only, as for instance, until the suit is finally disposed of by the court, or perpetual, i.e., for all time.

(C) Specific Restitution of Property

The third kind of judicial remedy is the specific restitution of property. It is granted where the plaintiff has been wrongfully dispossessed of immovable property, or of some specific movable property, is entitled to recover such property.

(2) Extra-Judicial remedies

Extra-judicial remedies are those which are open to an injured party to adopt when he takes the law into his own hands and helps himself in the matter.

The following are Extra - Judicial Remedies.

1. Self Defence

It is lawful for a man to defend his person or property and to use

reasonable force towards another for the purpose.

2. Expulsion and Re-entry

A person who is entitled to the immediate possession of immovable property, may expel the trespasser therefrom and re-enter it, provided that the force used by him is reasonable, and does not transgress the reasonable limits of the occasion.

3. Reception

A person entitled to the immediate possession of chattel (i.e., movable property) may recover it from any person in possession of it and detained it, provided that such possession was wrongful in its inception.

4. Distress Damage Feasant

If one man's beast is on another man's land without license (i.e., without the owner's permission), and spoil his corn, grass etc., the owner is entitled to take possession of the beast until satisfaction is made to him for the injury he has sustained. The distress must be taken at the time the damage is done and while the beast is on the land.

Distress damage feasant is a remedy by which if cattle or other things are on a man's land and do damage there, he may summarily seize them without legal process, and retain them as a pledge for the redress of the injury he has sustained.

Anything animate or inanimate, which is wrongfully on the land of another and is doing damage, may be distrained for such damage. The distrainer must, however, supply the distrained animals with sufficient food and water.

The right is founded on the principle of recompense, which justifies a person in retaining that which occasions injury to his property till amends are made by the owner. The right does not give a right of sale. It can be exercised only by a person who has a sufficient possession of

land to entitle him to maintain an action of trespass. The distress must be taken at the time damage is done; for, if the damage was done yesterday, and the distress taken today, that would be illegal.

Topic -XLI **Discharge of Tort**

If a tort is committed tortious liability arises and the aggrieved person gets a right of action. The wrongdoer or the tort-feasor is liable to pay compensation to the person wronged or the victim. The meaning of discharge of tort is 'coming to an end of tortious liability'. Tortious liability comes to an end under the following circumstances.

A) Death of the parties

The common law maxim 'actio personalis moritur cum persona' means personal right of action dies with person. In England tortious liability arising from personal torts such as assault, battery, false imprisonment and defamation came to end with the death of the wronged person or the wrongdoer. However death of the wrongdoer or the wronged person did not put an end to the right of action relating to torts against property(eg trespass, nuisance, conversion etc.). The right to sue survived to the legal heirs of the deceased in such cases.

In 1934, the Law Reform (Miscellaneous Provisions) Act was passed in England. This enactment made changes in the common law rule. By virtue of this enactment, the death of either parties to a suit does not result in end of the suit. The cause of action would survive to the legal representative of the deceased except in the case of action for defamation in which the cause of action comes to an end on the death of either parties.

In India (except Kerala), by virtue of section 306 of the Indian Succession Act, 1925, death of the victim of defamation, assault or personal injuries (which have not caused the death), puts an end to tortious

liability. Liability in regard to other torts can be enforced by the legal representatives of the injured party.

In Kerala, as per section 2 of the Kerala Torts (Miscellaneous Provisions) Act, 1976, on the death of any person, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate. However this section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery. It is to be noted that section 306 of the Indian Succession Act,1925 is not applicable in the State of Kerala.

The result is that all cause of action arising from torts will survive except the following:

- (i) claim for damages for defamation
- (ii) claim for damages for seduction
- (iii) claim for damages for inducing one spouse to leave or remain apart from the other or
- (iv) claim for damages on the ground of adultery.

B) Accord and satisfaction

Accord means an agreement whereby a person agrees to accept some valuable consideration in lieu of right of action that he has against the other. Satisfaction means actual payment of amount of consideration so agreed. When the agreement is executed and satisfaction has been made the agreement is called accord and satisfaction. It operates as a bar to the right of action. An accord and satisfaction in favor of one joint tort-feasor operates in favor of all when the injury is one and indivisible.

C) Release

A tortious liability would come to an end when the wronged person / aggrieved person voluntarily releases the tort-feasor from his liability.

It should not be by threat, compulsion or force. A release made under mistake, or in ignorance of one's right or obtained by fraud is not valid. Once

a valid release is made, the tort-feasor will be discharged from his liability. A covenant not to sue one of the two joint tort-feasors doesn't operate as a release so as to discharge the other.

E) By expiry of Period of Limitation

If the person wronged fails to approach a court of law within the period of limitation, right to institute suit will be barred. It will operate as discharge of tortious liability.

In India period of limitation for institution of suits relating to tort is contained in Part VII (Articles 72 to 91) of the Schedule to the Limitation Act, 1963. Suit for compensation for libel is to be instituted within one year from the date of publication of the libel. If the defamed fails to institute the suit within one year from the date of publication of the libel, his right to institute the suit will be lost and the person published the libel will be discharged by operation of law.

F) Waiver by Election

Waive means to give up. Where a man who has more remedies than one against the tort-feasor has elected to pursue one of them and gives up all other remedies, the tortious liability is discharged to that extent. He cannot pursue the waived remedies thereafter, and the tort-feasor will be discharged as to the remedies so waived.

G) By Judgement

If an action is brought before the court seeking redress for the tort and a judgement is given by a competent court, the liability for that particular tort comes to an end. If the plaintiff fails in his suit, he cannot approach any court of law again on the very same tort. This principle is based on maxim *res judicata*.

**Part-II
The Consumer Protection Act, 1986**

**Topic - I
Introduction**

In the modern world, a person cannot lead a life in isolation. He will have to depend others for satisfying his wants. He may approach a person to purchase some goods or to get a service for consideration. Thus a person may become a consumer of goods or services. When you purchase a fan or a gas stove or a refrigerator, you become the consumer of goods. When you open a bank account or take an insurance policy or get your car repaired or avail treatment from a doctor or subscribes a telephone, you become the consumer of services.

The industrial revolution resulted in more and more production and unhealthy competition in the market. In order to withstand in the market, the manufacturers and suppliers of goods and services started to give advertisements containing false statements as to the quality and benefits of goods and services. Believing the advertisements to be true, the consumers started to purchase the goods or avail the services but they are being cheated or exploited by the supply of defective goods or deficiency in service.

Before the enactment of the Consumer Protection Act, 1986, a person aggrieved by the defective goods or deficiency in service had to approach the ordinary civil court to get his grievances redressed. The proceedings in ordinary civil court is complex, expensive and time consuming. In order to give more protection to the interest of Consumers of goods and services the Parliament enacted the Consumer Protection Act, 1986.

The Consumer Protection Act, 1986 aims to confer more protection and speedy remedy to consumers of goods and services by -

(i) establishment of "Consumer Disputes Redressal Forum" in every District for deciding disputes between consumer and supplier of goods and services. It is known as "District Forum"

(ii) establishment of a "Consumer Disputes Redressal Commission" in every State for deciding disputes between consumers and suppliers of goods and services . It is known as "State Commission"

(iii) establishment of a "National Consumer Disputes Redressal Commission" for deciding disputes between consumers and supplier of goods and services. It is known as "National Commission"

(iv) establishment of a "Central Consumer Protection Council" for promoting and protecting the rights of the consumers.

(v) establishment of a "State Consumer Protection Council" for promoting and protecting the rights of consumers within the state

After the coming into force of the Consumer Protection Act, 1986, a consumer who is aggrieved by the defective goods or deficiency in service can file a complaint to the District Forum or State Commission or National Commission for getting his grievances redressed. The complainant need not pay court fee. The complaint will be disposed of by following a summary procedure and thus he will get cheap, speedy and effective remedy. The complaint is to be filed within two years from the date of cause of action.

In *Dhanbir Singh v. Haryana Urban Development Authority* (2013 (11) SCC 472), it was observed by the Supreme Court that the Consumer Protection Act, 1986 was enacted to provide for better protection of the interests of consumers and for establishment of Consumer Coun-

cils and other authorities for the settlement of consumer disputes and for matters connected therewith.

Topic - II Who is a CONSUMER ?

The Consumer Protection Act, 1986 aims to protect the interest of Consumers of Goods and Services. Section 2 (d) of the Act defines Consumer.

By virtue of section 2(d), Consumers can be classified into two heads. They are(1) Consumer of Goods and (2) Consumer of Services.

Consumer of Goods

The following persons can be considered to be Consumer of Goods

1. A person who has purchased goods for a consideration. The consideration may be paid or promised to pay or partly paid or partly promised.

2. A person who has purchased goods under a system of deferred payment is also a consumer.

3. A person who is the user of any goods. He should have used the goods with the approval of the person who purchased the goods.

A person who has purchased goods for 'resale' or for any 'commercial purpose' is not a consumer. However, If a person has purchased some goods and uses it by him for the purpose of earning his livelihood by means of self-employment, it will not be a commercial purpose and he will be a consumer.

Thus if a person purchases a taxi or a photo-stat machine or a sewing machine and uses it by himself for the purpose of earning his livelihood by means of self-employment, that will not be deemed to be a "commercial purpose" and such a person will be considered to be a consumer.

Hindustan Motors Ltd v. N.P Tamankar (1996) CPJ 313 (NC)

A person purchased a car to be used it as a taxi. It was intended to be used by him for earning his livelihood by means of self - employment. The National Commission held that the purchaser of taxi for his self - employment is a consumer.

Sterling Computer Ltd. v. P.R. Kutty (1996) CPJ 118 (NC)

The complainant who was a contractor purchased a computer for his office use and it was used by his office staff. The computer was not being used to earn his livelihood. There was some defect in the working of the computer. The National Commission held that the computer was purchased for commercial purpose and the complainant was not a consumer and the complaint was dismissed.

Chima Engineering Service v. Rajan Singh (1997) I SCC 131

The Supreme Court held that a person who buys goods and uses them himself exclusively for purpose of earning his livelihood by means of self employment comes under the purview of consumer.

Kalpavruksha Charitable Trust v. Taushmical Brothers Ltd (AIR 1999 SC 3356)

The appellant, a charitable trust, was running a diagnostic centre. The C T Scan installed in the diagnostic centre had some defects. Though the appellant was a charitable trust only 10 % of the patients availed free service. The court held that the machinery was being used for 'commercial purpose' and thus the appellant is not a consumer.

Consumer of Service

The following persons are Consumer of Services.

1. A person who has hired or availed of any service for consideration. The consideration may be paid or promised to pay or partly paid or partly promised to pay.
2. A person who has hired or availed of any service under a system of deferred payment.
3. A beneficiary of any service when such services are availed of with the approval of the person who hired the service for consideration.

A consumer of service can file a complaint when there is deficiency in service.

Union of India v. Mrs. S. Prakash (1991)

It was held that the telephone subscriber of a telephone is a consumer as the rental charges paid is the consideration for the services rendered by the Telephone Department. The Consumer Forum can entertain a complaint by the subscriber for deficiency in service.

Mahanagar Telephone Nigam v. Vinod Karkare (1991)

A telephone complaint remained unattended for over six months. It was held that there was deficiency in service from the part of the telephone department and the State Commission awarded Rs. 6,600 as compensation. In this case the claim was allowed in favour of the user of the telephone although he was not a subscriber of the telephone.

Vasantha P. Nair v. Smt. V. P. Nair (1991)

The National Commission held that a patient is a consumer and the medical assistance is a service. If there is deficiency in the performance

of medical service the consumer can approach a consumer forum.

Indian Medical Association v. V. P Shantha and others (1995)

The Supreme Court held that a patient aggrieved by any deficiency in treatment from both private clinic and government hospitals are entitled to seek damages under the Consumer Protection Act.

Spring Meadows Hospital v. Harjot Ahluwalia (AIR 1998 S C 1801)

A minor child was brought to the hospital. He had high fever and an unqualified nurse without prior test gave intravenous chloroquine injection. The child collapsed and suffered irreparable brain damage and became a "vegetable state" for the rest of his life. He was the only son of his parents. The court held that the parents of the child and the child were consumers. The parents hired the services and the child is a beneficiary of such service. The court upheld the decision of the National Commission and awarded 12.50 lacs to the minor child and 5 lacs to the parents of the child.

C Silakumar v. Dr. John Arthur (1998) CPJ 436

The complainant had difficulty in passing urine. The doctor completely cut off his penis without any justification. The complainant, a 23 year old young man, had become impotent. The doctor was directed to pay Rs. 8 lakhs as compensation to the complainant.

Topic - III

Consumer Disputes Redressal Forum (DISTRICT FORUM)

The Consumer Protection Act provides for the establishment of a three -tier Quasi Judicial system for the purpose of rendering speedy and inexpensive remedy to the aggrieved consumer.

Section 9 of the Act empowers the State Government to establish a Consumer Disputes Redressal Forum in each district. It will be known

as District Forum. The state government has to establish the District Forum by notification. The District Forum is the lowest in the hierarchy of the three-tier quasi judicial system. The other two are State Commission and National Commission.

The constitution of a District Forum shall be as follows:

1. A President .

He shall be a person who is qualified to be a District Judge.

2. Two other members.

One of the members shall be a woman.

They shall have the following qualifications

- (i) Should be not less than thirty five years of age.
- (ii) Should possess a bachelor's degree from a recognised university.
- (iii) Should be persons of ability, integrity and standing. They should have adequate knowledge or experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy or industry, public affairs or administration.

A person shall be disqualified for appointment as a member under the following circumstances:

- (a) If he has been convicted and sentenced to imprisonment for an offence which, in the opinion of the State Government, involves moral turpitude.
- (b) If he is an undischarged insolvent .
- (c) If he is of unsound mind and stands so declared by a competent court
- (d) If he has been removed or dismissed from the service of the Government or body corporate owned or controlled by the Government

- (e) If he has, in the opinion of the State Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member.

The President and members of the District Forum are to be appointed by the State Government on the recommendation of a Selection Committee. Such Selection Committee shall consist of three *ex-officio* members. They are:

- (i) The President of the State Commission - Chairman
- (ii) Secretary, Law Department of the State - Member
- (iii) Secretary in charge of the Department of consumer affairs in the State- Member.

A member of the District Forum shall hold office for a term of 5 years or up to the age of 65 years whichever is earlier. However he shall not be eligible for re-appointment for another term of five years or up to the age of sixty five years, whichever is earlier. The re-appointment is to be made on the basis of recommendation of the Selection Committee.

The District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed does not exceed rupees twenty lakhs.

A Complaint shall be instituted in a District Forum within the local limits of whose jurisdiction -

- (a) the opposite party actually resides or carries on business or has a branch office or personally works for gain, or
- (b) the cause of action, wholly or in part arises.

A complaint may be filed in a District Forum by the Consumer or any recognised Consumer Association or the Central or the State Government.

Every complaint filed shall be accompanied with such amount of fee as may be prescribed.

On receipt of a complaint the District Forum may, by order, allow the complainant to be proceeded with or reject it. A complaint shall not be rejected unless an opportunity of being heard is given to the complainant. The admissibility of the complaint shall be decided within twenty one days from the date on which the complaint was received. The District Forum shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen. However if the complainant satisfies the District Forum that he had sufficient cause for not filing the complaint within such period, the complaint can be admitted after recording reasons for condoning the delay.

On admission of a complaint, the District Forum shall refer a copy of the complaint to the opposite party within a period of twenty one days from the date of its admission. The opposite party shall give his version of the case within a period of thirty days or within the period extended (15 days) by the District Forum.

If the opposite party denies the allegations contained in the complaint, the District Forum shall proceed to determine the dispute by taking evidence. After completion of the proceedings if the District Forum is satisfied that the goods suffered from any of the defects or there is deficiency of service, it shall issue an order to the opposite party directing him to do one or more of the following things:-

- (a) To remove the defect
- (b) To replace the goods with a new goods
- (c) To return the price
- (d) To pay compensation
- (e) To remove the deficiencies in the services
- (f) To provide cost to the complainant.

A person who is aggrieved by the order of the District Forum may prefer an appeal against such order to the State Commission within 30 days from the date of the order. The State Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period. If the order of the District Forum directs payment of any amount, the State Commission shall not entertain an appeal unless the appellant has deposited fifty percent of that amount or twenty -five thousand rupees, whichever is less.

If an interim order of the District Forum is not complied with, the District Forum may attach the property of the person not complying with such order. The attachment shall remain in force for a period of three months. At the end of three months, if non-compliance continues, the property attached may be sold and out of the sale proceeds , the District Forum may award such damages as it thinks fit to the complainant and shall pay the balance, if any, to the party entitled to it.

If any amount is due from any person under an order of the District Forum, the person entitled to the amount may make an application to the District Forum and the District Forum may issue a certificate for the said amount to the Collector of the District and the Collector shall proceed to recover the amount in the same manner as arrears of land revenue.

If a complaint instituted before the District Forum is found to be frivolous or vexatious, the District Forum shall dismiss the complaint after recording reasons in writing and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees.

If a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any other order made by the District Forum, such trader or person or complainant shall be punishable

with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or with both.

Topic - IV

Consumer Disputes Redressal Commission (STATE COMMISSION)

The Consumer Protection Act provides for the establishment of a three -tier Quasi Judicial system for the purpose of rendering speedy and inexpensive remedy to the aggrieved consumer.

Section 9 of the Act empowers the State Government to establish a Consumer Disputes Redressal Commission. It will be known as State Commission. The state government has to establish the State Commission by notification.

The State Commission shall consist of -

a) A President.

He shall be a person who is or has been a Judge of a High Court. He shall be appointed by the State Government after consultation with the Chief Justice of the High Court.

b. Two other members.

One of the members shall be a woman.

They shall have the following qualifications

- (I) Should be not less than thirty five years of age.
- (II) Should possess a bachelor's degree from a recognised university.
- (III) Should be persons of ability, integrity and standing.
They should have adequate knowledge or experience of at

least ten years in dealing with problems relating to economics, law, commerce, accountancy or industry, public affairs or administration.

A person shall be disqualified for appointment as a member under the following circumstances:

- (a) If he has been convicted and sentenced to imprisonment for an offence which, in the opinion of the State Government, involves moral turpitude.
- (b) If he is an undischarged insolvent
- (c) If he is of unsound mind and stands so declared by a competent court
- (d) If he has been removed or dismissed from the service of the Government or body corporate owned or controlled by the Government
- (e) If he has, in the opinion of the State Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member.

The members of the State Commission are to be appointed by the State Government on the recommendation of a Selection Committee. Such Selection Committee shall consist of three *ex-officio* members. They are:

- (i) The President of the State Commission - Chairman
- (ii) Secretary, Law Department of the State - Member
- (iii) Secretary in charge of the Department of consumer affairs in the State - Member.

A member of the State Commission shall hold office for a term of 5 years or up to the age of 67 years whichever is earlier. However he shall not be eligible for re-appointment for another term of five years or up to the age of sixty seven years, whichever is earlier. The re-appointment is to be made on the basis of recommendation of the Selection Committee.

A person appointed as a President of the State Commission shall also be eligible for re-appointment.

The State Commission shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed exceeds rupees twenty lakhs but does not exceed rupees one crore.

A Complaint shall be instituted in a State Commission within the local limits of whose jurisdiction -

- (a) the opposite party actually resides or carries on business or has a branch office or personally works for gain, or
- (b) the cause of action, wholly or in part arises.

A complaint may be filed in a State Commission by the Consumer or any recognised Consumer Association or the Central or the State Government.

Every complaint filed shall be accompanied with such amount of fee as may be prescribed.

On receipt of a complaint the State Commission may, by order, allow the complainant to be proceeded with or reject it. A complaint shall not be rejected unless an opportunity of being heard is given to the complainant. The admissibility of the complaint shall be decided within twenty one days from the date on which the complaint was received. The State Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen. However if the complainant satisfies the State Commission that he had sufficient cause for not filing the complaint within such period, the complaint can be admitted after recording reasons for condoning the delay.

On admission of a complaint, the State Commission shall refer a copy of the complaint to the opposite party within a period of twenty -

one days from the date of its admission. The opposite party shall give his version of the case within a period of thirty days or within the period extended (15 days) by the State Commission.

If the opposite party denies the allegations contained in the complaint, the State Commission shall proceed to determine the dispute by taking evidence. After completion of the proceedings if the State Commission is satisfied that the goods suffered from any of the defects or there is deficiency of service, it shall issue an order to the opposite party directing him to do one or more of the following things:-

- (a) To remove the defect
- (b) To replace the goods with new goods
- (c) To return the price
- (d) To pay compensation
- (e) To remove the deficiencies in the services
- (f) To provide cost to the complainant.

A person who is aggrieved by the order of the State Commission may prefer an appeal against such order to the National Commission within 30 days from the date of the order. The National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period. If the order of the State Commission directs payment of any amount, the National Commission shall not entertain an appeal unless the appellant has deposited fifty percent of that amount or twenty -five thousand rupees, whichever is less.

If an interim order of the State Commission is not complied with, the State Commission may attach the property of the person not complying with such order. The attachment shall remain in force for a period of three months. At the end of three months, if non-compliance continues, the property attached may be sold and out of the sale proceeds , the State Commission may award such damages as it thinks fit to the com-

plainant and shall pay the balance, if any, to the party entitled to it.

If any amount is due from any person under an order of the State Commission, the person entitled to the amount may make an application to the State Commission and the State Commission may issue a certificate for the said amount to the Collector of the District and the Collector shall proceed to recover the amount in the same manner as arrears of land revenue.

If a complaint instituted before the State Commission is found to be frivolous or vexatious, the State Commission shall dismiss the complaint after recording reasons in writing and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees.

If a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any other order made by the State Commission, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or with both.

The State Commission shall have jurisdiction to hear appeals against the orders of any District Forum within the State. The State Commission shall have jurisdiction to call for the records and pass appropriate orders in any consumer dispute which is pending before any District Forum within the State, if it appears to the State Commission that such District Forum has exercised jurisdiction illegally or with material irregularity.

Topic -V

National Consumer Disputes Redressal Commission (NATIONAL COMMISSION)

The Consumer Protection Act provides for the establishment of a three -tire Quasi Judicial system for the purpose of rendering speedy and inexpensive remedy to the aggrieved consumer.

Section 9 of the Act empowers the Central Government to establish a National Consumer Disputes Redressal Commission. It will be known as National Commission. The Central government has to establish the National Commission by notification.

The National Commission shall consist of -

- a) A President. He shall be a person who is or has been a Judge of the Supreme Court. He shall be appointed by the Central Government after consultation with the Chief Justice of the India.
- b) Four other members. One of the members shall be a woman. They shall have the following qualifications

- (i) Should be not less than thirty five years of age.
- (ii) Should possess a bachelor's degree from a recognised university.
- (iii) Should be persons of ability, integrity and standing. They should have adequate knowledge or experience of at least ten years in dealing with problems relating to economics, law, commerce; accountancy or industry, public affairs or administration.

A person shall be disqualified for appointment as a member under the following circumstances:

- (a) If he has been convicted and sentenced to imprisonment for an offence which, in the opinion of the State Government, involves moral turpitude.
- (b) If he is an undischarged insolvent
- (c) If he is of unsound mind and stands so declared by a competent court
- (d) If he has been removed or dismissed from the service of the Government or body corporate owned or controlled by the Government
- (e) If he has, in the opinion of the State Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member.

The members of the National Commission are to be appointed by the State Government on the recommendation of a Selection Committee. Such Selection Committee shall consist of three *ex-officio* members. They are:

- (i) A person who is a Judge of the Supreme Court, to be nominated by the Chief Justice of India - Chairman
- (ii) Secretary, The Department of Legal Affairs in the Govt. of India - Member
- (iii) Secretary of the Department of consumer affairs in the Government of India - Member.

A member of the National Commission shall hold office for a term of 5 years or up to the age of 70 years whichever is earlier. However he shall not be eligible for re-appointment for another term of five years or up to the age of seventy years, whichever is earlier. The re-appointment is to be made on the basis of recommendation of the Selection Committee.

A person appointed as a President of the State Commission shall

also be eligible for re-appointment.

The National Commission shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed exceeds rupees one crore.

A complaint may be filed in a National Commission by the Consumer or any recognised Consumer Association or the Central or the State Government.

Every complaint filed shall be accompanied with such amount of fee as may be prescribed.

On receipt of a complaint the National Commission may, by order, allow the complainant to be proceeded with or reject it. A complaint shall not be rejected unless an opportunity of being heard is given to the complainant. The admissibility of the complaint shall be decided within twenty one days from the date on which the complaint was received. The National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen. However if the complainant satisfies the National Commission that he had sufficient cause for not filing the complaint within such period, the complaint can be admitted after recording reasons for condoning the delay.

On admission of a complaint, the National Commission shall refer a copy of the complaint to the opposite party within a period of twenty - one days from the date of its admission. The opposite party shall give his version of the case within a period of thirty days or within the period extended (15 days) by the National Commission.

If the opposite party denies the allegations contained in the complaint, the National Commission shall proceed to determine the dispute by taking evidence. After completion of the proceedings if the National

Commission is satisfied that the goods suffered from any of the defects or there is deficiency of service, it shall issue an order to the opposite party directing him to do one or more of the following things:-

- (a) To remove the defect
- (b) To replace the goods with new goods
- (c) To return the price
- (d) To pay compensation
- (e) To remove the deficiencies in the services
- (f) To provide cost to the complainant.

A person who is aggrieved by the order of the National Commission may prefer an appeal against such order to the Supreme Court within 30 days from the date of the order. The Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period. If the order of the National Commission directs payment of any amount, the Supreme Court shall not entertain an appeal unless the appellant has deposited fifty percent of that amount or twenty - five thousand rupees, whichever is less.

If an interim order of the National Commission is not complied with, the National Commission may attach the property of the person not complying with such order. The attachment shall remain in force for a period of three months. At the end of three months, if non-compliance continues, the property attached may be sold and out of the sale proceeds , the National Commission may award such damages as it thinks fit to the complainant and shall pay the balance, if any, to the party entitled to it.

If any amount is due from any person under an order of the National Commission, the person entitled to the amount may make an application to the National Commission and the National Commission may issue a certificate for the said amount to the Collector of the District and

the Collector shall proceed to recover the amount in the same manner as arrears of land revenue.

If a complaint instituted before the National Commission is found to be frivolous or vexatious, the Commission shall dismiss the complaint after recording reasons in writing and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees.

If a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any other order made by the Commission, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or with both.

The National Commission shall have jurisdiction to hear appeals against the orders of any State Commission. The National Commission shall have jurisdiction to call for the records and pass appropriate orders in any consumer dispute which is pending before any State Commission if it appears to the National Commission that such State Commission has exercised jurisdiction illegally or with material irregularity.

Topic -VI **Consumer Protection Councils**

The Consumer Protection Act, 1986 empowers the Central and State Governments to establish Consumer Protection Councils in addition to the three-tier Quasi-Judicial authorities. The protection and promotion of the rights of the consumers is the main object of the Consumer Protection Councils. The Consumer Protection Council established by the Central Government is known as Central Consumer Protection Council.

The Consumer Protection Council established by the State Governments are known as State Consumer Protection Council and District Consumer Protection Councils.

1. Central Consumer Protection Council

Section 4 of the Consumer Protection Act empowers the Central Government to establish a Central Consumer Protection Council by notification.

The Central Council shall consist of the following 150 members

- (a) The Minister - in - charge of Consumer Affairs in the Central Government, who shall be the Chairman of the Central Council
- (b) The Minister of State or Deputy Minister -in -charge of Consumer Affairs in the Central Government who shall be the vice-chairman of the Central Council
- (c) The Minister of Food and Civil Supplies
- (d) Eight members of Parliament - five from Lok Sabha and three from Rajya Sabha
- (e) The Secretary of the National Commission for Scheduled Castes and Scheduled Tribes
- (f) Twenty representatives of the Central Government Department and autonomous organisations concerned with consumer interests..
- (g) Thirty five representatives of the Consumer Organisations or Consumers
- (h) Ten representatives of women
- (i) Twenty representatives of farmers, traders and industries.
- (j) Fifteen persons capable of representing consumer interest not specified above.
- (k) The Secretary in the Department of Civil Supplies. He shall be the member secretary of the Central Council.

Objects of Central Council / Rights of Consumers

Section 6 of the Consumer Protection Act deals with six rights of consumers and these rights are to be promoted and protected by the

Central Council. The promotion and protection of the following right is the main object of Central Council.

1. Right to Safety

Every consumer has a right to be protected against marketing of goods and services which are hazardous to life and property. This right is to be promoted and protected by the Central Council

2. Right to Information

Every consumer has a right to be informed about the quality, quantity, potency, purity, standard and price of goods and services. This right is to be promoted and protected by the Central Council

3. Right to Choose

Every consumer has the right to access to a variety of goods and services at competitive prices and an option to choose the goods and services. This right is to be promoted and protected by the Central Council

4. Right to be Heard

Whenever a consumer has a complaint, he has a right to be heard and also to be assured that his interest will receive due consideration at appropriate forums. This right is to be promoted and protected by the Central Council

5. Right to Seek Redressal

Every consumer has a right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation. This right is to be promoted and protected by the Central Council

6. Right to Consumer Education

Every consumer has a right to consumer education. This right is to be promoted and protected by the Central Council

2. The State Consumer Protection Councils

Section 7 of the Act deals with State Consumer Protection Councils. Section 7 empowers the State Government to establish a Consumer Protection Council for the state by notification.

The State Council shall consist of the following members

- (a) The Minister in Charge of Consumer Affairs in the State Government. He shall be the Chairman of the State Council
- (b) Such number of other official and non official members representing such interest as may be prescribed by the State Government.

The objects of the Central and State Councils are one and the same. So the State Council shall promote and protect the six rights of the consumers as contained in section 6 of the Act.

3. The District Consumer Protection Councils

By virtue of section 8A of the Act the State Government shall establish for every district, by notification, a council to be known as District Consumer Protection Council.

The District Consumer Protection Council shall consist of the following members

- (a) The Collector of the District, who shall be its Chairman
- (b) Such number of other official and non official members representing such interest as may be prescribed by the State Government.

The objects of every District Councils shall be to promote and protect within the district the six rights of consumers laid down in section 6 of the Act.

Part -III

Compensation under the Motor Vehicles Act, 1988

Magnitude of Road Accidents

India is considered to be a developing country. However there are more than 72 million motor vehicles plying on the Indian roads. Every increase in use of motor vehicles results in rise of motor accidents and consequential injuries to persons and properties. Over 1,37,000 people were killed in road accidents in 2013 alone. There is one death in every four minutes from road accidents in India. One serious road accident occurs every minute and 15 die on Indian roads every hour. In India 1214 road crashes occur every day. 20 children under the age of 14 die every day due to road crashes in the country. 377 people die every day, equivalent to a jumbo jet crashing every day.

The motor accidents may be resulted from the negligence of the driver or negligence of the victim or without any fault on the part of the driver or victim (for example, sudden break failure). The motor vehicle accidents may result in death of the owner of the vehicle, driver of the vehicle, passengers in the vehicle, persons standing on the side of the road, persons walking along the road or a shop keeper sitting inside his shop. Motor Vehicle accidents may also result in minor and major injuries to persons. It may also result in loss of property.

Indian Law relating to Compensation

In India, the law relating to compensation for injuries suffered in motor vehicle accidents is contained in the Motor Vehicles Act, 1988. The Motor Vehicles Act, 1988 has been enacted by the Parliament of India. It is a comprehensive legislation. It regulates all aspects of motor vehicles plying on roads. The Act came into force from 1 July 1989. It replaced Motor Vehicles Act, 1939 which earlier replaced the first such enactment Motor Vehicles Act, 1914. In order to implement the legislative provisions of the Act, the Government of India made the Central Motor Vehicles Rules 1989.

Salient features of the Motor Vehicles Act, 1988 are as follows:

1. It provides for compulsory driving licence. A person shall not drive a motor vehicle in any public place if he does not hold an effective driving licence issued to him authorising him to drive the vehicle. Owner of motor vehicle shall not allow or permit a person who does not have an effective driving licence. Chapter II (sections 3 to 28) deals with licensing of drivers, renewal, suspension and cancellation of driving licence.
2. It made conductor's licence mandatory. Conductors of stage carriages (buses) should have conductor's licence. A person shall not act as a conductor of a stage carriage, if he does not hold an effective conductor's licence issued to him authorising him to act as a conductor. Owner of stage carriage shall not employ or permit any person who is not so licensed to act as a conductor of stage carriage. Chapter III (sections 29 to 38) deals with granting and revocation of conductor's licence.
3. Registration of motor vehicles is made mandatory. Every motor vehicle is to be registered with the registering authority. A vehicle which is not registered shall not be driven in any public place or in any other place. Chapter IV (sections 39 to 65) deals with registration of motor vehicles, transfer of ownership, suspension and cancellation of registration.
4. Permit for transport vehicles is made compulsory. No owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place without a permit granted by competent authority. The Act provides for granting of stage carriage permit, contract carriage permit, private service vehicle permit and goods carriage permit. Chapter V (sections 66 to 96) provides for control of transport vehicles.
5. Chapter VIII (sections 112 to 138) deals with control of traffic such as limits of speed, duty to obey traffic signals, duty to wear protective headgear (helmet) while riding motor cycle, etc.
6. Chapter X (sections 140 to 144) deals with "liability without fault" in case of death or permanent disablement resulting from motor vehicle accidents.
7. Chapter XI (sections 145 to 164) deals with compulsory insurance of motor vehicles against third party risks and the liability of insurer.

9. Chapter XII (sections 165 to 176) deals with establishment of Motor Accident Claims Tribunals, application for compensation, procedure and powers of Claims Tribunals, Awards of Claims Tribunals, Appeals and Recovery of money under an award.

10. Chapter XIII (sections 177 to 210) deals with offences, penalties and procedure.

Persons Entitled to Claim Compensation

Accidents arising out of use of motor vehicles may result in death of persons, bodily injury to persons or damage to any property of a third party. By virtue of section 166 of the Act of 1988 the following persons can claim compensation.

- (i) If the accident has resulted in bodily injury, the person who has sustained the injury.
- (ii) If the accident has resulted in damage to property, the owner of the property
- (iii) If death has resulted from the accident, by all or any of the legal representatives of the deceased.
- (iv) An agent duly authorised by the injured person or the legal representatives of the deceased.

The present law of compensation for the injuries suffered in road accident involving a motor vehicle is very much different from the law as it originated in the common law courts of Great Britain.

Under the traditional law of tort the only person entitled to claim compensation was the victim. The connotation of victim was restricted. It was confined to the person actually hurt in the accident. The dependents of the victim, in the event of his death, were not treated to be victims of the accident and were therefore not entitled to claim compensation. The maxim then operating was *actio personalis moritur cum persona*, meaning,

personal action dies with the person. By operation of this maxim pending suit for compensation abated on the death of the claimant. The cause of action did not survive to the heirs or legal representatives. This caused great hardship to the members of the family of the deceased victim who were dependant for their livelihood solely on his income. They were rendered without support. Although the law of compensation for road accidents developed in the courts of equity, they did not replace the maxim with another suitable one.

The credit for providing relief was taken by the British Parliament when it enacted the Fatal Accidents Act, 1846 for Britain, and the Fatal Accidents Act, 1855 for India. These Acts entitled specified relations of the deceased to maintain claim for compensation. The relations entitled under the Indian Law were- (1) wife (2) husband (3) parents and (4) children.

In 1956, the Motor Vehicles Act, 1939 was amended and "legal representatives of the deceased" were given the entitlement. This entitlement has been maintained in S. 166 (1) (c) of the 1988 Act. The term "legal representative" was not defined in 1939 Act. It has not been defined in 1988 Act also.

However Rule 2 (c) of the Kerala Motor Accidents Claims Tribunals Rules, 1977 defines the expression "Legal Representative" to mean a person who in law is entitled to inherit the estate of the deceased if he had left any estate at the time of his death, and also includes any legal heir of the deceased and the executor or administrator of the estate of the deceased.

This definition is very wide and includes even an intermeddler with the property of the deceased. From the above development it can be noticed that the concept of compensating loss of the individual has given place to the concept of compensating loss to the estate.

Thus in the state of Kerala the "legal representatives" of the deceased as defined in the Kerala Motor Accidents Claims Tribunals Rules, 1977 can

claim compensation when a person dies in a motor vehicle accident.

In **Gujarat State Road Transport Corporation v. Ramanbhai Prabhatbhai**, (AIR 1987 SC 1670) the Supreme Court has held that Fatal Accidents Act has no application to claims under the Motor Vehicles Act. Thus if a person dies in a motor vehicle accident, his legal representatives can claim compensation. Their claim is entertained as per the provisions of the Motor Vehicles Act and not under the Fatal Accidents Act.

Applications to be made to MOTOR ACCIDENTS CLAIMS TRIBUNAL

An application for compensation is to be made to Motor Accidents Claims Tribunal(popularly known as MACT). The application shall be made in the prescribed form. Originally the claim for compensation was to be filed in the ordinary civil court of competent jurisdiction in the form of plaint which was registered as a suit.

By section 165 of the Act of 1988, the State Governments are authorised to constitute Motor Accidents Claims Tribunals by notification in the official gazette. The MACT shall have jurisdiction to adjudicate upon claims for compensation in respect of accidents involving the death or, bodily injury to, persons or damage to any property of a third party arising out of the use of motor vehicles. The territorial jurisdiction of each Tribunal shall also be notified.

By Section 175 of the Act where any Claims Tribunal is constituted for any area no civil court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area.

An application for compensation shall be made, at the option of the claimant, either to -

- (i) the MACT having jurisdiction over the area in which the accident

occurred, or

- (ii) the MACT within the local limits of whose jurisdiction the claimant resides or carries on business, or
- (ii) the MACT within the local limits of whose jurisdiction the defendant resides.

Who should be made Defendants / Respondents

or

Who Is Liable to Pay Compensation

Under the traditional law, the basis of claim was "fault". The party liable was the wrongdoer only. Sometimes when the wrong-doer was the chauffeur (driver), employed by the owner of the vehicle, it became difficult to ensure payment of the compensation on account of the poor financial position of the wrong-doer. This situation was met by development of the principle of vicarious liability of the master for the acts of his servants done in the course of employment. With the development of this principle, the owner of the vehicle and the chauffeur both became liable to pay compensation jointly and severally.

Taking note of the rising road accidents, consequential injuries, inability of owners and drivers of the vehicles to pay compensation, and the security of injured and his families, the Motor Vehicles Act,1988 provides for compulsory insurance of vehicles against third party risks. Owners of motor vehicles have to insure their vehicles against third party risks.

If the vehicle is insured against third party risks, the injured person or legal heirs of the deceased can claim compensation either from -

- (i) the owner, or
- (ii) from the driver, or
- (iii) from the insurance company, or
- (iv) from them jointly.

Chaper XI (sections 145 to 164) of the Motor Vehicles Act,1988 deal with compulsory insurance of motor vehicles against third party risks. Section

146 of the Act prohibits use of motor vehicles in a public place without an insurance policy against third party risks.

If the vehicle was not insured against third party risks, the injured can claim compensation either from the owner or from the driver or from them jointly.

The liability of insurer to pay compensation commences as soon as the contract of insurance comes into force. It continues during the operation of the policy. A policy can be renewed during the period when the policy is in operation or on its expiration. The risk would be covered from the moment the renewal comes into force.

In National Insurance Co. Ltd v. J.N. Dhabi (AIR 1997 SC 2147), an expired insurance policy was renewed at 4.00 p.m. on 25-10-1983. The vehicle met with an accident at 11.14 a.m. on 25-10-1983. As the accident occurred before the renewal of the policy, the Supreme Court held that the insurance company could not be made liable for the said accident.

If the insurance company denies the existence of insurance policy, the owner of the vehicle has to give evidence to show that the accident occurred during the period when the insurance policy was in operation.

In Oriental Insurance Co. Ltd v. Sudhakaran K.V. and Others (2008(2) KLT 936, it was held by the Supreme Court that a gratuitous passenger - pillion rider- on a scooter is not to be treated as a third party when the accident has taken place owing to rash and negligent riding of scooter.

It is to be noted that if a pillion rider on a scooter is injured in an accident that resulted from the negligence of the driver of another vehicle, for example, collision between a car and scooter, he can claim compensation from the driver, owner and insurer of the other vehicle(car). Further the person who was riding the scooter can also claim compensation from the driver, owner and insurer of the car, if he has sustained injury,

In National Insurance Co. Ltd v. Vidyadhar Maharinwala (AIR 2009 SC 208), it was held that if the offending vehicle was driven by a person without a valid licence on the date of accident, the insurance company got exonerated from its liability under the contract of insurance. The result of this decision is that the driver and owner of the vehicle will only be responsible to compensate the injured.

In National Insurance Co. Ltd v. Swaran Singh (AIR 2004 SC 1531), it was held that if the vehicle was driven by a person having learner's licence at the time of accident, the insurance company is liable to pay compensation as person holding learner's licence is a duly licenced person entitled to drive vehicle as per provisions of the Motor Vehicles Act and Rules made thereunder.

Nature and Extent of Liability to pay Compensation

Based on the nature and extent of liability to pay compensation, as recognised by the Motor Vehicles Act, 1988, we can classify the claims under three heads:

- (i) Claim for compensation under section 140, on the principle of "no fault"
- (ii) Claim for compensation under section 163A on the principle of "no fault" and of structured formula basis
- (iii) Claim for compensation on the basis of rash and negligent driving or principle of "fault".

Under the original law, the basis of claim for compensation was "fault" of the defendant/driver. The courts awarded compensation only when the driver/defendant was "at fault". Therefore, it was necessary for the plaintiff/claimant (person claiming compensation - "claimant") to assert and establish that the vehicle involved was being driven rashly and negligently at the time of accident. The burden of proof was on the plaintiff. The suit/claim of the plaintiff failed if the defendant was able to prove that his act fell within any of

the general defences such as act of God, inevitable accident (sudden failure of brake, blasting of tyre etc), contributory negligence of the plaintiff, consent of the plaintiff etc. The defendant could take the defence of "contributory negligence" and avoid or reduce his liability. Thus many a time the plaintiff failed in the action and defendant escaped liability.

Doctrine of Res Ipsa Loquitur

In order to shift the burden of proof, the common law courts evolved the doctrine of *res ipsa loquitur*, meaning the thing or event speaks for itself. By the application of this doctrine, the courts presumed rash and negligent driving where the facts were eloquent enough to lead to that conclusion. Thus where the victim got hooked to the vehicle and was dragged for some distance before the vehicle came to stop, rash and negligent driving was apparent and was treated as established.

The evolution of the above doctrine brought much needed relief to the victims of road accidents.

Need for "No Fault Liability"

As the number of road accidents increased and untold hardship suffered by the victims and their dependents, the need for establishing "no fault liability" arose and came to the notice of the courts.

The State was reminded of this obligation by the Supreme Court. In *Srimati Manjushri Raha and others v. B.L. Gupta*, (1977) 2 SCC 174 it was observed: "The time is ripe for serious consideration of creating no-fault liability (in motor accident claim cases)."

A reminder was issued by the Supreme Court in *Motor Owners Insurance Co. Ltd. v. Jadavji Keshavji Modl and others* (1981) 4 SCC 660. The recommendation was accepted when the Motor Vehicles Act, 1939 was amended in 1982. By this amendment S. 92-A (3) was added recognizing no fault liability. It was as follows:

"In any claim for compensation under Sub-Section (1) the claimant shall not be

required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person."

Section 140 and section 163 A of the Act of 1988 also recognise the principle of "no fault liability".

Liability under section 140 on the principle of "No Fault"

By section 140(1) of the Act, if death or permanent disablement of any person has resulted from an accident arising out of the use of motor vehicle, the owner of the vehicle shall be liable to pay compensation as mentioned in sub-section (2).

By section 140(2), the amount of compensation payable in case of death of any person shall be a fixed sum of fifty thousand rupees and the amount of compensation payable in respect of permanent disablement of any person shall be a fixed sum of twenty-five thousand rupees.

By section 140(3), in any claim for compensation under section 140(1), the claimant shall not be required to plead and establish that the death or disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner of the vehicle or of any other person.

By section 140(4) of the Act, a claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made. So also the quantum of compensation recoverable in respect of such death or disablement shall not be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

Thus section 140 recognises "no fault" liability in cases of death or permanent disability. Further the doctrine of contributory negligence which

is available as defence under the common law is also abrogated in cases of death and permanent disability. Thus even when there is no negligence on the part of the driver or negligence on the part of the victim, the legal representatives of the deceased or the victim who sustained permanent disability is entitled to get the fixed compensation as prescribed under section 140(2) of the Act.

It is to be noted that compensation payable under section 140 (2) is limited to the extent of Rs.50,000 for death and Rs.25,000 in case of permanent disablement.

Payment of Compensation on Structured Formula under Section 163A

Section 163-A was added to 1988 Act by amendment Act of 1994. This provision is absolutely new. A parallel provision was not contained either in 1939 Act or in 1988 Act as originally enacted.

By virtue of sub-section (1) of section 163A, the owner of the motor vehicle or the authorised insurer shall be liable to pay compensation as indicated in the second schedule to the legal heirs or victim, in case of death or permanent disablement due to accident arising out of the use of motor vehicle.

By virtue of sub-section (2) of section 163-A, when a claim for compensation is made under sub-section(1), the claimant shall not be required to plead or establish that the death or permanent disablement was due to any wrongul act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person. Thus sub-section(2) curtails oral evidence although to a lesser degree.

Section 163A provides for payment of compensation on the basis of structured formula as given in Second Schedule to the Act. Under the schedule, in case of death, the compensation is calculated on the basis of age-range and annual income. The amount reached by this calculation is reduced by 1/3rd which represents the amount which the victim would have

supposedly spent on himself, if he had survived.

Paragraph 2 of the Schedule says that the amount of compensation shall not be less than Rs. 50,000/- In order to claim compensation higher than Rs. 50,000/- the claimant will have to adduce evidence regarding the age of the deceased at the time of accident and his annual income at that time. He need not lead any evidence on longevity in the family as a statutory multiplier is available in the schedule. Deficiency in evidence on the question of age and income need not worry the claimant, as even then he would get at least. Rs.50,000.

In addition, the claimant will get general damages mentioned in 3rd paragraph. The amount of compensation for funeral expenses, loss of consortium (if the claimant is spouse) and loss of estate is statutorily fixed under clauses (i), (ii) and (iii) of this paragraph. Therefore no oral or documentary evidence is required in respect of these items. Documentary evidence will be required in respect of medical expenses mentioned in Clause (iv). Oral evidence may also be required to prove the bills and vouchers, if their genuineness is not accepted by the respondent. However the maximum amount awardable under this head is Rs. 15,000/.

In the absence of evidence on medical expenses the minimum compensation that a claimant who is a spouse can get under the schedule is Rs.59, 500.00 as follows:

(1) Para 2 (minimum)	Rs. 50,000.00
(2) Para 3 (i) funeral expenses	Rs. 02,000.00
(3) Para 3 (ii) Loss of consortium	Rs. 05,000.00
(4) Para (iii) loss of estate	Rs. 02,500.00
Total-	Rs. 59,500.00

Thus Rs. 59,500/- is more than the compensation contemplated under S.140.

Paragraphs 4 and 5 and partly paragraph 6 deal with determination of compensation for injuries and disabilities. For the purpose of calculating

compensation on the basis of income a notional income of Rs. 15,000 per annum is fixed in paragraph 6 (a) for those who had no income at all i.e., for non-earning persons. Under clause (b) a notional income is fixed for non-earning spouse of an earning person; it is 1/3rd of the income of the latter.

S. 163 A debars a claimant from claiming compensation under section 140 (2) as well as section 163A. To the same effect is the provision contained in S. 141 (1). Therefore, option will have to be exercised by the claimant before filing the claim.

Claim for compensation on the basis of rash and negligent driving

Chapter XII contains the general law of adjudication of "claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party, or both."

While Sections 140 and 163A falling under Chapters X and XI respectively are confined to claims arising from death and permanent disablement, the provisions of Chapter XII are not confined on the basis of the nature of injury suffered.

While Sections 140 and 163A prescribe definite figures of compensation, no such definite figures are mentioned either in Section 166 which deals with preferment of claim or in any other section falling under the Chapter. From this it would appear that claims falling under this Chapter are to be adjudicated on the basis of the general law of torts.

It is to be noted that one cannot seek remedy under all the sections. An injured or legal representative of the deceased has to claim either under section 163A or section 166 of the Act. The claimants have to elect one of the remedies provided in section 163A or section 166.

In **Reshma Kumari v. Madan Mohan** (2013 (2) KLT 304 (SC), it was observed by a Bench of three judges of the Supreme Court as follows:

"The 1988 Act gives choice to the claimants to seek compensation on structured formula basis as provided in s. 163A or make an application for compensation arising out of an accident of the nature specified in sub-section (1) of s.165 under s.166. (By section 165(1) Motor Accidents Claims Tribunals are to be established by the State Governments for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damage to any property of a third party so arising, or both) The claimants have to elect one of the two remedies provided in s.163A and s.166. The remedy provided in s.163A is not a remedy in addition to the remedy provided in s.166 but it provides for an alternative course to s.166. By incorporating s.163A the owner of a motor vehicle or authorised insurer shall be liable to pay compensation on structured formula basis as indicated in the Second Schedule in the case of death or permanent disablement due to accident arising out of the use of motor vehicle. The peculiar feature of s.163A is that for a claim made thereunder, the claimants are not required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner or owners of the vehicle concerned.

The scheme of s.163 A is a departure from the general principle of law of tort that the liability of the owner of the vehicle to compensate the victim or his heirs in a motor accident arises only on the proof of negligence on the part of the driver. Section 163 A has done away with the requirement of the proof of negligence on the part of the driver of the vehicle where the victim of an accident or his dependents elect to apply for compensation under s.163A. When an application for compensation is made under s.163A the compensation is paid as indicated in the Second Schedule.

On the otherhand, by making an application for compensation arising out an accident under s.166 it is necessary for a claimant to prove negligence on the part of the driver or owner of the vehicle. The burden is on the claimant to establish the negligence on the part of the driver or owner of the vehicle and on proof thereof, the claimant is entitled to compensation. No doubt when a claim under section 166 is made, the court may apply the

doctrine of **res ipsa loquitur** to relieve the claimant from the liability to prove the negligence of the respondent driver. The respondent can at the same time raise the defence of **contributory negligence** from the part of claimant.

For the determination of quantum of compensation payable on a claim under section 166, the principle applicable is that the Tribunal can award compensation which appears to it to be "just."

In **Reshma Kumari v. Madan Mohan** (2013 (2) KLT 304 (SC) the Supreme Court held that the expression, "just" means the amount so determined is fair, reasonable and equitable by accepted legal standards and not a forensic lottery. Obviously, "Just Compensation" does not mean 'perfect' or 'absolut' compensation. The just compensation principle requires examination of the particular situation obtaining uniquely in an individual case.

There cannot be a straitjacket formula and quantum of compensation depends upon the nature of injuries, status of the victim, effect of the injury on victim's future, pecuniary loss, including expenses on medical treatment, mental and physical shock, pain and suffering, inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life. etc.

In **Sarala Verma & Others v. Delhi Transport Corporation & Anr.** (2010 (2) KLT 802(SC) the Supreme court held that in a claim for compensation for death made under section 166 of the M.V.Act, in order to arrive at compensation amount, the Second Schedule to the Act applicable to section 163A has no application. The court has given a table containing multiplier to be used to arrive at the compensation amount, in cases of claim arising in a death case.

In **Reshma Kumari v. Madan Mohan** (2013 (2) KLT 304 (SC), the Supreme Court held that in an application for compensation made under section 166 in death cases where the age of the deceased is 15 years and above, the Claims Tribunals shall select the multiplier as indicated in Column

(4) of the table prepared in Sarala Verma Case. In cases where the age of the deceased is upto 15 years, irrespective of the section 166 or 163A under which the claim has for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the table in Sarala Varma case should be followed.

In short, the principles stated in Sarla Verma case is to be followed in computing compensation claims made under section 166, arising in a death case.

Period of Limitation

S. 166 (3) of 1988 Act as originally enacted, maintained the limitation of six months but the modified proviso put restriction on the period for which delay could be condoned. That period was only six months. The consequence of this restriction was that on the expiry of the period of twelve months from the date of occurrence of accident, the right to file claim for compensation was irretrievably lost. This was indeed a very harsh situation and has now been relieved through amendment Act of 1994. By this amendment Sub-section (3) along with the proviso has been omitted. This indicates that the intention of the Parliament is that a claim for compensation under the Motor Vehicles Act should not be governed by any law of limitation.

Thus a claim can be preferred even after 10 years or 20 years. The complete lifting of bar of limitation is likely to cause hardship to vehicle owners and insurers, particularly the latter whose relevant records may be weeded out by the time the claim is preferred. Rules of limitation, resjudicata and order 2 Rule 2 of C.P.C. serve a social purpose, the same being of achieving finality within a reasonable period of time. It is against public Interest to keep controversies alive indefinitely. The sword of Democles should not remain hanging indefinitely over the head of a person under liability.

Execution of Award

When the claims were entertained by the Civil Courts, a decree was

passed which was executed in accordance with the provisions of Order XXI of the Code of Civil Procedure.

Now under S. 174 of the Act, the amount awarded can be recovered as arrears of land revenue. This provision has been made obviously in the hope that it will result in expeditious realization of the amount awarded.

By Rule 394 of the Kerala Motor Vehicles Rules, 1989, an award of the Claims Tribunal can also be executed by the Tribunal by resorting to the provisions of Code of Civil Procedure, 1908 as if the award were a decree for payment of money.

Appeals

Section 173 of the Act provides for appeal from the award of the Tribunal. Any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of award, prefer an appeal to the High Court.

No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees.

Appendix - I

THE KERALA TORTS (MISCELLANEOUS PROVISIONS) ACT, 1976

(Act 8 of 1977)

[Published under notification No. 740-Leg-Uni./75/Law. dt.01/03/1977 In KG. No 138 dt.01/03/1977. Received the assent of the Vice-President acting as President on 17-02-1977]

An Act to unify and amend the law relating to survival of causes of action, liability of joint tortfeasors and liability in cases of contributory negligence in respect of torts.

Preamble- WHEREAS it is expedient to unify and amend the law relating to survival of causes of action, liability of joint tortfeasors and liability in cases of contributory negligence in respect of torts.

Be it enacted in the twenty-seventh year of the Republic of India as follows.

PART - I

PRELIMINARY

1. **Short title, extent and commencement** - (1) This Act may be called the Kerala Torts (Miscellaneous Provisions) Act, 1976
- (2) It extends to the whole of the State of Kerala.
- (3) It shall come into force at once.

PART - II

EFFECT OF DEATH IN RELATION TO CERTAIN CAUSES OF ACTION IN TORTS

2. **Effect of death on certain causes of action-** On the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate.

Provided that this section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

3. **Damages recoverable in such cases -** Where a cause of action

survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person-

(a) shall not include any exemplary damages.

(b) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry.

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his except that a sum in respect of funeral expenses may be included.

4. Action in cases where death occurs before or at the same time the damage is suffered - Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

5. Rights conferred by this Act to be in addition to rights conferred by the Fatal Accidents Act - The rights conferred by this Act for the benefit on the estates of deceased persons shall be in addition to, and not in derogation of, any rights conferred on the dependents of deceased persons by the Indian Fatal Accidents Act, 1855 (Central Act 13 of 1855) and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Act as it applies in relation to other causes of action not expressly excepted from the operation of section 2 of this Act.

Explanation - In this section and in sections 7 and 8, dependents means the wife, husband, parent and child within the meaning of the Indian Fatal Accidents Act, 1855.

6. Damages provable in Insolvency - In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this Act, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

PART -III PROCEEDINGS AGAINST, AND CONTRIBUTION BETWEEN TORTFEASORS

7. Proceedings against, and contribution between, joint and several tortfeasors - (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) -

(a) judgment obtained against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of his estate, or of the dependents of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sum recoverable under the judgements given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgement first given; and in any of those actions, other than that in which judgement is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action.

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so however that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

PART IV APPORTIONMENT OF LIABILITY IN CASES OF CONTRIBUTORY NEGLIGENCE

8. Apportionment of liability in case of contributory negligence - (1) Where any person suffers damage as the result partly of his own and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Provided that -

(a) This sub-section shall not operate to defeat any defence arising under a contract.

(b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this sub-section shall not exceed the maximum limit so applicable.

(2) Where the damages are recoverable by any person by virtue of sub-section (1), subject to any reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

(3) Section 7 shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of sub-section (1) in

respect of the damage suffered by any person.

(4) Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, accordingly if an action were brought for the benefit of the estate under Part II of this Act, the damages recoverable would be reduced under sub-section (1), and damages recoverable in an action brought for the benefit of the dependents of that person under the Indian Fatal Accidents Act, 1855 shall be reduced to a proportionate extent.

(5) Where, in any case to which sub-section (1) applies, one of the persons at fault avoids liability to any other such person or his personal representative on the plea that the claim is barred by limitation, he shall not be entitled to recover any damages or contribution from that other person or representative by virtue of that sub-section.

Explanation- In this section "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence; and damage includes loss of life and personal injury.

Part - V

Repeal

9. Repeal - (1) Travancore Law Reforms (Miscellaneous) Provisions Act, 1124 (Act XII of 1124) is hereby repealed.

(2) The Legal Representatives Suits Act, 1855 (Central Act 12 of 1855), shall cease to apply to that part of the State of Kerala where it was in force immediately before the commencement of this Act.

(3) Section 306 of the Indian Succession Act, 1925 (Central Act 39 of 1925, so far as it relates to right of action in torts, shall cease to apply to the State of Kerala.

Appendix - II
THE FATAL ACCIDENTS ACT, 1855
(Act no 13 of 1855)

An Act to provide compensation to families for loss occasioned by the death of person caused by actionable wrong

WHEREAS no action or suit is now maintainable in any Court against a person who, by wrongful act, neglect or default, have caused death of another person, and it is often -times right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him.

It is enacted as follows:-

1. **Short Title and Extent** - (1) This Act may be called the Fatal Accidents Act, 1855
- (2) It extends to the whole of India except the State of Jammu and Kashmir

1A. Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong - Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

'Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased:

and in every such action the court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought:

and the amount so recovered, after deducting costs and expenses,

including the costs not recovered from the defendant, shall be divided amongst the before mentioned parties, or any of them, in such shares as the court by its judgement or decree shall direct.

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

Claim for loss to estate may be added - Provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

3. Plaintiff shall deliver particulars etc - The plaintiff in any such action or suit shall give a full particular of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and the nature of the claim in respect of which damages shall be sought to be recovered.

4. Interpretation Clause - The following words and expressions are intended to have the meaning hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject -matter; that is to say the word "person" shall apply to bodies politic or corporate; and the word "parent" shall include father and mother and grand-father and grand-mother; and the word "child" shall include son and daughter and grand-son and grand-daughter and step-son and step-daughter.