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What is a Tort?

Introduction

The word tort originates from the French language. It is equivalent to the English word "wrong" and Romanian law's term "delict". It is derived from the Medieval Latin word "tortum" which means "wrong" or "injury" which itself was further developed from the Old Latin word "torquere" which means "to twist". It is a breach of duty which amounts to a civil wrong. A tort arises when a person's duty towards others is affected, an individual who commits a tort is called a **tortfeasor**, or a wrongdoer. And where there are multiple individuals involved, then they are called **joint tortfeasors**. Their wrongdoing is called as a **tortious act** and they can be sued jointly or individually. The main aim of the Law of Torts is the compensation of victims.

Section 2(m) of the Limitation Act,1963, Addresses tort as being a civil wrong which is not just exclusively a breach of contract or a breach of trust.

Definitions by various thinkers

According to John Salmond, He addresses tort as being only a civil wrong which has unliquidated damages (those damages for which there is no fixed amount) in the form of remedy and which is not just exclusively the breach of contract or the breach of trust or breach of merely fair and impartial obligation.

According to Richard Dien Winfield, Tortious liability emerges from the breach of a duty primarily fixed by the law, this duty is towards the other people generally and its breach is redressible by an action for unliquidated damages.

According to Fraser, A tort is an infringement of a right in rent of a private individual giving a right of compensation at the suit of the injured party.

Objectives of a tort

1. To determine rights between the parties to a dispute.
2. To prevent the continuation or repetition of harm i.e. by giving orders of injunction.
3. To protect certain rights of every individual recognized by law i.e. a person's reputation.
4. To restore one's property to its rightful owner i.e. where the property is wrongfully taken away from its rightful owner.

Essential Elements of a tort

Three essential elements which constitute a tort are,

1. A Wrongful act or omission, and
2. Duty imposed by the law.
3. The act must give rise to legal or actual damage, and

It should be of such a nature that it should give rise to a legal remedy in the form of an action for damages.

What is a Wrongful Act?

A wrongful act can be either morally wrong or legally wrong and can also be both at the same time.

A legal wrongful act is one which affects one's legal right, the wrongful act must be one recognized by law, the act must be in violation of the law to be a legal wrongful act. An act which seems *Prima facie* (based on the first impression) innocent may also end up infringing somebody else's legal right, innuendo

(Where a statement is said by an individual which may be *Prima facie* innocent but may also have a secondary meaning which can harm the reputation of another in the eyes of the public or the person who comes to know of such information) is an example of this. Liability for a tort arises when the wrongful act being complained of amounts to an infringement of a legal private right or a breach or violation of a legal duty. i.e. If a person is prevented from voting by another, even if the candidate he was going to vote for, wins, his legal right to vote has been violated.

For example, if someone whose religion does not allow him/her to eat non-vegetarian food, still eats it then he/she will be morally wrong but not legally wrong. And if a person whose religion doesn't allow him or her to eat non-vegetarian and he or she strictly follows that religion is forcefully fed by someone then it is a legal wrong on the part of the person forcing the other one to eat that food which he or she does not want to eat.

What is a duty imposed by law?

A duty of care is one which is imposed on every individual and requires a standard of reasonable care that he could see as being harmful towards others. Hence, a duty imposed by law is a duty which is legally enforceable in the Indian courts.

What is a Legal damage?

Literal meaning of damage- to affect injuriously.

The term "damages" is often confused with the term "damage", while they may look similar, they have different meanings and are significantly distinct from each other, "damages" refers to the compensation sought for, while "damage" refers to actual loss or injury.

Within the scope of the subject matter

The second important ingredient in constituting a tort is legal damage. In order to prove an action for tort in the court, the plaintiff has to prove that there was a wrongful act or an act or omission which resulted in the breach of a legal duty or the violation of a legal right. So, there must be a violation of a legal right of a person and if there is no violation of a legal right then there can be no action under the law of torts. If there has been a violation of a legal right, the same is

actionable whether the plaintiff has suffered any loss or not. This is expressed by the maxim, *"Injuria sine damno"* where *'Injuria'* refers to "infringement of the legal right of a person" and the term '*damnum'* means "substantial harm, loss or damage to that individual". The term 'sine' means "without". However, if there is no violation of a legal right, no action can lie in a court despite of the loss, harm or damage to the plaintiff caused by the defendant.

Illustration :- A runs a successful school, after 5 months another school opens up nearby due to which he suffered heavy losses in the business, here he has suffered no legal damage but has only suffered damage in terms of business value so he cannot sue the competitor school for any kind of damages (similar to the case of *Gloucester Grammar School Case*(1410) Y B 11 Hen IV 27).

The factual significance of legal damage is illustrated by two maxims namely:

- *Injuria sine damno, and*
- Damnum sine injuria.

Injuria sine damno means injury without damage. Such damage is actionable under the law of torts. It occurs when a person suffers a legal damage instead of actual loss, i.e. his legal right is infringed by some other individual. In other words, this is an infringement of an absolute private right of a person without having suffered any actual loss.

An example of this can be the landmark case of, *Ashby v. White*(1703) 92 ER 126, where Mr. Ashby, the plaintiff, was prevented from voting by the constable Mr. White. This rule is basically based on the old maxim "*Ubi jus ibi remedium*" which translates to "where there is a right, there will be a remedy."

Another example in the Indian context would be the case of,

Bhim Singh v. State of J and K, where the plaintiff was a Member of the parliament and was not allowed to enter into the premises of the Assembly election by a police constable, hence his legal right was infringed.

Damnum sine injuria whereas translates to damage without injury, here the party affected suffers damage which may also be physical but suffers no infringement of their legal rights. In other words, it means the occurrence of an actual and substantial loss to a party without any infringement of a legal right. Here no action lies in the hands of the plaintiff as there is no violation of a legal right.

Distinction between *Injuria sine damno* and *Damnum sine injuria*

(1) On one hand, i.e. in the case of Injuria sine damno there is no physical damage or an actual loss on the part of the plaintiff while on the other hand in case of damnum sine injuria there is actual damage and loss on the part of the plaintiff.

(2) Secondly, in the case of Injuria sine damno, the party suffers with the infringement of their legal rights, while in the case of Damnum sine injuria, there is no legal right infringement.

(3) Thirdly, Injuria sine damno is actionable in the court while Damnum sine injuria is not actionable in court.

(4) Fourthly, the Injuria sine damno deal with the legal wrongs while Damnum sine injuria deal with the moral wrongs.

Tort and other wrongs

Tort and Crime – Distinguished

(1) A tort is basically a private wrong, i.e. it is the infringement of a person's right in rem, in other words, it is an infringement of a personal right. While a crime is a public wrong, i.e. is against the whole world and the state, it is an infringement of rights in personam, in other words, it is an infringement of the public right.

(2) The remedy in the case of law of torts is in the form of damages, while in the case of a crime, it is in terms of punishment.

(3) In the case of a tort, a suit is filed. Whereas, in the case of a crime, a complaint is filed.

(4) Law of torts is an uncodified law whereas law of crimes is a codified law.

(5) In tort, intention is important but not in all cases, whereas in the case of criminal law intention is the crux of the offence itself.

Example: A good example of this can be Assault, where the party who has been assaulted can bring charges against the person who has assaulted him or her. Also he or she can claim for damage in the civil courts under Tort law.

Torts and Breach of Contract – Distinguished

(1) In the case of a tort the duty is fixed by the law, whereas in the case of contract the duty is fixed by the parties involved.

(2) In case of a tort, the duty is towards everyone in the society, whereas in the case of a contract, the duty is towards specific individuals only.

(3) Motive is often taken into account in the case of a tort, while, in the case of a contract, motive is irrelevant.

(4) Damages in the case of a tort are different under different circumstances, whereas, in the case of a contract, the damages are in the form of compensation for the loss suffered in peculiar form.

(5) In the case of a tort, intention is taken into consideration in some cases, whereas, in the case of a breach of contract, intention is irrelevant.

Example : A father who employs a surgeon for the treatment of his minor son, and if his son is injured by the surgeon's carelessness. Here the father can sue the surgeon for the breach of contract also, as there is no contract between the minor son and the surgeon, the minor son can sue the surgeon(for the careless act which amounts to negligence) in tort and can also put charges on the surgeon but he cannot sue for the breach of contract.

Torts and Breach of trust – Distinguished

(1) In the case of a tort, the compensation is in the form of unliquidated damages, whereas, in the case of breach of trust, the compensation is in the form of liquidated damages.

(2) Law of torts has originated as a part of common law whereas, breach of trust could be redressed in the Court of Chancery.

(3) Law of trust is regarded as a division of the law of property, whereas, law of tort is not regarded as a division of the law of property.

Liquidated damages vs Unliquidated damages

Both of these damages solidifies the plaintiffs right to be compensated. Liquidated damages, on one hand, have their amount of compensation fixed while on the other hand, unliquidated damages have no prior fixed amount, they change with the intensity of the offence committed by the defendant.

The extent of the amount to be compensated in the case of liquidated damages is predetermined whereas in the case of unliquidated damages in order to get the maximum compensation the plaintiff has to prove the extent of the damage he has suffered from.

Tortious liability and mental element

A tortious liability arises when an individual or a person causes any injury to another person's property, reputation, his life, etc. It is civil in nature and the intention due to which such an injury was caused may or may not be necessary, i.e., it doesn't matter if it was caused intentionally or by accident in most of the cases in the law of torts. The important thing is to figure out the mental element in order to determine the tortious liability of an individual, and on the basis of intention, tort can be either Intentional tort or unintentional tort.

- ## Intentional Tort

Intentional tort is one in which the tort is committed with full knowledge of the outcome of the act along with the mental intention to cause such a tort. Having mala fide intention is necessary to commit an Intentional Tort.

Intentional torts are –

- Battery.
- Assault.
- False imprisonment.
- Trespass to land, etc.

- Unintentional Tort

Unintentional torts are caused usually by accident or by mistake by the defendant to the plaintiff without any mala fide (Evil or Wrongful) intention towards doing such an act. These are usually committed on the breach of duty of care which a reasonable human being would've considered under normal circumstances. **Negligence** (failure to take proper care over something) is a great example of this kind of tort.

The most common **example** of Negligence as a civil wrong can be the negligence tort cases of **slip and fall** which can occur when the owner of a premises fails to take reasonable care to the floor of his property thus leaving water on the floor carelessly which in turn results in harming the individuals whoever enters his premises. Here, the owner of the premises did not intent to harm the visitors at all but due to his carelessness, such an outcome came to be.

Relevance of Intention and Motive

Generally, the motive is the state of mind with intent or a purpose in the mind of an individual while being in the commission of an act. While on one hand, the motive is the ultimate object for which an act is done, the intention refers to the immediate purpose of the act. Now the question arises whether these mental elements play a significant role in the determination of tortious liability or not? In criminal law the concept of mental element plays a significant role in determining the role of a person's liability but in case of law of tort, mental element does not usually play a significant role, as there are some torts that can be committed without having the intention to do them and the person who still ends up committing these offences still end up being responsible for them, such as in the case of negligence, while on the other hand mental element is necessary in order to prove a person's liability in the case of Battery, Assault, etc.

Situation of law of Torts in India

- In India, the concept of law of Torts has been there since even before it gained its independence from the Britishers. The Sanskrit word "Jimha" was used in Hindu law in the sense of "tortuous of fraudulent conduct", the word literally meant "crooked". Hindu and Muslim laws had compensation assured for certain tortious acts. But even today, in the Modern India, the law of torts is mainly the English law which owes its origin to the principles of the common law of England.

- Although in the Indian courts, before any English law is applied, it is first overlooked whether if it will be applicable in Indian society's point of view or not. Hence the law of torts is still uncodified(those that originated from sources such as court decisions or customs) in India and is still based on the common law of England.
- The law of torts is underdeveloped in India as most of the people are not at all aware of these due to high amount of unawareness about its existence in our nation, another thing is the fact that not everyone can afford a lawyer and the process of court-work which takes a lot of time as well as a lot of money.
- Still the law of torts play a significant role in the Indian courts as there are many frequent cases of Defamation, Negligence, etc.

Conclusion

It can very well be established from above that, a tort is a civil wrong which is caused when one individual infringes another's legal rights. And the concept of mental element may or may not be relevant in certain tort as in order to determine it, we would first have to know the nature of the tort committed by the individual. It can be done intentionally like in the case of Battery, as well as accidentally without the intention of committing such an act by performing certain acts carelessly or by accident like in the case of negligence. The situation of Law of tort is not so well as many people are still not aware of the rights that they possess which is due to the fact that there is a lack of awareness among the people, the fact that the law of torts is still uncodified and is a direct derivative of the common law of England makes it less likely to be adaptable in certain cases to the Indian context, although now it has been adapted into the Indian context.

General defenses under law of torts

Introduction

Whenever a case is brought against the defendant for the commission of a tort and all the essential elements of that wrong are present, the defendant would be held liable for the same. Even in such cases, the defendant can avoid his liability by taking the plea of the defenses available under the law of torts.

Some defenses are particularly relating to some offences. In the case of defamation, the defenses available are fair comment, privileges and justification, etc.

Let's see what are these defenses available to a person under the law of tort and how can it be pleaded along with some of the important cases.

Meaning of General Defenses

When a plaintiff brings an action against the defendant for a tort committed by him, he will be held liable for it, if there exists all the essential ingredients which are required for that wrong. But there are some defenses available to him using which he can absolve himself from the liability arising out of the wrong committed. These are known as '**General defenses**' in the law of tort.

The defences available are given as follows:

- *Volenti non fit injuria or the defense of 'Consent'*
- The wrongdoer is the plaintiff
- Inevitable accident
- Act of god
- Private defense
- Mistake
- Necessity
- Statutory authority

Volenti non fit injuria

In case, a plaintiff voluntarily suffers some harm, he has no remedy for that under the law of tort and he is not allowed to complain about the same. The reason behind this defence is that no one can enforce a right that he has voluntarily abandoned or waived. Consent to suffer harm can be express or implied.

Some examples of the defence are:

- When you yourself call somebody to your house you cannot sue your guests for trespass;
- If you have agreed to a surgical operation then you cannot sue the surgeon for it; and
- If you agree to the publication of something you were aware of, then you cannot sue him for defamation.
- A player in the games is deemed to be ready to suffer any harm in the course of the game.
- A spectator in the game of cricket will not be allowed to claim compensation for any damages suffered.

For the defence to be available the act should not go beyond the limit of what has been consented.

In *Hallv. Brooklands Auto Racing Club*[1], the plaintiff was a spectator of a car racing event and the track on which the race was going on belonged to the defendant. During the race, two cars collided and out of which one was thrown among the people who were watching the race. The plaintiff was injured. The court held that the plaintiff knowingly undertook the risk of watching the race. It is a type of injury which could be foreseen by anyone watching the event. The defendant was not liable in this case.

In *Padmavati v. Dugganaika*[2], the driver of the jeep took the jeep to fill petrol in it. Two strangers took a lift in the jeep. The jeep got toppled due to some problem in the right wheel. The two strangers who took lift were thrown out of the jeep and they suffered some injuries leading to the death of one person.

The conclusions which came out of this case are:

- The master of the driver could not be made liable as it was a case of a sheer accident and the strangers had voluntarily got into the vehicle.
- The principle of *Volenti non fit injuria was* applicable here.

In *Wooldrige v. Sumner*[3], a plaintiff was taking some pictures standing at the boundary of the arena. The defendant's horse galloped at the plaintiff due to which he got frightened and fell into the horse's course and was seriously injured. The defendants were not liable in this case since they had taken due care and precautions.

In the case of *Thomas v. Quartermaine*[4], the plaintiff was an employee in the defendant's brewery. He was trying to remove a lid from a boiling tank of water. The lid was struck so the plaintiff had to apply an extra pull for removing that lid. The force generated through the extra pull threw him in another container

which contained scalding liquid and he suffered some serious injuries due to the incident. The defendant was not liable as the danger was visible to him and the plaintiff voluntarily did something which caused him injuries.

In *Illot v. Wilkes*[5], a trespasser got injured due to spring guns present on the defendant's land. He knowingly undertook the risk and then suffered injuries for the same. This was not actionable and the defendant was not liable in the case.

Similarly, if you have a fierce dog at your home or you have broken pieces of glass at the boundaries, all this is not actionable and is not covered under this defence.

Consent must be free

- For this defence to be available it is important to show that the consent of the plaintiff was freely given.
- If the consent was obtained under any compulsion or by fraud, then it is not a good defence.
- The consent must be given for an act done by the defendant.
- For example, if you invite someone to your house for dinner and he enters your bedroom without permission then he will be liable for trespass.

In the case of *Lakshmi Rajan v. Malar Hospital*[6], a 40 year old married woman noticed a lump in her breast but this pain does not affect her uterus. After the operation, she saw that her uterus has been removed without any justification. The hospital authorities were liable for this act. The patient's consent was taken for the operation not for removing the uterus.

- If a person is not in a condition to give consent then his/her guardian's consent is sufficient.

Consent obtained by fraud

- Consent obtained by fraud is not real consent and does not serve as a good defence.

In *Hegarty v. Shine*[7], it was held that mere concealment of facts is not considered to be a fraud so as to vitiate consent. Here, the plaintiff's paramour had infected her with some venereal disease and she brought an action for assault against him. The action failed on the grounds that mere disclosure of facts does not amount to fraud based on the principle ***ex turpi causa non oritur actio*** i.e. no action arises from an immoral cause.

- In some of the criminal cases, mere submission does not imply consent if the same has been taken by fraud which induced mistake in the victim's mind so as to the real nature of the act.
- If the mistake induced by fraud does not make any false impression regarding the real nature of the act then it cannot be considered as an element vitiating consent.

In *R. v. Wiliams*[8], a music teacher was held guilty of raping a 16 years old girl under the pretence that the same was done to improve her throat and enhancing her voice. Here, the girl misunderstood the very nature of the act done with her and she consented to the act considering it a surgical operation to improve her voice.

In *R. v. Clarence*[9], the husband was not liable for an offence when intercourse with her wife infected her with a venereal disease. The husband, in this case, failed to inform her wife about the same. Here, the wife was fully aware of the nature of that particular act and it is just the consequences she was unaware of.

Consent obtained under compulsion

- There is no consent when someone consents to an act without free will or under some compulsion.
- It is also applicable in the cases where the person giving consent does not have full freedom to decide.
- This situation generally arises in a master-servant relationship where the servant is compelled to do everything that his master asks him to do.
- Thus, there is no applicability of this maxim *volenti non fit injuria,* when a servant is compelled to do some work without his own will.
- But, if he himself does something without any compulsion then he can be met with this defence of consent.

Mere knowledge does not imply assent

For the applicability of this maxim, the following essentials need to be present:

- The plaintiff knew about the presence of risk.
- He had knowledge about the same and knowingly agreed to suffer harm.

In the case of *Bowater v. Rowley Regis Corporation*[10], a cart-driver was asked to drive a horse which to the knowledge of both was liable to bolt. The driver was not ready to take that horse out but he did it just because his master asked to do so. The horse, then bolted and the plaintiff suffered injuries. Here, the plaintiff was entitled to recover.

In *Smith v. Baker*[11], the plaintiff was an employer to work on a drill for the purpose of cutting rocks. Some stones were being conveyed from one side to another using crane surpassing his head. He was busy at work and suddenly a stone fell on his head causing injuries. The defendants were negligent as they did not inform him. The court held that mere knowledge of risk does not mean that he has consented to risk, so, the defendants were liable for this. The maxim volenti non fit injuria did not apply.

But, if a workman ignores the instructions of his employer thereby suffering injury, in such cases this maxim applies.

In *Dann v. Hamilton*[12], a lady even after knowing that the driver was drunk chose to travel in the car instead of any other vehicle. Due to the negligent driving of the driver, an accident happened which resulted in the death of the driver and injuries to the passenger herself. The lady passenger brought an action for the injuries against the representatives of the driver who pleaded the defence of volenti non fit injuria but the claim was rejected and the lady passenger was entitled to get compensation. This maxim was not considered in this case because the driver's intoxication level was not that high to make it obvious that taking a lift could be considered as consenting to an obvious danger.

This decision was criticized on various grounds as the court did not consider contributory negligence while deciding the case but the court's reason for not doing so is that it was not pleaded that is why it was not considered.

A driver's past negligent activities do not deprive him of this remedy if someone travels with the same driver again.

Negligence of the defendant

In order to avail this defence it is necessary that the defendant should not be negligent. If the plaintiff consents to some risk then it is presumed that the defendant will not be liable.

For example, when someone consents to a surgical operation and the same becomes unsuccessful then the plaintiff has no right to file a suit but if the same

becomes unsuccessful due to the surgeon's negligence then in such cases he will be entitled to claim compensation.

In *Slater v. Clay Cross Co. Ltd.*[13], the plaintiff suffered injuries due to the negligent behaviour of the defendant's servant while she was walking along a tunnel which was owned by the defendants. The company knew that the tunnel is used by the public and had instructed its drivers to give horns and drive slowly whenever they enter a tunnel. But the driver failed to do so. It was held that the defendants are liable for the accident.

In *Haynes v. Harwood*, the defendants' servant left two unattended horses in a public street. A boy threw a stone on the horses due to which they bolted and created danger for a woman and other people on the road. So, a constable came forward to protect them and suffered injuries while doing so. This being a rescue case so the defence of volenti non fit injuria was not available and the defendants were held liable.

However, if a person voluntarily attempts to stop a horse which creates no danger then he will not get any remedy.

In the case of *Wagner v. International Railway*, a railway passenger was thrown out of a moving train due to the negligence of the defendants. One of his friends got down, after the train stopped, to look for his friend but then he missed the footing as there was complete darkness and fell down from a bridge and suffered from some severe injuries. The railway company was liable as it was a rescue case.

In *Baker v. T.E. Hopkins & Son*, due to the employer's negligence, a well of a petrol pump was filled with poisonous fumes. Dr. Baker was called to help but he was restricted from entering the well as it was risky. He still went inside to save two workmen who were already stuck in the well. The doctor himself was overcome by the fumes and then he was taken to the hospital where he was declared dead. When a suit was filed against the defendants, they pleaded the defence of consent. The court held that in this case the defence cannot be pleaded and the defendants, thus, were held liable.

- If A creates danger for B and he knows that a person C is likely to come to rescue B. then, A will be liable to both B and C. Each one of them can bring an action for the same, independently.
- If someone knowingly creates danger for himself and he knows that he will likely be rescued by someone, then he is liable to the rescuer.

In *Hyett v. Great Western Railway Co.*, the plaintiff got injured while saving the defendant's cars from a fire which occurred due to negligence on the part of the

defendants. The plaintiff's acts seemed to be reasonable and the defendant was held liable in this case.

Unfair Contract Terms Act, 1977 (England)

The Unfair Contract Terms Act, 1977, limits the right of a person to exclude his liability resulting from his negligence in a contract.

Negligence Liability

- Sub-section 1 puts an absolute ban on a person's right to exclude his liability for death or personal injury resulting from the negligence by making a contract or giving a notice.
- Sub-section 2 is for the cases in which the damage caused to the plaintiff is other than personal injury or death. In such cases, the liability can only be avoided if a contract term or notice satisfies the reasonability criteria.
- Sub-section 3 says that a mere notice or agreement may be enough for proving that the defendant was not liable but in addition to that some proofs regarding the genuineness of the voluntary assumption and plaintiff's consent should also be given.

Volenti non fit injuria and Contributory negligence

- Volenti non fit injuria is a complete defence but the defence of contributory negligence came after the passing of the Law Reform (Contributory Negligence) Act, 1945. In contributory negligence, the defendant's liability is based on the proportion of fault in the matter.
- In the defence of contributory negligence, both are liable – the defendant and the plaintiff, which is not the case with volenti non fit injuria.
- In volenti non fit injuria, the plaintiff knows the nature and extent of danger which he encounters and in case of contributory negligence on the part of the plaintiff, he did not know about any danger.

Plaintiff the wrongdoer

There is a maxim "**Ex turpi causa non oritur actio**" which says that "from an immoral cause, no action arises".

If the basis of the action by the plaintiff is an unlawful contract then he will not succeed in his actions and he cannot recover damages.

If a defendant asserts that the claimant himself is the wrongdoer and is not entitled to the damages, then it does not mean that the court will declare him free from the liability but he will not be liable under this head.

In the case of *Bird v. Holbrook*, the plaintiff was entitled to recover damages suffered by him due to the spring-guns set by him in his garden without any notice for the same.

In *Pitts v. Hunt*, there was a rider who was 18 years of age. He encouraged his friend who was 16 years old to drive fast under drunken conditions. But their motorcycle met with an accident, the driver died on the spot. The pillion rider suffered serious injuries and filed a suit for claiming compensation from the relatives of the deceased person. This plea was rejected as he *himself was the wrongdoer* in this case.

Inevitable accident

Accident means an unexpected injury and if the same accident could not have been stopped or avoided in spite of taking all due care and precautions on the part of the defendant, then we call it an inevitable accident. It serves as a good defence as the defendant could show that the injury could not be stopped even after taking all the precautions and there was no intent to harm the plaintiff.

In *Stanley v. Powell*, the defendant and the plaintiff went to a pheasant shooting. The defendant fired at a pheasant but the bullet after getting reflected by an oak tree hit the plaintiff and he suffered serious injuries. The incident was considered an inevitable accident and the defendant was not liable in this case.

In *Assam State Coop., etc. Federation Ltd. v. Smt. Anubha Sinha*[21], the premises which belonged to the plaintiff were let out to the defendant. The tenant i.e. the defendant requested the landlord to repair the electric wirings of the portion which were defective, but the landlord did not take it seriously and failed to do so. Due to a short circuit, an accidental fire spread in the house. No negligence was there from the tenant's side. In an action by the landlord to claim compensation for the same, it was held that this was the case of an inevitable accident and the tenant is not liable.

In *Shridhar Tiwari v. U.P. State Road Transport Corporation*[22], a bus of U.P.S.R.T.C. reached near a village where a cyclist suddenly came in front of

the bus and it had rained heavily so even after applying breaks the driver could not stop the bus as a result of this the rear portion of the bus hit another bus which was coming from the opposite side. It was known that there was no negligence on the part of both the drivers and they tried their best in avoiding the accident. This was held to be a case of inevitable accident. The defendant i.e. U.P.S.R.T.C. was held not liable for this act.

In the case of *Holmes v. Mather*[23], the defendant's horse was being driven by his servant. Due to the barking of dogs, the horse became unmanageable and started to bolt. In spite of every effort of the driver, the horse knocked down the plaintiff. This makes it a case of an inevitable accident and the defendants were held not liable for the incident.

In *Brown v. Kendall*[24], the dogs of the plaintiff and the defendant were fighting with each other. The defendant tried to separate them and while doing so, he accidentally hit the plaintiff in the eye causing him some serious injuries. The incident was purely an inevitable accident for which no claim could lie. So, the court held that the defendant is not liable for the injuries suffered by the plaintiff as it was purely an accident.

In *Padmavati v. Dugganaika*[25], the driver of the jeep took the jeep to fill petrol in it. Two strangers took a lift in the jeep. The jeep got toppled due to some problem in the right wheel. The two strangers who took lift were thrown out of the jeep and they suffered some injuries leading to the death of one person.

The conclusions which came out of this case are:

- The master of the driver could not be made liable as it was a case of a sheer accident and the strangers had voluntarily got into the vehicle.
- The principle of *volenti non fit injuria* was applicable here.
- It was a case of a sheer accident which no one could foresee.

In *Nitro-Glycerine case*[26], A firm of carriers i.e. the defendants, in this case, was given a wooden case which was to carry from one place to another. The contents of the box were unknown. There was some leakage in the box and the defendants took the box to their office so that they can examine it. After taking out the box, they saw that it was filled with Nitro-Glycerine and then it suddenly exploded and the office building which belonged to the plaintiffs got damaged. The defendants were held not liable for the same as the same could not be foreseen.

In the case of *Oriental Fire & General Ins. Co. Ltd. v. Raj Rani*[27], the front right spring and other parts of a truck broke all of a sudden and the driver could not control it and dashed into a tractor that was coming from the opposite direction. The driver and the owner of that truck could not prove that they had taken all reasonable precautions while driving the truck. The court held that this case comes under negligence and has nothing to do with the inevitable accident and the defendant was liable.

Act of God

Act of God serves as a good defence under the law of torts. It is also recognized as a valid defence in the rule of '***Strict Liability***' in the case of *Rylands v. Fletcher*[28].

The defence of Act of God and Inevitable accident might look the same but they are different. Act of God is a kind of inevitable accident in which the natural forces play their role and causes damage. For example, heavy rainfall, storms, tides, etc.

Essentials required for this defence are:

- Natural forces' working should be there.
- There must be an extraordinary occurrence and not the one which could be anticipated and guarded against reasonably.

Working of natural forces

In *Ramalinga Nadar v. Narayan Reddiar*[29], the unruly mob robbed all the goods transported in the defendant's lorry. It cannot be considered to be an Act of God and the defendant, as a common carrier, will be compensated for all the loss suffered by him.

In *Nichols v. Marsland*[30], the defendant created an artificial lake on his land by collecting water from natural streams. Once there was an extraordinary rainfall, heaviest in human memory. The embankments of the lake got destroyed and washed away all the four bridges belonging to the plaintiff. The court held that the defendants were not liable as the same was due to the Act of God.

Occurrence must be extraordinary

Some extraordinary occurrence of natural forces is required to plead the defence under the law of torts.

In *Kallu Lal v. Hemchand*[31], the wall of a building collapsed due to normal rainfall of about 2.66 inches. The incident resulted in the death of the respondent's children. The court held that the defence of Act of God cannot be pleaded by the appellants in this case as that much rainfall was normal and something extraordinary is required to plead this defence. The appellant was held liable.

Private defence

The law has given permission to protect one's life and property and for that, it has allowed the use of reasonable force to protect himself and his property.

- The use of force is justified only for the purpose of self-defence.
- There should be an imminent threat to a person's life or property.

For example, A would not be justified in using force against B just because he believes that some day he will be attacked by B.

- The force used must be reasonable and to repel an imminent danger.

For example, if A tried to commit a robbery in the house of B and B just draw his sword and chopped his head, then this act of A would not be justified and the defence of private defence cannot be pleaded.

- For the protection of property also, the law has only allowed taking such measures which are necessary to prevent the danger.

For example, fixing of broken glass pieces on a wall, keeping a fierce dog, etc. is all justified in the eyes of law.

In *Bird v. Holbrook*[32], the defendant fixed up spring guns in his garden without displaying any notice regarding the same and the plaintiff who was a trespasser suffered injuries due to its automatic discharge. The court held that this act of the defendant is not justified and the plaintiff is entitled to get compensation for the injuries suffered by him.

Similarly, in *Ramanuja Mudali v. M. Gangan*[33], a landowner i.e. the defendant had laid a network of live wires on his land. The plaintiff in order to reach his own land tried to cross his land at 10 p.m. He received a shock and sustained some serious injuries due to the live wire and there was no notice regarding it.

The defendant was held liable in this case and the use of live wires is not justified in the case.

In *Collins v. Renison*[34], the plaintiff went up a ladder for nailing a board on a wall in the defendant's garden. The defendant threw him off the ladder and when sued he said that he just gently pushed him off the ladder and nothing else. It was held that the force used was not justifiable as the defence.

Mistake

The mistake is of two types:

- Mistake of law
- Mistake of fact

In both conditions, no defence is available to the defendant.

When a defendant acts under a mistaken belief in some situations then he may use the defence of mistake to avoid his liability under the law of torts.

In *Morrison v. Ritchie & Co*[35], the defendant by mistake published a statement that the plaintiff had given birth to twins in good faith. The reality of the matter was that the plaintiff got married just two months before. The defendant was held liable for the offence of defamation and the element of good faith is immaterial in such cases.

In *Consolidated Company v. Curtis*[36], an auctioneer auctioned some goods of his customer, believing that the goods belonged to him. But then the true owner filed a suit against the auctioneer for the tort of conversion. The court held auctioneer liable and mentioned that the mistake of fact is not a defence that can be pleaded here.

Necessity

If an act is done to prevent greater harm, even though the act was done intentionally, is not actionable and serves as a good defence.

It should be distinguished with private defence and an inevitable accident.

The following points should be considered:

- In necessity, the infliction of harm is upon an innocent whereas in case of private defence the plaintiff is himself a wrongdoer.
- In necessity, the harm is done intentionally whereas in case of an inevitable accident the harm is caused in spite of making all the efforts to avoid it.

For example, performing an operation of an unconscious patient just to save his life is justified.

In *Leigh v. Gladstone*[37], it was held that the forcible feeding of a person who was hunger-striking in a prison served as a good defence for the tort of battery.

In *Cope v. Sharpe*[38], the defendant entered the plaintiff's premises to stop the spread of fire in the adjoining land where the defendant's master had the shooting rights. Since the defendant's act was to prevent greater harm so he was held not liable for trespass.

In the case of *Carter v. Thomas*[39], the defendant who entered the plaintiff's land premises in good faith to extinguish the fire, at which the fire extinguishing workmen were already working, was held guilty of the offence of trespass.

In *Kirk v. Gregory*[40], A's sister-in-law hid some jewellery after the death of A from the room where he was lying dead, thinking that to be a more safe place. The jewellery got stolen from there and a case was filed against A's sister-in-law for trespass to the jewellery. She was held liable for trespass as the step she took was unreasonable.

Statutory authority

If an act is authorized by any act or statute, then it is not actionable even if it would constitute a tort otherwise. It is a complete defence and the injured party has no remedy except for claiming compensation as may have been provided by the statute.

Immunity under statutory authority is not given only for the harm which is obvious but also for the harm which is incidental.

In *Vaughan v. Taff Valde Rail Co.*[41], sparks from an engine of the respondent's railway company were authorized to run the railway, set fire to the appellant's woods on the adjoining land. It was held that since they did not do

anything which was prohibited by the statute and took due care and precaution, they were not liable.

In *Hammer Smith Rail Co. v. Brand*[42], the value of the property of the plaintiff depreciated due to the loud noise and vibrations produced from the running trains on the railway line which was constructed under a statutory provision. The court held that nothing can be claimed for the damage suffered as it was done as per the statutory provisions and if something is authorized by any statute or legislature then it serves as a complete defence. The defendant was held not liable in the case.

In *Smith v. London and South Western Railway Co*.[43], the servants of a railway company negligently left the trimmings of hedges near the railway line. The sparks from the engine set fire to those hedges and due to high winds, it got spread to the plaintiff's cottage which was not very far from the line. The court held that the railway authority was negligent in leaving the grass hedges near the railway line and the plaintiff was entitled to claim compensation for the loss suffered.

Absolute and conditional authority

The authority given by a statute can be of two types:

- Absolute
- Conditional

In the case of Absolute authority, there is no liability if the nuisance or some other harm necessarily results but when the authority is conditional it means that the same is possible without nuisance or any other harm.

In the case of *Metropolitan Asylum District v. Hil*[44], the hospital authorities i.e. the appellants were granted permission to set up a smallpox hospital. But the hospital was created in a residential area which was not safe for the residents as the disease can spread to that area. Considering it a nuisance an injunction was issued against the hospital. The authority, in this case, was conditional.

Conclusion

This article is to emphasize the important role played by General Defences in avoiding one's liability in torts. While learning about tort it is necessary to learn about General Defences in the law of Tort. General defences are a set of 'excuses' that you can undertake to escape liability. In order to escape liability

in the case where the plaintiff brings an action against the defendant for a particular tort providing the existence of all the essentials of that tort, the defendant would be liable for the same. It mentions all the defences which can be pleaded in cases depending upon the circumstances and facts.

In order to plead a defence it is important to understand it first and then apply the suitable defence accordingly.

What are the Remedies Available in the Law of Torts?

Introduction

Let us begin this topic by understanding what 'remedy' actually means in Law. A party is said to be 'aggrieved' when something that they may have been enjoying has been taken away from them by another party. This is an infringement of a party's rights and it is treatable by law. A **legal remedy** is one such treatment. When the aggrieved person is taken back to the position that they were enjoying before their rights were infringed, they are said to have been provided with a legal remedy. There are various types of legal remedies. For instance, if something that belongs to you has been taken away from you by a party, the court can either ask them to pay you back in money, or ask them to return your belongings as they were, and may also punish the party in some cases. There are two broad types of remedies in Tort Law.

1. Judicial Remedies
2. Extra-Judicial Remedies

Judicial Remedies

As the term suggests, these are the remedies that the courts of law provide to an aggrieved party. Judicial remedies are of three main types:

1. Damages
2. Injunction
3. Specific Restitution of Property

Extra-judicial Remedies

On the other hand, if the injured party takes the law in their own hand (albeit lawfully), the remedies are called extra-judicial remedies. These are of five main types:

1. Expulsion of trespasser
2. Re-entry on land
3. Re-caption of goods
4. Abatement
5. Distress Damage Feasant

Now, let us discuss both judicial and extrajudicial remedies in some detail.

Damages

Damages, or legal damages is the amount of money paid to the aggrieved party to bring them back to the position in which they were, before the tort had occurred. They are paid to a plaintiff to help them recover the loss they have suffered. Damages are the primary remedy in a cause of action for torts. The word "damages" should not be confused with the plural of the word "damage", that generally means 'harm' or 'injury'.

Types of damages

Depending upon the 'objective' of the compensation, that is, whether the plaintiff is to be compensated or the defendant has to be 'punished', there are 4 types of damages:

1. **Contemptuous**– contemptuous damages are also called ignominious damages. The amount of money awarded by the court in this case is very low, as to show the court's disapproval, that is, when the plaintiff himself is at some fault and cannot wholly be said to be 'aggrieved'.
2. **Nominal**– Nominal damages are awarded when plaintiff's legal right is infringed, but no real loss has been caused to him. For example, in cases of trespass, when damage has not been caused, a legal right is still infringed. Here, the objective is not to compensate the plaintiff.
3. **Substantial**– Substantial damages are said to be awarded when the plaintiff is compensated for the exact loss suffered by him due to the tort.

4. **Exemplary/Punitive**– These are the highest in amount. Punitive damages are awarded when the defendant has excessively been ignorant of the plaintiff's rights and great damage has been caused to the defendant. The objective here is to create a public example and make people cautious of not repeating something similar.

General and Special Damages

When there is a direct link between the defendant's wrongful act and the loss suffered by the plaintiff. For instance, a person A, due to his negligence, collides his car with a person B, who has a rare bone condition. In this case, the actual damage suffered by the plaintiff will be compensated, not taking into account the rare bone condition of the plaintiff. General damages are ascertained by calculating the amount of actual loss suffered by the plaintiff. For e.g, physical pain and loss caused due to it, or if the quality of life of the plaintiff is lowered.

Special damages are awarded by proving *special* loss. There is no straitjacket formula to derive the actual amount. The plaintiff just has to prove the loss suffered by him/her. For e.g., medical expense, loss of wage (prospective), repair or replacement of lost or damaged goods/property.

Damages for nervous or mental shock

Nervous shock

When, due to a negligent act or any other tortious act, a plaintiff's nerves are damaged due to shock and trauma, irrespective of whether a physical harm has also been caused with it, he/she is entitled to be compensated for it. The question before the court of law is whether the nervous shock is actually a resulting consequence of the defendant's act.

Mental shock

Mental shock, on the other hand is the shock to a person's intellectual or moral sense. Mental shock, too, can be compensated for in a suit for damages. Earlier, it was thought that mental shock cannot really be compensated for, because it cannot be measured, but recently the courts have recognized that the damage in case of mental shock is just as real as a physical injury.

Cases

McLoughlin v O'Brian

The plaintiff's husband and three children met with an accident with the defendant, due to the defendant's negligence. After seeing her husband and children grievously injured, and hearing the news of one of her children's death, the plaintiff suffered nervous and mental shock and went into a state of clinical depression. The House of Lords in this case ruled in favour of the plaintiff, McLoughlin, whereby she recovered damages for her nervous shock too.

Gujarat State Road Transport Corporation, Ahmedabad v. Jashbhai Rambhai

The plaintiffs in this case were relatives (mother and children) of a middle-aged couple who met with an accident when another moving bus drove over them as soon as they deboarded their own. The court delivered a judgement in favour of the plaintiffs, and they received compensation under the heading of 'Pain, Shock and Sufferings'.

Measurement of Damages

There is no arithmetic formula to decide the quantum of damages. Therefore, a number of factors, including the facts and circumstances of each case are to be considered to ascertain the damages. Damages are therefore awarded at the discretion of the court.

Remoteness of 'Damage'

As discussed above, the main aim is to bring the aggrieved party back to the status quo, that is, compensating the plaintiff. As a general rule, damage suffered by the plaintiff should be a direct consequence of the defendant's act. Any action can have multiple following consequences. A person cannot be held accountable for all the consequences resulting from his act. The remoteness of consequences resulting from a person's act has been an issue of debate in the Law of Torts over the years. Various tests were developed over time to determine what consequences of an act can a person be held liable for. When there is no cause and effect relationship between the defendant's act and the injury caused to the plaintiff, the damage is said to be too remote to be compensated.

Re Polemis Case (Re Polemis & Furness, Withy & Co Ltd)

In this case, Polemis, the plaintiff owned a cargo ship that they had chartered to the defendants. While unloading cargo from the ship, the defendant's employees accidentally knocked a plank into the ship, which caused a spark to ignite, that resulted in an explosion. The question before the court was, whether the damage due to the explosion was a direct result of the act of the defendant's employee.

Leisboch Case (Liesbosch Dredger v SS Edison)

In this case, the plaintiff's dredger was damaged and sunk by the defendants (Edison), due to their negligence. The dredger was working under a contract with the terms that some amount had to be paid if the work was not completed on time. The plaintiff did not have enough funds to arrange a new dredger to complete the said work. They claimed all the resulting damages. The court held that the plaintiff's own lack of funds cannot be compensated by the defendants.

Wagon Mound Case (Overseas Tankship Ltd. v. Morts Docks & Engineering Co.)

In this case, the defendants owned a ship (The Wagon Mound No. 1). The plaintiffs were the owners of a dock named Morts Dock. Due to the defendant's negligence a spark was ignited that set some floating cotton waste nearby on fire, due to which the plaintiff's wharfs and their ship, the Wagon Mound was damaged.

Purpose of Damages in Torts

The main object behind remedying by damages is to bring the plaintiff back into the position that he/she was in before the injury due to the tort occurred, or in other words, to bring him back to the position he would have been in, if the tort did not ever occur.

Injunction

Injunction is an equitable remedy available in torts, granted at the discretion of the court. An equitable remedy is one in which the court, instead of compensating the aggrieved party,asks the other party to perform his part of the promises. So, when a court asks a person to not continue to do something, or to do something positive so as to recover the damage of the aggrieved party,

the court is granting an injunction. A very simple example is that of a court ordering a company of builders to build on a land near a hospital, for the construction sounds may be creating a nuisance to the hospital.

An injunction is an order of a court that restrains a person from continuing the commission of a wrongful act, or orders the person to commit a positive act to reverse the results of the wrongful act committed by him, that is, to make good what he has wrongly done. To receive injunction against a party one must prove damage or the possibility of prospective damage (apprehended damage). An injunction can be temporary or permanent, and mandatory or prohibitory. Let us discuss each of them one by one. Law relating to injunctions is found in the Code of Civil Procedure, 1908 and from Section 37 to Section 42 of the Specific Relief Act (henceforth referred to as the Act), 1963.

A suit of injunction can be filed against any individual, group or even the State.

According to the Section 37 of the Act there are two types of injunctions– temporary and perpetual (permanent).

Temporary Injunction

A temporary or interlocutory injunction is granted during the pendency of a case, to maintain the status quo and avoid further damage until the court passes a decree. It prevents the defendant from continuing or repeating the breach that he had been doing. A temporary injunction is granted to prevent the party from suffering through the damages during the court proceedings. They may be granted at any stage during the pendency of the case. Either of the parties can seek an injunction to be granted.The power to grant a temporary injunction is derived from Rule 1 and 2 of Order XXXIX (39) of the Code of Civil Procedure. Certain principles are kept in mind while granting a temporary injunction:

1. There has to be a prima facie case.
2. A balance of convenience has to be maintained. (That is, which party is more at loss, etc.)
3. There has to be an irretrievable damage. (The damage has to be such that cannot be compensated for, in money)

Cases in which temporary injunction is granted

A temporary injunction may be granted in any of the following cases:

- An injunction can be granted in favour of a party and against the government if the government is barring the party from doing a lawful act or freely exercising his rights.
- Under Section 80 of the CPC, an injunction can be granted against an act done by a government/public officer working in his official capacity.
- When the property in dispute is in danger of being damaged or wasted by either of the parties.
- In cases of tenancy. A plaintiff being unjustly removed as a tenant, that is, not through the due legal process, can seek an injunction against his/her landlords.
- In case of a continuing nuisance, where the defendant is asked to discontinue his act of nuisance so as to prevent further damage to the plaintiff while the case is being decided.
- In cases of trademark, copyright infringement, etc.

Permanent Injunction

A perpetual or permanent injunction is granted after the court has heard the case from both sides and passes a decree. Here, since it is a court decree, it is final and perpetually applicable. That is, the defendant cannot continue his wrongful act, or has to do a positive act for perpetuity.

Cases in which permanent injunction is granted

- To avoid multiplicity of judicial proceedings.
- When damages do not adequately compensate the plaintiff.
- When the actual damage cannot be ascertained.

Mandatory Injunction

When the court has asked the party to *do* something, it is a mandatory injunction. That is, when the court compels a party to perform a certain act so as to bring back the aggrieved party or the plaintiff to the position that he/she was in before the commission of the act of the defendant. For example, the

court may ask a party to make available some documents, or to deliver goods, etc.

Prohibitory Injunction

When the court has asked the party to *not* do something, it is a prohibitory injunction.The court prohibits a person, or refrains them from doing something that is wrongful. For instance, it may ask the party to remove an object of nuisance or to stop his act of nuisance.

When can injunctions *not* be granted

According to Section 41 of the Specific Relief Act, an injunction cannot be granted:

1. To stop a person from filing a case in the same court in which the injunction suit is sought, unless such an injunction is being asked for, to prevent a multiplicity of proceedings.
2. To restrain or stop a person from filing or fighting a case in a court that is not subordinate to the one in which injunction is being sought.
3. To prevent a person from applying to any legislative body
4. To restrain a person from filing or fighting a criminal case
5. To prevent the breach of contract, performance of which is not enforced specifically
6. To prevent an act that is not a clear act of nuisance
7. To prevent a continuing breach in which the plaintiff has himself acquiesced
8. When an equally effective relief can be obtained in any other way or through any other sort of proceeding
9. When the conduct of the plaintiff (or his agents) has been so wrongful as to disentitle him from the assistance of the court.
10. When the plaintiff has no personal interest in the said matter.

Limitation period

According to Article 58 of the Limitation Act, 1963, the period of limitation for filing an injunction suit is **three** years from when the 'right to sue first accrues', that is, when the *right* to cause of action commences, not the cause of action itself. It is an important question of law as to when the cause of action actually arises. In the case of **Annamalai Chettiar vs A.M.K.C.T. Muthukaruppan Chettiar,** it was held that the right to sue accrues "when the defendant has clearly or unequivocally *threatened* to infringe the right asserted by the plaintiff in the suit".

Case:

M/S. Hindustan Pencils Pvt. Ltd. vs M/S. India Stationery Products

In this case, the plaintiff filed a suit for perpetual injunction against M/s. India Stationery Products for infringement of their trademark on their product 'Nataraj', in respect of pencils, pens, sharpners, erasers, etc, claiming that the trademark was adopted by them in 1961, and that the defendants had wrongly got themselves registered a copyright similar to them. The court ruled in favour of the plaintiff granting the defendant an interim injunction.

Specific Restitution of Property

The third judicial remedy available in the Law of Torts is that of Specific Restitution of Property. Restitution means restoration of goods back to the owner of the goods. When a person is wrongfully dispossessed of his property or goods, he is entitled to the restoration of his property.

Extra-Judicial Remedies

When a person can lawfully avoid or remedy himself without the intervention of courts, the remedies are called extra-judicial remedies. In this, the parties take the law in their own hands. Some examples are:

Expulsion of trespasser

A person can use a reasonable amount of force to expel a trespasser from his property. The two requirements are:

- The person should be entitled to immediate possession of his property.

- The force used by the owner should be reasonable according to the circumstances.

Illustration: A trespasses into B's property. B has the right to use reasonable force to remove him from his property and re-enter himself.

Re-entry on land

The owner of a property can remove the trespasser and *re enter* his property, again by using a reasonable amount of force only.

Re-caption of goods

The owner of goods is entitled to recapture his/her goods from any person whose unlawful possession they are in. Re-caption of goods is different from specific restitution in that it is an extra-judicial remedy, in which the person need not ask the court for assistance, instead, takes the law in his own hands.

Illustration: If A wrongfully acquires the possession of B's goods, B is entitled to use reasonable force to get them back from A.

Abatement

In case of nuisance, be it private or public, a person (the injured party) is entitled to remove the object causing nuisance.

Illustration: A and B are neighbours. Branches of a tree growing on A's plot enter B's apartment from over the wall. After giving due notice to A, B can himself cut or remove the branches if they're causing him nuisance.

Distress Damage Feasant

Where a person's cattle/other beasts move to another's property and spoil his crops, the owner of the property is entitled to take possession of the beasts until he is compensated for the loss suffered by him.

Conclusion

In torts, the object behind remedying a party is to take the aggrieved party back to the status or position that they were enjoying before the occurrence of tort. It is not to punish the defendant, as in crime. Remedies can be judicial and extrajudicial. When due process of law is required for a party to gain remedy, and the courts are involved, the remedies are called judicial remedies. When the law is taken in his/her own hands by the parties, they are called extra-judicial remedies.

Joint Tortfeasors and Laws in India

Introduction

When two or more persons unite to cause damage to another person, then they will be liable as joint tortfeasors. All those who actively participate in the civil wrong commission are joint tortfeasors. Based on the percentage of damage caused by his negligent act, each joint tortfeasor is responsible for paying a portion of the compensation granted to the complainant. According to the principle of contribution, the defendant who pays more than his share of the damages, or who pay more than he is at fault, may bring an action to recover from the other defendant.

Illustration

The claimant has the right to recover the damages from both the defendants, if X and Y are found to be at fault.

Liability of Independent Tortfeasor

They are severally liable for the same damage due to an independent course of action. In ***Thompson v. London County Council***, it was observed that "the damage is one but the cause of action which led to the damage are two". Such tortfeasors are, therefore, severally liable for the same damage, not jointly liable for the same tort.

In **Koursk case**, Koursk and Clan Chisholm collided with one another. As a result, the ship Clan Chisholm collided and sank another ship Itria. The owners of the damaged ship Itria recovered the damages from Clan Chisholm for the loss suffered but were not fully satisfied as the liability of the owners of Clan Chisholm was limited to the lesser amount. Subsequently, owners of Itria filed a

suit against the Koursk also. It was held that Koursk and Clan Chisholm were not joint tortfeasors but only independent tortfeasors. The liability of the Independent tort was held to be several and not joint and therefore, there could be as many causes of action as the number of tortfeasors.

Liability of Several Concurrent Tortfeasors

When the same injury is caused to another person by two or more person as a result of their separate tortious acts, this results in several concurrent tortfeasors. Even where successive injuries are caused, the parties remain multiple, concurrent tortfeasors as long as the negligence of each is both a factual and proximate cause of each injury.

Illustration

Several concurrent tortfeasors will occur in a chain collision situation, as described in the case of ***Rutter v Allen***.*[1]* In this case, the plaintiff stopped his vehicle behind a truck that had come to a sudden stop. The Plaintiff was then struck from behind by a vehicle driven by the defendant X which was struck by a vehicle driven by the defendant Y. The exact sequence of the collisions could not be determined with certainty because they all occurred within a very short time frame. Despite this, it was held that due to both the defendant's negligence, the damage had been caused to the plaintiff's vehicle. As a consequence, the accused were several concurrent tortfeasors and were jointly and severally liable for the damage caused by their negligence.

If a complainant suffers multiple accidents, several concurrent tortfeasors may also be the individual tortfeasors from each accident. For example, in a motor vehicle accident in *Hutchings v Dow[2]*, the complainant suffered damage. He was further injured in an assault about 18 months later. It was determined that the complainant suffered from severe and ongoing depression resulting from both the motor vehicle accident and the assault. The court stated that "several tortfeasors whose acts combined to produce the same damage, i.e. depression," were the defendants from the motor vehicle accident and the assault perpetrator.

Liability of Joint Tortfeasors

When two or more persons join together for common action, then all the persons are jointly and severally liable for any tort committed in the course of such action. There were three principles in English Common Law with regard to the liability of joint tortfeasors.

- The **first principle** is that the liability of wrongdoers is joint and several i.e. each is liable for the whole damage. The injured may sue them jointly or separately.
- The **second principle** was laid down in the case of ***Brinsmead v Harrison***, where it was held that a judgment obtained against one joint wrongdoer released all the others even though it was not satisfied.
- The **third rule** was laid in the case of ***Merryweather v Nixon,*** where it was held that in common law, no action for contribution could be sustained by one wrongdoer against another, although one who sought a contribution might have been compelled to pay the full damages. The reason alleged for this rule was that any such claim to the contribution must be based on an implied contract between the tort-feasors and that such a contract was illegally concluded with a view to committing an illegal act.

But the above rules were virtually abolished by the Law reforms Act, 1935 and the Civil Liability Act, 1978. The first rule in Brinsmead case being unjust, was abolished by the Act 1935 and therefore by the Act of 1978 which now provides that judgment recovered against any person liable in respect of any debt or damage should not be bar to an action, or to the continuance of an action, against another person who is jointly liable with him with respect to the debt and damage.

The second rule in Merryweather case is that a tortfeasor who has been held liable cannot recover contribution from other joint tortfeasors, being unjust, has also been abolished by the Act of 1935 which, as per section 6(1), provides that a tortfeasor who has been held liable to pay more than the share of the damages, can claim contribution from the other joint tortfeasors.

The third unjust rule was created by section 6(1)(b) of the Law Reform Act, of 1935 that if successive actions are brought, the amount of damages recoverable shall not, in the aggregate exceed, the amount of damages awarded in the first judgment. This rule, being unjust has now been repealed and replaced by section 4 of the civil liability Act, 1978 which now disallows the only recovery of cost in the subsequent suits, unless the court is of the opinion that there was a reasonable ground for bringing the action.

Laws in India

In India, there is no statutory law on joint tortfeasors' liability. As stated above, in England the Law Reform Act, 1935 and the Civil Liability Act 1978, have virtually brought the position of joint- tortfeasors on par with the independent tortfeasors. The question therefore arises, should the Indian courts follow the

common law on joint tortfeasors which was laid down in Brinsmead and Merryweather cases and was prevailing in England prior to 1935 or the law enacted by the British Parliament in 1935 and 1978? Up to 1942, the courts in India had followed the law as laid down in **Brinsmead and Merryweather** cases, but in some cases, the courts expressed doubts about its applicability in India.

The Supreme court of India, in ***Khushro S. Gandhi v. Guzdar[4]***, refused to follow the common law of England. The fact was that in the suit for damages for defamation, one of the defendants had tendered an apology to the plaintiff and the court had passed a compromise decree between the plaintiff and the defendants who tendered an apology. When the plaintiff wanted to continue the suit against the other defendants, it was contended by the defendants that the compromise decree released all other defendants from their liability. Rejecting the contentions of the defendants, the court held that in the case of joint tortfeasors, in order to release all joint tortfeasors, the plaintiff must receive full satisfaction or which the law must consider as such from a tortfeasor before other joint tortfeasors can rely on accord and satisfaction. The rule which is in consonance with justice, equity and good conscience will convince only that type of liability of tortfeasors as joint and several.

In the light of the above decision, the recent trend of the Indian court is to follow or adopt common law of England or the law enacted by the British Parliament if it is in consonance with the principles of equity, justice and good conscience under the Indian Constitution.

When does the liability of joint tortfeasors arise?

Liability of joint tortfeasors arises in three circumstances and they are:

Agency

When one person is authorized by another person to do work on his behalf then any tort committed by that person, the agent then principal who is authorizing the work will jointly and independently be held liable. When a tort is committed by an agency then both principal and agent are considered as joint tortfeasors. When any partner commits tort during the course of the business, then all other partners are also considered as joint tortfeasors.

Vicarious Liability

When a person is liable for the tort committed by another person under special circumstances, the liability is joint and both are joint-tortfeasors. Thus, when a servant commits a tort in the course of employment, the master can be made liable along with the servant as a joint-tortfeasors.

Joint Action

Where two or more persons join together for common action then all the persons are jointly and severally liable for the tort committed in the course of action.

Tortfeasors Defenses

An individual or entity accused of committing a civil mistake basically has three options for defending their actions. These tortfeasor defenses include:

Consent and Waiver

A tortfeasor (defendant) may defend his position in a civil lawsuit if the accuser (defendant) has been explicitly warned of the risk or danger of engaging in the harmful activity. This defense is referred to as the legal maxim volenti non fit injuries, which means "no injury is done to a consenting person." This tortfeasor defense usually relies on signed waivers of liability

Comparative Negligence

In comparative negligence, tortfeasors may try to defend themselves by claiming that the complainant contributed to his own damage by committing acts of recklessness or negligence. A similar concept called "contributory negligence" often results in the court assigning a percentage of fault to each party, which ultimately dictates the percentage of financial responsibility for which each party will be held accountable.

Illegality

Where at the time of the injury, the complainant committed an illegal act for which he was seeking compensation, the defendant's liability may be reduced, or entirely eliminated.

Remedies

The law of contribution says that Y claims to share the liability to X with others was based on the fact that they were subject to a common liability to X, whether equally with Y or not. The words in respect of the same damage emphasized the need for one loss to be allocated among those liable. The amount of the contribution recoverable from any person shall be fair and equitable, taking into account the extent of his responsibility for the damage. The court may exempt any person from the liability to make a contribution or direct that any person's contribution amounts to full compensation.

The plaintiff fell down a hole which had been left uncovered by the negligence of a contractor employed by the defendant to carry out certain works on the premises on which the plaintiff had come. It was held that the contractor who was added as a third person to the suit was liable to contribute one-half of the damages.

Criticism of Joint Tortfeasors

Joint and multiple liability doctrine is criticized because it can result in severe inequities. For example, a defendant who has only 10 percent responsibility for an accident that is jointly and severally liable with a defendant who is 90 percent at fault for an accident may have to bear the full amount of damage financial burden, even though his or her mistake was quite minor.

Conclusion

Joint and multiple liabilities is a system that protects the complainants when one or more wrongdoers are unable to pay damages owed to the complainant. However, this can lead to disproportionate and unexpected results for tortfeasors.

What is Defamation?

Introduction

Defamation as the meaning of the word suggests **is an injury to the reputation of a person** resulting from a statement which is false**.** A man's reputation is treated as his property and if any person poses damage to property he is liable under the law, similarly, a person injuring the reputation of a person is also liable under the law. Defamation is defined in section 499 of Indian Penal Code 1860 and section 500 provides that a person committing an

offense under this section is liable with simple imprisonment for a term of 2 years or fine or with both.

Essentials of Defamation

A. The statement must be defamatory

The very first essential of the offense of defamation is that the statement must be defamatory i.e. which tends to lower the reputation of the plaintiff. **The test to check if a particular statement is defamatory or not will depend upon how the right thinking members of society are likely to take it.** Further, a person cannot take a defense that the statement was not intended to be defamatory, although it caused a feeling of hatred, contempt or dislike.

In the Case of Ram Jethmalani v. Subramanian Swamy court held Dr. Swamy to be liable for defaming Mr. Jethmalani by saying that he received money from a banned organization to protect the then CM of Tamil Nadu in the case of the assassination of Rajiv Gandhi. In another recent case of Arun Jaitley v Arvind Kejriwal, the court held the statement said by Arvind Kejriwal and his 5 other leaders to be defamatory. However, the matter was finally disclosed after all the defendants apologized for their actions.

Illustration

A publishes an advertisement in a local newspaper stating false information that the company of B has committed fraud of Rs 20,00,000. Now, this statement will amount to defamation as this newspaper will be read by many readers and will surely injure the reputation of B's company.

However, it is to be noted that mere hasty expression spoken in anger, or vulgar abuse to which no hearer would attribute any set purpose to injure the character would not amount to defaming a person.

Illustration

If A an employer scolds his employee B for not coming on time in front of the whole staff, then B cannot take the plea that A has injured the reputation of B.

B. The statement must refer to the plaintiff

In an action for defamation, the plaintiff has to prove that the statement of which he Complains referred to him, it will be immaterial that the defendant did not intend to defame the plaintiff. If the person to whom the statement was published could reasonably infer that the statement referred to him, the defendant will then be liable

Illustration- If A, a bank publishes a notice to all its branches to not give the loan to any person from xyz as the people of xyz are more often repeated defaulters. Now due to this B, a resident of xyz has suffered a huge loss. Now B can hold A liable for defaming him although the bank did not directly focus on him.

In the case of T.V., Ramasubha Iyer v. A.M.A Mohindeen Court held the defendants liable for publishing a statement without any intention to defame the defendants. The statement mentioned that a particular person carrying business of Agarbathis to Ceylon has been arrested for the offense of smuggling. The plaintiff was also one of the person carrying on a similar business, and as a result of this statement his reputation also severely damaged.

C. The statement must be published

Publication of defamatory statement to some person other than the person defamed is a most important aspect for making any person liable, and unless that is done, no action for defamation will lie.

However, if a third person wrongfully reads a letter meant for the plaintiff, then the defendant likely to be liable. But if the defamatory letter sent to the plaintiff is likely to be read by somebody else, there will be a valid publication.

In the case of Mahendra Ram v. Harnandan prasad the defendant was held liable for sending a defamatory letter to plaintiff written in Urdu knowing that the plaintiff did not knew Urdu and the letter will very likely be read over by another person.

Forms of Defamation

1. **Slander**– It is the publication of a defamatory statement in a transient form For example- Defaming a person by way of words or gestures.
2. **Libel**– It is the representation made in some permanent form.

For example- Defaming a person through a representation made in some permanent form like writing, printing etc.

English law on libel and slander

Under English criminal law, libel is treated as a crime but slander is not. Slander is only a civil wrong. This distinction between libel and slander is mainly on two reasons-

1. Under Criminal law, only libel has been recognized as an offense. Slander is no offense.
2. Under the law of torts, slander is actionable, except in few cases where special damage has to be proved. Libel is always actionable i.e. without any proof. However, slander is also actionable in the following 4 cases:

- Imputation of a criminal offense to the plaintiff.
- Imputation of an infectious disease to the plaintiff which has the effect of preventing others from associating with the plaintiff. Example A makes a statement in his office that his colleague is suffering from AIDS. He can here be liable for defaming his colleague.
- The imputation that a person is incompetent, dishonest or unfit in regard to the office, profession, trade or business carried on by him.
- Imputation of unchastity or adultery to any woman or girl.

Indian law on Libel and Slander

Unlike English law, Indian law does not make any distinction between libel and slander and both are treated as criminal offenses under section 499 IPC. In the case of Hirabai Jehangir v. Dinshawdulji the Bombay and Madras high court both held that no distinction needs to be made between treating libel and slander as criminal offenses.

Innuendo

A statement is prima facie defamatory when its natural and obvious meaning leads to that conclusion. Sometimes it may happen that the statement was prima facie innocent but because of some secondary meaning, it may be considered to be defamatory. For this secondary instance plaintiff must prove the secondary meaning i.e. innuendo which makes the statement defamatory.

Illustrations

Z makes a statement that X is an honest man and he never stole my watch. Now this statement is at first instance may be innocent, but it can be defamatory if the person to whom it was made, interprets from this that X is a dishonest man having stolen the watch.

Defamation of class of persons

When particular words spoken are referred to a group of individuals or a class of persons, then no single person of that group or class can sue unless he proves that the words could reasonably be considered to referring him.

Illustration- If a person wrote that all doctors were thieves, then no particular doctor could sue him unless there was something that pointed out that the person actually intended to defame him individually.

This situation will be different if the person wrote that all doctors of Ganga ram hospital are thieves and then doctors of Ganga ram hospital can sue him for defaming them.

Communication between husband and wife

In the eyes of law, both husband and wife are one person and the communication of a defamatory matter from the husband to the wife or vice versa is no publication and will not come within the purview of section 499. Section 122 of the Indian Evidence Act 1872 deals with privileged communications between husband and wife and makes them out of the scope of section 499 **except in suits between married persons, or in a proceeding in which one married person is prosecuted for any crime committed against the other.**

In a leading case of T.J. Ponnen v. M.C Verghese the court held that the letter from husband to his wife containing defamatory matter concerning the father-in-law will not amount to defamation. It will very much be covered within the scope of privileged communications between husband and wife as laid in section 122 of the Indian Evidence Act 1872.

Defenses to defamation

The defenses to an action for defamation are

1. Justification of truth

2. Fair comment
3. Privilege

Justification of truth

In a civil action for defamation, the truth of the defamatory matter is a complete defense and the reason for this is that " Law will not permit a man to recover damages for something being true about him ".

Under criminal law on the other hand merely proving that the statement was true is not a good defense and besides this, the defendant has to show that it was made for public good also.

If the defendant is not able to prove the truth of the facts, the defense cannot be availed. In the case of Radheyshyam Tiwari v. Eknath court held the defendants for publishing defamatory matter against the defendants. Later the defendants were not able to prove that the facts published by him were true and, therefore he was held liable.

Fair comment

Making a fair comment on matters public interest is a valid defense to an action for defamation. For this, the following must be proved

- **It must be a comment i.e, an expression of opinion rather than an assertion of fact**

For example, If X says that A has been guilty of breach of trust and therefore he is a dishonest man. Here the latter words are a comment on the former. But if A did not commit any breach of trust and X still says to him as a dishonest man. Then it will not be a comment and will amount to an assertion of fact.

- **The comment must be fair**

The comment should be fair i.e. should not be based upon untrue facts.

For example, X publishes serious allegations of bribery against Y in a newspaper. Later X is not able to prove the truthness of these allegations and therefore his comment will not amount to fair comment.

- **The matter commented upon must be of public interest-**

The matter on which the defendant has commented must be of public interest. Matters like administration of government departments, courts, ministers, public meetings, textbooks, etc are considered to be matters of public interest.

Privilege

As the word suggests itself i.e. giving special status. These special occasions when the law recognizes that the right of free speech outweighs the plaintiffs right to defamation and a defamatory statement made on such occasion is not actionable. Privileges are of two types.

1. **Absolute privileges**– In matters of these complete immunity is given to person speaking and no action for defamation can lie against him. It includes 3 aspects

- **Parliamentary proceedings**– Article 105(2) of the Indian constitution gives immunity to parliamentarians to speak anything during the course of business of parliament and no action would lie against them.
- **Judicial proceedings**– This protection has been given to judges under judicial officers protection act of 1850. It also extends to counsels, witnesses, and parties to a suit.

2. **Qualified privilege**– This privilege is also available and under this, **it is necessary that the statement must have been made without a malice i.e a wrongful intention.**

For example, A, a shopkeeper, says to B, who manages his business, " Sell nothing to Z unless he pays you ready money, as I am doubtful of his honesty. Now A will fall under this exception if he has made his imputation on Z in good faith for the protection of his own interest.

Conclusion

After analyzing all the key aspects of defamation as laid in section 499 IPC, we have found that the essence of defamation lies in the injury to the reputation of a person. And for this injury, he can very much sue the defendants. Defamation is of two types libel and slander. Both are considered as criminal offenses in India. There are certain exceptions to this known as privilege.

Application of Tort law in Domestic Disputes

Domestic Relations is an evolving area of Tort Law dealing with the internal functions of a family. The evolution of Domestic Relations Tort has not only influenced the manner in which family members can collect as a result of

tortious behavior for damages or interference with the family unit itself; it has influenced the manner in which husbands, wives, kids, and legal guardians are seen as legal entities.

Children and wives were originally regarded as chattels under common law and worked under the proprietary rights of a man. Several advances in family law in the 1900s provided for women and children's legal rights to act as separate legal entities from their husbands/fathers.

Husband and Wife

In the case of husband and wife, the issue of personal liability can be dealt with two scenarios. First, the husband's liability for wife's torts and Second, the action between the husband and wife.

i) Husband's Liability for Wife's Torts

Under common law, a married woman could not sue any person for any tort in the earlier phase of development of tort, unless and until her husband joined her as a party to the plaintiff. In addition, a wife could not be sued without making her husband a defendant's party.

These anomalies were removed by the legislative acts, i.e., The Married Women's Property Act, 1882, and the Law Reform (Married Women and Tortfeasors) Act, 1935. After these acts, a wife may sue or be charged without making her husband a joint party to the suit.

However, if the husband and wife are joint tortfeasors, then they can be made jointly liable.

- Drinkwater v. Kimber, (1952) 2 Q.B. 281

This case, explains the point. There a lady was injured because of the combined negligence from her husband and a third party. She recovered the full amount of compensation from the third party. The third-party could not recover any contribution from the husband as the husband could not be made liable towards his wife for personal injuries.

Regarding the contribution between the wrongdoers, the original rule in England was known as the rule in **Merryweather v. Nixon.** It stated that in the case of

joint tortfeasors, the one tort-feasor who paid the full amount of damages for the wrongdoing could not claim contribution from the others.

The Law Reform (Married Women and Tortfeasors) Act, 1953 abolished this disability and enabled the joint tortfeasors to recover their contribution. The Law Reform (Husband and Wife) Act, 1962 has changed further and in this regard, the law has changed to the effect that when a spouse sues a third person, the latter can claim contribution from the other spouse who was a joint tort-feasor.

ii) Action between Spouses

At common law, there could be no action between husband and wife for tort. If the other spouse committed a tort, neither the wife could sue her husband nor the husband could sue his wife. The change has been brought up by the Married Women's Property Act,1882 and permitted the married woman to sue her husband in tort for protection and security of her property. The property includes chose in action which is given in Section 24 of Married Women's Property Act, 1882.

As a wife could sue her husband only for the protection and security of her property, she could not sue her husband if he caused her personal injuries. Thus, if the husband damages her watch, she could sue for the same but if negligently fractured her legs, she could not bring any action for the same. The husband has no right for an action for any kind of harm caused by his wife to him.

- ## Curtis v. Wilcox [1948] 2 K.B. 474 (C.A.)

The defendant by his negligent driving injured the plaintiff, a passenger in his car. After the issue of her writ, claiming, inter alia, damages for pain and suffering, but before the hearing of the action, the plaintiff married the defendant. The defendant, in substance the husband's insurance company, pleaded that the claim for general damages was barred by the marriage.

Oliver J. held that he was bound by the judgment of **McCardie J.** in **Gottliffe v. Edelston [1930] 2 K.B. 378**, and disallowed the claim for general damages. The Courts of Appeal (Scott, **Wrottesely L.JJ., Wynn-Parry J.**) in a considered judgment per **Wynn-Parry J.,** allowed the appeal and overruled **Gottliffe v. Edelston.** They agreed with **Mccardie J.'s** view that a thing in action includes a right of action in tort, but they dissented from his

decision that 'thing in action' as used to define separate property in the Married Women's Property Act, 1882, Section 24, was used in a limited sense. Accordingly, a wife is now entitled to sue her husband for a purely personal antenuptial tort.

- Broom v. Morgan (1953) 1 Q.B. 597

In this case, it was held that if a husband committed a tort against his wife in the course of his employment of his master, the master was liable for the same. DENNING L.J. observed: "If the servant is immune from an action at the suit of the injured party owing to some positive rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him, notwithstanding the immunity of the servant. The rule prohibiting action between spouses has been abolished by the Law Reform (Husband and Wife) Act, 1962. Now, the husband and wife can sue each other as if they are unmarried. The Act, however, places a restriction on the action during the marriage by one spouse against another and the court has been given a power to stay the action if it appears that no substantial benefit will accrue to either party from the proceedings, or the case can be more conveniently disposed of under Section 17 of the Married Women's Property Act, 1882. Under Indian law, personal capacity to sue and be sued in tort between husband and wife is governed by their personal laws, be they Hindus, Sikhs, Jains or Muslims. For Christians, the Married Women's Property Act, 1874, removed various anomalies.

Furthermore, the Indian Constitution removes all anomalies of marital status and personal capacity present in common law. Article 14 embodies a guarantee against arbitrariness and unreasonableness, taking into account the case of **Ajay Hasia v. Khalid Mujib (1983).**

Parental and Quasi-parental Authority

Parents and persons in *loco parentis* have a right to administer punishment on a child to prevent him from doing mischief to himself and others. The law is that a parent, teacher, or other person having lawful control or charge of a child or young person is allowed to administer the punishment on him. Parents are presumed to delegate their authority to the teacher when a child is sent to the school.

Such an authority warrants the use of reasonable and moderate punishment only and, therefore, if there is excessive use of force, the defendant may be liable for assault, battery or false imprisonment, as the case may be.

In England, as per Section 1 (7), Child and Young Person's Act, 1933 a parent, a teacher, or other person having lawful control or charge of a child or young person is allowed to administer the punishment on him.

- Cleary v. Booth, (1893) 1 Q.B. 465

Facts:

Booth (Defendant), a school headmaster, administered corporal punishment on two boys after learning that they had fought on the way to school. The defendant was charged with assault and battery and convicted for it. He appealed.

Held:

The authority of a teacher to correct his students is not limited only to the wrongs which the student may commit upon the school premises but may also extend to the wrongs done by him outside the school, for *"there is not much opportunity for a boy to exhibit his moral conduct while in school under the eye of the master, the opportunity is while he is at play or outside the school".*

There is no question that, while at home, a child is under a parent's authority. It is also clear that while at school, a child is under the head master's authority. The question is under what authority the child is when he was on his way from home to school. Likely, the child may be said to be under the headmaster's authority through the parent's delegated duty. In that case, if necessary, the headmaster has the right to inflict punishment on the child in order to correctly raise the child. The authority of the headmaster extends not only to acts performed by children while they are at school but also on the way going to and fro from school to home. Here, the two boys were on their way to school when they are engaged in fighting.

The Tort of Nuisance

Introduction

A person in possession of a property is entitled to its undisturbed enjoyment as per law. However, if someone else's improper use or enjoyment in his property ends up resulting into an unlawful interference with his enjoyment or use of that

property or of some of the rights over it, or in connection with it, we can say that the tort of nuisance has occurred.

The word “nuisance” has been derived from the Old French word “nuire” which means “to cause harm, or to hurt, or to annoy”. The Latin word for nuisance is “nocere” which means “to cause harm”.

Nuisance is an injury to the right of a person’s possession of his property to undisturbed enjoyment of it and results from an improper usage by another individual.

Definitions by Various thinkers

According to **Stephen**, nuisance is anything done to the hurt or annoyance of the tenements of another, or of the lands, one which doesn’t amount to trespass.

According to **Salmond**, nuisance consists in causing or allowing to cause without lawful justification, the escape of any deleterious thing from one’s land or from anywhere into land in possession of the plaintiff, such as water, smoke, gas, heat, electricity, etc.

Essential elements of Nuisance

Wrongful act

Any act which is done with the intention to cause the infringement of the legal rights of another is considered to be a wrongful act.

Damage or loss or annoyance caused to another individual.

Damage or loss or annoyance must be such which the law should consider as a substantial material for the claim.

Kinds of Nuisance

1. Public Nuisance

The Indian Penal code defines nuisance as an act which causes any common injury, danger or annoyance, to the people in general who dwell or occupy the property, in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to the people who may have occasion to use any public right.

Public nuisance affects the society and the people living in it at large, or some considerable portion of the society and it affects the rights which the members of the society might enjoy over the property. The acts which seriously affects or interferes with the health, safety or comfort of the general public is a public nuisance.

Instances where an individual may have a private right of action in respect to a public nuisance:

- He must show the existence of any personal injury which is of a higher degree than the rest of the public.
- Such an injury has to be direct and not just a consequential injury.
- The injury must be shown to have a huge effect.

2. Private Nuisance

Private Nuisance is that kind of nuisance in which a person's use or enjoyment of his property is ruined by another. It may also injuriously affect the owner of the property by physically injuring his property or by affecting the enjoyment of the property. Unlike public nuisance, in private nuisance, an individual's usage or enjoyment of property is ruined as distinguished from the public or society at large. The remedy for private nuisance is a civil action for damages or an injunction or both.

Elements which constitute a private nuisance

- The interference must be unreasonable or unlawful. It is meant that the act should not be justifiable in the eyes of the law and should be by an act which no reasonable man would do.

- Such interference has to be with the use or enjoyment of land, or of some rights over the property, or it should be in connection with the property or physical discomfort.
- There should be seeable damage to the property or with the enjoyment of the property in order to constitute a private nuisance.

Case Law: Rose v. Miles(1815) 4M &S. 101

The defendant had wrongfully obstructed a public navigable creek which obstructed the defendant from transporting his goods through the creek due to which he had to transport his good through land because of which he suffered extra costs in the transportation. It was held that the act of the defendant had caused a public nuisance as the plaintiff successfully proved that he had incurred loss over other members of the society and this he had a right of action against the defendant.

A nuisance may be in respect of either **property** or **physical discomfort**

1. Property

In the case of a nuisance with respect to the property, any sensible injury to the property will be enough to support an action for the damages.

2. Physical discomfort

In a suit of nuisance arising out of physical discomfort, there are two essential conditions required.

- **In excess of the natural and ordinary course of enjoyment of the property.**

The usage by the third party should be of out of the natural course of enjoyment from one party.

- **Interfering with the ordinary conduct of human existence.**

The discomfort should be of such a degree that it would affect an individual in the locality and people would not be able to put up or tolerate with the enjoyment.

Case Law: Radhey Shyam v. Gur Prasad AIR 1978 All 86

Mr Gur Prasad Saxena and another filed a suit against Mr Radhey Shyam and five other individuals for permanent injunction restraining the defendant from installing and running a flour mill in the premises occupied by the defendant. Gur Prasad Saxena filed another suit against Radhey Shyam and five other individuals for a permanent injunction from running and continuing to run an oil expeller plant. The plaintiff has alleged that the mill was causing a lot of noise which in turn was affecting the health of the plaintiff. It was held that by running a flour mill in a residential area, the defendant was causing a nuisance to the plaintiff and affecting his health severely.

What are the defences available to Nuisance?

There are many valid defences available to an action for tort, these are:

1. Prescription

- A prescription is a title acquired by use and time and which is allowed by the law, a person claims any property because his ancestors have had the possession of the property by law.
- Prescription is a special kind of defence, as, if a nuisance has been peacefully and openly been going on without any kind of interruption then the defence of prescription is available to the party. On the expiration of this term of **twenty years**, the nuisance becomes legalised as if it had been authorised in its commencement by a grant from the owner of the land.
- The essence of prescription is explained in Section 26 of the limitations act and Section 15 of the Easements Act.

There are three essentials to establish a person's right by prescription, these are

1. **Use or enjoyment of the property:** The use or enjoyment of the property must be acquired by the individual by law and the use or enjoyment must be done openly and peacefully.
2. **Identity of the thing/property enjoyed:** The individual should be aware of the identity of thing or property which he or she is peacefully or publically enjoying.
3. **It should be unfavourable to the rights of another individual:** The use or enjoyment of the thing or property should be of

such a nature that it should be affecting the rights of another individual thus causing a nuisance and even after knowing of such a nuisance being caused there must've been no action taken against the person causing it for at least twenty years.

2. Statutory authority

- When a statute authorises the doing of a particular act or the use of land in a way, all the remedies whether by action or indictment or charge, are taken away. Provided that every necessary reasonable precaution has been taken.
- The statutory authority may be either absolute or conditional.
- When there is an absolute authority, the statue allows the act and it is not necessary that the act must cause a nuisance or any other form of injury.
- Whereas in the case where there is a conditional authority, the state allows the act to be done only if it can be done without any causation of nuisance or any other form of injury.

What are the remedies for nuisance?

There are three kinds of remedies available in the case of a nuisance, these are:

1. Injunction

An injunction is a judicial order restraining a person from doing or continuing an act which might be threatening or invading the legal rights of another. It may be in the form of a temporary injunction which is granted on for a limited period of time which may get reversed or confirmed. If it is confirmed, then it takes the form of a permanent injunction.

2. Damages

The damages may be offered in terms of compensation to the aggrieved party, these could be nominal damages. The damages to be paid to the aggrieved party is decided by the statue and the purpose of the damages is not just compensating the individual who has suffered but also making the defendant realise his mistakes and deter him from repeating the same wrong done by him.

3. Abatement

Abatement of nuisance means the removal of a nuisance by the party who has suffered, without any legal proceedings. This kind of remedy is not favoured by the law. But is available under certain circumstances.

This privilege must be exercised within a reasonable time and usually requires notice to the defendant and his failure to act. Reasonable for may be used to employ the abatement, and the plaintiff will be liable if his actions go beyond reasonable measures.

Example: Ace and Beck are neighbours, Beck has a poisonous tree on his land which overtime outgrows and reaches the land of Ace. Now Ace has every right to cut that part of the tree which is affect his enjoyment of his land with prior notice to Beck. But if Ace goes to Beck, land without his permission, and chops off the entire tree which then falls on the land of Beck, then Ace shall be in the wrong here as his action taken would be beyond reasonableness.

Nuisance and Trespass – Distinguished

1. Trespass, on one hand, is the direct physical interference with the plaintiff's possession of the property through some material or tangible object whereas, in the case of a nuisance, it is an injury to some right of the possession of the property but not the possession itself.
2. Trespass is actionable per se (actions which do not require allegations or proof), whereas, in the case of a nuisance, only the proof of actual damage to the property is required.

Example: Simply entering on another individual's property without the owner's consent and without causing him any injury would be trespass whereas if there is an injury to the property of another or any interference with his enjoyment of the property, then it will amount to a nuisance.

3. If the interference with the use of the property is direct, then the wrong is trespass. Whereas if the interference with the use or enjoyment of the property is consequential then it will amount to a nuisance.

Example: Planting a tree on someone else's land would amount to trespass whereas if a person plants a tree on their own land which then outgrows to the land of another would amount to a nuisance.

Case Law: **Ushaben Navinchandra Trivedi v. Bhagyalaxmi Chitra Mandal AIR 1978 Guj 13, (1977) GLR 424.**

In this case, the plaintiff had sued the defendant for a permanent injunction to restrain the defendant from showing a movie named "Jai Santoshi Maa". It was said by the plaintiff that the contents of the movie significantly hurt the religious sentiments of the people belonging to the Hindu community as well as the religious sentiments of the plaintiff as the movie showed Hindu Goddess' Laxmi, Parvati, and Saraswati, to be jealous of one another and were ridiculed in the film. It was held that hurt to religious sentiments was not an actionable wrong.

Conclusion

The concept of nuisance arises commonly in everyone's daily life, in fact, the Indian courts have borrowed quite a lot from the English principles as well as from the decisions of the common law along with creating their own precedents. This has helped the concept of nuisance in the field of law develop quite extensively and assures the fairness and well being of all the parties which may be involved such as in the case of Private nuisance, the party which is being affected, as well as, in the case of public nuisance, where the society at large is being affected.

Trespass to Land and Dispossession

Meaning of Trespass

Black's Law Dictionary defines trespassing as an unlawful act committed against the person or property of another person; in particular, unlawful entry into the real property of another person. Trespass means the wrongful disturbance of possession of land or goods of another person. A person who intentionally and without consent enters another person's property is a trespasser. It signifies an infringement or infringement of a right.

Examples:

- Continuing Trespass
- Criminal Trespass
- Innocent Trespass
- Joint Trespass

Camden, LCJ said that "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing."

Kinds of Trespass

There are two kinds of trespass:

- *Trespass quare olasum fregit*– this means the entry on another person's land.
- *Trespass de bonis asportatis*– this means the taking away of another person's goods.

Trespass to Land

Trespass to land stems from the dictum "cuius est solum, eius est usque, and coelum et ad infernos"– meaning that anyone who owns the land owns it all the way up to heaven and down to hell.

Land is far more than merely the physical soil. Land ownership has been granted the rights to all natural resources on the land. Land includes any buildings and fixtures attached to the ground like houses, walls, standing crops, the ground itself, the airspace above and the ground below to a reasonable height or depth in relation to the normal use of the land.

In the case of trespass to land, the unlawful land infringement must be direct, intentional and actionable in itself. The entry must be intentional in the sense that the trespasser intended to go onto that particular land. The trespasser's intention to trespass is not at all necessary. Illustration: A parachutist's entry into the land accidentally blown by the wind is unintentional and there is no liability for trespass.

How is Trespass to Land committed?

Trespass to land may be committed in three situations. In each case, the entry must be without justification. The cases are:

Entering the land of the plaintiff:

- In order to constitute a trespass, entry is essential.

- Entry must be without permission.
- The land must be in possession of the plaintiff, it may be actual or constructive.
- Entry must be voluntary which means not against a person's will or by force.
- Entry must be intentional.

If the defendant consciously enters a land that he believes is his own but that turns out to be the plaintiff's land, he is still liable for trespass. It is irrelevant that the defendant made a reasonable mistake and was not negligent.

Basely v. Clarkson [1]

When the defendant mowed his own land, he mistakenly crossed the boundary and mowed the land of his neighbor, believing it was his own land. The defendant's plea of mistake in claiming trespass to land failed because his act of cutting grass was intentional even though he made a mistake as to where the boundary was. However, if the entry is proven to be involuntary then it is not a trespass.

Smith v. Stone [2]

If someone else throws a person on the land of someone else, i.e. his entry is unintentional then he will not be liable. There is no act of entry by the defendant in such a situation. It is a general presumption that a person who owns the surface of land owns all the underlying strata. Thus at the instance of the owner of the surface, an entry beneath the surface at whatever depth is an actionable trespass. But in some cases, it is possible that the underlying strata may be in the possession of a different person.

Illustration: When a person who is not in possession of the surface holds mining rights: if the surface of the land is in possession of A and the subsoil in possession of B, the surface entry will be an infringement of A and the subsoil entry will be an infringement of B.

Note- Entering a land prior to the complete transfer of its title to the acquirer shall be considered a trespass.

Public streets, including pavements, are primarily dedicated to public use for passage purposes and may not be used for private residence, private business or as a prayer ground for a particular community.

By staying on land having asked to leave or after any permission has come to an end:

If there remains a person who has legally entered another's land, he commits trespass after his right of entry has ceased. His misconduct relates back to making his original entry tortuous, and he is liable for damages, not just for the entry itself, but for all subsequent acts. This is referred to as trespass ab initio and the abuse will make the original entry illegal.

Gokak Patel Volkart Ltd. V. Dundayya Gurushiddaiah Hiremath [3]

Although entry into the property may be legal, therefore, if possession continues even after permission has been given, it may amount to trespass ab initio. The corresponding concept of continuity of a civil mistake can be found in the Tort Law. Trespass in torts can be continued one. Again, if the entry was legal but is subsequently abused and continued after the permission has been determined, the infringement may be ab initio.

Minister of Health v. Bellotti [4]

A licensee whose license has been terminated or is extinguished by expiry may be sued as a trespasser if, upon request, he does not vacate and a reasonable time has elapsed.

Trespass by interference with the land of another :

Any interference with another's land is considered to be a constructive entry and trespass. Example- throwing stones or materials over neighboring land, it may also be a gas or invisible fumes. Driving a nail into a person's wall, placing anything against the plaintiff's wall, planting trees in plaintiffs land, or placing any chattel upon the plaintiffs land is trespass by interference on the land of another person. It was said in *Abdul Gani v. Sadu Ram and Others* [5] that discharge of filthy water from a spout in the defendant's house on the plaintiff's land is trespass.

Difference Between Trespass and Nuisance

Trespass	Nuisance
By the nature of injury, if the injury is direct then it is	If the injury is consequential, then it is Nuisance.

Trespass.	
Trespass is actionable per se.	Nuisance is actionable only on proof of damage.
Trespass describes prohibited conduct.	Nuisance describes a type of harm that is suffered.
Trespass requires direct entry into the property of the plaintiff.	Nuisance is indirect and can take place from outside the property of the plaintiff.
A person only in the direct possession (including tenant) of land can sue.	A person who is indirectly affected may sue.
Illustration: Throwing stones on the neighbor's land.	Illustration: If the roots of a tree planted on the defendant's land undermine the foundation of neighbor "s building then it is nuisance.

Aerial Trespass

The landowner has the right to the airspace above the surface ad infinitum. The ordinary rule is that whoever has the solum, whoever has the site, is the owner of all up to the sky and down to the earth's center. In modern times, the owner has the right to air and space above his land is limited to the height required for the ordinary use and enjoyment of his land.

Kelsen v. Imperial Tobacco Co. Ltd. [6]

An advertising sign erected by the defendants over the plaintiff's single storey shop projected into the airspace. The defendant argued that a superincumbent airspace invasion was not trespass, but a nuisance alone. The projection into the airspace of the plaintiff was held to be a trespass and not a mere nuisance, and a mandatory injunction was granted.

Bernstein v. Skyviews [7]

When Bernstein sued the defendants in trespass for taking aerial photographs from hundreds of meters above the ground of his house, the issue of trespass into the airspace above the ground was in question.

The Court held that at that height Bernstein had no reasonable use of airspace and the defendant was not liable for trespass on that ground.

Indian Law of Aerial Trespass

Section 17 provides that no suit shall be brought in respect of trespass or nuisance, solely because of the aircraft's flight over any property at a height above ground that is reasonable in view of wind, weather and all the circumstances of the case, or solely because of the ordinary incidents of such flight.

The law provides that anyone who flies to cause damage to a person or property may be punished with six months' of imprisonment or a fine of Rs 1,000 or both.

Continuing Trespass

Every Continuance of Trespass is a fresh infringement and an action can be brought against it. The continuation of day-to-day trespass is considered a separate trespass on each day in law. Illustration: An action can be taken for the original trespass of placing some material on someone else's land and another action to continue the deposited things.

Note: A recovery of damages in the first action, by way of satisfaction, does not operate as a purchase of the right to continue the injury.

Trespass by Animals

Cattle trespass was ancient common law torture whereby the animal keeper was strictly liable for any damage caused by the straying animal. Livestock keepers are responsible as if they have committed the trespass on their own. Cattle trespass liability is strict which means independent of negligence. In India, there is the Cattle Trespass Act of 1871.

Criminal Trespass

Entry into or into another's property in criminal law is not an offense per se. Either with the intention of committing an offense or intimidating, insulting or annoying the person in possession of the property in order to commit a criminal offense.

Illustration: A has an orchard; B enters the orchard for a pleasure trip without harm; he may be held liable for civil infringement. But if B goes into stealing fruits, he will be guilty of a criminal offense.

Remedies

The person whose land is infringed may bring an action for trespass against the wrongdoer. He may also forcefully defend his possession against a trespasser; he may forcefully eject him. *Note: actions include, as the case may be, claims for damages or injunctions.*

Damages

A claim for damages in order to recover any financial loss suffered as a result of an infringement may be made or, alternatively, a nominal sum may be awarded if no damage is suffered.

Injunction

In some cases of land trespass, the claimant may not want financial compensation at all, but will instead seek an injunction, a court order to prevent a continuing or future infringement, or perhaps a statement of unlawful infringement. **Example**: Asking someone to remove his tree.

Proving possession at the time of trespass is important when initiating action, either actual or constructive. Possession means having something at your own disposal or the right to use it exclusively. It is protected in its own right. According to Salmond- "the possession of a material object is the continuing exercise of a claim to the exclusive use of it." It has two elements that are mental and physical. The mental element is called as 'animus' and the physical element is known as 'corpus'.

Animus denotes the possessor's intention regarding things and corpus consists of the external facts in which this intention realized, embodied or fulfilled itself. A thing's physical possession does not give possession right who holds it.

Example: A has gone to a car showroom and is examining the vehicle's different features and taking the test drive. The car is in his custody while driving the car, but not in his possession. But he's in full possession of it if he runs away with the car. Here, he has both the animus and possession necessary, and he can exclude others except the car shop owner. The wrongful possession is therefore protected by law against all but the wrongful possession.

Possession

(i)- Possession in fact (de facto possession) like servant's possession.

(ii) Possession in law (de jure possession) like master's possession.

The servant's intention here is to exclude others on behalf of his master and he can maintain a trespass action against those who interfere with property or article possession. While the intention of a master is to exclude others from interfering with the thing and he is doing so on his own behalf.

There is a difference between 'possession right' and 'possession right.' If X is a landlord who subordinates his premises to Y for 11 months, it means X is entitled to possession after 11 months ' expiry and the tenant is entitled to possession during this period. A person who has the right of possession has the right to sue for infringement and not the right of possession.

Defenses

The following defenses are available as a defense for trespass-

- Exercise of easement and prescription
- Leave and License
- Acts of Necessity
- Self-Defense
- Authority of Law
- Re-entry on land
- Re-taking of goods and chattel
- Abating a nuisance

Dispossession

Dispossession is wrongfully taking possession of land from its rightful owner. Thus, the landowner was completely deprived of his dominion by the person's act.

Prerequisite

- The plaintiff/owner must have possession.
- The plaintiff should have a better title as compared to the defendant.

Remedy

The party dispossessed can bring an action to recover possession of the land.

Defenses

Defenses against suits pursuant to Section 5 of the Specific Relief Act, 1963 are mainly two-fold-

1- That the defendant has a better title than the plaintiff;

2- Prescription.

Note–

- The landlord does not need to prove his title, but just end the tenancy.
- The licensee can not dispute the title of the persons who licensed them.
- There is a conflict of opinion between high Courts whether the complainant in the suit for possession of the immovable property is entitled to succeed merely by proving that they had previous possession or whether he is bound to prove title.