Paper: "LAW OF TORTS, CONSUMER PROTECTION AND MOTOR VEHICLES ACT"

Unit-I ---INTRODUCTION AND PRINCIPLES OF LIABILITY IN TORTS

In this Unit following topics will be discussed:

a. Development of Tort Actions in England and India
b. Definition of Tort, Distinction between Tort and Contract, Quasi contract, Crime
c. Constituents of Torts—Wrongful Act; Damage: *Injuria Sine Damno* & *Damno Sine Injuria*
d. Strict Liability and Absolute Liability
e. Vicarious Liability

ORIGIN AND DEVELOPMENT OF THE LAW OF TORTS

Indian Law is practically English Law. The law of torts as followed by the courts in India is mainly the English law of torts which itself is based on the principles of the common law of England. Indian courts are bound to administer the English common law rules only in so far as they are consistent with justice, equity and good conscience. It is true that some of the eminent judges of the British Indian High Courts refused to follow certain English common law principles — such *as* the rule of common employment, non-contribution between joint tortfeasors, etc., for the reason that they are unsuitable to Indian conditions and not in conformity with the rules of justice, equity, and good conscience. But apart from certain exceptional cases our courts invariably follow English principles for all practical purposes. Hence the dictum of Six Courtenary Ilbert that "the law of

torts or civil wrongs as administered by the courts in British lndia, whether to Europeans or natives is practically English law". Thus in order to understand the basic principles of the law of torts we have to resort primarily to English law.

English law is mainly built up of case law. It is said to be a edifice of case law. There are only a few statutory enactments concerning this branch of law.

In early English law remedies for wrongs were dependent on **writs**. The writ was an Order of the King, issued by the "Chancellor or his office, summoning the defendant to appear before court and show cause against the plaintiffs complaint. No one could bring an action unless he obtained a writ from the writshop which was a government department invested with the powers of issuing writs. Suitors had to pay a price for the issue of writs in their favour. If an injured party purchased a wrong writ or if he could not fit his claim within any one of the pre-existing writs, then even though a substantial right of his had been infringed, he would still have to go out of court without any redress for his grievance. **Writs of** The writs that remedied the injuries which in modern times are called torts were at first the ***writs of trespass*** and later the writs of trespass on the case. The word trespass is generally understood by laymen as signifying any unauthorized entry on another person's land, but in law it has a much wider significance. The writ of trespass lay for injuries to land, or to goods, or to the person. But it was limited to injuries which were direct and immediate such as that occasioned by throwing a log directly on to the road and it hitting a man there. It did not extend to indirect or consequential injuries such as those sustained by one who subsequently stumbled over-the log. But these came to be remediable by writs of trespass upon the case, which were simply writs of trespass adapted to meet the special circumstances of the case.

The distinction between the writs of trespass and trespass on the case is pointed out by Salmond in the following words: "The act of throwing water into one's neighbour's premises is a trespass, but to fix a spout in such a fashion that rain water is discharged by it into those premises is a mere nuisance actionable in the case. Throwing a match, whether accidentally or on purpose into another man's haystack is a tresspass, lighting a fire on one's own land,

which spreads into the adjoining property and burns a haystack there is actionable only in case."

In modern times, courts do not attach so much importance to form as to the substance. If a judge is satisfied that in the case before him there has been an infringement of a legal right vested in the plaintiff he will be anxious to do justice to the injured, irrespective of technical defects in the pleading. In *United Australia v. Barclays Bank Ltd.,* 1941 AC 1, the plaintiff's claim for the recovery of money from the defendant for the wrongful conversion of a cheque was sought to be resisted on some technical plea of waiver of torts but the House of Lords rejected the contention and allowed the plaintiff's suit. Lord .Atkin said: "Fantastic resemblances of contracts invented in order to meet requirements of law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred." At the present day the substance is predominant over form and the rule is *ubijus ibi remedium,* which means that wherever there is a legal right there is a legal remedy, or, there is no right without a remedy.

DEFINITION OF TORT

It is often said that a wrong which is not a crime, which is not a breach of contract or which is not a breach of trust, is a wrongful tort. An act twisted, crooked, which is not straight and lawful, is tort. The word tort is derived from the latin word *'tortum'* meaning 'twist'. Like all other wrongs, tort is a wrongful act whereby the wrongdoer commits the breach of a legal right vested in some individual. Tort is a civil wrong, but not all civil wrongs are torts. Thus broadly speaking, those civil wrongs which do not fit any defined category of civil wrongs, are torts.

Tort has been defined by various jurists as;-

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

Pollock: "The law of torts in civil wrongs is a collective name for the rules governing many species of liability which although their subject-matter is wide

and varied have certain broad features in common, enforced by the same kind of legal process and are subject to similar exceptions."

Fraser: It is infringement of a right *in rem* of private individual giving a right to compensation at the suit of the injured party.

Prof Bangia: "Tort is a civil wrong which is redressable by an action for unliquidated damages, and which is other than a mere breach of contract or breach of trust."

Section 2 of the Limitation Act, 1963: "Tort is a civil wrong which is not exclusively a breach of contract or breach of trust."

Nature of the tort can be best understood by distinguishing—

a.tort and crime

b.tort and breach of contract

c.tort and breach of trust

Tort	**Crime**
1.There is an infringement of private or civil rights of individual.	1.There is breach of public rights which affect the whole community.
2.The forum of redressal is a civil court.	2.Proceedings are to be initiated in a criminal court.
3.The suit for damages is filed in the court against the wrongdoers by the plaintiff himself.	3.Proceedings are initiated against the accused by the State.
4.The main aim is to recompensate the plaintiff for the loss suffered by him from the wrongful act of the defendant.	4.The main aim is to punish the accused if convicted, to set example that such crime is not repeated in future.

Tort	**Contract**
1.There is a breach of duty which is fixed by law.	1.There is breach of duty which is fixed by the contracting party.
2.Motive for breach of duty is immaterial..	2.Motive for breach of contract is often taken into consideration.
3.There is violation of a right in *rem* i.e a right vested in some determinate	3.A breach of contract is an infringement of a right in *personam* i.e. a available to some definite person and in which society has no concern.

person and available against the whole world. 4.Damages are generally unliquidated and are determined by the court on the facts and circumstances of the case.	4.Damages are fixed according to the terms and conditions of contract.

Tort and Breach of Trust

Only similarity between breach of trust, breach of contract and tort is that claim is usually for monetary compensation. In some cases of breach of trust, the damages may be liquidated, they may as well be unliquidated. Again, in the case of breach of trust, there exists a relationship of trustee and beneficiary between the two, but it is not so in tort. Trust is a breach of law of property.

General Conditions of Liability in Tort

Following are the conditions on which tortuous liability is determined—

1. Wrongful act or omission
2. Resultant Damage
3. Legal remedy

Wrongful act or omission:

A tortious act may be positive or negative, in either case act must be one which is regarded by law as unlawful. When a person has a legal right to perform, and if he fails to do it, he can be made liable. If the act complained of does not violate legal right of another person, it is not tort. Violation of moral, social and religious duties does not come under the category of torts. Thus, in tort the plaintiff has to prove that his legal rights have been violated by the act or omission of the defendant.

Resultant Damage:

Mere act or omission or failure to do duty will not be a tort, unless it results in some injury to the person suing, or violation of his legal right. But, it is not every damage that is an injury in the eyes of law. There may be a wrong caused to a person but, if actual legal damage is not caused to him, no action in torts will be maintainable. Thus, if a legal right has been violated, remedy must be provided. This is expressed as, *injuria sine damno*. If there is no violation of legal right, even

though the act of one party causes harm or injury to the other, no action can be filed. This is expressed as *damnum sine injuria*, i.e. damage without the violation of legal right and it is not actionable in a court of law.

Legal remedy:

The maxim *'ubi jus ibi remedium'* i.e where there is right, there is a remedy, means that whenever a right is violated, the person whose right has been infringed has a remedy against the person so violating his right. A tort is a civil wrong for which the remedy is an action for unliquidated damages. Thus, the main remedy for a tort is an action for damages. There are other remedies such as specific restriction and injunction. But, an action for unliquidated damages is an essential characteristic of remedy for tort. It is mainly the right to damages which brings such wrongful acts within the category of torts.

Damage without Injury (Damnum since injuria)

There are many acts which though harmful are not wrongful and give no right of action to him who suffer from their effects. Damage so done and suffered is called damnum. Since injuria or damage without injury. Damage without breach of legal right will not constitute a tort. They are instances of damage suffered from justifiable acts. An act or omission committed with lawful justification or excuse will not because of action though it result in harm to another as combination in furtherance of trade interest or lawful uses of ones own premises.

In *Mogul steam ship co. R. Mc gregor grow & co*.; the defendant steamship companies wished to monopolise the china tea carrying trade. They therefore combined together to offer reduced freight in order to induce shipper to empty them. In consequences, the mogul steamship company, which had been excluded from the combination, were driven out of trade and the company brought an action for conspiracy against the defendants. The plaintiffs further alleged that the defendants had willfully caused loss to them by compelling certain merchants. In china to cease to act as their agents by means of a threat that if they continued to do so, the agency of the defendant association will be withdrawn from them. This was held by house of lords to be no cause of action, it being a justifiable measure of self protection on the port of the association to prevent the same

person from occupying the inconsistent position of agents both for association and plaintiff. The defendants were held not liable for their object was merly to and protect and extend their trade and they had not used any unlawful means.

Town area committee v Prabhu Dayal: In this case a suit for compensation was field by the plaintiff against the town area committee for the demolition of his constructions protruding on the road without due notice, the court found that the plaintiff himself was guilty of constructing the building illegally without obtaining proper sanction from town Area committee. The high court held that demolition of an unauthorised building is not injuria to the owner and therefore despite the damage he cannot get compensation (*dammun since injuria*).

Injury without damage (injuria sine damnum)

Just as there are cases in which damage is not actionable as a tort, so conversely there are cases in which an act is actionable, although it has not caused any damage.

In, Ashby v. white, the plaintiff was wrongfully restrained to vote by the officers in parliamentary election. The candidate for whom the plaintiff wanted to give his vote had come out successful in election, still the plaintiff brought an action claiming damage against the defendants for maliciously preventing him for exercising his statutory right of voting in that election. Lord Holt, CJ, held that plaintiff is entitled to damages by saying that there was infringement of legal right vested in the plaintiff.

STRICT LIABILITY AND ABSOLUTE LIABILITY

There are situations when a person may be liable for some harm even though he is not negligent in causing the harm, or sometimes he may have even made some positive efforts to avert the same. In this connection, the rules laid down in two cases, firstly, in the decision of the House of Lords in *Ryland v. Fletcher* and secondly, in the decision of the Supreme Court of India in *M.C.Mehta v. Union Of India,* may be noted.

The Rule of Strict Liability

Strict liability has its origin in the case of *Ryland v. Fletcher* (1886) LR 3 HL 330, where the facts were that the defendants who had a mill near Ainsworth in Lancashire wanted to improve its water supply. They constricted a reservoir by employing reputed engineers to do it. When the reservoir was filled, water flowed down in the plaintiff's neighboring coal mine causing damage. The engineers were independent contractors. There was some negligence in their part not properly sealing disused mine shafts which they had come across during the construction of the reservoir and it was through those shafts that the water flooded the plaintiff's mine. The defendants were in no way negligent having employed competent engineers to do the job and as the engineers were independent contractors, the defendants could not be made vicariously liable for their negligence. The Court of Exchequer dismissed the claim as showing no cause of action. But the Court of Exchequer Chamber allowed the appeal. The judgment of BlackBurn, J., of that court which laid down a new basis of liability was approved by House of Lords. The basis of liability was laid down by BlackBurn , J. in these words: "The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape."

For the application of the rule, three essentials should be there:

(1) Some dangerous thing must have been brought by a person on his land, i.e., a thing which is likely to do mischief if it escapes. The rule has been applied to gas, electricity, vibrations, sewage, explosives, noxious fumes and rusty water.

(2) The thing thus brought or kept by a person on his land must escape. Thus if there is a projection of the branches of a poisonous tree on the neighbor's land, this amounts to escape and if cattle lawfully there on the neighbor's land are poisoned by eating the leaves of the same, the defendant will be liable under the rule.

(3) It must be a non- natural use of the land. Water collected in reservoir in such huge quantity in Rylands v. Fletcher was held to be non-natural use of land.

Exceptions to the rule

The following exceptions to the rule has been recognized:

(1) *Act of God (vis major),* which is defined to be such a direct, violent, sudden, and irresistible act of nature as could not, by any amount of ability, have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. Thus those acts which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause will come under the category of acts of God. E.g., storm, tempest, lightning, extraordinary fall of rain.

(2) *Plaintiff's own default,* if the plaintiff suffers damage by his own intrusion into the defendant's property, he cannot complain for the damage so caused. In *Ponting v. Noakes*, (1849) 2 Q.B. 281 the plaintiffs horse intruded into the defendant's land and died after having nibbled the leaves of a poisonous tree there. The defendant was held not liable because damage would not have occurred but for the horse's own intrusion to the defendant's land.

(3) *Consent of the plaintiff,* in case of *volenti non fit injuria*, i.e., where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule does not arise. Such a consent is implied where the source of danger is for the 'common benefit' of both the plaintiff and the defendant. For example, when two persons are living on the different floors of the same building , each of them is deemed to have consented to the installation of the things of common benefit, such as the water system, gas pipes or electric wiring. When water has been collected for the common benefit of the plaintiff and the defendant, will not the defendant be liable for the escape of such water unless there us negligence on his part.

(4) *Act of third party,* if the harm has been caused due to the act of a stranger, who neither the defendant's servant nor the defendant has any control over him, the defendant will notbe liable under this rule. Thus in *Box v. Jubb*, (1879) 4 Ex. D. 76. The overflow from the defendant's reservoir was caused by the blocking of a drain by strangers,

the defendant was held not liable for that. If, however the act of the stranger is or can be foreseen by the defendant and the damage can be prevented, the defendant must, by due care, prevent the damage. Failure on his part to avoid such damage will make him liable. In a decision of the Supreme Court in *M.P. Electricity Board v. Shail Kumar*, A.I.R. 2002 S.C. 551, the rule of strict liability was applied and the defense of the dangerous thing being an act of stranger was not allowed because the same could have been foreseen.

(5) *Statutory Authority,* no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. The statue must authorize the use of the dangerous thing either expressly or by necessary implications.

The Rule of Absolute Liability

In *M.C. Mehta v. UOI* AIR 1987 SC 1086, the supreme court evolved the rule of '*absolute liability'* as part of Indian law in preference to the rule of strict liability. It expressly declared that the new rule was not subject to any of the exceptions under *Rylands* rule. For instance when the escape of the substance causing damage is due to the act of a stranger, say due to sabotage, there is no liability under the *Rylands* rule.

The court observed: "This rule (Ryland v Fletcher) evolved in the 19th century at a time when all these developments of science and technology had not taken place….we have to evolve new principles and lay down new norms which would adequately deal with new problems which arise in a highly industrialized economy."

The Supreme Court also laid down that the measure of compensation can be correlated to the magnitude and capacity of the enterprise, so that the compensation can have the deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it. Thus, unlike the strict liability where ordinary or compensatory damages are awarded,

under absolute liability, exemplary damages are awarded. In *Bhopal case* AIR 1990SC 27, the *Mehta* principle was applied in determining the compensation payable to the gas victims.

VICARIOUS LIABILITY

The general rule is that a person is liable for his own acts and he cannot be made liable for the acts done by others. But to this general rule, certain exceptions were recognized when one is made liable for the acts of others. This happens when one stands in certain relationship with another. When one is made liable for the acts of another, this is known as vicarious liability. Cases of liability for the acts of others arise mainly in reference to the following relationship:

a. Liability of the principal for the wrongs of the agent
b. Liability of the partner for the wrongs of other partners, and
c. Liability of the master for the wrongs of his servant

Liability of the Principal:

Where one person authorizes another to commit a tort, the liability for that will be not only of that person who has committed but also of that who authorized it. The maxim is, an act of the agent is the act of the principal (qui facit per alium facit per se). When an act is authorized by the principal and is done by the agent, both are liable. The liability is joint and several.

The authorization may be express or implied. In fact, in most of the cases of vicarious liability of the principal, the authorization is not direct. An agent acting in the ordinary course of the performance of his duties assigned to him, may commit a wrong, and if he does so, not merely he but the principal is also liable. But it is necessary that the agent must act in the ordinary course of his duties, otherwise the principal will not be liable.

In Lloyd vs. Grace Smith & Co., (1912) AC 716, One Mrs. Lloyd approached the office of Grace Smith & Co., a firm of solicitors, to consult them about her properties. She was attended by the managing clerk of the firm who advised hger

to sell two of her properties and invest the sale proceeds in some venture. On her accepting the advice she was made to sign two documents which were purported to be sale deed, but in fact gift deeds in his favour. The clerk ultimately sold the properties and misappropriated the sale proceeds. On her suit against the company, she succeeded as the court observed that the clerk, the agent of the firm was acting in the course of his apparent and ostensible authority, the principal was thus was held liable even though he had no knowledge and the agent had acted solely for his personal benefit.

For the purpose of application of the rule of vicarious liability, it is not necessary that the authorization should be in so many words. You may ask your friend to drive the car for you, and if in the course of driving the car, he negligently involves your car into an accident, you are liable, as he was driving for you, and not for himself. Even when an agent is not authorized by the principal, expressly or impliedly, to do an act, but if the principal ratifies the act, he is liable. Of course the act must have been done for the principal. If agent has done the act on his own behalf and not on behalf of the principal, no authorization can be validly done. Secondly, the ratification must be unequivocal and with the full knowledge of the act done by the agent.

Liability of Partners:

The Indian Partnership Act lays down that the relationship between the partners inter se is that of the principal and agent and this applies in the cases of tortuous liability. Thus, in a firm, all partners are liable to the same extent as principal is liable for the acts of his agents. The liability of all the partners is joint and several.

Master and Servant:

Like an agent or a partner, if a servant does some wrong in the course of employment, the master is liable. Again, the liability of the master and servant is joint and several. This is based on the maxim of *respondeat superior* meaning let the principal be liable. The master's liability is also based on the principal, he who does an act through another is deemed in law to do it himself (*qui facit per alium*

facit per se). The liability of the master arises even when the servant acts against the express instructions of the master. The master will be liable for the tort of his servant if the following two conditions are satisfied:

a. The wrong should be committed by a person who is servant, and
b. The wrong should have been committed by him in the course of his employment.

The question is now, determining the liability of a person for the acts of his servant, is that the latter comes within the meaning of the word 'servant'. Servant is a person who is employed by his master to do some work under him and under his directions and control.

A servant should not be confused with a person known as independent contractor.

What distinguishes an independent contractor is that he undertakes to do certain work and how that work is to be done, he seeks no direction from anybody. He is not under the control of the person who has given him contract. Thus, when you travel in your car which is being driven by your driver (i.e. who is your employee) and if by his negligent driving an accident occurs, you would be liable, but if you are going in a taxi and driver by his negligence causes accident, you are not responsible. In the former case, the car-driver is your servant, while in the latter case, taxi driver is an independent contractor. In Devinder Siungh vs. Mangal Singh, AIR 1981 P & H 53, where one D entrusted his truck for repairs for a workshop. While the owner of the workshop was driving the truck, by his negligent driving, he injured a passer-by, one P. On an action by P against D, it was held that D was not liable as the owner of the workshop was an independent contractor.

Exceptions:

The rule that a person is not liable to the acts of an independent contractor, the following exceptions are recognized:

a. Where the employer of an independent contractor authorizes the doing of an illegal act or ratifies it, he is liable.
b. An employer of an independent contractor is liable in case of strict liability.

c. An employer of an independent contractor is liable for the danger caused on or near a highway.
d. An employer of an independent contractor is liable for nuisance.
e. If the wrong of the independent contractor results from master's common law duties to his servant, he would be liable.

Mater is not liable if the servant is not under his control: For instance, captain of a ship or a surgeon in a hospital is not under the control of the ship-owner or the hospital respectively. However, under the modern trends in the law of torts, the hire and fire rule is applied in many cases. The rule means if one employs another person and pays him salary or remuneration or wages and has power to dismiss him, one is liable to the acts of one's employees. Under modern law, hospital management is considered to be liable for the professional negligence of their doctors, such as radiographers, surgeons, physicians etc.

Lending of one's servant: When a person lends the service of his servant to a third person, the question is: who is vicariously liable for the acts of servant, tge original master or the third person? The answer depends as to who has the control over the acts of the servant. But it seems that the consensus of the authorities is that it is the general and permanent employer who is liable. Thus, where a transport company lends its truck and the driver to another transport, the driver on account of his rash and negligent driving causes injury to a person, it is the original transport company which is liable [AIR 1966 Punj 395]. However, where the relationship of master and servant has been constituted for a particular occasion, the temporary employer is liable for the acts of the servant. It is necessary to establish that the temporary employer was in the position of a master. In, Hull vs. Lees, (1904) 2 KB 602, an association was engaged in supplying qualified nurses to attend on patients, and during the course of such employment, they were paid by the patients. P has employed the services one nurse, Q, through the good offices of the association but on account of the negligence of the nurse, P got severe scalding. P sued the association. It was held that the association was not liable.

Fraud & mistake of servant: When a servant while in the course of the performance of his duties as such commits a fraud, the master would be liable for

the same. The master's liability extends to the theft of the servant committed in the course of employment of another's articles entrusted to the master.

The master is equally liable for the mistakes, or erroneous or excessive use of the authority causing losses to the goods of the other entrusted to the master. Since the servant has implied authority of the master to protect the property of the master and if the servant in performing such duty uses excessive force, the master is liable to the resultant loss or injury to the third person.

Delegation of authority by the servant: If the servant delegates the authority given to him by his master to a third person and if that person commits a wrong, the master will be liable. Thus, if a driver of a bus instead of driving it, allows a third person to drive, and if the third person by his negligent driving causes injury to someone, the master will be liable. The master is liable for his servants negligence for delegating the authority to a third person and not that the third person is acting in the course of employment.

Doctrine of common employment:

Under English Law doctrine of common employment was recognized as an exception to rule of vicarious liability of the master for the servant's wrongful acts. It lays down that a master is not liable for the negligent harm done by one servant to another acting in the course of their common employment. The essentials of the doctrine are:

a. The wrongdoer and the person injured/harmed must be fellow servants, and
b. At the time of harm/injury or accident, they were engaged in common employment.

In England, the doctrine has been abolished by the Law Reform (Person Injuries) Act, 1948.

At one time, the doctrine of common employment was held to be applicable in India, but it was limited later on under certain statutes, and has been abolished by the Employer's Liability Act, (Amending Act of 1951).

Vicarious Liability of the State

Although Article 300 of the Constitution of India lays down that the Union of India and the States are juristic persons and can sue and can be sued, the circumstances in which the tortuous liability of the State arises, has not been specified. It lays down that the Government of India and the Indian States can be sued or can sue in the like manner as the Dominion of India can be sued or can sue before the coming into force of the Constitution. Under the Government of India Act, 1935, the liability of Government is same as that of the East India Company. In Peninsular and Oriental Steam Navigation Co. vs. Secretary of State for India, the question raised was, whether the Secretary of State for India is liable for the damages occasioned by the negligence of the savants in the services of the Government. C.J. Peacock, observed; 'The East India Company were a company to whom sovereign functions were delegated and who traded on their on account and for their own benefit, and were engaged in transaction partly for the purpose of Government and partly on their own account, which without such delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in exercise of what are usually termed as sovereign powers and acts done in conduct without such powers delegated to them.' Further, "But where the act is done or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot lawfully be exercised except by a sovereign, no action will lie."

Further in KasturiLal vs. State of UP, Supreme Court in 1965 made distinction between sovereign and non-sovereign functions of State.

The following position emerges from the various decisions:

1. The liability of the Union of India and States is same as that of the East India Company.
2. The Government is not liable for torts committed by its servants in the exercise of the sovereign powers. The Government is liable for the torts committed in the exercise of non-sovereign functions.
3. Sovereign powers means powers which can be lawfully exercised by only by a sovereign or by a person to whom such powers have been delegated.
4. No defined tests to know what are the sovereign powers. Functions like— maintenance of defence forces, maintenance of law and order and proper

administration are included in the sovereign powers. Functions like—trade, business and commerce and welfare activities are amongst non-sovereign powers.

Paper: "LAW OF TORTS, CONSUMER PROTECTION AND MOTOR VEHICLES ACT"

Unit-II ---JUSTIFICATION IN TORT

As in criminal offences, so also in torts, there are certain defences available which are as:

a. Volenti non fit injuria
b. Act of god
c. Inevitable accident
d. Necessity
e. Private defence
f. Judicial and quasi judicial acts

Volenti Non Fit Injuria/ Consent

No action lies against the injury suffered voluntarily as no man can enforce a right which he has voluntarily waived or abandoned. The consent may be express or implied. One cannot sue a guest for trespass when one has invited him, one cannot sue a surgeon when one has consented to be operated upon by him, one cannot sue a person for defamation if one has agreed to the publication of such defamatory statements. Similarly incidents of implied consent to suffer harm can be—responding to the cry of help of a person who is unable to control his car, and in the process if one is injured, one cannot complain, or the spectators by their

presence in a stadium are deemed to have agreed to take the risk of being hurt, in a cricket match by a ball or in a car race if hurt by a car going off the track accidently.

In the defence of volenti non fit injuria, consent must be free. When consent is obtained by fraud, undue influence or coercion, it is not free.

For the defence of volenti non fit injuria two essential requirements are:

1. The knowledge of the risk and
2. Knowingly agreeing to suffer the harm, injury or risk

Mere knowledge of the risk or likelihood of injury does not imply consent on his part. Mere knowledge of the risk without assumption of it does not bring into play the defence of volenti non fit injuria. The law may stated thus:

a. Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that the reasonable care has been taken to render it as little dangerous as possible, he voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done to him, even though the cause, from which he suffered might give to others a right of action.
b. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot be reasonably held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger.

In Bowater vs. Rowley Regis Corp., the plaintiff, a cart driver was asked to drive a horse by his master, which to the knowledge of both, was liable to bolt. The plaintiff protested but ultimately took out the horse in obedience to the order. The horse bolted and the plaintiff is injured thereby. Held, the maxim 'volenti non fit injuria' did not apply and the plaintiff was entitled to recover.

Rescue cases are exception to volenti non fit injuria. In Hayness vs. Harwood, a two horse van was left unattended on a public road by P's servant. A child threw stone on the horses and they bolted. B, a police constable, who was on duty inside a nearly police station, ran and managed to control the horses, and to save lives of many women and children who were on the street but in the result was injured. On B's action for damages for the negligence of P's servant, the defence of volenti non fit injuria was raised but was rejected. The doctrine of assumption of risk does not apply where a person has, under an exigency caused by other's misconduct, consciously and deliberately faced the risk, even of death, to rescue others from imminent danger of personal injury or death, and it is immaterial whether the person endangered is one to whom he owes a duty of protection as a member of family or is a mere stranger to whom he owes no such duty.

Same principle will apply when somebody by his negligence puts himself in danger rather than any third person. For example, A by his own wrongful act creates a situation which endangers A himself and the circumstances are such that he can expect that somebody will come to his rescue, A will be liable to the rescuer.

Act of God/ Vis Major

According to Salmond, act of God includes all those acts which a man cannot avoid even by taking reasonable care. Such accidents are the result of natural forces and are unconnected with the agency of man. Act of God is a good defence to any action in tort. Thus when the damage, loss or injury is caused on account of operation of natural forces or phenomena, such as heavy downpour, storms, floods, earthquakes, droughts etc.

Two essential ingredients of the defence of act of God are:

1. The act must result on account of working of natural forces, and
2. The occurrence must be extraordinary.

Accidents may happen by reason of the play of natural forces or by intervention of human agency or by both. It may be that in either of these cases, accidents may be inevitable. But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be Acts of God.

In Nichols vs. Marsland, the defence was successfully pleaded. There the defendant created some artificial lakes on his land by damming some natural streams. Once there was an extraordinary heavy rainfall, stated to be heaviest in human memory, as a result of which, the embankments of the lakes gave way. The rush of the water washed away four bridges belonging to the plaintiff. It was held that the defendants were not liable as the loss had occurred due to Act of God.

Inevitable accident

Pollock describes inevitable accidents as, 'accidents which a person of ordinary prudence cannot avoid in spite of all reasonable care on his part in the circumstances in which they occur.'

An inevitable accident does not mean absolutely inevitable but it means unavoidable by any such precaution as a reasonable man, doing such an act then and there, could be expected to take.

A man must be vigilant to guard against probable incidents, not against imaginary incidents. In Stanley vs. Powell, P and Q members of the shooting party were engaged in pheasant shooting. While engaged so, P's shot got glanced off an oak tree and injured Q. It was held that the injury to the plaintiff was the consequence of an inevitable accident and accordingly P was not liable.

Necessity

The defence of necessity means that an act causing damage is done under the necessity to prevent a greater evil or harm. Even if the harm is done intentionally, in such cases, no liability arises. There is distinction between the defence of necessity and private defence. In the former the harm is inflicted on the innocent person, while in the latter, harm or injury is inflicted on the person claiming relief i.e. plaintiff. The defence of necessity is also different from inevitable accident, as in the latter harm/injury is caused despite the best effort to avoid it. When to avoid a ship from sinking it becomes necessity to lighten its load, then throwing away goods overboard to save passengers and the crews are acts of necessity. So is the case when a house is pulled down to prevent the spread of the fire or when

injury is caused to the drowning person in saving him, or forcible feeding of a prisoner on hunger strike to save his life.

However, where interference is not a reasonable necessity, the defence of necessity cannot be availed of. Thus, in Carter vs. Thomas, P who entered the house of Q in good faith to extinguish the fire where fireman were already busy in extinguishing fire, it was held that P was guilty of trespass, because P was no more than an intermeddler. He was not needed there. There was no necessity for him to go there.

Private Defence

Every person has the right to protect his property or person and he can use necessary force for this purpose. Private defence or self defence is good defence in an action for tort as well. But the use of the force in private defence should be reasonable, which is necessary to protect ones property or person. The use of force is justified in self defence when there is an imminent danger or threat to the safety of person or property. However, what force is necessary or when reasonable force is required will depend on the circumstances of each case. In self defence fixing of pieces of glasses or spikes on the wall or keeping a watchgdog may be justified, but fixing of high voltage barb-wire or spring guns is not justified.

Judicial and Quasi Judicial Acts

There are special laws which provides protection to judicial officers with basic aim to enable judicial officers to administer law without any fear of being brought to litigation against them. Such laws provide protection to judicial officers and immunity against litigation which is called judicial privilege. Halsbury's Law of

England explains about the judicial privilege as; 'the object of judicial privilege is not to protect malicious or corrupt judges, but to protect the public from the danger to which the administration of justice would be exposed if the persons concerned therein were subject to enquiry as to malice, or to litigation with those whom their decision might offend. It is necessary that such persons should be permitted to administer the law, not only independently and freely and without favour, but also without fear.' Further it lays down, whenever the protection of the exercise of judicial powers applies, it is so absolute that no allegation that the acts or words complained were done or spoken mala fide, maliciously, corruptly, or without reasonable or probable cause suffices to found an action. No such protection is granted if a magistrate is acting mala fide and outside his jurisdiction.

In Anwar Hussain v. Ajoy Kumar Mukherji, AIR 1965 SC 1651, it was held that judicial privilege is absolute provided the act done by him in discharge of his judicial duties was within his jurisdiction. The same protection is also granted if at the time of the act complained of he was acting out of jurisdiction, provided that he in good faith believed himself to have jurisdiction to do or order the act.

In India, laws provide protection to Judicial officers for any act done or ordered to be done by him in the discharge of his judicial duty. According to Section 1 of the Judicial Officers Protection Act, 1850:

"No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction;

Provided that he at the time in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any court or other person, bound to execute the lawful warrants or orders of any such judge, Magistrate, justice of peace, Collector or other person acting judicially shall be liable to be sued in any civil court, for the execution of any warrant or order which he would be bound to execute, if within the jurisdiction of the person issuing the same."

In State of U.P. v. Tulsi Ram, AIR 1971 All. 162, the question which had arisen was whether a judicial officer, who negligently ordered the wrongful arrest of a person, could be liable for the wrong of false imprisonment. Five persons were prosecuted for certain offences. One of them was acquitted by the sessions court upheld the conviction of only three of the five persons and authorized the issue of warrants against these three convicted persons. As a result of this order, the plaintiffs, even though they had been acquired by the High Court, were arrested by the police. They were lodged in jail at 2 p.m and released at 3 p.m. They filed a suit claiming compensation from the judicial officer, stating that their arrest before their relations and friends on the day of festival had caused much humiliation, physical discomfort and mental suffering to them.

On an appeal court held that state was not liable because the act done by its servant was in discharge of his duties imposed by law. The High Court on the other hand, held judicial officer liable for the wrongful arrest of the plaintiff (in appeal respondent). It was held that the judicial officer was not exercising any judicial function but only an executive function while issuing warrants and, therefore, therefore the protection under the Judicial Officers Protection Act, 1850 would not be available in this case. "He (judicial officer) signed the warrants

without looking into the orders of this court or the directions of the Sessions Court or even his own orders… He failed to apply his mind to the facts of the case or to directions given to him. It cannot be said that he was protected at all by the Judicial Officers Protection Act in signing warrants negligently."

No action lies resulting from an act done under the authority or direction of a law dully passed by a competent legislature, even if otherwise the act would be a tort.

PAPER—"LAW OF TORTS, CONSUMER PROTECTION AND MOTOR VEHICLES ACT"

Unit-III ---SPECIFIC TORTS

In this Unit following, specific torts will be discussed;

1. Defamation
2. Negligence
3. Nuisance
4. Trespass to person
5. Malicious prosecution and nervous shock

DEFAMATION

Man's reputation is considered to be his property, more precious than any other property. Defamation is an injury to reputation of a person.

Defamation is customarily classified into, (a) libel and (b) slander. Broad distinction between the two is that libel is addressed to the eye while as slander to the ear. Slander is the publication of defamatory statement in a transient form. Examples of it may be spoken words. Libel is a representation made in some permanent form e.g. writing, printing, picture, effigy or statute.

In a cinema film not only the photographic part of it is considered to be libel but also the speech which synchronises with it is also a libel. In Youssoupoff v. M.G.M. Pictures Ltd., [(1934) 50 T.L.R. 581], a film produced by an English Company, a lady, Princess Natasha, was shown as having relations of seduction or rape with the man Rasputin, a man of worst possible character. It was observed that so far

as photographic part of the exhibition is concerned, that is the permanent matter has to be seen by the eye, and it is proper subject of an action for libel, if defamatory.

Under English Law, the distinction between libel and slander is material for two reasons;

1. Under criminal law, only libel has been recognized as an offence. Slander is no offence.
2. Under law of torts, slander is actionable, save in exceptional cases, only on proof of special damage. Libel is always actionable per se i.e. without the proof of any damage.

Slander is also actionable per se in the following four exceptional cases---

1. Imputation of criminal offence to the plaintiff
2. Imputation of contagious or infectious disease to the plaintiff which has effect of preventing others from associating with the plaintiff
3. Imputation that the person is incompetent, dishonest, or unfit in regard to the office, profession, calling, trade or business carried on by him
4. Imputation of unchastity or adultery to any woman or girl.

Requisites of Defamation:

The constituent elements of defamation are:

a. the words must be defamatory
b. the defamatory words, should directly or indirectly refer to the person defamed, and
c. publication of the words by any medium should take place

(a)Defamatory Words:

The defamatory words or statements are those which cause an injury to reputation. Reputation is injured when one is lowered in the estimation of members of the society generally or when one is avoided by others or others shun his company. In short, an imputation which exposes the aggrevieved person to disgrace, humiliation, ridicule or contempt, is defamatory.

The criterion to determine whether a statement is defamatory or not, is “how do the right thinking members of the society think”? If they consider the statement as disgraceful, humiliating, ridiculous or contemptuous, the statement is

defamatory. If the statement is likely to injure the reputation of the aggrieved person, it is no defence on the part of the defamer that he never intended to do so. Words which merely hurt feelings or cause annoyance but in no way cast reflection on reputation or character, are not libelous. Vulgar abuses uttered as mere abuse and not understood by the person who hears them as defamatory, though they hurt one's pride.

Many a time, people do not directly use defamatory words, but utter defamatory words in innuendoes. **Innuendoes** are those words, which appear innocent but contain some secondary or latent meaning which is defamatory. Thus if A says to B in the presence of P that 'P is very honest man, he could never have stolen anything.' The statement will be defamatory if from this, B understood that P was a dishonest man.

If the words or statements are defamatory, it is immaterial with what intention they are uttered or circulated. In Morrison v. Ritetise, [(1902) 4 F 654], one R in good faith published a mistaken statement that M a lady, had given birth to twins. The fact of the matter was that M was married only two months back. The statement was held defamatory.

b.*Words Must Refer To The Person Defamed:*

In any action for defamation, the person defamed must establish that the defamatory words or the statement referred to him. In other words, defamatory statement was such that the defamed person would reasonably infer that the statement was directed against him. In Jones v. Holton & Co., [(1909) 2 KB 444], it was observed that if libel speaks of a person by description without mentioning the name, in order to establish a right of action, the plaintiff must prove to the satisfaction of the jury that ordinary readers of the paper, who knew him, would have understood that it referred to him.

A good illustration is provided by Newstead v. London Express Ltd., [(1939) 4 All ER 319], in the newspaper a news item appeared thus: 'Harold Newstead, a Camberwell man, has been convicted for bigamy.' The news was true to Harold Newstead, Camberwell Barman. Another Harold Newstead, Camberwell barber and his friend thought that it referred to him and brought a suit for defamation. As the statement was understood as referring to Harold Newstead, Camberwell

barber, the statement was held defamatory, though newspaper never intended him to be the person.

The state of English Law was considered unsatisfactory as it led to the conviction of innocent person. Consequently the Defamation Act,1952 was passed unde which it was established that the publisher of the statement did not intended to publish it concerning the other man, or the words were not defamatory on the face of them and he did not know the circumstances under which they were understood to be defamatory. He would not be liable.

Ordinarily there cannot be a defamation of a class of persons. If a person says: 'lawyers are liers' or 'all doctors are incompetent', no lawyer or doctor can sue for defamation unless he shows that these words were in reference to him. In Knupffer v. London Express Newspaper Ltd., [(1944) 1 All ER 495], Lord Atkin observed: "There can be no law that a defamatory statement made of a firm, or trustee, or the tenants of a particular building, is not actionable, if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. The reason as to why a libel published of a large or indeterminate number of persons described by some general name fails to be actionable, is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement."

(c)*Publication of Defamatory material:*

No defamation will be constituted unless defamatory statement or material is published. Publication does not mean publication in press or by leaflets. If it is brought to the notice or knowledge of persons or even to a single person other than the defamed person, amounts to publication. If a defamatory matter enclosed in an envelop is not publication. Dictating a defamatory letter to stenographer or typist is publication, but not to the private secretary. If a third person opens the letter not meant for him wrongly, for instance father reads the latter meant for his son or servant reads letter meant for his master, there is no publication. But if defamatory letter is written on a post card or telegram, it will amount to communication of defamation, irrespective of the fact whether someone has read it or not. If a letter is written in a language which the defamer

does not understand and, therefore has to be read by someone else, it amounts to communication.

If one spouse writes a defamatory letter to the other, there is no defamation, as there is no publication. In T.J. Ponnam v. M.C. Verghese, AIR 1970 SC 1976, the husband wrote number of defamatory letters to his wife about his father-in-law. The wife passed on these letters to his father. The father-in-law sued for defamation. The husband claimed privilege, under section 122, Indian Evidence Act. The Supreme Court took the view that if such letters fall into the hands of the defamed person, he can prove them in any other manner and if proved, the action for defamation will lie.

If a third person writes a defamatory letter about one spouse to the other in such a manner that the former is most likely to read it, there is sufficient communication.

Defences to Defamation:

1. Justification or truth
2. Fair comment
3. Privilege

1.Justification or truth:

In defamation there cannot be better defence than that of truth, as the law will not permit a man to recover damages in respect of any injury and character which he either does not or ought not to possess. The deference is still available even though the statement is made maliciously. Defence is available if the statement is substantially correct though incorrect in respect of certain minor details. In Alexender v. North Eastern Rly.,[(1885)6 B & S 340], a news was published in the newspaper that X has been sentenced to a fine of pond of 1 or three weeks imprisonment. In the alternative, while in fact X was sentenced to a fine of pound 1 or 14 days imprisonment. It was held that the statement in the press was substantially correct and no action lied. Obviously, if defamer fails to prove the truth of statement, he is liable.

2.Fair comment:

The second defence to an action for defamation is that the statement was a fair comment in public interest. Comment means expression of an opinion. The essentials of this defence are:

a. It must be a comment, i.e. expression of opinion
b. Comment must be fair
c. Comment must be in public interest

Comment and statement of facts are different. Comment is an expression of opinion on certain facts and circumstances, and not statement of fact. For instance, after reading A's book, B says 'it is a foolish book.' 'It is an indecent book.' ''A' must be a man of impure mind.' These are comments. But if he says, 'I am not surprised that A's book is foolish and indecent and he is weak and of impure mind.' In former case, it is a comment and in the latter case , it is a statement of fact.

Since comments are always made on facts, it is necessary that facts commented upon should be generally known or the commentator should make them known before comments upon them. A says 'B is guilty of breach of trust.' This is a statement of fact and must be true. A then adds, 'B is, therefore, a dishonest man.' This is a comment. But if audience or public do not know the fact that B has been convicted for breach of trust, the latter statement will be statement of fact.

Comment should be fair. No comment can be fair which is based on untrue facts. Thus, when commenting on play, it was stated that, 'play potrays vulgarity as it contents a scene of rape', while in fact there is no such scene, the comment is not fair.

3.Privilege

This is also one of the fundamental principles that there are circumstances when freedom of speech has privilege and even if it is defamatory it is protected. The individuals right to reputation is subordinate to the privilege of freedom of speech. This privilege may be; absolute or qualified.

The Constitution of India grants privilege to any speech made in parliament or state legislature and publication of the same under the authority of parliament or state legislature is privileged.

Similarly, in any judicial proceeding, no action for defamation lies for words spoken or written, against judges, counsels, witnesses or parties. But the words, oral/ written must be pertaining to proceedings.

State communications are also privileged. Statements made by one government officer to another in the course of official duty are privileged communications. So are the statements made by the ministers in the course of their official duty.

Even in the case of ***qualified privilege*** the statement should be made without malice. The following conditions should be satisfied for claiming qualified privilege:

a. The statement must be made without malice, and
b. The statement must be made on a privileged occasion

The following are considered as privileged occasions:

a. When it is made in the discharge of the duty
b. Protection of interest, or
c. It is a fair report of parliament, judiciary or other public proceedings.

Defining privileged occasion, the court in Adam v. Ward, [(1917) AC 309], held; "A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.'

NEGLIGENCE

In day to day usage Negligence denotes mere carelessness. In legal sense it signifies failure to exercise the standard of care which the doer as a reasonable

man should, by law, have exercised in the circumstances. Generally speaking there is a legal duty to take care where it was or should have been reasonably foreseeable that failure to do so was likely to cause injury. Negligence is, accordingly, a mode in which many kinds of harms may be caused, by not taking such adequate precautions as should have been taken in the circumstances to avoid or prevent that harm, as contrasted with causing such harm intentionally or deliberately. A man may, accordingly, cause harm negligently though he was not careless but tried to be careful, if the care taken was such as the court deems inadequate in the circumstances. Generally speaking one is responsible for the direct consequences of his negligent acts where he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to another. Negligence takes innumerable forms, but the commonest forms are negligence causing personal injuries or death, of which species are employers' liability to an employee, the liability of occupiers of land to visitors thereon, the liability of suppliers to consumers, of persons doing work to their clients, of persons handling vehicles to other road-users, and so on. The categories of negligence are not closed and new varieties such as negligence causing economic loss may be recognized.

Negligence has two meanings in law of torts:

1. *Negligence as state of mind*- Negligence is a mode of committing certain torts e.g. negligently or carelessly committing trespass, nuisance or defamation. This is the *subjective* meaning of negligence advocated by the Austin, Salmond and Winfield.
2. *Negligence as a type of conduct*- Negligence is a conduct, not a state of mind. Conduct which involves the risk of causing damage. This is the *objective* meaning of negligence, which treats negligence as a separate or specific tort.

Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care or skill, by which neglect the plaintiff has suffered injury, to his person or property (Heaven v. Pender 1883 Q.B.D. 503)

Essentials of Negligence

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

1. That the defendant owed a duty of care to the plaintiff.
2. That the defendant made a breach of the duty i.e. he failed to exercise due care and skill.
3. That plaintiff suffered damage as a consequence thereof.

1. Duty of care to the plaintiff

The existence of a duty situation or a duty to take care is thus essential before a person can be held liable negligence. It means a legal duty rather than a mere moral, religious or social duty. The plaintiff has to establish that the defendant owed to him specific legal duty to take care, of which he has made a breach. Normally the existence of a duty situation in a given case is decided on the basis of existing precedents covering similar situations; but it is now well accepted that new duty situations can be recognized. In *Donoghue v. Stevenson* (1932) AC 562, the appellant plaintiff drank a bottle of ginger beer which was brought from a retailor by her friend. The bottle which was of dark opaque glass in fact contained the decomposed body of snail (found out by her when she had already consumed a part of the contents of the bottle).

Held that the manufacturer of bottle was responsible for his negligence towards the plaintiff. According to Lord Atkin: "A manufacturer of the products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of the reasonable care in the preparation or putting up of the products will result in an injury to consumers' life or property, owes a duty to the customer to take that reasonable care."

The House of Lords also rejected the plea that there was no contractual relationship between the manufacturer and plaintiff. Lord Atkin said: "The rule that you are to love your neighbor becomes in law *'you must not injure your neighbor'*.''

Similarly, in *Hedley Byrne &co. Ltd v. Heller & Partners Ltd* (1964) AC 465 (HL), again a new duty was recognized. It was held that the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care and that a negligent, though honest, misrepresentation in breach of this duty may give rise to an action for damages apart from contract or fiduciary relationship. Lord Pearce in this case said: " How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the court's assessment of the demands of society for protection from carelessness of others."

Whether the defendant owes a duty to the plaintiff or not depends on *reasonable foreseeability* of the injury to the plaintiff. In *Heaven v. Pender*(1883)11 Q.B.D.503 , held that the duty arises only if a person is nearer to the person or property of another. A useful test to decide culpability is to determine what a 'Reasonable Man' (i.e. a man of ordinary prudence or intelligence) would have foreseen and behaved under the circumstances. The standard of foresight of the reasonable man is an impersonal or objective test. However, the standard of care of the reasonable man involves in its application a subjective element. In *Rural Transport Service v. Bezlum Bibi* (AIR 1980 cal 165), the conductor of an overloaded bus invited passengers to travel on the roof of the bus. One of the passengers on the roof of the bus was struck by an overhanging branch of a tree. He fell down and died. Held that there was negligence on the part of both the driver and conductor of the bus.In *SushmaMitra v. M.P. State Road Transport Corpn. (AIR 1974 M.P. 68),* the plaintiff was resting her elbow on the window sill. A truck coming from the opposite direction hit her elbow as a result of which she received severe injuries. Held that it is the duty of the driver to pass on the road at a reasonable distance from the other vehicles.

When the injury to the plaintiff is not foreseeable, the defendant is not liable. In Glasgow Corpn. V. Muir (1943 A.C.488), the managers of the defendant corporation tearooms permitted a picnic party to have their food in the tearoom. Two members of the picnic party were carrying a big urn containing 6-9 gallons of tea to a tearoom through a passage where some children were buying ice creams. Suddenly one of the persons lost the grip of the handle of urn and six children,

including the plaintiff, were injured. Held that the managers could not anticipate such an event and, therefore, she had no duty to take precautions. Hence neither she nor he corporation could be held liable.

To establish negligence it is not enough to prove that the injury was foreseeable. But a reasonable likelihood of the injury has also to be shown. The duty is to guard against reasonable probabilities rather than bare or remote or fantastic possibilities. In *Fardon v. Harcourt* (1932 L.T.391), the defendant parked his car by the roadside and left a dog inside the car. The dog jumped out and smashed a glass panel. A splinter from this glass injured the plaintiff while he was walking past the car. Held that the accident being very unlikely, the defendant was not liable. In *Balton v. Stone* (1951 A.C850), a person on road was injured by a ball hit by a player on a cricket ground abutting on that highway. The ground had been used for 90 years and during the last 30 years the ball had been hit in the highway on about six occasions but no one had been injured. Held that the defendant (committee and members of cricket club) were not negligent.

When the defendant owed a duty of care to persons rather than the plaintiff, the plaintiff cannot sue even if he might have been injured by the defendant's act. Thus the duty must be owed to the plaintiff. In *Palsgraf v. Long Island Railroad Co.* (1928) a passenger carrying a package was trying to board a moving train. He seemed to be unsteady as if about to fall. A railway guard, with an idea to help him pushed him from behind. In this act, the package (of fire works) fell resulting in an explosion, as a result of which the plaintiff was injured. Held that the guard if negligently to the holder of the package was not negligent in relation to the plaintiff standing far away (about 25 feet).

Similarly counsel has a duty towards client. The counsel should be careful in performing his professional duties. If a counsel, by his acts or omissions, causes the interest of the party engaging him, in any legal proceedings to be prejudicially affected. He does so at his peril. On the same analogy a person engaged in some particular profession is supposed to have the requisite knowledge and skill needed for the purpose and he has a duty to exercise reasonable degree of care in the conduct of his duties. The standard of care needed in a particular case

dependents on the professional skill expected from persons belonging to a particular class. A surgeon or anesthetist will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong. In case of specialists, a higher degree of skill is needed. Explaining the nature of duty of care in medical profession, the supreme court observed in *Dr. LakshmanBalkrishna Joshi v. TrimbakBapuGodbole*(A.I.R. 1989):

"The petitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor, no doubt, has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency."

2. Breach of Duty

After the plaintiff has shown that defendant owed a duty to him, the plaintiff to succeed in a claim for negligence, has next to show that the defendant was in breach of this duty. It means not taking due care which is required in a particular case. The law requires taking of two points into to determine the standard of care required:

(a)The importance of the object to be attained- The law does not require greatest possible care but the care required is that of a reasonable and prudent man under certain circumstances. The amount of care, skill, diligence or the like, vary according to the particular case. The prudent man, ordinarily, with regard to undertaking an act is the man who has acquired that special skill to do the act which he undertakes; a man who has not acquired that special skill is imprudent in undertaking to do the act, however careful he may be, and, however great his skill in other things. The law permits taking chance of some measure of risks so that in public interest various kinds of activities should go on. As has been pointed in *Dabron v. Bath Tramways* (1946) 2 All E.R. 333 that if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of the abnormal risk.

A balance has therefore to be drawn between the importance and usefulness of an act and the risk created thereby. Thus a certain speed may not be negligent for a fire brigade vehicle but the same speed may be an act of negligence for another vehicle.

In *Latimer v. A.E.C. Ltd* (1953) A.C. 643, due to heavy rain a factory was flooded with water, which got mixed with some oily substances. The floors in the factory became slippery. The factory owners spread all the available sawdust but some oily patches still remained there. The plaintiff slipped and was injured. Held that the defendants had acted reasonably and, therefore, they were not liable.

(b) The magnitude of risk- The degree of care which a man is required to use in a particular situation in order to avoid the imputation of negligence varies with the obviousness of the risk. If the danger of doing injury to the person or property of another by the pursuance of a certain line of conduct is great, the individual who proposes to pursue that particular course is bound to use great care in order to avoid the foreseeable harm. On the other hand if the danger is slight only a slight amount of care is required. Thus the driver of a vehicle has to observe a greater care when he is passing through a school zone, or he finds a blind man, a child or an old man. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. In Kerala State Electricity Board v. Suresh Kumar 1986 ACJ 998, a minor boy came in contact with an overhead electric wire which had sagged to 3 feet above the ground, got electrocuted thereby and received burn injuries. The Electricity Board had a duty to keep the overhead wire 15 feet above the ground. The Board was held liable for breach of its statutory duty. Glasgow Corp. v. Taylor (1922)1 A.C. 44 is another illustration where there was lack of due care according to the circumstances of the case. In that case poisonous berries were grown in a public garden under the control of the corporation. The berries looked like cherries and thus had tempting appearance for the children. A child, aged seven, ate those berries and died. It was found that the shrub bearing the berries was neither properly fenced nor a notice regarding the deadly character of the berries was displayed. It was, therefore, held that the defendants were liable for negligence. Similarly, in Bishwanath Gupta v. Munna 1971 M.P.L.J. 721, the driving of a truck at a speed of

10 to 12 miles per hour was held to be negligent when the children playing on a road were visible to the driver and he could anticipate that some of them may cross the road on seeing the approaching truck. The duty in such a case was to drive so slow that in case of necessity the vehicle could be immediately stopped.

Good sense and policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. In a moment of peril and difficulty the court not expect perfect presence of mind, accurate judgment and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because upon review of facts, it can be seen that the course he had adopted was not in fact the best. In Jones v. Staveley, Iron & Chemical Co. Ltd, (1995) 1 All ER 6, it was held that the standard of care owed by an employer to his workmen in his factory for the purpose of determining his liability to them for negligence is higher than the standard to be applied in determining whether there has been contributory negligence on the part of one of the workmen.

3. Damages

It is also necessary that the defendant's breach of duty must cause damage to the plaintiff. The plaintiff has also to show that the damage thus caused is not too remote a consequences of the defendants negligence.

Proof of Negligence (*Res Ipsa Loquitur*)

The general rule is that it is for the plaintiff to prove that the defendant was negligent. Initial burden of making a *prima facie*case against defendant is on plaintiff, but once this onus is discharged, it will be for the defendant to prove that the incident was the result of inevitable accident or contributory negligence on the part of the plaintiff. Direct evidence of the negligence, however, is not necessary and the same may be inferred from the circumstances of the case.

Though, as a general rule, the plaintiff has to discharge the burden of proving negligence on the part of the defendant, there are, however, certain cases when the plaintiff need not prove that and the inference of negligence is drawn from the facts. There is a presumption of negligence according to the Latin maxim '*res ipsa loquitur*' which means the thing speaks for itself. In such a case it is sufficient for the plaintiff to prove accident and nothing more. The defendant can, however, avoid his liability by disapproving negligence on his part. Certain things regarding this maxim has to be kept in mind, these include:

(1) The maxim is not a rule of law. It is a rule of evidence benefiting the plaintiff because the true cause of accident may lie solely within the defendant's knowledge.

(2) The maxim applies when- (i) the injurious agency was under the management or control of the defendant, and (ii) the accident is such as in the ordinary course of thing, does not happen if those who have the management use proper care.

(3) The maxim has no application when the accident is capable of two explanations. Also, it does not apply when the facts are sufficiently known.

If a brick falls from a building and injures a passerby on the highway, or the goods while in the possession of a bailee are lost, or a stone is found in a bun, or a bus going on a road overturns, or death of a person is caused by live broken electric wire in a street, a presumption of negligence is raised. In *Agyakaur v. Pepsu* R.T.C AIR 1980 P&H 183, a rickshaw going on the correct side was hit by a bus coming on the wrong side of the road. Held that the driver of bus was negligent.In *Municipal Corpn.Delhi v. Subhagwati*AIR 1966 SC 1750, due to the collapse of the Clock Tower situated opposite to Town Hall in the main bazar of ChandniChowk, Delhi, a number of persons died. The Clock Tower belonged to the Municipal Corporation of Delhi. The supreme court explained the legal position as:

"There is a special obligation on the owner of the adjoining premises for the safety of the structures which he keeps beside the highway. If these structures fall into disrepair so as to be of potential danger to the passerby or to be a nuisance,

the owner is liable to anyone using the highway that is injured by reason of the disrepair. In such a case, the owner is legally responsible irrespective of whether the danger is caused by patent or latent(hidden) defect."

In *PillutlaSavitri v. G.K.Kumar,* AIR 2000 A.P.467, the plaintiff's husband, who was a practicing Advocate at Guntur, was relaxing in front of his tenanted premises on the ground floor. Suddenly, a portion under construction on the first floor of the building collapsed and the sun-shade and parapet wall fell down on the advocate, resulting in his death. The principle of *res ipsa loquitur* was applied and there was presumed to be negligence on the part of the defendants, who were getting the construction work done. The defendants were held liable to pay damages.

In *Mrs. AparnaDutta v. Apollo Hospital Enterprises Ltd.,* AIR 2000 Mad. 340, the plaintiff got herself operated for the removal of her uterus in the defendant hospital, as there was diagnosed to be a cyst in the area of one of her ovaries. Due to the negligence of the hospital surgeon, who performed the operation, an abdominal pack was left in her abdomen. The same was removed by second surgery. Leaving foreign material in the body during operation was held to be a case of res ipsa loquitur. The doctor who performed the operation and the hospital authorities were held liable to pay compensation of Rs. 5,80,000 to the plaintiff for their negligence.

In *Walkelin v. London and South Western Railway Co.* (1886)12 A.C. 41, the dead body of a man was found near a railway crossing on the defendant's railway. The man had been killed by a train (at the night time) bearing the usual head lights but the driver had not sounded the whistle when he approached the crossing. In an action by the widow, it was held that from these facts, it could not be reasonably inferred that the accident occurred due to the defendant's negligence. Lord Halsburry said:

"One may surmise, and it was but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather the man ran against the train?

Medical and Professional Negligence

In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. A surgeon does not undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantage than himself; but he undertakes to bring a fair, reasonable, and competent degree of skill; and in a an action against him by a patient, the question is whether the injury complained of must be referred to the want of a proper degree of skill and care in the defendant or not. In a suit for damages the onus is upon the plaintiff to prove that the defendant was negligent and that his negligence caused the injury of which the plaintiff complained.

Dr. Laxman v. Dr. Trimbak, AIR 1969 SC 128, court held that a doctor when consulted by a patient owes him certain duties, *viz.,* a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give and a duty of care in administration of that treatment. A breach of any of these duties gives a right of action for negligence to the patient.

Under English law as laid down in Bolam v. Friern Hospital Management Committee, (1957) 2 All ER118, a doctor, who acts in accordance with a practice accepted as proper by a responsible body of medical men, is not negligent merely because there is a body of opinion that takes a contrary view. MC NAIR, J., in his summing up to jury observed:

"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercisingand professing to have that special skill….. A man need not to possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

At common law, a doctor cannot lawfully operate on adult persons of sound mind or give them any other treatment involving the application of physical force without their consent for otherwise he would be liable for the tort of trespass. But when a patient is incapable, for one reason or another, of giving his consent, a doctor can lawfully operate upon or give other treatment provided that the operation or the other treatment concerned is in the best interest of the patient if only it is carried out in order to save his life or to ensure improvement or to prevent deterioration in his physical or mental health. The test here also in determining liability would be whether the doctor acted in accordance with the practice accepted at the time by a responsible body of medical opinion skilled in the particular form of treatment. Prior consent or approval of the court for giving the treatment is not necessary. But in case of a patient of unsound mind, the court may entertain a petition for declaration that a proposed operation or treatment on the patient may be lawfully performed. These principles were laid down by the House of Lords in *F v. Berkshire Health Authority*, (1989)2 All ER545 (HL).

Now coming to legal profession, till recently in England Barristers enjoyed immunity from being sued for professional negligence which was reasoned on the basis of public policy and in public interest. This immunity was extended to 'solicitor advocates by section 62 of the Courts and Legal Services Act, 1990. But the House of Lords in *Arthur JS Hall &CO. v. Simons*(2000) 3 All ER 673 (HL), recently changed this law and held that now neither public policy nor public interest justified the continuance of that immunity. Thus Barristers and solicitor advocates are now liable in England for negligence like other professionals. In India section 5 of the Legal Practitioners (fees) Act, 1926 provides that no legal practitioner who has acted or agreed to act shall, by reason only of being a legal practitioner, be exempt from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duties. The expression legal practitioner means "an advocate, vakil or attorney of any High Court, a pleader, mukhtar or revenue agent. After adverting to the provisions of the Act, the supreme Court in *M.Veerappa's v. Evelyn Squeira,* AIR 1998 SC 506, p. 514, held that an advocate who has been engaged to act is clearly liable for negligence

to his is client. The Supreme Court, however, left open the question whether an advocate who has been engaged only to plead can be sued for negligence.

Contributory Negligence

In certain circumstances a person who has suffered an injury will not be able to get damages from another for the reason his own negligence has contributed to his injury; every person is expected to take care reasonable care of himself. According to john G. Fleming, "Negligence is conduct that fails to conform to the standards required by law for safeguarding others (actionable negligence) against unreasonable risk of injury." Thus, when the plaintiff by his own want of care contributes to the damage caused by the negligence or wrongful conduct of the defendant, he is considered to be guilty of *contributory negligence.*It does not mean breach of a duty towards other party but it means absence of due care on his part about his own safety.

For example, a pedestrian tries to cross the road all of a sudden and is hit by a moving vehicle, he is guilty of contributory negligence. In this case, the defendant could completely escape his liability for accident. Take another case, if the conductor of a bus invites passengers to travel on the roof of the bus, and one of the passengers travelling on the roof is hit by the branch of a tree and falls down and gets killed, there is not only negligence on the part of the conductor also contributory negligence on the part of the passengers. What amounts to contributory negligence in the case of an adult may not be so in case of a child. If, however, a child is capable of appreciating the danger he may be held guilty of contributory negligence. In *Yachuk v. Oliver Blis Co. Ltd* (1949) A.C. 386, the defendant's servants sold some gasoline to two boys aged 7 and 9 years. The boys falsely stated that they needed the same for their mother's car. They actually used it for their play and one of them got injured. The defendant was held liable in full for loss.

At Common Law, contributory negligence was a complete defense, and the negligent plaintiff could not claim any compensation from the defendant. The court modified this rule and introduced the rule of "Last Opportunity" or "Last Chance."

The last opportunity rule may be stated as: "When an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care". The rule was applied *in Davies v. Mann* (1882) 10 M. and W. 546; in this case, the plaintiff fettered the forefeet of his donkey and left it in a narrow highway. The defendant was driving his wagon too fast and the donkey was run over and killed. Inspite of his negligence the plaintiff was entitled to claim compensation because the defendant had the last opportunity to avoid the accident.

The rule was further defined in the case of *British Columbia Electric Co. v. Loach* (1916) 1 A.C. 719, "a defendant, who had not in fact the last opportunity to avoid the accident, will nevertheless be liable if he would have that opportunity but for his negligence" (Constructive Last Opportunity). The rule of last opportunity also was very unsatisfactory because the party whose act of negligence was earlier, altogether escaped the responsibility.

The law was changed in England. The Law Reform (Contributory Negligence) Act, 1945 provides that when both parties are negligent and they have contributed to some damage, the damage will be *apportioned* as between them according to the degree of their fault (According to Winfield, where the plaintiff's negligence was so closely implicated with the defendant's negligence so as to make it impossible to determine whose negligence was the decisive cause, the plaintiff cannot recover).

The same is considered to be the position in India as well. The Kerala Torts (Miscellaneous Provisions) Act, 1976 contains provisions for apportionment of liability in case of contributory negligence. In India, contributory negligence has been considered as a defense to the extent the plaintiff is at fault. Thus, if in an accident the plaintiff is as much at the fault as the defendant the compensation to which he would otherwise be entitled will bw reduced to 50%.

Composite Negligence

When the negligence of two or more persons result in the same damage to a third person there is said to be a 'composite negligence', and the persons responsible

are known as 'composite tort-feasors'. In case of contributory negligence there is negligence on the part of the defendant as well as the plaintiff. Plaintiff's own negligence contributes to harm which he has suffered. In the case of composite negligence, there is negligence of two or more persons towards the plaintiff, and the plaintiff himself is not to be blamed. While contributory negligence is a defense available to the defendant to overcome or reduce the liability in relation to the plaintiff, the composite negligence is not a defense.

NUISANCE

Nuisance as a trot means an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it. Acts interfering with the comfort, health or safety are the examples of it. The interference may be any way, e.g., noise vibrations, heat, smell, smoke, fumes, water, gas, electricity, excavation or disease producing germs. Nuisance should be distinguished from trespass. Trespass is (i) a direct physical interference, (ii) with the plaintiff's possession of land, (iii) through some materials or tangible object. Both nuisance and trespass are similar in so far as in either case the plaintiff has to show his possession of land. The two may even coincide, some kinds of nuisance being also continuing trespasses. The points of distinction between two are as follows:

If interference is direct, the wrong is trespass; if it is consequential it amounts to nuisance. Planting a tree on another's land is trespass. But when a person plants a tree over his own land and the roots or branches project into or over the land of another person that is nuisance. To throw stones upon one's neighbor's premises is a wrong of trespass; to allow stone from a ruinous chimney to fall upon those premises is the wrong of nuisance.

Trespass is interference with a person's possession of land. In nuisance there is interference with a person's use or enjoyment of land. Such interference with the use or enjoyment could be there without any interference with the possession. For example, a person by creating offensive smell or noise on his own land could cause nuisance to his neighbor.

Moreover, in trespass interference is always through some material or tangible objects. Nuisance can be committed through the medium of intangible objects also like vibrations, gas, noise, smell, electricity or smoke.

Kinds of Nuisance

Nuisance is of two kinds:

i. Public or Common Nuisance

ii. Private Nuisance or Tort of Nuisance

Public Nuisance

Public nuisance is a crime where as private nuisance is a civil wrong. Public nuisance is interference with the right of public in general and is punishable as an offence. Obstructing a public way by digging a trench, or constructing structures on it are examples of public nuisance.

For example, digging trench on a public highway may cause inconvenience to public at large. No member of the public, who is thus obstructed or has to take a diversion along with others, can sue under civil law. But if anyone of them suffers more damage than suffered by the public at large, e.g., is severely injured by falling into the trench, he can sue in tort. In order to sustain a civil action in respect of a public nuisance proof of special and particular damage is essential.

The proof of special damage entitles the plaintiff to bring a civil action for what may be otherwise a public nuisance. Thus, if the standing of horses and wagons for an unreasonably long time outside a man's house creates darkness and bad smell for the occupants of the house and also obstructs the access of customers into it, the damage is 'particular, direct and substantial' and entitles the occupier to maintain an action.

In Dr. Ram Raj Singh v. Babulal A.I.R 1982 All.285 the defendant erected a brick grinding machine adjoining the premises of the plaintiff, who was a medical practitioner. The brick grinding machine generated dust, which polluted the atmosphere. The dust entered the consulting chamber of the plaintiff and caused physical inconvenience to him and patients, and their red coating on clothes, caused by the dust, could be apparently visible. It was held that special damages

to the plaintiff had been proved and a permanent injunction was issued against the defendant restraining him from running his brick grinding machine there.

In Rose v. Milles (1815) the defendant wrongfully moored his barge across a public navigable creck. This blocked the way for plaintiff's barges and the plaintiff had to incur considerable expenditure in unloading the cargo and transporting same by land. It was held that there was special damage caused to the plaintiff to support his claim.

If the plaintiff cannot prove that he has suffered any special damage, i.e. more damage than suffered by the other members of the public, he cannot claim any compensation for the same.

Private Nuisance or Tort of nuisance

Its essentials: To constitute the tort of nuisance, the following essentials are required to be proved:

1. Unreasonable interference
2. Interference is with the use of enjoyment of land.
3. Damage.

1. Unreasonable interference:

Interference may cause damage to the plaintiff's property or may cause personal discomfort to the plaintiff in the enjoyment of property. Every interference is not a nuisance. To constitute nuisance the interference should be unreasonable. Every person must put up with some noise, some vibration, some smell, etc. so that members of the society can enjoy their own right. If I have the house by the side of the road I cannot bring an action for the inconvenience which necessarily incidental to the traffic on the road. Nor can I sue my neighbor if his listening to the radio interferes with my studies. So long as the interference is not unreasonable, no action can be brought.

In Radhey Shyam v. Gur Prashad AIR 1987 Mad.28 Gur Prasad and another filed a suit against Radhey Shyam and others for a permanent injunction to restrain them from installing and running a flour mill in their premises. It was alleged that the said mill would cause nuisance to the plaintiffs, who were occupying the first

floor portion o the same premises in as much as the plaintiffs would lose their peace on account of rattling noise of the flour mill and thereby their health would also be adversely affected. It was held that substantial additional to the noise in a noisy locality, by the running of the impugned machines, seriously interfered with the physical comfort of the plaintiffs and as such it amounted to nuisance, and the plaintiffs were entitled to an injunction against the defendants.

In Ushaben v. Bhagya laxmi Chitra Mandir A.I.R 1978 Guj.13, the plaintiffs-appellants sued the defendants-respondents for a permanent injunction to restrain them from exhibiting the film "Jai Santoshi Maa" It was contended that exhibition of the film was a nuisance because the plaintiff's religious feeling were hurt as Goddesses Saraswati, Laxmi and Parvati were defined as jealous and were ridiculed. It was held that hurt to religious feelings was not an actionable wrong. Moreover, the plaintiffs were free not to see the movie again. The balance of convenience was considered to be in favor of the defendants and as such there was no nuisance.

Sensitive Plaintiff: An act which is otherwise reasonable does not become unreasonable and actionable when the damage, even though substantial, is caused solely due to sensitiveness of the plaintiff or the use of which he puts his property. If certain kind of traffic is no nuisance for a healthy man, it will not entitle a sick man to bring an action if he suffers thereby, even though the damage is substantial. If some noises which do not disturb or annoy an ordinary person but disturb only the plaintiff in his work or sleep due to his over sensitiveness, it is no nuisance against this plaintiff.

In Robinson v. Kilvert (1889) Ch. D. 88; the plaintiff warehoused brown paper in a building. The heat created by the defendant in the lower portion of the same building for his own business dried and diminished the value of plaintiff's brown paper. The loss was due to exceptionally delicate trade of plaintiff and paper generally would not have been damaged by the defendant's operations. It was held that the defendant was not liable for the nuisance.

Does Nuisance Connote state of affairs? : Nuisance is generally continuing wrong. A constant noise, smell, vibration is a nuisance and ordinarily an isolated act of

escape cannot be considered to be a nuisance. Thus, in Stone v. Bolton(1949) All E.R. 237; the plaintiff, while standing on a highway, was injured by a cricket ball hit from the defendant's ground, but she could not succeed in her action for nuisance. At first instance, Oliver J. said:" An isolated act of hitting a cricket ball on to the rod cannot, of course, amount to a nuisance.

Malice: If the act of the defendant which is done with evil motive, becomes an unreasonable interference it is actionable. A person has right to make a reasonable use of his own property but if the use of his property causes substantial discomfort to others, it ceases to be reasonable. "If a man creates a nuisance, he cannot say that he is acting reasonably. The two things are self-contradictory." In Allen v. Flood (1898) A.C. 1, 101; Lord Watson said: "No proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance if his neighbors or of the public. If he violates that condition h commits a legal wrong, and if he does so intentionally he is guilty of a malicious wrong, in its strict legal sense."

2. Interference with the use or enjoyment of land

Interference may cause either (A) injury to the property itself, or (B) injury to comfort or health of occupants of certain property.

(A) Injury to Property: An unauthorized interference with the use of the property of another person through some object, tangible or intangible, which causes damage to property, is actionable as nuisance. It may be by allowing the branches of a tree to overhang on the land of another person, or the escape of the roots of a tree, water, gas, smoke or fumes, etc. on to neighbor's land or even by vibrations.

Nuisance to incorporeal Property

(i) Interference with the right of support of land and buildings: A person has a "natural" right to have his land supported by his neighbor's and therefore removal of support, lateral, or from beneath is a nuisance. The natural right from support of neighbor's land is available only in respect of land without buildings or other structure on land.

Right to support by grant or prescription: In respect of buildings the right of support may be acquired by grant or prescription. Regarding the right of support for buildings it is observed in Partridge v. Scott (1838) 2 & W. 220. "Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds a house at the extremity of a land, he does not thereby acquire any easement of support or otherwise over the land of his neighbor. He has no right to load his own soil, so as to make it require the support of his neighbors unless he has a grant to that effect."

(ii) Interference with Right to Light and Air

England

Right to light is also not a natural right and may be acquired by grant or prescription. When such a right has been thus acquired, a substantial interference with it is an actionable nuisance. It is not enough to show that the plaintiff's building is having less light than before.

In Colls v. Home and Colonial Stores, Ltd. (1904) A.C. 179, the construction of a building by the defendant only diminished the light into a room on a ground floor, which was used, as an office and where electric light was otherwise always needed. It was held that the defendant was not liable. It was "not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before….in order to give a right of action, there must be a substantial privation of light."

INDIA

In India also the right to light and air may be acquired by an easement. Sec. 25, Limitation Act, 1963 and Sec 15, Indian Easements Act, 1882 make similar provisions regarding the mode and period of enjoyment required to acquire this prescriptive right.

(B) Injury to comfort or health: Substantial interference with the comfort and convenience in using the premises is actionable as a nuisance. A mere trifling or fanciful inconvenience is not enough. The rule is De minimis non curat lex that means that the law does not take account of very trifling matters. There should

be “a serious in convenience and interference with the comfort of the occupiers of the dwelling-house according to notions prevalent among reasonable English men and women…..” The standard of comfort varies from time to time and place to place. Inconvenience and discomfort from the point of view of a particular plaintiff is not the test of nuisance but the test is how an average man residing in the same area would take it. The plaintiff may be oversensitive.

Disturbance to neighbors throughout the night by the noises of horses in a building which was converted into a stable was nuisance. Similarly, attraction of large and noisy crowd outside a club kept open till 3 a.m. and also in which entertainments by music and fireworks have been arranged for profit, are instances of nuisance. Smoke, noise and offensive vapour may constitute a nuisance even though they are not injurious to health.

3. Damages

Unlike trespass, which is actionable per se, actual damage is required to be proved in an action for nuisance. In the case of public nuisance, the plaintiff can bring an action in tort only when he proves a special damage to him. In private nuisance, although damage is one of the essentials, the law will often presume it. In Fay v. Prentice (1854) 1 C.B.828; a cornice of a defendant’s house projected over the plaintiff’s garden. It was held that the mere fact that the cornice projected over plaintiff’s garden raises a presumption of fall of rain water into and damage to the garden and the same need not be proved. It was a nuisance.

Nuisance on highways: Obstructing a highway or creating dangers on it or in its close proximity is a nuisance. Obstruction need not be total. The obstruction must, however be unreasonable. Thus, to cause the formation of queues without completely blocking the public passage is a nuisance. In Barber v. Penley (1893)2 Ch.447, due to considerable queues at the defendant’s theatre access to the plaintiff’s premises, a boarding house became extremely difficult at certain hours. Held, the obstruction was a nuisance and the management of the theatre was liable.

Projections: As regards projections on the highway by objects like overhanging branches of a tree or a clock etc. from the land or building adjoining the highway,

no action for nuisance can be brought for such projections unless some damage is caused thereby.

In Noble v. Harrison(1926) 2 K.B. 332 the branch of a beech tree growing on the defendant's land hung on the highway at a height of about 30 feet above the ground. In fine weather the branch of a tree suddenly broke and fell upon the plaintiff's vehicle which was passing along the highway. For the damage to the vehicle the plaintiff sued the defendant to make him liable either for nuisance, or alternatively, for the rule in Rylands v. Fletcher. It was held that there was no liability or nuisance because the mere fact the branch of the tree was overhanging was not nuisance, nor was the nuisance created by its fall as the defendant neither knew nor could have known that the branch would break and fall. There was no liability under the rule in Rylands v. Fletcher either, as growing a tree was a natural use of land.

Defences:

A number of defences have been pleaded in an action for nuisance. Some of the defences have been recognized by the courts as valid defences and some others have been rejected both the valid or effectual defenses as well as ineffectual defences have been discussed below.

Effectual defences

1. Prescriptive right to commit nuisance

A right to do an act, which would otherwise be a nuisance, may be acquired by prescription. If a person has continued with an activity on the land of another person for 20 years or more, he acquires a legal right by prescription, to continue therewith in future also. years sec. 15, Indian Easement Act and S. 25, Limitation Act, 1963 says,a right to commit a private nuisance may be acquired as an easement if the same has been peaceably and openly enjoyed as an easement and as of right, without interruption, and for 20. On the expiration of this period of 20 years, the nuisance becomes legalized ab initio as if it has been authorized by a grant of the owner of serviant land from the beginning held in Sturges v. Bridgman, (1879) 11 Ch. D. 852, at 863.

2. Statutory Authority

An act done under the authority of a statute is a complete defence. If nuisance is necessarily incident to what has been authorized by a statute, there is no liability for that under the law of torts. Thus, a railway company authorized to run railway trains on a track is not liable if, in spite of due care, the sparks from the engine set fire to the adjoining property held in Vaughan v. Taff Vale Rail Co., (1860) 5 H. and N. 697; Also see Dunney v. North Western Gas Board, (1963) 3 All E.R. 916. In the absence of such an authority, the railway authority would have been liable even though there was no negligence; Jones v. Festing Rail Co., (1868) L.R. 3 Q.B. 733.

or the value of the adjoining property is depreciated by the noise, vibrations and smoke by the running of trains Hammersmith Ry.Co. v. Brand, (!869) 4 H.L. 171. If there is negligence in the running of trains, the railway co., even though run under a statutory authority will be liable. See Smith v. L. and S.S. Ry. Co., (1870), L.R. 6 C.P. 14. According to Lord Halsbury quoted in London Brighton and south Coast Rail Co. v. Turman, (1885) 11 A.C. 45 at p. 50: "It cannot now be doubted that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at Common Law.

Ineffectual defences

1. Nuisance due to acts of others

Sometimes, the act of two or more persons, acting independently of each other, may cause nuisance although the act of anyone of them alone would not be so. An action can be brought against anyone of them and it is no defence that the act of the defendant alone would not be a nuisance, and the nuisance was caused when other had also acted in the same way.

2. Public Good

It is no defence to say that what is a nuisance to a particular plaintiff is beneficial to the public in general, otherwise no public utility undertaking could be held liable for the unlawful interference with the rights of individuals. In Shelfer v. City

of London Electric Lightning Co. and Thorpne v. Burmfit, (1873) L.R. 8 Ch. 650, during the building of an electric power house by the defendants, there were violent vibrations resulting in damage to the plaintiff's house. In an action for injunction by the plaintiff, the defence pleaded was that if the building was not constructed the whole of the city of London would suffer by losing the benefit of the light to be supplied through the proposed power house. The plea was rejected and the court issued an injunction against the defendants.

3. Reasonable care

Use of a reasonable care to prevent nuisance is generally no defence. In a **Rapier** v. **LondonTramways Co**. (1893) 2 Ch. 588; considerable stench amounting to nuisance was caused by the defendants stables constructed to accommodate 200 horses to draw their trams. The defence that maximum possible care was taken to prevent the nuisance failed and the defendants were held liable.

4. Plaintiff Coming to nuisance

It is no defence that the plaintiff himself came to place of nuisance. A person cannot be expected to refrain from buying a land on which a nuisance already exists and the plaintiff can recover even if nuisance has been going on long before he went to that place. The maxim volenti non fit injuria cannot be applied in such a case. Held in Ellostion v. Feetham, (1835) 2 Bing N.C . 134; Bliss v. Hall, (1838) 4 Bing N.C. 183; Sturges v. Bridgman, (1876) 11 Ch. D. 852

TRESPASS TO THE PERSON

There are three main wrongs which fall under the umbrella of trespass to the person: assault, battery and false imprisonment. They are intentional torts, meaning they cannot be committed by accident. Although these descriptions sound like they are crimes, and indeed do share their names with some crimes, it is important to remember that these are civil wrongs and not criminal wrongs. A person liable in tort for assault, battery or false imprisonment will not face a sentence. Instead, they will be ordered to pay damages to their victim.

Assault

Assault means physical contact. But in tort, an assault occurs when a person apprehends immediate and unlawful physical contact. In other words, fearing that you are about to be physically attacked makes you the victim of an assault. It is also necessary that an attack can actually take place. If an attack is impossible, then despite a person's apprehension of physical contact there can be no assault. So a person waving a stick and chasing after another person who is driving away in a car would not be an assault. It is also generally thought that words alone cannot constitute an assault, but if accompanied by threatening behaviour the tort may have been committed.

Battery

If the physical contact that is apprehended in an assault actually takes place, then the tort of battery has been committed. It is not necessary for the physical contact to cause any injury or permanent damage to the victim, or even be intended to do so. The only intention required is that of making physical contact. It is also not necessary for the tortfeasor, that is, the wrongdoer, to actually touch the victim, so battery may be committed by throwing stones at someone or spitting on them.

False Imprisonment

False imprisonment is the unlawful restraint of a person which restricts that person's freedom of movement. The victim need not be physically restrained from moving. It is sufficient if they are prevented from choosing to go where they please, even if only for a short time. This includes being intimidated or ordered to stay somewhere. A person can also be restrained even if they have a means of escape but it is unreasonable for them to take it, for example, if they have no clothes or they are in a first floor room with only a window as a way out. False imprisonment can also be committed if the victim is unaware that they are being restrained, but it must be a fact that they are being restrained.

Defences to Trespass to the Person

1. ***Consent***

If a person consents to being physically contacted, then no tort of battery exists. Consent may be given expressly by words or implied from conduct. A patient can

give express medical consent to their doctor before undergoing an operation which in other circumstances might amount to a battery. Similarly, certain sports, such as rugby, on the face of it comprise a continuous series of assaults and batteries. Clearly it would be absurd if the law allowed a rugby player to sue the opposing team for trespass to the person. So a person who consents to being physically contacted within the rules of a particular game is not a victim of a tort. Deliberate acts of violence on the playing field, though, do not fall within this defence.

2. Necessity

A wrongdoer may have a successful defence if they can show that it was necessary to act in the way they did. In other words, there must be a sound justification for breaking the law. A person who grabs another and drags them by force from the path of an oncoming vehicle, and who by doing so prevents them from serious injury or death, is not liable in tort. Similarly, a doctor who performs emergency surgery on an unconscious patient, who naturally cannot consent, in order to save their life, may successfully argue that the battery was necessary if the surgery performed was limited to that which was required to save the patient's life.

3. Self-Defence

The defence of self-defence will only succeed if the force used was not excessive and was reasonable and necessary in the circumstances to prevent personal injury. Each case must be considered on its own facts. For example, if a person is attacked with a knife it may be reasonable for them to defend themselves also with a knife, but not necessarily with an automatic pistol. It will be for the courts to decide what is reasonable.

4. In Defence of Others

Similarly to self-defence, a wrongdoer may successfully argue that their actions were justified in order to assist a third party who they reasonably believe is in immediate danger of being attacked. Most commonly this occurs when a parent is protecting a child or one spouse is protecting another.

5. Defence for False Imprisonment

If the victim was restrained under legal authority or justification, or if the perpetrator was exercising their legal rights or duties, then there is a complete defence to false imprisonment.

MALICIOUS PROSECUTION

Malicious prosecution is a mode of abuse of legal process. Malicious prosecution consists of institution of criminal proceedings in a court of law maliciously and unreasonably and without a proper cause of action. If a person can show actual damage, he can file an action for damages under the law of torts.

Essentials:

a. The proceedings were instituted without any probable or reasonable cause
b. Proceedings were filed maliciously and not to book a criminal in a court of law/not with a mere intention of carrying the law into effect
c. Termination of Proceedings in favour of the Plaintiff
d. As a result of such prosecution, the plaintiff has suffered damage.

Example: P informed police that a theft has been committed in his house and he suspected that it has been committed by A. A was consequently arrested but was discharged by the magistrate as the final police report showed that A was not connected with the theft. When A prosecuted P for malicious prosecution, the court dismissed the suit as there was no prosecution in a court of law. To prosecute is to set the law in motion.

Prosecution is not deemed to have commenced before a person is summoned to answer a complaint.

Reasonable and probable cause means, an honest belief in the guilt of the accused person upon a full conviction, founded upon reasonable grounds of the existence of circumstances, which assuming them to be true, would reasonably lead any prudent man placed in the position of the accused to the conclusion that the person charged was probably guilty of the crime imputed.

There is a reasonable and probable cause when one has sufficient ground for thinking that the other person has committed the offence. In Abrath vs. N.E.Railway Co.,(1886) 1 UBD 440, one ‘M’ had recovered compensation for his injury in a railway collision from the railway Co. Latter on the railway Co. came to

know that those injuries were not suffered in the collision but were artificially created by him in collision with one doctor 'P'. The railway Co. made inquiries and on legal advice sued P for conspiring with M to defraud the railway Co. 'P' was acquitted and he filed an action for malicious prosecution against the railway. It was held that railway Co. had reasonable and probable cause.

Another essential ingredient is malice. Malice means presence of some improper or wrongful motive, an intent to use the legal process in question for some other purpose e. g. a wish to injure the other party rather than to vindicate law or justice. Mere acquittal of the plaintiff is no proof of malice. It may be malice if the person acted in undue haste, recklessly or failed in making proper and due inquiries or in sprit of retaliation or on account of long standing enmity.

The last essential ingredient is that the person has been acquitted or the conclusion of proceeding is in favour of the plaintiff and consequent to it the plaintiff has suffered damage. If proceedings terminate in favour of the plaintiff but he has not suffered any damage, then no action for malicious prosecution lies. On account of the prosecution one must suffer damage, the damage may be injury to ones fame, reputation. It may also put in danger his life or liberty, or it may result in damage to his property.

NERVOUS SHOCK/EMOTIONAL DISTRESS/PSYCHIATRIC INJURY

"Sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind".

"Sudden assault on the nervous system."

Courts have awarded damages for emotional distress as far back as 1897 in the famous case of Wilkinson v Downton,[1897] 2 Q.B. 57 which concerned a practical joke gone awry. In Wilkinson the Defendant, as a joke, told the plaintiff that her husband had been severely injured in an accident causing her shock and resulting in a period of incapacity.

In Wilkinson, Mr. Justice Wright enunciated the principle "that if a person willfully does an act, calculated to cause harm to another, and thereby infringes his legal right to personal safety, and in consequence causes physical harm including

mental distress, a cause of action arises in the evidence of lawful justification for the act."4 What is noteworthy about Wilkinson is that this statement of principle was made well before the Court created the tort of negligent infliction of mental distress.

When liability for psychological injury becomes available, the pool of potential plaintiffs can expand to include the individual bystanders to the incident, family members who suffer emotional damage upon seeing the incident, and even friends of the victim who suffer trauma upon hearing of the event.

A claim for damages for emotional distress can come in a variety of forms. One may be claiming, in the words of Lord Denning, damages for "nervous shock". Other commonly used terms are damages for emotional upset, intentional infliction of mental distress, negligent infliction of emotional distress or negligent infliction of psychiatric damage. The common element to these claims is that, under Canadian law, the complainant must establish two components: first, the psychological injury suffered by the plaintiff was a foreseeable consequence of the defendant's negligent conduct, and second, that the psychological injury was so serious that it resulted in a recognizable psychiatric illness.

Foreseeability has generally been interpreted as what a "reasonable person" would foresee. In the context of an accident, foreseeable emotional distress means psychiatric injury as a reasonably foreseeable consequence of exposure to the trauma of the accident and its aftermath [McLoughlin v. Arbor Memorial Services Inc. [2004] O.J. No. 5003.].

Within the test of foreseeability, courts have recognized the importance of proximity.

Liability will only attach where a duty of care can be established. In general, judges have an easier time dealing with cases where the conduct of the defendant directly affects the plaintiff.

However, many cases of nervous shock are not pursued by the primary victim, but by the secondary victim. Secondary victims either see or hear of a tragic event, and suffer emotional damage therefrom.

Courts have chose to deal with the issue of proximity by differentiating between the duty required for a primary versus a secondary victim. To collect damages, a primary victim needs to show only that physical injury, not psychiatric damage, is

foreseeable by the conduct of the defendant. In contrast, a secondary victim must establish that psychiatric damage was foreseeable.

It is well established in English law that a person who has intentionally and without good reason caused another emotional distress will be liable for any psychiatric injury that follows. Before a claimant can recover damages for the nervous shock which he suffered as a result of the defendant's negligence, he must prove all of the elements of the tort of negligence.

1.The existence of a duty of care, i.e. the duty on the part of the defendant not to inflict nervous shock upon the claimant.

2.A breach of that duty, i.e. the defendant's actions or omissions in the circumstances fell below what would be expected from a reasonable person in the circumstances.

3.A causal link between the breach and the psychiatric illness, i.e. the nervous shock is the direct consequence of the defendant's breach of duty.

4.The nervous shock was not too remote a consequence of the breach.

PAPER—"LAW OF TORTS, CONSUMER PROTECTION AND MOTOR VEHICLES ACT"

Unit-IV --- Consumer Protection

INTRODUCTION

The expression 'consumer' in the common sense, means 'all of us may be called consumers, when we purchase some movable or immovable property or hire services for various purposes.' But in the present socio economic scenario, we find that the consumer is a victim of many unfair and unethical tactics adopted in the market place. The untrained consumer is no match for the businessman marketing goods and services on an organised basis and by trained professionals. He is very often cheated in the quality, quantity and price of goods and services. The consumer who was once the *'King of the market'* has become the victim of it. He is not supplied adequate information so as to the characteristics and performance of many consumer goods and suffer due to unfairness of many one sided standard forms of contracts. The modern economic, industrial and social development have made the notion of 'freedom of contract' largely a matter of fiction and an empty slogan so far as many consumers are concerned.

The *caveat emptor*- 'let the buyer beware' doctrine of the law concerning the sale of goods, assumed that the consumer was responsible for protecting

himself and would do so by applying his intelligence and experience in negotiating the terms of any purchase. That principle may have been appropriate for transactions conducted in village markets. In early times, the consumer may have been able to protect himself since the products were less sophisticated and could be inspected before purchase. But now the conditions have changed. Many modern goods are technological mysteries. The consumer knows little or nothing about these highly sophisticated goods. In real life, products are complex and of great variety and consumers and retailers have imperfect knowledge. The principle of caveat emptor, thus, has ceased to be appropriate as a general rule. The consumers need protection by law when goods fail to live up to their promises or indeed cause injury.

With globalisation and development in the international trade and commerce, there has been substantial increase of business and trade, which resulted in a variety of consumer goods and services to cater to the needs of the consumers. In recent years, there has been a greater public concern over consumer protection issues all over the world. Taking into account the interest and needs of consumers in all countries, particularly those in developing countries, the consumer protection measures should essentially be concerned with- (i) the protection from hazards to health and safety; (ii) the promotion and protection of economic interests; (iii) access to adequate information; (iv) control on misleading advertisements and deceptive representation; (v) consumer education; (vi) effective consumer redress. The consumer deserves to get what he pays for in real quantity and true quality. This lecture deals with the basic concept of consumer, services and goods. The object of this lecture is to focus on the progressive and social welfare legislations designed to protect the interests of the consumers.

BASIC CONCEPTS: CONSUMER, SERVICE, GOODS

CONSUMER

The expression consumer is defined in S. 2(1)(d) of the Act. The primary purpose of the definition is to restrict the availability of consumer remedies only. The method adopted is to confine the Act to non-business buyers from business sellers.

According to Section 2(d), 'CONSUMER' means any person who-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payments, when such services are availed of with the approval of the first-mentioned person;

[Explanation: For the purposes of sub-clause (i), “commercial purpose” does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;]

The definition of the term 'consumer' given in clause (d) of section 2(1) of the Act is comprehensive one so as to cover not only consumer of goods but also consumer of services. The definition is wide enough to include in

consumer not only the person who buys any goods for consideration but also any user of such goods with the approval of the buyer. Similarly, it covers any person who hires or avails of any services for consideration and also includes any beneficiary of such services, when availed with the approval of the hirer. Thus, any user of goods or any beneficiary of services. other than the actual buyer or hirer, is a consumer for the purpose of this Act and he is competent to make a complaint before the Consumer Redressal Forum under this Act. The Act aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of service. The important characteristic of goods and services under the Act is that such goods are supplied at a price to cover the costs which consequently result in profit or income to the seller of goods or provider of services. It includes anyone who consumes goods or services at the end of the chain of production.

The Supreme Court in its decision in *Lucknow Development Authority v. M. K. Gupta* [(1994) 1 SCC 243] noted that the word 'consumer' is comprehensive expression. It extends fro am person who buys any commodity either as eatable or otherwise from a shop, business house, corporation, store, fair-price shop to use it for private use or consumption and not for a commercial purpose. The term 'consumer' also includes any person who uses the goods with the permission of the buyer though he is not himself buyer.

CONSUMER OF GOODS

Under sub-clause (i) of section 2(1)(d), a consumer for the purpose of goods means any person, who-

a. buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and

b. includes any user of such goods other than the person who buys them, when such use is made with the approval of the buyer, but

c. does not include any person who obtains such goods for resale or for any commercial purpose. Commercial purpose does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self- employment.

The above provision reveals that a person claiming himself as a consumer should satisfy that- (i) there must be a sale transaction between the seller and the buyer; (ii) the sale must be of goods; the buying of goods must be for consideration; (iv) the consideration has been paid or promised or partly paid and partly promised, or under any system of deferred payment; and (v) the user of the goods may also be a consumer when such use is made with the approval of the buyer.

However, the term consumer does not include a person who obtains any goods for resale or for any commercial purpose. It is obvious that the parliament intended to restrict the benefits of the Act to ordinary consumers purchasing goods wither for own consumption or even for use in some small venture which they may have embarked upon in order to make a living as distinct from large scale manufacturing or processing activity carried on for profit.

Consumer of Services

The second category of consumer laid down under the act is that of hirer or user of services. Under sub-clause (ii) of Section 2(1)(d) of the Act, a consumer for the purpose of services means any person, who-

a. hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and

b. includes any beneficiary of such services other than the person who hires or avails of them when such services are availed of with the approval of the hirer; but.

c. does not include a person who avails of such services for nay commercial purpose. Commercial purpose does not include a person of services availed by him exclusively for the purpose of earning his livelihood, by means of self-employment.

In order to be a consumer for the purpose of services, it is necessary that the services must have been hired or availed of for consideration. But it is not necessary to pay the consideration immediately, it may be paid afterwards or in instalments. A student hiring the services of the university on payment of fees for appearing at the examination; or passenger getting railway reservation after payment is hiring service for consideration, is a consumer of services.

Service

The term services according to sec. 2(1)(o) means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying a news or other information, but does not include the rendering of any services free of charge or under a contract of personal service.

In *R.C. Dixit v. Principal, St. Paul School*, [(2002) III CPJ 5] the complainant's daughter was admitted in school on payment of various fees and security deposits. Since there was no proper arrangement in the school for teaching economics, the complainant withdrew daughter and put her in another school. The complainant sought full refund of the fees. The State Commission held

that since the withdrawal from the school was voluntary, admission fees and monthly tuition fees were not refundable, whereas the annual maintenance, support fees and library fees were refundable after proportionate deduction on account of deficiency in services.

AUTHORITIES FOR CONSUMER PROTECTION

Introduction

The consumer movement in India arose out of dissatisfaction of the consumers as many unfair practices were being indulged in by the sellers. There was no legal system available to consumers to protect them from exploitation in the marketplace. For a long time, when a consumer was not happy with a particular brand product or shop, he or she generally avoided buying that brand product, or would stop purchasing from that shop. It was presumed that it was the responsibility of consumers to be careful while buying a commodity or service. It took many years for organisations in India, and around the world, to create awareness amongst people. Because of all these efforts, the movement succeeded in bringing pressure on business firms as well as government to correct business conduct which may be unfair and against the interests of consumers at large. A major step was taken on 24th of December 1986 by the Indian government to safeguard the interest of the consumer by enacting a comprehensive legislation- the Consumer Protection Act, 1986. The Consumer Protection Act, 1986 is a social benefit oriented legislation and the provisions of the Act have to be construed as broadly as possible in favour of the consumer to achieve the purpose of the enactment but without doing violence to its language.

It may be mentioned at the outset that anyone interested in the task of consumer protection movement has to be well versed in various laws and not

merely with the Consumer Protection Act, 1986. He should have knowledge of laws relating to Contract, Tort, Railways, Telegraphs, Telephones, Post, Air Travel, Insurance, Electricity, Water, Housing, Medicine, Banking, Finance, Engineering, Motor Vehicles, Hotel Industry, Entertainment, Cooperative Societies, Tourism Agencies, Sales Tax, Central Excise, Limitation, Transport etc. There is no limit to subjects, which may come before a Consumer Forum / Commission for decision. In addition, one should also be well versed with the laws relating to unfair trade practice and restrictive trade practices. Be it as it may. In India various Acts intended to protect the consumers against different forms of exploitation were enacted.

According to the Preamble, the purpose of the Act is:

To provide for the better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers disputes and for matters connected therewith.

The object and purpose of enacting the Act is to render simple, inexpensive and speedy remedy to the consumers with complaints against defective goods and deficient services and for that a quasi-judicial machinery has been sought to be set up at the District, State and Central levels. These quasi-judicial bodies are required to observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance with the orders given by the quasi-judicial bodies have also been provided.

Authorities for Consumer Protection

Prior to the Consumer Protection Act, 1986 for any consumer complaint one had to go to an ordinary Civil Court. he had to engage a lawyer, pay the

necessary Court fee and he was harassed for years before any outcome, positive or negative, was there in that litigation. Under the Consumer Protection Act, no Court fee has to be paid and the decision on the complaint is more quicker, as the court can evolve a summary procedure in disposing of the complaint. Under the Act, the Consumer Disputes Redressal agencies, which have been set up are:

1. Consumer Disputes Redressal Forum to be known as *District Forum*.

2. Consumer Disputes Redressal Commission to be known as *State Commission* and

3. National Consumer Disputes Redressal Commission known as *National Commission*.

District Forum

Composition of the District Forum (Section 10)

Each District Forum shall consist of the following :

(a) a person who is, or has been, or is qualified to be a District Judge, who shall be its President;

(b) two other members, one of whom shall be a woman, who shall have the following qualifications, namely :-

(i) be not less than thirty-five years of age, (ii) possess a bachelor's degree from a recognized university, (iii) be persons of ability, integrity and standing, and have adequate problems relating to economics, law, commerce, accountancy, industry public affairs or administration: Provided that a person shall be disqualified for appointment as a member, if he-

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

the Government or a body corporate owned or controlled by the Government; or (e) has, in the opinion of the state Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member; or (f) has such other disqualifications as may be prescribed by the State Government.

Method of appointment

Every appointment under sub-section (I) shall be made by the State Government on the recommendation of a selection committee consisting of the following, namely :-

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

Provided that where the President of the state Commission is, by reason of absence or otherwise, unable to act as Chairman of the Selection Committee, the State Government may refer the matter to the Chief Justice of the High Court for nominating a sitting Judge of that High Court to act as Chairman.

Terms of Office and Salary

Every member of the District Forum shall hold office for a term of five years or up to the age of 65 years, whichever is earlier.

Provided that a member shall be eligible for re-appointment for another term of five years or up to the age of sixty-five years, whichever is earlier, subject to the condition that he fulfils the qualifications and other conditions for appointment and such re-appointment is also made on the basis of the recommendation of the Selection Committee.

Provided also that a person appointed as the President or as a member, before the commencement of the Consumer Protection (Amendment) Act,

2002, shall continue to hold such office as President or member, as the case may be, till the completion of his term.

The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the District Forum shall be such as may be prescribed by the State Government.

Jurisdiction of the District Forum (Section 11)

Subject to the other provisions of this Act, the District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed does not exceed rupees 20 lakhs.

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

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or carry on business or have a branch office, or personally work for gain, as the case may be, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

In *Kurukshetra University v. Vinay Prakash Verma,* (1993) CPJ 647, it was held that objection & regarding territorial jurisdiction should be taken at the earliest opportunity or the same deemed to have been waived.

Further in Consumer *Education and Research Society v. Canara Bank*, (1991 CPR 405, it has been held a petition of complaint can be filed against corporation carrying on business within the territory of District Forum or Commission even though its sole or principal office is situated outside state limits.

Manner in which complaint shall be made (Section 12)

(1) A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by-

(a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;

(b) any recognised consumer association whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not;

(c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or

(d) the Central or the State Government, as the case may be, either in its individual capacity or as a representative of interests of the consumers in general.

(2) Every complaint filed under sub-section (1) shall be accompanied with such amount of fee and payable in such manner as may be prescribed.

(3) On receipt of a complaint made under sub-section (1), the District Forum may, by order, allow the complaint to be proceeded with or rejected:

Provided that a complaint shall not be rejected under this sub-section unless an opportunity of being heard has been given to the complainant:

Provided further that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint was received.

(4) Where a complaint is allowed to be proceeded with under sub-section (3), the District Forum may proceed with the complaint in the manner provided under this Act:

Procedure on receipt of complaint (Section 13)

(1) The District Forum shall, on admission of a complaint, if it relates to any goods,-

(a) refer a copy of the complaint to the opposite party mentioned in the complaint directing him to give his version of the case within a period of *thirty days* or such extended period not exceeding *fifteen days* as may be granted by the District Forum;

(b) where the opposite party on receipt of a complaint referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the consumer dispute.

For the purposes of this section, the District Forum shall have the same powers as are vested in a civil court under Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:-

(i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath,

(ii) the discovery and production of any document or other material object producible as evidence,

(iii) the reception of evidence on affidavits, (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any

other relevant source. (v) issuing of any commission for the examination of any witness, and (vi) any other matter which may be prescribed.

Every proceeding before the District Forum shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860), and the district Forum shall be deemed to be a civil court for the purposes of section'" 195, and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

It has been held in *Sagli Ram v. General Manager, United India Insurance Co. Ltd*., II (1994) CPJ 444 that a consumer knocking at the door of the redressal agencies under the Act for relief in a consumer dispute must do so with clean hands; 1994 (I) CPR 434.

Finding of the District Forum (Section 14)

If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely:- .

(a) to remove the defect pointed but by the appropriate laboratory from the goods in question;

(b) to replace the goods with new goods of similar description which shall be free from any defect;

(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;

(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;

Provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit:

e) to remove the defects in goods or deficiencies in the services in question;

(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(g) not to offer the hazardous goods for sale;

(h) to withdraw the hazardous goods from being offered for sale;

(ha) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;

(hb) to pay such sum as may be determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

Provided that the minimum amount of sum so payable shall not be less than five per cent of the value of such defective goods sold or services provided, as the case may be, to such consumers:

Provided further that the amount so obtained shall be credited in favour of such person and utilized in such manner as may be prescribed;

(hc) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;)

(i) to provide for adequate costs to parties.

Appeal (Section 15)

Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed:

Provided that the State commission may entertain an appeal after the expiry of the said period of thirty days If it is satisfied that there was sufficient cause for not filing it within that period.

In *General Manager. Telecom v. Jyantilal Hemchand Gandhi*, 1993 (III) CPR 155. it was held that the appellate fora constituted under the Act should not dismiss the appeal merely on the ground of default of appearance of the appellant but the merits of the case should be considered on the basis of the material available before them and thereafter pass appropriate order in the appeal;

Composition of the State Commission (Section 16)

Each State Commission shall consist of:

(a) a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President:

Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court;

(b) not less than two, and not more than such number of members, as may be prescribed, and one of who shall be a woman, who shall have the following qualifications, namely:-

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

Provided that not more than fifty per cent of the members shall be from amongst persons having a judicial background.

Every appointment under Sub-section (1) shall be made by the State Government on the recommendation of a Selection Committee consisting of the following members, namely:-

(i) President of the State Commission -Chairman. (ii) Secretary of the Law Department of the State -Member. (iii) Secretary, incharge of Department dealing with consumer affairs in the State -Member. Provided that where the President of the State Commission is, by reason of absence or otherwise, unable to act as Chairman of the Selection Committee, the State Government may refer the matter to the Chief Justice of the High Court for nominating a sitting Judge of that High Court to act as Chairman.

The salary or honorarium and other allowances payable to, and the other terms and conditions of service of, the members of the State Commission shall be such as may be prescribed by the State Government.

Every member of the State Commission shall hold office for a term of five years or up to the age of sixty-seven years, whichever is earlier:

Provided that a member shall be eligible for re-appointment for another term of five years or up to the age of sixty-seven years, whichever is earlier, subject to the condition that he fulfils the qualifications and other conditions.

Jurisdiction of the State Commission (Section 17)

Subject to the other provisions of this Act, the State Commission shall have jurisdiction-

(a) to entertain- (i) complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees exceeds rupees 20 lakhs but does not exceed one crore ; and (ii) appeals against the orders of any District Forum within the State; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

A complaint shall be instituted in a State Commission within the limits of whose jurisdiction –

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or (b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided that in such case either the permission of the State Commission is given or the opposite parties who do not reside or carry on business or have a branch office or personally works for gain, as the case may be, acquiesce in such institution; or (c) the cause of action, wholly or in part, arises.)

In *Kashyap Constructions (Pvt.) Ltd.v. Delhi Development Authority,* 2001 (1) CPR. 128. It was held that the State Consumer Disputes Redressal Commission has no jurisdiction to entertain complaints regarding the transactions of shops/kiosks having been purchased in auction from the Delhi Development Authority;

Appeals (Section 19)

Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 17 may prefer an appeal against such order to the National Commission within a

period of thirty days from the date of the order in such form and manner as may be prescribed.

Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

Composition of the National Commission (Section 20)

The National Commission shall consist of-

(a) a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President; -

Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of India;

(b) not less than four, and not more than such number of members, as may be prescribed, and one of whom shall be a woman, who shall have the following qualifications, namely :-

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

Provided that not more than fifty per cent of the members shall be from amongst the persons having a judicial background.

Provided further that a person shall be disqualified for appointment, if he –

(a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the Central Government, involves moral turpitude; or (b) is an undischarged insolvent; or (c) is of unsound mind and stands so declared by a competent court; or (d) has been removed or dismissed from the service of the

Government or a body corporate owned or controlled by the Government; or (e) has, in the opinion of the Central Government, such financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member; or (f) has such other disqualifications as may be prescribed by the Central Government:

Provided that every appointment under this clause shall be made by the Central Government on the recommendation of a Selection Committee consisting of the following, namely ;-

(a) a person who is a Judge of the Supreme Court, to be nominated by the Chief Justice of India -Chairman. (b) the Secretary in the Department of Legal Affairs in the Government of India -Member (c) Secretary of the Department dealing with consumer affairs in the Government of India -Member.

Salary and Term of Office

The salary or honorarium and other allowances payable to and the other terms and conditions of service of the members of the National Commission shall be such as may be prescribed by the Central Government.

Every member of the National Commission shall hold office for a term of five years or up to the age of seventy years, whichever is earlier and shall not be eligible for re- appointment.

Provided that a member shall be eligible for re-appointment for another term of five years or up to the age of seventy years, whichever is earlier, subject to the condition that he fulfils the qualifications and other conditions for appointment.

Jurisdiction of the National Commission (Section 21)

Subject to the other provisions of this Act, the National Commission shall have jurisdiction-

(a) to entertain- (i) complaints where the value of the goods or services and compensation, if any claimed exceeds one crore; and (ii) appeals against the orders of any State Commission; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

Appeal (Section 23)

Any person, aggrieved by an order made by the National Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 21, may prefer an appeal against such order of the Supreme Court within a period of thirty days from the date of the order:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

Limitation Period (Section 24A)

The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

A complaint may be entertained after the period if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.

Dismissal of Frivolous or Vexatious Complaints (Section 26)

Where a complaint instituted before the District Forum, the State Commission or, as the case may be, the National Commission is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees, as may be specified in the order.

REMEDIES

In this lecture you will be able to know the remedies available to consumer under the Consumer Protection Act, 1986.

The main objective of the Act is to provide simple, speedy and inexpensive redressal to the consumer's grievances. To provide this, a three-tier quasi-judicial machinery at the national, state and district level has been envisaged under the Act; National Consumer Disputes Redressal Commission (National Commission).; State Consumer Disputes Redressal Commission (State Commission); District Consumer Disputes Redressal Forum (District Forum).

The District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed does not exceed rupees 20 lakhs. A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction:-

- The opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually

and voluntarily resides or carries on business, or has a branch office or personally works for gain; or

- Any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain. In such a case, it is necessary that there should be either the permission of the District Forum, or the acquiescence in the institution of the suit, of such of the opposite parties who do not reside or carry on business or have a branch office, or personally work for gain, as the case may be, or
- The cause of action, wholly or in part, arises.

In J.K. Synthetics Ltd. V. Smt. Amita Bhargava, II (1993) C.P.J. 242 (N.C.), the registered office of the O.P. was at Kanpur. Payment was made through a bank in Delhi. Complaint filed in Calcatta was held to be outside the territorial jurisdiction of the District Forum. The order passed by the Calcatta District Forum was set aside.

Complaint can be filed by consumer, any voluntary organisation representing consumers registered under Companies Act/Societies Act, Central Government, State Government or Union Territory, and a group of consumers having common dispute.

Remedies:

The District Forum / State Commission / National Commission may pass one or more of the following orders to grant relief to the aggrieved consumer :

- to remove the defects pointed out by the appropriate laboratory from goods in question
- to replace the goods with new goods of similar description which shall be free from any defect

- to return to the complainant the price, or, as the case may be, the charges paid by the complainant
- to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to negligence of the opposite party;
- to remove the defects or deficiencies in the services in question
- to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them
- not to offer the hazardous goods for sale
- to withdraw the hazardous goods from being offered for sale
- to provide for adequate costs to parties.

By the Consumer Protection (Amendment) Act, 1993, the District Forum has been specifically empowered to order that the defects or deficiencies in the services in question be removed, or to discontinue or not to repeat any unfair or restrictive trade practice, not to offer for sale, or to withdraw the hazardous goods from the market, or to provide adequate costs to the parties.

The term 'service', according to sec. 2(1)(o) means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electric or other energy, board or lodging or both, entertainment, amusement or the purveying a news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. Deficiency, according to sec. 2(1)(g), means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained to be performed by a person in pursuance of a contract or otherwise in relation to any service.

In Dist. Engineer Telecom., Sriganganagar v. Dr. Tej Narain Sharma, III (1995) C.P.C. 225, the dues of the telephone bill had been deposited by the complaint after the due date, 22 days after this deposit the telephone was disconnected without even remaining the complaint on phone. The phone remained disconnected for 15 days. The disconnection was held to be due to the negligence and same amounted to deficiency in services. The compensation was awarded for mental distress, agony and loss of reputation.

In Union of India v. Nathmal Hansaria, I (1997) C.P.J. 20 (N.C.), the daughter of the complainant, fell down and died while passing through inter-connecting passage in the Tinsukhia Mail going from Delhi to Guwahati. The passage was not protected by any grills, etc. The State Commission awarded compensation of Rs. 2 lacs for death of girl and Rs. 25,000/- for mental agony, etc. to the parents of the deceased on account of deficiency in service by the opposite party, Railways. The decision was upheld by the National Commission.

In a significant ruling in Vasantha P. Nair v. Smt. V.P. Nair, I (1991) C.P.J. 685, the National Commission upheld the decision of the Kerala State Commission which said that a patient is a consumer and the medical assistance was a service and therefore, in the event of any deficiency in the performance of medical service, the consumer courts can have the jurisdiction. It was further observed that the medical officers service was not a personal service so as to constitute an exception to the application of the Consumer protection Act.

Supreme Court in its landmark decision in Indian Medical Association v. V.P. Shantha and others, III (1995) C.P.J. I (S.C.), has held that patients aggrieved by any deficiency in treatment, from both private clinics and Govt. hospitals, are entitled to seek damages under the Consumer Protection Act.

Procedure on Admission of Complaint by District Forum:

District forum shall refer a copy of the admitted complaint within 21 days from the date of admission to the opposite party (i.e admissibility of the complaint shall be decided within 21 days from the date on which the complaint was received), directing him to give his version of the case within 30 days or such extended period not exceeding 15 days as may be granted by the district forum.

After giving due opportunity to the opposite party to represent his case, the district forum shall proceed to settle the case. If the opposite party omits or fails to represent his case within the given time, the district forum can pass ex-parte order.

An endeavour shall be made to decide the complaint within 3 months from the date of receipt of notice by the opposite party where the goods does not require any testing; and within 5 months, where any testing or analysis of the goods is needed. No adjournments shall be ordinarily allowed unless sufficient cause is shown and reasons for adjournments have been recorded in writing by the forum.

District forum can pass interim order as may be deemed just and proper in the facts and circumstances of the case.

There is also a provision (sub sec 7 to sec 13) for substitution of the representative on the death of a party in the event of death of a complainant who is consumer or of the opposite party. In Balbir Singh Makal v. Sir Ganga Ram Hospital, I (2001) C.P.J. 45 (N.C.), there was a complaint against a surgeon for medical blunder which resulted in the death of the complainants son. While the complaint was pending the surgeon died. It was held by the national

Commission that on the death of the surgeon the cause of action had come to an end. Hence, the legal heirs of the surgeon could not be made liable for the surgeon's negligence.

Under the law of torts, the rule is 'actio personalis moritur cum persona', which means that the personal action against the defendant dies with the death of the defendant. That the rule has been recognized in respect of the consumer cases.

Appeal to State Commission shall be made within a period of 30 days and shall be disposed of within a period of 90 days.

The district forum, the state commission or the national commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen. However it may be extended after prescribed period, if the complainant satisfies the forum, or commission, as the case may be, that he has sufficient cause for not filing appeal within such period. Reasons for condoning delay must be recorded.

The delay in filing an appeal may be condoned if the appellant is able to show that there was sufficient cause for such delay. In Vice Chairman, D.D.A. v. O.P. Gauba, III (1995) C.P.J. 18 (N.C.), there was delay of 38 days by the Delhi Development Authority in making the appeal. The grounds for delay were the examining of the case from all its aspects at different levels. It was held that delay caused by inter office consultations is not sufficient cause and hence the delay was not condoned.

In Delhi Development Authority v. I.S. Narula, II (1995) C.P.J. 333, certified copy of the order of the District Forum was received by the appellant on 13-7-94. The appeal was filed on 27-9-94. The alleged reason for the delay was public

holidays on 14th and 15th August, 1994, strike in Tis Hazari Court, and procedural delay in obtaining sanction of D.D.A. by the Counsel for filing the appeal. The Supreme Court observed that the power of condonation should be exercised liberally. There was held to be sufficient cause, and, hence, the delay was condoned.

If the opposite party fails to appear and contest, the District Forum may proceed and pass an ex parte order. If sufficient cause is shown for not appearing in the case, an ex parte order may be set aside. The District Forum, which has the right to pass an ex parte order has also the power to set aside the same. In Maya Mitra v. K.P. Equipments, I (1996) C.P.J. 330 (West Bengal S.C.D.R.C.), it has been held that the District Forum, which has the right to decide the case ex parte if the opposite party or his agent fails to appear on the date of the hearing, has also the right to set aside the order if sufficient cause is shown provided that such a prayer is made early, without any undue delay.

If the complainant fails to appear on the date of hearing, the District Forum may dismiss the complaint in default. Such a dismissal of the complaint may be set aside and the complaint may be restored. In Kamlesh Bansal v. Balaji Land Traders,III (1995) C.P.J. 510 Delhi S.C.D.R.C, the complainant filed a complaint and failed to appear on the date fixed by the District Forum for ex parte evidence. Within 23 days of dismissal of complaint, the complainant applied for the restoration of the complaint. The said application was rejected on the ground that the District Forum could not restore the complaint. It has been held by the Delhi State Commission that the Commission, while excising appellate jurisdiction, can set aside the order of the District Forum dismissing the said application for restoring the complaint.

It is necessary that the Forum should take into account the evidence and the documents produced by the parties and the order of the forum should be speaking order, i.e., it should give reasons for the order. In K.S. Sidhu v. Senior Executive Engineer, I (2001) C.P.J. 144 (Punjab S.C.D.R.C), the complaint filed before the District Forum was dismissed by a non-speaking Order. The order did not discuss the evidence and the documents submitted before it. It was held that such an order was unjust and arbitrary and was liable to be set aside on that ground.

Similarly complaints can be made to State Commission and National Commission if the pecuniary value of the goods or services and compensation, if any, claimed exceeds Rs. 20 lakhs and below one crore. National Commission can entertain complaints where the value of the goods or services and compensation, if any, claimed exceed one crore, and it can entertain appeals against the orders of any State Commission.

Every order made by the District Forum, the State Commission or the National Commission may be enforced by the District Forum, the State Commission or the Nation Commission as the case may be, in the same manner as a decree or order made by a civil court. If the said authorities are not able to execute their orders themselves, they may forward the same for execution to the Court, in the following manner:

i. If the execution is sought against a company, it may be sent to a court within the local limits of whose jurisdiction the registered office of the company is situated, and
ii. If the execution is sought against any person, it may be sent to the Court within the local limits of whose jurisdiction the place where the

person concerned voluntarily resides or carries on business or personally works for him, is situated.

The court to which the order is to sent, shall then execute the order as if it were a decree or order sent to it for execution.

The procedures under the Act and under the Commissions are relatively simpler and more informal than under normal litigation. In fact any consumer can appear before the commission and need not even hire a lawyer to argue one's case. Despite the simple procedures there have not been too many consumer cases in India unlike the United States where the courts are filled with consumer grievances. One of the reasons for this fact has been the lack of adequate consumer awareness of their rights in India and the seemingly intimidating structure of courts and the legal profession. However to its credit, it must be said the Consumer Protection Act remains one of those rare laws which allows for a speedy and simple protection of the rights of ordinary people, and judicious use of the same would foster a greater consumer movement in India in this age where the market is flooded with more products but not necessarily more information.

PAPER—"LAW OF TORTS, CONSUMER PROTECTION AND MOTOR VEHICLES ACT"

Unit-V--Motor Vehicles Act

Introduction

In this Unit general overview of the Motor Vehicles Act,1988 will be given.

First of all I would like to acquaint you with the basic aim of the Motor Vehicles Act,1988. The Motor Vehicles Act,1988 is a comprehensive enactment in respect to various matters relating to traffic safety on the roads and minimization of road accidents. The Act came into force from 1 july 1989. It replaced Motor Vehicles Act,1939, which earlier replaced the first such enactment Motor Vehicles Act,1914.

The Act provides in detail the legislative provisions regarding licensing of drivers/ conductors, registration of motor vehicles, control of motor vehicles through permits, special provisions relating to State transport undertakings, traffic regulations, insurance, liability, offences and penalties etc.

There are various rights created for claiming compensation in case of any death or bodily injury caused in an accident arising out of the use of motor vehicles.

By the Motor Vehicles (Amendment) Act, 1994, inter alia, amendments were made for make special provisions under sections 66 & 67 so as to provide that vehicles operating on eco–friendly fuels shall be exempted from the requirements of permits and also the owners of such vehicles shall have the discretion to fix fares and freights for carriage of passengers and goods. The intention in bringing the said amendments was to encourage the operation of vehicles with such eco-friendly fuels.

Over the years, judiciary has not only been called upon time to time to interpret these statutory provisions and apply them to different facts and situations, but also to lay down various legal principles for assessing compensation. The Motor Vehicles Act,1988, does not provide any guidelines for the identification of the items of loss to be compensated, nor does it lay down any criteria for the compilation of the quantum of compensation for each item of loss.

This is an Act to make a comprehensive rewiew of all aspects of Motor Accident Compensation law. An Act to consolidate and amend the law relating to motor vehicles.

Liability rule deal with the unintended accidents and related issues. A suit under liability rules is generally a private suit (over injuries) as opposed to a criminal prosecution. If the legal requirements are fulfilled, the injurer is required to compensate the victim.

Dear students, now we will study the rules for compensation under Motor Vehicles Act,1988.

COMPENSATION UNDER MOTOR VEHICLES ACT, 1988

Rules for payment of compensation can be discussed under two sub-headings;

a. Fault based liability and
b. no fault liability

Fault based liability and no fault liability

The cases of motor accidents constitute a major bulk of tort cases in India. To prevail in a suit generally , a victim must also demonstrate that the injurer has breached a duty he owe to the victim. When an injurer breaches a legal duty he is said to be “at fault’ or negligent. Breach of a duty is caused by doing something which a reasonable man should do under the circumstances.

The rule of negligence with the defence of contributory negligence holds injurer liable if and only if he was negligent and the victim was not. In India, this rule requires proportional sharing of liability when both parties were negligent. That

is, the compensation the victim receives gets reduced in proportion to his or her negligence.

The rule of strict liability always holds the injurer liable irrespective of the care taken by the two parties.

Before 1988 for motor vehicle accidents liability of injurer was predominantly fault based liability. However, the 1988 amendment to the Act brought in an element of strict liability. The following provision (section. 140) was introduced in the amendment:

"where death or permanent disablement of any person has resulted from an accident arising out of the use of the motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section."

In simple terms, this amendment implied that the injurer or the insurance company of the injurer has to pay a certain amount as compensation to the victim irrespective of whose fault it is.

The Act was further amended in 1994. As a result of this amendment, liability of injurer became even stricter. According to section 163-A:

"Notwithstanding anything containing in this Act or any other law for the time being in force, the owner of the motor vehicle or the authored insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation as indicated in the second schedule, to legal heirs or the victim s the case may be."

The claimant shall not be required to plead or establish that the death or permanent disablement was due to any wrong full act or neglect or default of the owner of the vehicle or the vehicles concerned or any other person.

While filing the damage awards (i.e the liability payments to be made by the injurer to the victim), courts should take into account the entire loss suffered by

victim. A court may entitle the victim to over or under compensation. Such court errors can cause various effects depending upon the liability rule in force.

Motor Vehicles Act,1988, however, recognizes limited 'no fault liability' but only in the cases of death and permanent disablement. While deciding on compensation, courts have applied rule of negligence with defence of contributory negligence. For instance, if the liability is limited to Rs. 50.000 in the case of death and Rs.25,000 in the case of permanent disablement. Such compensation can be claimed without establishing any negligence on the part of owner or the driver of the vehicle. The compensation claimed exceeding the amount can prevail only if negligence is proved.

Liability Without Fault In Certain Cases

Liability without fault in certain cases is dealt under Chapter X of the Act.

Section 140 provides Liability to pay compensation in certain cases on the principle of no fault. – It runs as

(1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicles shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under subsection (1) in respect of the death of any person shall be a fixed sum of 85[fifty thousand rupees] and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of 86[twenty – five thousand rupees].

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force :

Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163 – A."

In Teethi vs. Motor Accidents Claims Tribunal, AIR 1996 Ker 237, it aws observed that under section 140 of the Act, the liability of the owner or owners of the vehicle or vehicles is joint and several. In accidents involving two Motor vehicles, liability to pay compensation is upon both the owners. If only one owner is identified, he is liable to pay compensation.

These provisions apply in cases where the claimant suffers death or permanent disablement, as defined in the Act. The object behind no-fault principle is to give minimum relief expeditiously to the victim of the road accident or his legal representative. To that extent, these provisions constitute a measure of social justice.

The right to claim compensation under section 140 in respect of death or permanent disablement of any person shall be in addition to any other right to claim compensation in respect thereof under any other provision of this Act or of any other law for the time being in force. Thus the claims for death or permanent disablement can also be persued under other provisions of the Act on the basis of negligence.

It was held in Ashok vs. Ashok Singh, 1996 (1) ACJ 392, To claim interim award under no fault liability certificate from a medical practitioner regarding permanent disablement is sufficient.

Similarly in New India Insurance Co. Ltd. Vs. Mithakhan, 1996 (1) ACJ 155, it was held that where compensation is claimed in respect of death or permanent disablement under section 140 of the Act, the claim for compensation is required to be disposed of in the first place in view of section 140(2) of the Act.

Section 141: Provisions as to other right to claim compensation for death or permanent disablement – The section runs as:

"(1) The right to claim compensation under section 140 in respect of death or permanent disablement of any person shall be in addition to 88[any other right, except the right to claim under the scheme referred to in section 163 – A (such other right hereafter] in this section referred to as the right on the principle of fault) to claim compensation in respect thereof under any other provision of this Act or of any other law for the time being in force.

(2) A claim for compensation under section 140 in respect of death or permanent disablement of any person shall be disposed of as expeditiously as possible and where compensation is claimed in respect of such death or permanent disablement under section 140 and also in pursuance of any right on the principle of fault, the claim for compensation under section 140 shall be disposed of as aforesaid in the first place.

(3) Notwithstanding anything contained in sub-section (1), where in respect of the death or permanent disablement of any person, the person liable to pay compensation under section 140 is also liable to pay compensation in accordance with the right on the principle of fault, the person so liable shall pay the first-mentioned compensation and -

(a) if the amount of the first-mentioned compensation is less than the amount of the second-mentioned compensation, he shall be liable to pay (in addition to the first-mentioned compensation) only so much of the second-mentioned

compensation as is equal to the amount by which it exceeds the first-mentioned compensation;

(b) if the amount of the first-mentioned compensation is equal to or more than the amount of the second-mentioned compensation, he shall not be liable to pay the second-mentioned compensation."

For instance if the first mentioned compensation is Rs. 25,000, and second mentioned is Rs.30,000, then the person liable is to pay an extra amount of Rs.5000 in total.

Section 141 makes provision to claim compensation for death or permanent disablement besides the claim for compensation for no fault liability.

For the purposes of this Chapter, under section 142 permanent disablement of a person shall be deemed to have resulted from an accident of the nature referred to in sub-section (1) of section 140 if such person has suffered by reason of the accident, any injury or injuries involving :-

(a) permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint; or

(b) destruction or permanent impairing of the powers of any members or joint; or

(c) permanent disfiguration of the head or face.

LIABILITY OF INSURER

Motor Vehicles Act makes the insurance of Motor Vehicles compulsory. The owner of every motor vehicle is bound to insure his vehicle against third party risk. The insurance Company covers the risk of loss to the third party by the use of the motor vehicle.

Thus if there is insurance against the third party risk, the person suffering due to the accident (third party) caused by the use of motor vehicle may recover compensation either from the owner or the driver of the vehicle, or from the insurance company, or from them jointly.

The policy of Insurance issued by an authorized insurer is;

1. To insure the person or class of person's specified in the policy.
2. Insurer is liable to the extent specified in section 147(2)
3. Liable for death, or bodily injury to any person, or damage to property of third party, or bodily injury to any passenger of a Public Service Vehicle.

1.Insurer's Liability For Third Party Risks—Liability For Injury To Certain Persons Or Class Of Persons (Other Than Gratuitous Passenger And Pillion Rider):

It is well settled that where the contract of insurance covers the risk of third party but not that of the owner or pillion rider of a two wheeler, the liability of the insurance company, in case of this nature, is not extended to a pillion rider of the vehicle.

In Oriental Insurance Co. Ltd. Vs. Sudhakaran; AIR 2008 SC 2729; the deceased was travelling as a pillion rider on a scooter, when she fell down and succumbed to the injuries sustained by her. In terms of section 147 of the Motor Vehicles Act,1988, it is imperative for the owner of the vehicle to take a policy of the insurance in regard to reimbursement of the claim to third party while it is from other risks.. The question involved here was, whether the pillion rider on a scooter would be a third party within the meaning of section 147.

Holding that the pillion rider in a scooter was not to be treated as a third party when the accident had taken place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle, the apex court held that the legal obligation arising under section 147, could not be extended to injury or death of the owner of the vehicle or the pillion rider.

The observations made in connection with carrying passengers in a goods vehicle, it was held would equally apply with equal force to gratuitous passengers (who pays no fare) in any other vehicle.[United India Insurance Co. Ltd vs. Tilak Singh, AIR 2006 SC 1576]

According to Section 2(30**) "owner**" means a person in whose name a motor vehicle stands registered and where such person is a minor, the guardian of such

minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement.

In M/s. Godavari Finance Co. vs. Degala Satyanarayanamma, AIR 2008 SC 2493, referring to the opening words "unless the context otherwise requires", in section 2(30) of 1988 Act, the Apex Court ruled: "In case of motor vehicle which is subject to a Hire-Purchase Agreement, the financer cannot ordinarily be treated to be the owner. The person in possession of the vehicle, and not the financer being the owner, would be liable to pay damages for the motor accident."

Liability is transferred with the transfer of certificate of insurance, as mentioned under section 157 of Motor Vehicles Act,1988. It reads as:

"Trasnfer of certificate of insurance. –

(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfer to another person the ownership of the another vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.

[Explanation. – For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]

(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

2. Extent Of Liability Of The Insurer Under The Act

Section 147(2) of the 1988 Act reads as:

"Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely :-

(a) save as provided in clause (b), the amount of liability incurred.

(b) in respect of damage to any property of a third party, a limit of rupees six thousand :

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier."

Insurer's liability for persons on the roof of a bus:

Section 123 says "(1) No person driving or in charge of a motor vehicle shall carry any person or permit any person to be carried on the running board or otherwise than within the body of the vehicle.

(2) No person shall travel on the running board or on the top or on the bonnet of a motor vehicle."

In New India Assurance Co. Ltd. Vs. Samandari Roadways Co., 1985 ACJ 239, it was held that no person should be carried on the running board or otherwise than within the body of vehicle. In such cases Insurance Co. not liable to pay any compensation.

Hit and run case:

Section 161 deals with the cases where the identity of the vehicle or vehicles involved in the accident cannot be ascertained in spite of reasonable efforts in that behalf. It reads as

Section 161(2): (2) Notwithstanding anything contained in the General Insurance

Business (Nationalisation) Act, 1972 (57 of 1972) or any other law for the time

being in force or any instrument having the force of law, the General Insurance Corporation of India formed under section 9 of the said Act and the insurance companies for the time being carrying on general insurance business in India shall provide for paying in accordance with the provisions of this Act and the scheme, compensation in respect of the death of, or grievous hurt to, persons resulting from hit and run motor accidents.

161(3) reads as: Subject to the provisions of this Act and the scheme, there shall be paid as compensation –

(a) in respect of the death of any person resulting from a hit and run motor accident, a fixed sum of [twenty-five thousand rupees];

(b) in respect of grievous hurt to any person resulting from a hit and run motor accident, a fixed sum of [twelve thousand and five hundred rupees].

Insurer's liability beyond the limits of the Act:

There is no limitation on Insurer to undertake liability beyond the limits of the Act, was held in Sheihhpura Trpt. Co. vs. NIT Ins. CO., AIR 1971 SC 1624.

3.Insurer's Liability For Use Of Vehicle In A Public Place

Vehicle can be said to be in use even when it cannot run e.g. taking out battery, when car is parked.

In a private place owner or driver of vehicle may be liable but insurer not liable. Private place is a place where visitors can go only after permission.

Clause (34) of Section 2 defines "public place". It means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set down by a stage carriage.

CLAIMS TRIBUNALS

Sections 165-175 of Motor Vehicles Act, 1988, deals with;

a. Setting up of a Claims Tribunals

b. Procedure to be followed

c. Award of compensation

A--Claims Tribunals

Section 165(1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claim Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.

Constitution:

Section 165(2) A Claims Tribunal shall consist of such number of members as the State Government may think fit to appoint and where it consists of two or more members, one of them shall be appointed as the Chairman thereof.

Section 165 (4) Where two or more Claims Tribunals are constituted for any area, the State Government, may by general or special order, regulate the distribution of business among them.

Qualification:

Section 165 (3) A person shall not be qualified for appointment as a member of a Claims Tribunal unless he –

(a) is, or has been, a Judge of a High Court, or

(b) is, or has been, a District Judge, or

(c) is qualified for appointment as a High Court Judge[or as a District Judge.]

Matters of adjudication by MACT

Section 165 says that Motor Accidents Claims Tribunals are constituted for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.

Claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles" includes claims for compensation under section 140 and section 163-A.

B--Procedure to be followed

Application for Compensation

Section 166 reads as

(1) An application for compensation arising out of an accident of the nature specified in sub-section

(1) of section 165 may be made –

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be :

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

On the Receipt of Application

Section 166(2) says that; every application under sub - section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides, or carries on business or within the local limits of whose jurisdiction the defendant resides.

Section 166(4): The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act. (i.e report filed by the police will be treated as application).

Simply the MACT, 1. Holds an enquiry.

2. summons the parties and

3. fixes the liability as per the procedure and passes an award.

Award of Claims Tribunal

The finding of MACT, fixing the liability and order for compensation is called award. It is final order. The award should;

a. determine the amount of compensation, which appears to it to be just.
b. Specify the persons to whom compensation shall be paid, and
c. Specify the amount which shall be paid by the insurer, or the owner, or the driver of the vehicle involved in the accident, or by all or any of them, as the case may be.

MACT can in special circumstances review its own award on the application made by a party.

Subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be (section 168).

The Claim Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award (section 168).

When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct.

An appeal against the award lies to a High Court. Before going for appeal the appellant has to deposit Rs.25000/- or 50% of the amount of award, whichever is less in the MACT. Then appeal is allowed.

Section 173 reads as: "(1) Subject to the provisions of sub-section (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court :

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court, unless he has deposited with it twenty-five thousand rupees of fifty per cent, of the amount so awarded, whichever is less, in the manner directed by the High Court :

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees."