RATANLAL & DHIRAJLAL

THE LAW OF TORTS

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RATANLAL & DHIRAJLAL

THE LAW OF TORTS

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CHAPTER I

GENERAL PRINCIPLES

SYNOPSIS

1. THE LAW OF TORTS IN INDIA

UNDER the Hindu Law and Muslim Law tort had a much narrower conception than the tort of the English law.[1] The punishment of crimes in these systems occupied a more prominent place than compensation for wrongs.[2] The law of torts as administered in India in modern times is the English law as found suitable to Indian conditions and as modified by the Acts of the Indian Legislature.[3] Its origin is linked with the establishment of British Courts in India.

[4]The first British Courts established in India were the Mayor's Courts in the three presidency towns of Calcutta, Madras and Bombay. These courts were established in the eighteenth century, and the charters which established them required them "to give judgment and sentence according to justice and right".[5] The Englishmen administering these courts normally drew upon the common law and statute law of England as found suitable to Indian conditions while deciding cases "according to justice and right". This led to introduction in these courts' jurisdiction of the English common and statute law in force at the time so far as it was applicable to Indian circumstances.[6] The Supreme Courts which were established sometime later in those three towns and which replaced the Mayor's Courts were modelled on the English pattern and had such jurisdiction and authority as the court of King's Bench had in

1. PRIYANATH SEN, Hindu Jurisprudence, p. 336; KASHI PRASAD SAXENA, Hindu Law and Jurisprudence, pp. 170, 171; ABDUL RAHIM, Muhamadan Jurisprudence, p. 360; RAMASWAMY IYER'S Law of Torts, 7th edition, (1975), Appendix, pp. 591, 592.
2. PRIYANATH SEN, Hindu Jurisprudence, p. 336.
3. SETALVAD, The Common Law in India, p. 110. SIR FREDERICK POLLOCK prepared a draft code of torts for India but it was never enacted into law; see 5 LQR 362. *Vidya Devi v. M.P. State Road Transport Corporation*, AIR 1975 MP 89 : 1974 ACJ 374 (378). The Indian Law of Torts based on English law is continued by Article 372 of the Constitution which has been interpreted to continue also the Common Law Principles applied in India; SETALVAD, The Common Law in India, pp. 225, 226; *Building Supply Corporation v. Union of India*, AIR 1965 SC 1061 (1068) : (1965) 2 SCWR 124 : (1965) 2 SCA 68 : (1967) 2 SCR 289.
4. The whole of this para with only a little variation has been adopted by SETH, J., in *Union Carbide Corporation v. Union of India*, 1988 MPLJ 540.
5. Letters Patent of September 24, 1726, the 13th year of the Reign of George I.
6. SETALVAD, The Common Law in India, pp. 12, 13; *Advocate General of Bengal v. Ranee Surnomoye Dossee*, (1863) 9 MIA 387 (426, 427).

England by the common law of England. The Supreme Courts were superseded by High Courts in those three towns, but the jurisdiction to administer the English common law was continued. The law of torts is part of the common law, and it was thus that the English law of torts came to be applied in the cities of Calcutta, Madras and Bombay. But the common law so applied by the High Courts of Calcutta, Madras and Bombay is applied only by those courts in the exercise of their ordinary original civil jurisdiction as distinguished from appellate jurisdiction, that is, the jurisdiction to hear appeals from decrees of mofussil courts. As regards other courts in India, there is no express provision for the administration of the English common law. These courts have been established by Acts almost all local, and the Acts establishing them contain each a section which requires them, in the absence of any specific law or usage, to act according to "justice, equity and good conscience".[7] The expression "justice, equity and good conscience" was interpreted by the Privy Council to mean "the rules of English law if found applicable to Indian society and circumstances".[8] The law as stated above is also the law to be administered by each of the High Courts in India in the exercise of its appellate jurisdiction.[9]

It has also been held that section 9 of the Code of Civil Procedure, which enables a Civil Court to try all suits of a civil nature, impliedly confers jurisdiction to apply the law of Torts as principles of justice, equity and good conscience.[10]

The law of torts or civil wrongs in India is thus almost wholly the English law which is administered as rules of justice, equity and good conscience. The Indian courts, however, before applying any rule of English law can see whether it is suited to the Indian society and circumstances.[11] The application of the English law in India as rules of justice, equity and good conscience has, therefore, been a selective application.[12] Further, in applying the English law on a particular point, the Indian courts are not restricted to the common law. The English law consists both of common law and statute law and the Indian courts can see as to how far a rule of common law has been modified or abrogated by statute law of England. If the new rules of English statute law replacing or modifying the common law are more in consonance with justice, equity and good conscience, it is open to the courts in India to reject the outmoded rules of common law and to apply the new rules. It is on this reasoning that the principles of the English statute, the Law Reform (Contributory Negligence) Act, 1945, have been applied in India although there is still no

7. For example, section 6 of the Central Provinces Laws Act, 1875.
8. *Waghela Rajsanji v. Shekh Masludin*, (1887) 14 IA 89, 96; ILR (1887) 11 Bom 551 (561); *Baboo Thakur Dhobi v. Mst. Subanshi*, (1942) Nag LJ 199 : ILR (1942) Nag 650 : AIR 1942 Nag 99; *Vidya Devi v. M.P. State Road Transport Corporation*, AIR 1975 MP 89 : 1974 ACJ 374 (378). The Supreme Court in *Rattan Lal v. Vardesh Chander*, AIR 1976 SC 588 (597) : (1976) 2 SCC 103 : (1976) 2 SCR 906 has held that in free India principles of justice, equity and good conscience should not be equated to English Law. The ruling in *Rattanlal's* case was given in the context of necessity of notice for forfeiture of a lease and not in the context of application of the English Law of torts. *Rattanlal's* case cannot be taken to have forbidden the application of the English Law of torts as is found suitable to Indian conditions which came to be introduced in India during the British period as principles of justice, equity and good conscience.
9. As to Calcutta, Madras and Bombay, see, Letters Patent, Clause 21; as to Allahabad, Patna, Lahore and Nagpur, see, Letters Patent, Clause 14.
10. *Union Carbide Corporation v. Union of India*, 1988 MPLJ 540.
11. See, the observations of KRISHNA AIYAR, J., in the context of the tort of conspiracy in *Rohtas Industries Ltd. v. Rohtas Industries Staff Union*, (1976) 2 SCC 82 (93) : AIR 1976 SC 425—"We cannot incorporate English torts without any adaptation into Indian Law."
12. *Gujarat State Road Transport Corporation v. Ramanbhai Prabhatbhai*, (1987) 3 SCC 238 : AIR 1987 SC 1690.

corresponding Act enacted by Parliament in India.[13] This reasoning was also applied in following the principles of rules 9 to 18 of Order 29 of the Supreme Court Rules (English) made under section 20 of the Administration of Justice Act, 1920, to enable the court to order interim payment in a tort action, although there are no statutory rules corresponding to the aforesaid rules in India.[14] And on similar reasoning, the Nagpur High Court refused to apply the doctrine of common employment in so far as it was abrogated in England by the Employers' Liability Act of 1880 even before the enactment of the corresponding Employers' Liability Act by the Indian Legislature in 1938.[15] On the other hand the Allahabad High Court has held that the rule enacted in the English statute, the Law Reform (Married Woman and Tort-feasors) Act, 1935, that although it is possible to bring separate actions against joint tort-feasors, the sums recoverable under these judgments by way of damages are not in the aggregate to exceed the amount of the damages awarded by the judgment first given is not in consonance with any principle of justice, equity and good conscience and is not applicable in India.[16] In this context it is also wise to remember that the English common law itself is imbued with flexibility and capacity to adapt itself to new situations and the courts in our country need not carry the notion that in applying the common law they have no authority to take a progressive view. As stated by LORD SCARMAN: "The common law, which in a constitutional context means judicially developed equity, covers everything which is not covered by statute. It knows no gaps: there can be no *casus omissus*. The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of a new law to meet the justice of the case. But whatever the court decides to do, it starts from a base-line of existing principle and seeks a solution consistent with or analogous to a principle or principles recognised. The real risk to the common law is not its movement to cover new situations and new knowledge but lest it should stand still halted by a conservative judicial approach. If that should happen, there would be a danger of the law becoming irrelevant to the consideration, and inept in its treatment of modern social problems. Justice would be defeated. The common law has, however, avoided this catastrophe by the flexibility given it by generations of judges".[17]

The decision of the Supreme Court,[18] which laid down that an enterprise engaged in a hazardous or inherently dangerous industry owes an absolute and non-delegable duty to the community shows that if an occasion arises the court can be more progressive

13. *Vidya Devi v. M.P. State Road Transport Corporation*, AIR 1975 MP 89 : 1974 ACJ 374 (378, 379). (G.P. SINGH, J.).
14. *Union Carbide Corporation v. Union of India*, 1988 MPLJ 540.
15. *Secretary of State v. Rukhminibai*, AIR 1937 Nagpur 354 : ILR (1938) Nag 54 : 174 IC 401.
16. *Nawal Kishore v. Rameshwar*, AIR 1955 All 594 (596). The law in England was also later altered by the Civil Liability Contribution Act, 1978, see, p. 237 *post*.
17. *Mcloughlin v. O'Brian*, (1982) 2 All ER 298 (310) : (1983) 1 AC 410 : (1982) 2 WLR 982 (HL). Recently the House of Lords judicially modified the common law rule that money paid under mistake of law cannot be recovered back by holding that levies and taxes paid to a local authority under *ultra vires* regulations can be recovered back as of right. In holding so LORD GOFF who delivered the leading speech for the majority was aware of the existence of a boundary separating legitimate development of the law by the judges from legislation. But he said that that boundary was not firmly or clearly drawn and varied from case to case otherwise a number of leading cases would never have been decided the way they were. LORD GOFF was also conscious that however compelling the principle of justice "it would never be sufficient to persuade a government to promote its legislative recognition by parliament; caution, otherwise known as the Treasury, would never allow this to happen." The case illustrates the extent to which the English judges can go to reform the common law: *Woolwich Building Society v. Inland Revenue Commissioners (No. 2)*, (1992) 3 All ER 737 : (1993) AC 70 : (1992) 3 WLR 366 (HL), pp. 760, 761, 763. The Indian law had long back taken that view. See, footnote 61, p. 10.
18. *M.C. Mehta v. Union of India*, AIR 1987 SC 1086 : (1987) 1 SCC 395, p. 420 : (1987) 1 ACC 157.

than the English Courts and can evolve new principle of tort liability not yet accepted by the English law. In the words of BHAGWATI, C.J.: "We have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence."[19] More recently SAHAI J., observed: "Truly speaking entire law of torts is founded and structured on morality that no one has a right to injure or harm other intentionally or even innocently. Therefore, it would be primitive to class strictly or close finally the ever-expanding and growing horizon of tortuous liability. Even for social development, orderly growth of the society and cultural refineness the liberal approach to tortuous liability by courts is more conductive."[20]

2. NATURE OF TORT

2(A) Definition of Tort

The term 'tort' is the French equivalent of the English word 'wrong' and of the Roman Law term 'delict'. It was introduced into the English law by Norman jurists. The word 'tort' is derived from the Latin term *tortum* to twist, and implies conduct which is twisted or tortious.[21] It now means a breach of some duty independent of contract giving rise to a civil cause of action and for which compensation is recoverable. In spite of various attempts an entirely satisfactory definition of tort still awaits its master. To provide a workable definition in general terms, a tort may be defined as a civil wrong independent of contract for which the appropriate remedy is an action for unliquidated damages.[22] A civil injury for which an action for damages

19. *M.C. Mehta v. Union of India*, AIR 1987 SC 1086 : (1987) 1 SCC 395, p. 420 : (1987) 1 ACC 157. The development of the common law in our country need not be always on the same lines as in England for the conditions in the two countries are not the same. As recently observed by the Privy Council: "The ability of the Common law to adopt itself to the differing circumstances of the countries where it has taken root is not a weakness but one of its strengths" : *Invercargill City Council v. Hamlin*, (1996) 1 All ER 756, p. 764 : (1996) AC 624 : (1996) 2 WLR 367.
20. *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*, (1994) 4 SCC 1 : JT 1994 (3) SC 492, p. 501.
21. The first reported use of the word tort is in *Boulton v. Hardy*, (1597) Cro. Eliz. 547, 548 : SALMOND and HEUSTON, Law of Torts, 20th edition, (1992), footnote 54. Also see, *Union of India v. Sat Pal Dharam Vir*, AIR 1969 J & K 128 (129) : 1969 Kash LJ 1; *Common Cause, a Registered Society v. Union of India*, (1999) 5 JT 237, p. 273 : AIR 1999 SC 2979, p. 3004 : (1999) 6 SCC 667.
22. Some other definitions are given below.—
"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."; WINFIELD and JOLOWICZ, on Tort, (12th edition, 1984), p. 3.
A tort is "a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation." SALMOND & HEUSTON, Law of Torts (1992), 20th edition, pp. 14, 15.
In his Law of Torts (15th edition, pp. 14, 15) SIR FREDERICK POLLOCK thus sums up the normal idea of tort:—
"Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related in one of the following ways to harm (including interference with an absolute right, whether there be measurable actual damage or not), suffered by a determinate person:—
(a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of.
(b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.
(c) It may be an act violating an absolute right (especially rights of possession or property), and treated as wrongful without regard to the actor's intention or knowledge. This, as we have seen, is an artificial extension of the general conceptions which are common to English and Roman Law.

(Footnote No. 22 Contd.)

will not lie is not a tort, *e.g.*, public nuisance, for which no action for damages will lie by a member of the public. The person committing a tort or wrong is called a tort-feasor or wrong doer, and his misdoing is a tortious act. The principal aim of the law of torts is compensation of victims or their dependants.[23] Grant of exemplary damages[24] in certain cases will show that deterrence of wrong-doers is also another aim of the law of torts.

2(B) Tort and Contract

There is a well-marked distinction between a Contract and a Tort. A contract is founded upon consent: a tort is inflicted against or without consent. A contract necessitates privity between the parties to it: in tort no privity is needed. A tort must also be distinguished from a pure breach of contract. First, a tort is a violation of a right *in rem*, *i.e.*, of a right vested in some determinate person, either personally or as a member of the community, and available against the world at large: whereas a breach of contract is an infringement of a right *in personam*, *i.e.*, of a right available only against some determinate person or body, and in which the community at large has no concern. The distinction between the two lies in the nature of the duty that is violated. In the case of a tort, the duty is one imposed by the law and is owed to the community at large. In the case of a contract, the duty is fixed by the will and consent of the parties, and it is owed to a definite person or persons.[25] Thus, if A assaults B, or damages B's property without lawful cause or excuse, it is a tort. Here the duty violated is a duty imposed by the law, and that is the duty not to do unlawful harm to the person or property of another. But if A agrees to sell goods to B for a price, and either party fails to perform the contract, the case is one of a breach of contract. Here there is no duty owed by A except to B, and none owed by B except to A. The duty that is violated is a specific duty owed by either party to the other alone, as distinguished from a general duty owed to the community at large. Secondly, in a breach of contract, the motive for the breach is immaterial: in a tort, it is often taken into consideration. Thirdly, in a breach of contract, damages are only as a measure of compensation. In an action for tort to the property, they are generally the same. But where the injury is to the person, character, or feelings, and the facts disclose improper motive or conduct such as fraud, malice, violence, cruelty, or the like which aggravate the plaintiff's injury, he may be awarded aggravated damages. Exemplary damages to punish the defendant and to deter him in future can also be awarded in certain cases in tort but rarely in contract.[26] A clause in a contract limiting liability cannot be relied upon by a person who is not a party to that contract and

(Footnote No. 22 Contd.)
(d) It may be an act or omission causing harm which the person so acting or omitting to act did not intend to cause, but might and should with due diligence have foreseen and prevented.
(e) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent.".
N.B. The definitions of Tort as given by WINFIELD and SALMOND were quoted by the Supreme Court in *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*, (1994) 3 JT 492, p. 501 : (1994) 4 SCC 1. Definitions from JOWITT'S Dictionary of English Law and WINFIELD were quoted in *Common Cause, a Registered Society v. Union of India*, (1999) 5 JT 237, p. 273 : AIR 1999 SC 2979, p. 3004 : (1999) 6 SCC 667.
23. G. WILLIAMS, The Aims of the Law of Torts, (1951) 4 Current Legal Problems, 137.
24. Chapter IX, title 1(D)(ii), p. 202.
25. See, *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*, (1994) 4 SCC 1 : (1994) 3 JT 492, p. 500 : 1999 ACJ 902.
26. *Rookes v. Barnard*, (1964) AC 1129 (1221) : (1964) 2 WLR 269 : (1964) 1 All ER 367 (HL); *Cassell and Co. Ltd. v. Broome*, (1972) AC 1027 : (1972) 1 All ER 601 (HL).

incurs liability in tort.[27] Another distinction that may be mentioned is that the law of torts is aimed at allocation or prevention of losses whereas the law of contract aims to see that the promises made under a contract are performed.

The same act may amount to a tort and a breach of contract. Persons, such as carriers, solicitors, or surgeons, who undertake to discharge certain duties and voluntarily enter into contracts for the due performance thereof, will be liable for neglect or unskillfulness either in an action for a breach of contract or in tort[28] to a party to the contract or in tort only to a person not a party to the contract who suffers injury. The breach of such contracts amounts also to a tort because such persons would be equally liable even if there was no contract as they undertake a duty independently of any contract. A father employs a surgeon to attend on his son. The son is injured by unskilful treatment. Here there is a contract between the father and the surgeon, but none between the son and the surgeon. The father, therefore, may sue the surgeon in contract, but the son can sue him only in tort.[29] In the celebrated case of *Donoghue v. Stevenson*,[30] a manufacturer who sold substandard article to a retailer who sold it to a customer was held liable to a friend of the customer who after consuming it became ill. The manufacturer was under a contractual duty to the retailer and was in breach of that duty but he also owed a duty in tort to take reasonable care not to harm the consumer.

The aforesaid distinctions between a tort and a contract though fundamentally sound are getting blurred in certain areas. Although normally a duty in tort is independent of any consent or agreement and is fixed by the law there are cases where some sort of prior consent or agreement on the part of the defendant is necessary. The more onerous duty of care owed by an occupier to visitors[31] as distinguished from the duty owed to trespassers is based on the permission granted to the visitor to enter upon the occupier's premises. Similarly, the duty of care owed to a person advised by a gratuitous advisor, who is placed in such a position that others may reasonably rely upon his judgment or skill, has been described as "equivalent to contract" and is dependant upon the advisor's agreeing to give advice in circumstances in which but for the absence of consideration there would be a contract.[32] An occupier's duty to visitors noticed above also furnishes an example of a tort duty which can be curtailed by agreement whether or not the agreement amounts to contract. In *Ashdown v. Samuel Williams & Sons Ltd.*,[33] it was held that an occupier of land can restrict or exclude any liability that he may otherwise incur to any licensee of his including his liability for negligence by conditions framed and made known to the licensee. Again although it is theoretically correct to say that in contract the duties are primarily fixed by the parties but in practice the use of

27. *Midland Silicones Ltd. v. Scruttons Ltd.*, (1960) 2 All ER 737 : (1961) 1 QB 106 : (1960) 3 WLR 372 : 104 SJ 603, confirmed in (1962) 1 All ER 1.
28. See, text and notes 41 to 50, pp. 7-8.
29. *Gladwell v. Steggall*, (1839) 5 Bing NC 733 : 8 LJCP 361. But, see, *Klaus Mittelbachert v. The East India Hotels Ltd.*, AIR 1997 Del 201, p. 230 (It was held that beneficiary to the contract can also sue in contract).
30. *Donoghue v. Stevenson*, (1932) AC 562 : 48 TLR 494 (HL). This case finally exploded the "privity of contract fallacy" that if A undertook a contractual obligation towards B, and his non-performance or mis-performance of that obligation resulted in damage to C, then C could not sue A unless he could show that A had undertaken towards him the same obligation as he had assumed towards B. See, SALMOND & HEUSTON, Law of Torts. 18th edition, (1981), p. 9.
31. 'Visitors' under the Occupiers' Liability Act, 1957 are those persons who would at common law be treated as invitees or licensees.
32. *Hedley Byrne & Co. v. Heller and Partners Ltd.*, (1964) AC 465 (530) : (1963) 3 WLR 101 : (1963) 2 All ER 575.
33. *Ashdown v. Samuel Williams & Sons Ltd.*, (1957) 1 QB 409 : (1957) 1 All ER 35.

standard form agreements and statutory regulation of contractual terms have curtailed to a large extent the freedom of the parties to settle the duties under a contract.[34] In the same context it may be observed that the fundamental duty in a contract to perform the promise like a tort duty comes into being by mere force of the law.[35] Another similarity that may be noticed is that although at the initial stage a duty in tort is towards persons generally but after there is a breach of that duty, the duty to pay compensation in tort is like a duty in contract owed to a determinate person or persons.

In the days preceding the rise of contract a person pursuing a "common calling", *i.e.*, a farrier, a smith, an inn-keeper, a surgeon and a common carrier was liable in damages for failure to exercise that skill which was normally expected from persons pursuing that calling and though later it became possible for one who entered into a contract with these persons to sue them in contract, a separate action in tort for breach of the duty imposed on them by law survived giving rise to concurrent remedies in tort and contract.[36] Another distinction that was drawn was between damage to property or person and economic loss; the former was thought to be more concerned with tort and the latter with contract.[37] The list of professions comprised in "common calling" was not extended to cover comparatively new professions such as stock-brokers, solicitors and architects,[38] who were held liable to their clients only in contract and not in tort.[39] Recent decisions have removed these anomalies and the rule emerging is that if the plaintiff would have had a cause of action in tort had the work been performed without any contract, *e.g.*, gratuitously, the existence of the contract does not deprive him of that remedy.[40] It is now accepted that there may be concurrent contractual and tortious duties owed to the same plaintiff who has a choice of proceeding either in tort or contract[41] except when he must rely on a specific term of the contract as distinct from any duty of reasonable care implicit in

34. "Due to change in political outlook and as a result of economic compulsions, the freedom to contract is now being confined gradually to narrower and narrower limits"; *I.S. & W. Products v. State of Madras*, AIR 1968 SC 478 (484, 485) : (1968) SCWR 808 : (1968) 1 SCR 479. See further, similar observations in *Omay v. City of London Real Property*, (1982) 1 All ER 660 (660) (HL) (LORD HAILSHAM L.C.).
35. "A contract is an obligation attached by the mere force of the law to certain acts of the parties." HAND, J., in *Hotchkiss v. National City Bank*, (1911) 200 Fed. 287; HOHFELD, Fundamental Legal Conceptions, (edited by W. W. COOK), p. 31. "It is a misconception to say that obligations arising under a contract are created by the parties and not by the law. Parties merely settle the terms of a contract, but the obligation to carry out the terms arises from section 37 of the Indian Contract Act, 1872 which enacts that parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law" : *M/s Shri Ganesh Trading Co., Saugar v. State of Madhya Pradesh*, 1972 MPLJ 864 (FB), p. 883 (G.P. SINGH, J.)
36. STREET, Torts, 6th edition, pp. 210, 211. For example, see, *Heren II* (1967) 3 All ER 686 (common carrier); *Constantine v. Imperial Hotels*, (1944) 2 All ER 171 (Inn Keeper) : 1994 KB 693 ; *Fish v. Kapur*, (1948) 2 All ER 176 (Doctor).
37. FLEMING, Law of Torts, 6th edition, p. 168. Everyone owes a duty not to damage another's person or property hence a cleaner who was employed by the plaintiff to clean his chandelier and who negligently allowed it to drop from the ceiling was held liable in tort although cleaning was not a common calling; *Jackson v. May Fair Window Cleaning Co. Ltd.*, (1952) 1 All ER 215. For economic loss, see, the case of solicitor; *Groom v. Crocker*, (1938) 2 All ER 394 : (1939) 1 KB 194.
38. STREET, Torts, 6th edition, p. 211.
39. *Groom v. Crocker*, (1938) 2 All ER 384 (Solicitor) : (1939) 1 KB 194 : 54 TLR 861; *Bagot v. Stevens Scanlar & Co.*, (1964) 3 All ER 577 (Architect) : (1964) 3 WLR 1162.
40. FLEMING, Law of Torts, 6th edition, pp. 168 (169).
41. *Coupland v. Arabian Gulf Petroleum Co.*, (1983) 3 All ER 226, p. 228 (CA) : (1983) 1 WLR 1136. The election may be made at any time before judgment; *Mahesan v. Malaysia Government Officers Co-operative Housing Society Ltd.*, (1978) 2 All ER 405 (411) (PC) (1979) AC 374 : (1978) 2 WLR 444 (Case of money had and received and fraud).

the particular relationship brought about by the contract in which case he has to depend exclusively on his contractual claim.[42] Thus, it has now been held that a solicitor is liable both in tort and contract to his client for negligent advice.[43] Presumably other professional men like stock-brokers and architects will now be in the same position as solicitors.[44] In *Caparo Industries Plc. v. Dickman,*[45] Lord BRIDGE in the context of an auditor observed: "In advising the client who employs him the professional man owes a duty to exercise that standard of skill and care appropriate to his professional status and will be liable both *in contract and in tort* for all losses which his client may suffer by reason of *any breach of that duty*."[46] After referring to these observations the Court of Appeal in a case relating to an insurance broker said: "This principle applies as much to insurance brokers or to those who exercise any other professional calling and to other professional activities which they carry on besides giving advice."[47] The judgment of *Oliver J.*, in *Midland Bank Trust Co. Ltd. v. Hett Stubbs & Kemp (a firm),*[48] met the appreciation and approval of the House of Lords in *Henderson v. Merrett Syndicates Ltd.*,[49] where LORD GOFF observed: "As a matter of principle it is difficult to see why concurrent remedies in tort and contract, if available against the medical profession should not also be available against members of other professions whatever form the relevant damage may take."[50]

In cases "arising out of contract equity steps in and tort takes over and imposes liability upon the defendant for unquantified damages for the breach of the duty owed by the defendant to the plaintiff" said the Supreme Court in *Manju Bhatia (Mrs.) v. New Delhi Municipal Council.*[51] In this case, a builder sold flats in a building, top four floors of which were demolished by the Municipal Council as they were constructed in violation of the Building Regulations. The purchasers of the flats which were demolished were not informed of the illegality by the builder. The Supreme Court held that each purchaser was entitled to return of the amount paid by him plus the escalation charges and having regard to all the circumstances each flat owner was allowed to receive Rs. Sixty lakhs from the builder. This case can be taken to be an authority that damages in tort can be allowed against a builder.

An exemption clause in a contract will also be available to the defendant in a tort action provided it is widely worded and specifically excludes or limits the liability for damages due to negligence.[52] A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for act or omission that would constitute the tort.[53]

Recent advance in the law of negligence allows a plaintiff although his person or property has not been injured to recover economic loss suffered by him by the

42. *Jarvis v. Moy*, (1936) K.B. 399 (Stockbroker flouting specific instructions).
43. *Midland Bank Trust Co. Ltd. v. Hett., Stubbs & Kemp*, (1978) 3 All ER 571 : (1978) 3 WLR 167.
44. *Bagot v. Stevens Scanlon & Col.*, (1964) 3 All ER 577 holding the contrary for Architect is no longer good law. See, WINFIELD & JOLOWICZ, Torts, 12th edition, (1984), p. 4, SALMOND & HEUSTON, Torts, 20th edition, (1992), p. 13.
45. (1990) 1 All ER 568 : (1990) AC 605 (HL).
46. (1990) 1 All ER 568, p. 575.
47. *Punjab National Bank v. de Boinville*, (1992) 3 All ER 104 (CA), p. 117 : (1992) 1 WLR 1138.
48. See footnote 43, *supra*.
49. (1994) 3 All ER 506 : (1995) 2 AC 145 : (1994) 3 WLR 761 (HL).
50. (1994) 3 All ER 506, p. 530.
51. AIR 1998 SC 223, p. 227 : (1997) 6 SCC 370.
52. *White v. Warrick*, (1953) 2 All ER 1021 : (1953) 1 WLR 1285 (CA); *Hall v. Brooklands Club*, (1933) 1 KB 205 (213).
53. *Henderson v. Merrett Syndicates Ltd., supra*, p. 530.

negligent act of the defendant in committing a breach of contract entered into between him and a third party provided there is a close degree of proximity and the loss suffered is a direct and foreseeable result of the defendant's negligence.[54] All this led to the observation that we are moving towards the principle that every breach of contract which might with reasonable care have been avoided is also a tort to a person foreseeably affected thereby including even the parties to the contract.[55] But the development of this principle, in so far as it covers parties to the contract, got a set back from the Privy Council decision in *Tai Hing Cotton Mill Ltd. v. Liu Chang Hing Bank Ltd.*,[56] where in the context of a relationship of banker and customer, their Lordships observed that they did not believe that there was anything to the advantage of the law's development in searching for a liability in tort where the parties were in contractual relationship particularly so in a commercial relationship. The Privy Council case was followed by the Court of Appeal in a case of master and servant where the terms of employment were regulated by contract. It was held that where a particular duty of care on the part of the master not to cause economic loss to the servant did not arise out of any express or implied term of the contract, it could not be inferred under the law of torts.[57] Recently the Privy Council, in the context of a contract of guarantee, observed that the tort of negligence has not subsumed all torts or does not supplant the principles of equity or contradict contractual promises or complement the remedy of judicial review or supplement statutory rights.[58] More recently the Privy Council observed: "The House of Lords has also warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss."[59]

2(C) Tort and Quasi-Contract

Quasi-contracts cover those situations where a person is held liable to another without any agreement for money or benefit received by him to which the other person is better entitled. According to the orthodox view the judicial basis of the obligation under a *quasi*-contract is a hypothetical contract which is implied by law and this is the reason why the subject is treated along with contract. But according to the radical view which is to be preferred, the obligation is *sui generis* and its basis is prevention of unjust enrichment.[60] In other words, the obligation under a *quasi*-contract is imposed by the law for the reason that the defendant has been

54. *Ross v. Counters*, (1979) 3 All ER 580 : (1980) Ch 297 : (1979) 3 WLR 605; *Junior Books Ltd. v. Veitchi Co. Ltd.*, (1982) 3 All ER 201 (HL). See, p. 467, *post*.
55. WINFIELD & JOLOWICZ, Tort, 12th edition, p. 7.
56. (1985) 2 All ER 947 (957) : (1986) AC 519 : (1986) 1 WLR 392 (PC).
57. *Reid v. Rush & Tompkins Group Plc*, (1989) 3 All ER 228 : (1990) 1 WLR 212 : (1989) 2 Lloyd's Rep 167 (CA).
58. *China and South Sea Bank Ltd. v. Tan*, (1989) 3 All ER 839 (PC), p. 841.
59. *Downsview Nominess v. First City Corp. Ltd.*, (1993) 3 All ER 626 (PC), p. 638 (A receiver or manager of a company appointed by debenture holders has only to act in good faith). Here the Privy Council made reference to *CBS Songs Ltd. v. Amstrad Consumer Electronics plc*, (1988) 2 All ER 484 (HL), p. 497; *Caparo Industries (P) Ltd. v. Dickman*, (1990) 1 All ER 568 (HL) and *Murphy v. Brentwood District Council*, (1990) 2 All ER 908 : (1991) 1 AC 398 (HL).
60. ANSON, English Law of Contract, 22nd edition, p. 603. *United Australia Ltd. v. Barclays Bank Ltd.*, (1947) AC 1 (27) (LORD ATKIN); *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Cambe Barbour Ltd.*, (1943) AC 32, (61) (LORD WRIGHT); *Westdeutsche Landesbank Girozentrale v. Islington London BC*, (1996) 2 All ER 961 : 1996 AC 669 (HL), p. 996; *Thomas Abraham v. National Tyre & Rubber Co.*, AIR 1974 SC 602 (606) : (1973) 3 SCC 458 : (1972) 1 SCWR 372. The subject of *quasi*-contracts is dealt with in Chapter V of the Indian Contract Act. For a recent case on unjust enrichment, see, *Lipkin Gorman (a firm) v. Karpnale Ltd.*, (1992) 4 All ER 521 : (1991) 2 AC 548 (HL) (A thief gambled with stolen money and lost. It was held that the owner could recover the money from the person who won in gambling from the thief).

unjustly enriched at the expense of the plaintiff. *Quasi*-contract differs from tort in that there is no duty owed to persons generally for the duty to repay money or benefit received is owed to a definite person or persons; and the damages recoverable are liquidated damages and not unliquidated damages as in tort. On both these aspects *quasi*-contract has similarity with contract. *Quasi*-contract resembles tort and differs from contract on one aspect that the obligation in it as in tort is imposed by the law and not under an agreement as in contract. There is one aspect in which *quasi*-contract differs from both tort and contract. This can be explained by taking a familiar example of *quasi*-contract that when A pays money under a mistake to B, B is under an obligation to refund it to A, even though the payment is voluntary and is not induced by any fraud or misrepresentation emanating from B.[61] In this illustration it cannot be said that there was any primary duty on B not to accept the money paid to him under a mistake and the only duty on him is the remedial or secondary duty to refund the money to A; but in tort as also in contract there is always a primary duty the breach of which gives rise to the remedial duty to pay compensation.[62]

2(D) Tort and Crime

A tort is also widely different from a crime. First, a tort is an infringement or privation of the private or civil rights belonging to individuals considered as individuals; whereas a crime is a breach of public rights and duties which affect the whole community considered as a community. Secondly, in tort, the wrongdoer has to compensate the injured party: whereas, in crime, he is punished by the State in the interests of society. Thirdly, in tort, the action is brought by the injured party: in crime, the proceedings are conducted in the name of the State and the guilty person is punished by the State. Criminal Courts are authorised within certain limits and in certain circumstances to order payment of a sum as compensation to the person injured out of the fine imposed on the offender.[63] The compensation so awarded resembles the award of unliquidated damages in a tort action but there is a marked difference. The award of compensation in a criminal prosecution is ancillary to the primary purpose of punishing the offender but in a tort action generally it is the main purpose. Only exemplary damages allowed in a tort action are punitive in nature and one of the reasons for severely restricting the categories of cases in which they can be awarded is that they import a criminal element in civil law without proper safeguards.[64]

The Bombay High Court has viewed the difference from the perspective of the nature of punishment and sanctions imposed. The court observed that "it is

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61. Under the English law till recently the mistake had to be one of fact and not of law. Under the Indian law, the mistake may be even one of law (Section 70, Contract Act) : *Sales Tax Officer, Banaras v. Kanhaiyalal Mukund Lal Saraf*, AIR 1959 SC 135 : 1959 SCR 1350 : 1959 SCJ 53. The English law also started moving in the same direction. In *Woolwich Building Society v. Inland Revenue Commissioners (no. 2)*, (1992) 3 All ER 737 : (1992) 3 WLR 366 : (1993) AC 70 (HL), it was held that money paid as tax under *ultravires* regulations can be recovered back). More recently it has been held that there is a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution : *Kleinwort Benson Ltd. v. Lincoln City Council*, (1998) 4 All ER 513 (HL). *Kanhaiyalal's* case was decided by a bench of 5 judges and was approved by a 7-judge bench in the *State of Kerala v. Aluminium Industries Ltd.*, (1965) 16 STC 689 : 1965 Ker LT 517 (SC). In *Mafatlal Industries Ltd. v. Union of India*, (1996) 9 SCALE 457 : (1996) 11 JT 283 : (1997) 5 SCC 536, it has been held that refund can be allowed only if the burden has not been passed on to another person.
62. WINFIELD and JOLOWICZ, Tort, 12th edition, (1984), p. 8.
63. Section 357 of the Code of Criminal Procedure
64. *Rookes v. Barnard*, (1964) AC 1129 : (1964) 1 All ER 367; *Cassell & Co. Ltd. v. Broome*, (1972) AC 1027 : (1972) 1 All ER 801.

fundamental principal (sic) that what constitutes crime is essentially a matter of statute law. Word "crime' is not defined precisely in the penal Code. A crime has to be distinguished from a tort or a civil wrong. The distinction consists in the nature of the sanction that is attached to each form of liability. In the case of a crime, the sanction is in the form of punishment while in the case of a tort or a civil wrong the sanction is in the form of damages or compensation to the person injured. Primarily, the purpose of punishment is deterrence. The purpose of compensation, however, is recompense".[65] There is, however, a similarity between tort and crime at the primary level. In criminal law also the primary duty not to commit an offence for example murder like any primary duty in tort is *in rem* and is imposed by the law.

The same set of circumstances will, in fact, from one point of view, constitute a tort, while, from another point of view, amount to a crime. In the case, for instance, of an assault, the right violated is that which every man has, that his bodily safety shall be respected, and for the wrong done to this right the sufferer is entitled to get damages. But this is not all. The act of violence is a menace to the safety of society generally, and will therefore be punished by the State. Where the same wrong is both a crime and a tort (*e.g.*, assault, libel, theft, mischief to property) its two aspects are not identical; its definition as a crime and as a tort may differ; what is a defence to the tort (as in libel the truth) may not be so in the crime and the object and result of a prosecution and of an action in tort are different. The wrongdoer may be ordered in a civil action to make compensation to the injured party, and be also punished criminally by imprisonment or fine. There was a common law rule that when a tort was also a felony the offender could not be sued in tort until he had been prosecuted for the felony or a reasonable excuse had been shown for his non-prosecution.[66] This rule has not been followed in India[67] and has been abolished also in England.[68]

Cases may easily be put showing that a transaction may involve a criminal, also a tortious element, and lastly, an element of *quasi*-contract so that the offender may be prosecuted for a criminal offence and sued for damages in an action on tort or sued for money had and received by him. Suppose that a person fraudulently obtains goods under circumstances which would render him liable to be indicted, and that he afterwards sells the goods and receives the proceeds of their sale, here the individual who wrongfully possessed himself of the goods would be liable to an indictment for fraud, to an action at suit of the rightful owner for recovery of the goods or their value or, lastly, to an action for the money had and received by the defendant.

3. CONSTITUENTS OF TORT

3(A) General

The law of torts is fashioned as "an instrument for making people adhere to standards of reasonable behaviour and respect the rights and interests of one another".[69] This it does by protecting interests and by providing for situations when a person whose protected interest is violated can recover compensation for the loss

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65. *State of Maharashtra v. Govind Mhatarba Shinde* (2010) 4 AIR Bom R 167 : (2010) 112 Bom LR 2241.
66. *Smith v. Salwyn*, (1914) 3 KB 98 : 111 LT 195. The rule did not bar an action but was a ground for staying it. It was based on the public policy that claims of public justice must take precedence over those of private reparation. The rule, however, became an anomaly after the police was entrusted with the duty to prosecute the offenders.
67. *Keshab v. Maniruddin*, (1908) 13 CWN 501; *Abdul Kawder v. Muhammad Mera*, ILR (1881) 4 Mad 410.
68. Section 1, Criminal Law Act, 1967.
69. SETALVAD, Common Law in India, p. 109.

suffered by him from the person who has violated the same.[70] By "interest" here is meant "a claim, want or desire of a human being or group of human beings which the human being or group of human beings seeks to satisfy, and of which, therefore, the ordering of human relations in civilised society must take account".[71] It is, however, obvious that every want or desire of a person cannot be protected nor can a person claim that whenever he suffers loss he should be compensated by the person who is the author of the loss.[72] The law, therefore, determines what interests need protection and it also holds the balance when there is a conflict of protected interests.[73] A protected interest gives rise to a legal right which in turn gives rise to a corresponding legal duty. Some legal rights are absolute in the sense that mere violation of them leads to the presumption of legal damage. There are other legal rights where there is no such presumption and actual damage is necessary to complete the injury which is redressed by the law. An act which infringes a legal right is a wrongful act. But every wrongful act is not a tort. To constitute a tort or civil injury (1) there must be a wrongful act committed by a person; (2) the wrongful act must give rise to legal damage or actual damage and (3) the wrongful act must be of such a nature as to give rise to a legal remedy in the form of an action for damages.

3(B) Wrongful Act

"The act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interest is not enough."[74]

An act which, *prima facie*, appears to be innocent may become tortious, if it invades the legal right of another person. A familiar instance is the erection on one's own land of anything which obstructs the light to a neighbour's house. It is, no doubt, lawful to erect what one pleases on one's own land; but if by twenty years' enjoyment, the neighbour has acquired the legal right to the unobstructed transmission of the light across that land, the erection of any building which substantially obstructs it is an invasion of the right, and so not only does damage, but is unlawful and injurious. The crucial test of legally wrongful act or omission is its prejudicial effect on the legal right of another.

Now, what is a legal right? It has been defined, by AUSTIN,[75] as a 'faculty' which resides in a determinate party or parties by virtue of a given law, and which avails against a party (or parties or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. Rights available against the world at large are very numerous. They are sub-divided into private rights and public rights.

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70. *Popatlal Gokaldas Shah v. Ahmedabad Municipal Corporation*, AIR 2003 Guj 44, p. 55.
71. POUND, Selected Essays, p. 86; STREET, Torts, 6th edition, p. 3.
72. "But acts or omissions which any moral Code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy" : *Donoghue v. Stevenson*, (1932) AC 562 : 48 T.L.R. 494 (HL) per LORD ATKIN.
73. For example, privileged occasions, where the interest of the person defamed in his reputation is subordinated to the interest of the person defaming in the exercise of freedom of speech on these occasions.
74. *Rogers v. Rajendro Dutt*, (1860) 8 MIA 103 (136) : 13 Moore PC 209. An empty threat to prosecute is not actionable: *Banwari Lal v. Municipal Board, Lucknow*, (1941) OWN 864 : AIR 1941 Oudh 572 : 1941 OLR 542.
75. Vol. II, p. 786.

Private rights include all rights which belong to a particular person to the exclusion of the world at large. These rights are: "(1) rights of reputation; (2) rights of bodily safety and freedom; (3) rights of property; or, in other words, rights relative to the mind, body, and estate; and, if the general word 'estate' is substituted for 'property', these three rights will be found to embrace all the personal rights that are known to the law".[76] Under the third head of rights of property will fall (a) those rights and interests, corporeal and in-corporeal, which are capable of transfer from one to another, and (b) those collateral rights of a personal nature which enable a person to acquire, enjoy and preserve his private property. Thus private property is either property in possession, property in action, or property that an individual has a special right to acquire.[77]

Public rights include those rights, which belong in common to the members of the State generally. Every infringement of a private right denotes that an injury or wrong has been committed, which is imputable to a person by whose act, omission, or forbearance, it has resulted. But when a public right has been invaded by an act or omission not authorized by law, then no action will lie unless in addition to the injury to the public, a special, peculiar and substantial damage is occasioned to the plaintiff.[78] The remedy of the public is by indictment, for, if every member of the public were allowed to bring action in respect of such invasion, there would be no limit to the number of actions which might be brought.[79]

To every right there corresponds an obligation or duty. If the right is legal, so is the obligation; if the right is contingent, imaginary, or moral, so is the obligation. A right in its main aspect consists in doing something, or receiving and accepting something. So an obligation consists in performing some act or in refraining from performing an act. Servitude of passage over a field appears as a right of walking or driving over it by the owner of the dominant tenement. The duty of the servient owner is to refrain from putting obstacles. An easement of light appears as a right on the part of the dominant owner to interdict the erection of buildings on the servient tenement, or to remove them when erected. The duty is to abstain from erecting them. The duty with which the law of torts is concerned is the duty to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others.

Liability for a tort arises, therefore, when the wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty.

3(C) Damage

"*Damage*" means the harm or loss suffered or presumed to be suffered by a person as a result of some wrongful act of another. The sum of money awarded by court to compensate "*damage*" is called "*damages*".

From the point of view of presumption of damage, rights are classified into (1) absolute and (2) qualified. When an absolute right is violated the law conclusively presumes damage although the person wronged may have suffered no pecuniary loss whatsoever. The damage so presumed is called legal damage. Violation of absolute right is, therefore, actionable *per se*, *i.e.*, without proof of any

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76. Per CAVE, J., in *Allen v. Flood*, (1898) AC 1, 29 : 77 LT 717.
77. Per BAYLEY, J., in *Hannam v. Mockett*, (1824) 2 B & C 934 (937).
78. *Lyon v. Fishmongers' Company*, (1876) 1 App. Cas. 662.
79. *Winterbottam v. Lord Derby*, (1867) LR 2 Ex 316 (321); *Iveson v. Moore*, (1699) 1 Ld. Raym. 486; *Ricket v. Metropolitan Ry. Co.*, (1864) 5 B & S 149 (156) : LR 2 HL 175.

damage. In case of qualified rights, there is no presumption of legal damage and the violation of such rights is actionable only on proof of actual or special damage. In other words, in case of an absolute right, the injury or wrong, *i.e.*, the tortious action, is complete the moment the right is violated irrespective of whether it is accompanied by any actual damage, whereas in case of a qualified right, the injury or wrong is not complete unless the violation of the right results in actual or special damage.

In the leading case of *Ashby v. White*,[80] which is illustrative of violation of an absolute right, LORD HOLT, C.J., said: "Every injury imports a damage; though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words,[81] though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it costs him nothing, not so much as a little diachylon (plaster), yet he shall have his action, for it is personal injury. So a man shall have an action against another for riding over his ground, though it does him no damage; for it is an invasion of his property and the other has no right to come there".

The real significance of legal damage is illustrated by two maxims, namely, *injuria sine damno* and *damnum sine* (or *absque*) *injuria*.

By *damnum* is meant damage in the substantial sense of money, loss of comfort, service, health, or the like. By *injuria* is meant a tortious act; it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie.[82] Any unauthorized interference, however trivial, with some absolute right conferred by law on a person, is an injury, *e.g.*, the right of excluding others from one's house or garden.

In cases of *injuria sine damno*, *i.e.*, the infringement of an absolute private right without any actual loss or damage, the person whose right is infringed has a cause of action. Every person has an absolute right to his property, to the immunity of his person, and to his liberty, and an infringement of this right is actionable *per se*. There are two kinds of torts those which are actionable *per se*, that is, without proof of actual damage, and those which are actionable only on proof of actual damage resulting from them. In the former kind the law presumes damage because certain acts are so likely to result in harm owing to their mischievous tendency that the law prohibits them absolutely; whereas in the latter there is no such presumption and actual damage must be proved.[83] Whenever a person has sustained what the law calls an 'injury' in the former class of cases he may bring an action without being under the necessity of proving special damage, because the injury itself is taken to imply damage. Actual, perceptible, or appreciable loss, or detriment is not indispensable as the foundation of an action. Trespass to person, that is assault, battery and false imprisonment, and trespass to property, whether it be land or goods and libel are

80. (1703) 2 Ld. Raym. 938 (955).
81. An action for slander may be maintained without proof of actual damage in exceptional cases *e.g.*, imputation of a criminal offence. Under English law normally actual damage is required for an action for slander though not for libel. The Indian Law does not recognise this distinction. Libel and slander are both in India actionable *per se*. See, Chapter XII, title 4(i) and (ii).
82. *Winsmore v. Greenbank*, (1745) Willes 577 (581).
83. "An act may be mischievous in two ways—either in its actual result or in its tendencies. Hence, it is that legal wrongs are of two kinds. The first consists of those in which the act is wrongful only by reason of accomplished harm which in fact ensues from it. The second consists of those in which the act is wrongful by reason of its mischievous tendencies as recognised by the law, irrespective of the actual issue." SALMOND, Jurisprudence, 12th edition, (1966), p. 355.

instances of torts that are actionable *per se*, and the court is bound to award to the plaintiff at least nominal damages if no actual damage is proved.

In India the same principles have been followed. The Privy Council has observed that "there may be, where a right is interfered with, *injuria sine damno* sufficient to found an action: but no action can be maintained where there is neither *damnum nor injuria*".[84] A violation of a legal right committed knowingly gives rise to a cause of action, *e.g.*, interference with an exclusive right to weigh goods and produce sold at a bazaar,[85] or to break a curd-pot in a temple on a certain day,[86] or to carry a procession through certain public streets of a village on specific occasions,[87] or to the supply of water from a channel[88] or to receive offerings by setting up a new temple in the name of the same deity in the same vicinity.[89]

If there is merely a threat of infringement of a legal right without the injury being complete the person whose right has been threatened can bring a suit under the provisions of the Specific Relief Act for declaration and injunction.

Refusal to register vote.—In the leading case of *Ashby v. White*,[90] the defendant, a returning officer, wrongfully refused to register a duly tendered vote of the plaintiff, a legally qualified voter, at a parliamentary election and the candidate for whom the vote was tendered was elected, and no loss was suffered by the rejection of the vote, nevertheless it was held that an action lay. In this case the returning officer had acted maliciously. Where, therefore, a returning officer, without any malice or any improper motive, in exercising his judgment, honestly refused to receive the vote of a person entitled to vote at an election, it was held that no action lay.[91] If a person entitled to be upon the electoral roll is wrongfully omitted from such roll so as to be deprived of his right to vote he suffers a legal wrong for which an action lies.[92] An action for damages will also lie if a citizen is deprived of his right to vote by a law which is unconstitutional law by reason of offending right to equality.[93]

84. *Kali Kissen Tagore v. Jodoo Lal Mullick*, (1879) 5 CLR 97 (101) : (1878) 6 IA 190 (195). It is not necessary to show that there has been any subsequent injury consequent on such infringement: see, *Ramachand Chuckerbutty v. Nuddiar Chand Ghose*, (1875) 23 WR 230; *Ramphul Sahoo v. Misree Lall*, (1875) 24 WR 97; contra, *Naba Krishna v. Collector of Hooghly*, (1869) 2 Beng LR (ACJ) 276; *Shama Churn v. Boidonath*, (1869) 11 Suth WR 2; *Seeta Ram v. Shaikh Kummeer Ali*, (1871) 15 Suth WR 250; *Kaliappa v. Vayapuri*, (1865) 2 MHC 442; *Nga Myat Hmwe v. Nga Yi*, (1906) UBR (1904-1906), Tort, p. 9; *Maung Thit Sa v. Maung Nat*, (1922) 1 BLJ 146.
Where attachment proceedings are taken *bona fide* in the belief that the judgment-debtor has an interest in the property, the plaintiff is not entitled to any damage: *Sain Dass v. Ujagar Singh*, ILR (1939) 21 Lah 191 : 186 IC 646 : AIR 1940 Lah 21.
85. *Bhikhi Ojha v. Harakh Kandu*, (1889) 9 AWN 89.
86. *Narayan v. Balkrishna*, (1872) 9 BHC (ACJ) 413. A person may possess the right to worship an idol at particular place when it is carried in procession or otherwise: *Nagiah Bathudu v. Muthacharry*, (1900) 11 MLJ 215; *Subbaraya Gurukul v. Chellappa Mudali*, ILR (1881) 4 Mad 315; *Krishnaswami Aiyangar v. Rangaswami Aiyangar*, (1909) 19 MLJ 743. The right of worship including any special right of worship is a civil right: *Subba Reddi v. Narayana Reddi*, (1911) 21 MLJ 1027.
87. *Andi Moopan v. Muthuveera Reddy*, (1915) 29 MLJ 91 : AIR 1916 Mad 593 : 29 IC 248.
88. *Rama Odayan v. Subramania Aiyar*, ILR (1907) 31 Mad 171, following *Quinn v. Leathem*, (1901) AC 495 : 65 JP 708 : 85 LT 289.
89. *Purshottamdas Parbhudas v. Bai Dahi*, (1940) 42 Bom LR 358 : AIR 1940 Bom 205 : ILR (1940) Bom 339.
90. *Ashby v. White*, (1703) 2 Ld. Raym. 938. See also, *Chunilal v. Kripashankar*, (1906) 8 Bom LR 838 : ILR 31 Bom 37. Express malice is not necessary. If the refusal is not in good faith, which implies due care and diligence, the person refusing to register the vote will be liable : *Draviam Pillai v. Cruz Fernandez*, (1915) 29 MLJ 704 : AIR 1916 Mad 569 : 31 IC 322.
91. *Tozer v. Child*, (1857) 7 El & Bl 377.
92. *The Municipal Board of Agra v. Asharfi Lal*, (1922) 44 All 202 : AIR 1922 All 1 : 20 All LJ 1.
93. *Nixon v. Herndon*, 273 U.S. 536.

Banker refusing customer's cheque.—An action will lie against a banker, having sufficient funds in his hands belonging to a customer, for refusing to honour his cheque, although the customer did not thereby sustain any actual loss or damage.[1]

In cases of *damnum sine injuria*, *i.e.*, actual and substantial loss without infringement of any legal right, no action lies. Mere loss in money or money's worth does not of itself constitute a tort. The most terrible harm may be inflicted by one man on another without legal redress being obtainable. There are many acts which, though harmful, are not wrongful and give no right of action. "*Damnum*" may be *absque injuria*. Thus, if I have a mill, and my neighbour sets up another mill, and thereby the profits of my mill fall off, I cannot bring an action against him; and yet I have suffered damage. But if a miller hinders the water from running to my mill, or causes any other like nuisance, I shall have such action as the law gives.[2]

Acts done by way of self-defence against a *common enemy*, such as the erection of banks to prevent the inroads of the sea,[3] removal of support to land where no such right of support has been acquired, and damage caused by acts authorised by statute are instances of *damnum absque injuria*, and damage resulting therefrom is not actionable. The loss in such cases is not caused by any wrong, but by another's exercise of his undoubted right; and, in every complicated society, the exercise, however legitimate, by each member of his particular rights, or the discharge, however legitimate, by each member of his particular duties, can hardly fail occasionally to cause conflict of interests which will be detrimental to some. Where an act is lawful or legally done, without negligence, and in the exercise of a legal right, such damage as comes to another thereby is damage without injury. Hence the meaning of the maxim is that loss or detriment is not a ground of action unless it is the result of a species of wrong of which the law takes cognizance. In a suit for damages based on a tort the plaintiff cannot succeed merely on the ground of damage unless he can show that the damage was caused by violation of a legal right of his.[4]

When a statute confers upon a corporation a power to be exercised for the public good, the exercise of power is not generally discretionary but imperative. No action lies against a District Board for the planting of trees by the side of a road even if a tree through unknown causes falls and damages the house of the plaintiff, unless it is proved that the District Board did not use due care and diligence.[5]

Interception of percolating water.—A landowner and millowner who had for about six years enjoyed the use of a stream, which was chiefly supplied by percolating underground water, lost the use of the stream after an adjoining owner dug on his own ground in extensive well for the purpose of supplying water to the inhabitants of the district. In an action brought by the landowner it was held that he had no right of action.[6] In *Acton v. Blundell*,[7] a landowner in carrying on mining operations on his land in the usual manner drained away the water from the land of another owner through which water flowed in a subterraneous course to his well, and it was held that the latter had no right to maintain an action.

1. *Marzetti v. Williams*, (1830) 1 B & Ad 415.
2. Per HANKFORD, J., in *Cloucester Grammar School*, (1410) YB 11 Hen IV, fo. 47, pl. 21, 22.
3. See, *Gerrard v. Crowe*, (1921) 1 AC 395. It is lawful for a person to erect an embankment on his land to protect his land from the influx of water from adjoining land : *Shanker v. Laxman*, AIR 1938 Nag 289 : ILR (1938) Nag 239 : 176 IC 663.
4. See, *Dhanusao v. Sitabai*, AIR [1948] Nag 698.
5. *District Board, Manbhum v. S. Sarkar*, AIR 1955 Pat 432 : 1955 BLJR 492 : ILR 34 Pat 661.
6. *Chasemore v. Richards*, (1859) 7 HLC 349; but see, *Babaji v. Appa*, (1923) 25 Bom LR 789 : AIR 1924 Bom 154 : 77 IC 131.
7. (1843) 12 M & W 324.

Where the defendant intended to divert underground water from a spring that supplied the plaintiff corporation's works, not for the benefit of his own land, but in order to drive the corporation to buy him off, it was held that the defendant's conduct was unneighbourly but not wrongful and therefore no action lay.[8] The rule as to the right of a landowner to appropriate percolating underground water applies equally to brine.[9]

It has again been recently reiterated[10] that a landowner is entitled to exercise his right to obstruct subterranean water flowing in undefined channels under his land regardless of consequences, whether physical or pecuniary, to his neighbours and regardless of his motive or intention or whether he anticipated damage. On this view, it was held that a landowner was not liable to his neighbour, whose land subsided damaging her house, for extraction of underground water despite warning that it was likely to result in collapse of neighbouring land. But this case also brings forward the necessity of change in law by judicial decision or legislation as modern methods of extraction of underground water without any restriction may bring down the water level in the neighbouring area to such an extent as to dry up all the wells and seriously affect life and vegetation in the neighbourhood.

Damage caused by lawful working of mine.—Where a landowner by working his mines caused a subsidence of his surface, in consequence of which the rainfall was collected and passed by gravitation and percolation into an adjacent lower coal-mine, it was held that the owner of the latter could sustain no action because the right to work a mine was a right of property, which, when duly exercised, begot no responsibility.[11]

Setting up rival school.—Where the defendant, a schoolmaster, set up a rival school next door to the plaintiff's and boys from the plaintiff's school flocked to defendant's, it was held that no action could be maintained.[12] Competition is no ground of action whatever damage it may cause, provided nobody's legal rights are infringed.[13]

Driving rival trader out of market.—A, B, C and D, shipowners, who shipped tea from one port to another, combined together, to keep the entire trade in their hands and consequently to drive F, a rival shipowner, out of trade by offering special terms to customers who deal with them to the exclusion of F, F sued A, B, C and D for the loss caused to him by their act. It was held that F had no right of action, for no legal right of F had been infringed. Damage done by competition in trade was not actionable.[14]

Use of title by spouse after dissolution of marriage.—Where the marriage of a commoner with a peer had been dissolved by decree at the instance of the wife, and she afterwards, on marrying a commoner, continued to use the title she had acquired by her first marriage, it was held that she did not thereby, though having no legal right to the user, commit such legal wrong against her former husband, as to entitle him, in the absence of malice, to an injunction to restrain her the use of the title.[15]

8. *Mayor & Co. of Bradford v. Pickles*, (1895) AC 587.
9. *Salt Union Ltd. v. Brunner, Mand & Co.*, (1906) 2 KB 822.
10. *Stephens v. Anglian Water Authority*, (1987) 3 All ER 379 (CA).
11. *Wilson v. Waddell*, (1876) 2 App Cas 95; *Fletcher v. Smith*, (1877) 2 App Cas 781; *Smith v. Kenrick*, (1849) 7 CB 515; *Westhoughton Coal and Cannel Co. v. Wigan Coal Corporation*, (1939) Ch 800.
12. *Gloucester Grammar School* case, (1410) YB 11 Hen IV, fo. 47, pl. 21, 23.
13. *Quinn v. Leathem*, (1901) AC 495, 539 : 70 LJPS 6.
14. *Mogul Steamship Co. v. Mc Gregor, Gow & Co.*, (1892) AC 25 : 61 LJQB 295. See, Chapter XIV, title 4(B), text and notes 63, 64, p. 362.
15. *Earl Cowley v. Countess Cowley*, (1901) AC 450.

Using of name of another man's house.—The plaintiff's house was called "Ashford Lodge" for sixty years, and the adjoining house belonging to the defendant was called "*Ashford Villa*" for forty years. The defendant altered the name of his house to that of the plaintiff's house. The plaintiffs alleged that this act of the defendant had caused them great inconvenience and annoyance, and had materially diminished the value of their property. It was held that defendant had not violated any legal right of the plaintiffs.[16]

Obstruction to view of shop.—The plaintiff carried on his business in a shop which had a board to indicate the materials in which he dealt. The defendant by virtue of statutory powers erected a gasometer which obstructed the view of his premises. In an action by the plaintiff to restrain by injunction the erection of the gasometer as it injured him by obstructing the view of his place of business, it was held that no injunction could be granted for the injury complained of.[17]

Misdelivery of telegram.—A sent a telegram to B for the shipment of certain goods. The telegraph company, mistaking the registered address of C for that of B, delivered the telegram to C. C, acting on the telegram, sent the goods to A. A refused to accept the goods stating that he had ordered the goods not from C, but from B. C sued the telegraph company for damages for the loss suffered by him. It was held that C had no cause of action against the company, for the company did not owe any duty of care to C, and no legal right of C could therefore be said to have been infringed.[18]

Water supply cut-off.—Due to the negligence of the defendants a fire hydrant near the defendants' factory on an industrial estate was damaged by their lorry. As a result of this, supply of water through the main was cut off and this caused loss of a day's work in the plaintiffs' factory. Neither the main nor the hydrant was the property of the plaintiffs. In an action by the plaintiffs to recover their loss it was held that the action did not lie because there was no *injuria*, as the duty not to damage the hydrant was owed to the owners of the hydrant that was damaged and not to the plaintiffs.[19]

Indian cases—Refusal of employment.—The plaintiffs owned a tug which was employed for towing ships in charge of Government pilots in the Hooghly. A troopship arrived in the Hooghly. The plaintiffs asked an exorbitant price for towing-up the ship, whereupon the Superintendent of Marine issued a general order to officers of the Government pilot service not to employ the tug in future. The plaintiffs brought an action against the Superintendent for damages. It was held that they had no legal right to have their tug employed by Government, and the action was dismissed.[20]

Ceasing to offer food to idol.—Where the servants of a Hindu temple had a right to get the food offered to the idol, but the person who was under an obligation to the idol to offer food did not do so, and the servants brought a suit against him for damages, it was held that the defendant was under no legal obligation to supply food to the temple's servants, and though his omission to supply food to the idol might involve a loss to the plaintiffs, it was *damnum absque injuria*, and could not entitle the plaintiffs to maintain a suit.[21]

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16. *Day v. Brownring*, (1878) 10 Ch D 294 : 39 LT 553.
17. *Butt v. Imperial Gas Co.*, (1866) LR 2 Ch App 158.
18. *Dickson v. Reuter's Telegraph Company*, (1877) 3 CPD 1 : 47 LJCP 1.
19. *Electrochrome Ltd. v. Welsh Plastics Ltd.*, (1968) 2 All ER 205.
20. *Rogers v. Rajendro Dutt*, (1860) 8 MIA 103 : 13 Moore PC 209.
21. *Dhadphale v. Gurav*, (1881) 6 Bom 122. See, *Bindachari v. Dracup*, (1871) 8 BHC (ACJ) 202 (refusal of a pleader to appear in a case under section 180, Criminal Procedure Code, is no injury); see, *Dhondu Hari v. Curtis*, (1907) 9 Bom LR 302; *W. H. Rattigan v. The Municipal Committee,*

(Footnote No. 21 Contd.)

Damage to wall by water.—The defendant built two *pacca* walls on his land on two sides of his house as a result of which water flowing through a lane belonging to the defendant and situated between the defendant's and plaintiff's houses damaged the walls of the plaintiff. The plaintiff had not acquired any right of easement. It was held that the defendant by building the wall on his land had not in any way violated the plaintiff's right, that this was a case of *damnum sine injuria* and that, therefore, no right of action accrued to the plaintiff.[22]

Loss of one academic year.—A student was wrongly detained for shortage of attendance by the Principal on a misconstruction of the relevant regulations and thereby the student suffered the loss of one year. In a suit for damages it was held that the suit was not maintainable as the misconstruction of the regulations did not amount to a tort.[23]

The result of the two maxims[24] is that there are moral wrongs for which the law gives no legal remedy though they cause great loss or detriment; and, on the other hand, there are legal wrongs for which the law does give a legal remedy, though there be only violation of a private right, without actual loss or detriment in the particular case. As already seen, there are torts which are not actionable *per se*. In these cases what is violated is a qualified right as distinguished from an absolute right in the sense that actual damage is an ingredient of the tort and the injury or wrong is complete only when it is accompanied by actual damage. Such damage is called variously, "express loss", "particular damage", "damage in fact", "special or particular loss".[25] But "actual damage" is the better expression to be used in the present context. Actual damage is the gist of action in the following cases: (1) right to support of land as between adjacent landowners; (2) menace; (3) seduction; (4) slander (except in four cases); (5) deceit; (6) conspiracy or confederation; (7) waste; (8) distress *damage feasant*; (9) negligence; (10) nuisance consisting of damages to property; and (11) actions to procure persons to break their contracts with others.

3(D) Remedy

A tort is a civil injury, but all civil injuries are not torts. The wrongful act must come under the category of wrongs for which the remedy is a civil action for damages. The essential remedy for a tort is an action for damages, but there are other remedies also, *e.g.*, injunction may be obtained in addition to damages in certain cases of wrongs. Specific restitution of a chattel may be claimed in an action for detention of a chattel. Where there is dispossession of land, the plaintiff in addition to damages also claims to recover the land itself. But it is principally the right to damages that brings such wrongful acts within the category of torts. There also exist a large number of unauthorised acts for which only a criminal prosecution can be instituted. Further, damages claimable in a tort action are unliquidated damages. For example, as earlier seen an action for money had and received in the context of *quasi*-contract, where liquidated damages are claimed is not a tort action.

(Footnote No. 21 Contd.)
Lahore, (1888) PR No. 106 of 1888 (erection of a slaughter-house near a person's house is no injury if no nuisance); *Shidramappa v. Mahomed*, (1920) 22 Bom LR 1107 : 59 IC 391 : AIR 1920 Bom 207 (erection of dam to pen back rainwater is an injury).
22. *Anand Singh v. Ramachandra*, AIR 1963 MP 28 : ILR (1960) MP 854 : 1961 Jab LJ 1352.
23. *Vishnu Dutt Sharma v. Board of High School and Intermediate Examination*, AIR 1981 All 46.
24. '*Damnum Sine Injuria*' and '*Injuria Sine Damnum*'.
25. See, the three meanings assigned to this expression in the judgment of BROWN. L.J., in *Ratcliffe v. Evans*, (1892) 2 QB 524 (528) : 66 LT 794. See, General and Special Damages, Chapter IX, titles 1(D)(iii), p. 213.

The law of torts is said to be a development of the maxim *ubi jus ibi remedium* (there is no wrong without a remedy). *Jus* signifies here the 'legal authority to do or to demand something; and *remedium* may be defined to be the right of action, or the means given by law, for the recovery or assertion of a right. If a man has a right, "he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; want of right and want of remedy are reciprocal.[26] The maxim does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal and made without consideration,[27] nor for many kinds of verbal slander, though each may involve utter ruin; nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms; and it would be more intelligibly and correctly stated, if it were reversed, so as to stand, "where there is no legal remedy, there is no legal wrong."[28] Again, speaking generally, there is in law no right without a remedy; and, if all remedies for enforcing a right are gone, the right has from practical point of view ceased to exist.[29] The correct principle is that wherever a man has a right the law should provide a remedy[30] and the absence of a remedy is evidence but is not conclusive that no right exists.[31]

4. GENERAL PRINCIPLE OF LIABILITY

There are two views prevailing on the subject of existence of some broad unifying principle of all tortious liability. The two views are set out in the question that SALMOND asked: "Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity and leaving all the residue outside the sphere of legal responsibility".[32] SALMOND preferred the second alternative and his book for this reason is still entitled as Law of Torts and not Law of Tort.[33] WINFIELD on the other hand accepted the second alternative, *i.e.*, the narrow view only from the practical point of view as a day to day matter but he contended that "from a broader outlook there was validity in the theory of a fundamental general principle of liability, for if we take the view, as we must, that the law of tort has grown for centuries, and is still growing, then some such principle seems to be at the back of it".[34] The entire history of the development of the tort law shows a continuous

26. Per HOLT, C.J., in *Ashby v. White*, (1703) 2 Ld Raym 938 (953).
27. Under Indian Law there is no legal remedy for the breach of a solemn promise made without consideration whether under seal or not.
28. Per STEPHEN, J., in *Bradlaugh v. Gossett*, (1884) 12 QBD 271 (285).
29. Per CAVE, J., in *In re, Hepburn, Ex parte Smith*, (1884) 14 QBD 394 (399).
30. *Letand v. Cooper*, (1965) 1 QB 232 : (1964) 3 WLR 573 : (1964) 2 All ER 929.
31. *Abbot v. Sullivan*, (1952) 1 KB 189 (200) : (1952) 1 All ER 226. For example, there is a right to receive a time-barred debt but there is no remedy to recover it.
32. SALMOND, Torts, 2nd edition, (1910), pp. 8, 9.
33. SALMOND and HEUSTON, Law of Torts, 20th edition, p. 18. At p. 21, the book in defence of SALMOND now says: "To some extent the critics seem to have misunderstood SALMOND. He never committed himself to the proposition, certainly untenable now, and probably always so, that the law of torts is a closed and inexpansible system ... SALMOND merely contended that these changes were not exclusively referable to any single principle. In this he was probably right."
34. WINFIELD and JOLOWICZ on Tort, 12th edition, (1984), p. 14. See further, FRIEDMANN, Legal Theory, 5th edition., p. 528. SETALVAD, The Common Law in India, p. 109: "A body of rules has grown and is constantly growing in response to new concepts of right and duty and new needs and conditions of advancing civilisation."

tendency, which is naturally not uniform in all common law countries, to recognise as worthy of legal protection, interests which were previously not protected at all or were infrequently protected and it is unlikely that this tendency has ceased or is going to cease in future.[35] There are dicta both ancient and modern that categories of tort are not closed and that novelty of a claim is no defence.[36] But generally, the judicial process leading to recognition of new tort situations is slow and concealed for judges are cautious in making innovations and they seldom proclaim their creative role. Normally a new principle is judicially accepted to accommodate new ideas of social welfare[37] or public policy[38] only after they have gained their recognition in the society for example in extra-judicial writings and even then the decision accepting the new principle is supported mainly by expansion or restriction of existing principles which "gradually receive a new content and at last a new form".[39] A modern example of final recognition of a new tort of intimidation is furnished by *Rookes v. Barnard*.[40] Recent advances in the field of negligence have recognised new duty situations.[41] It has been held[42] that there are not a number of separate torts involving negligence each with its own rules as was thought at the beginning of this century and that the general principle behind the tort of negligence is that "you must take reasonable care to avoid acts or omissions which you can reasonably *foresee* would be likely to injure your neighbour"[43] and a new duty situation may be recognised on this principle provided it is just and reasonable to do so.[44] May be that similarly in future some common principle may be found by the English law behind all torts but it has not so far recognised a general principle of liability,[45] or what is known as the *prima facie* tort theory under the American law that *prima facie* "the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of the pleading requires justification if the defendant is to escape".[46] The High Court of Australia in a controversial decision[47] *Beaudesert Shire Council v. Smith*[48] appeared to recognise the existence of an innominate tort of the nature of an

35. American Restatement of Torts, Article 1; D.L. LLOYD, Jurisprudence, 2nd edition, p. 245. *Dr. Mohammed v. Dr. Mehfooz Ali*, 1991 MP LJ 559.
36. *Ashby v. White* (1703) 2 Ld Raym 938; *Chapman v. Pickersgill*, (1762) 2 Wils 145 (146): "Torts are infinitely various, not limited or confined" (PRATT C.J.); *Donoghue v. Stevenson*, (1932) AC 562 (619) (HL): "The conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life" (LORD MACMILLAN); *Rookes v. Barnard*, (1964) AC 1129 (1169) : (1964) 2 WLR 269 (HL): *Home Officer v. Dorset Yacht Co. Ltd.*, (1970) 2 All ER 294 : 1970 AC 1004 (HL). The novelty of a claim may raise a presumption against its validity; see, *Wheeler v. Sanerfield*, (1966) 2 QB 94 (104) (LORD DENNING M.R.): "I would not exclude the possibility of such an action; but none as yet has appeared in the books. And this will not be the first."
37. CARDOZO, The Nature of the Judicial Process, p. 113; *Dr. Mohammed v. Dr. Mehfooz Ali, supra.*
38. HOLMES, The Common Law, p. 32; *Dr. Mohammed v. Dr. Mehfooz Ali, supra.*
39. HOLMES, The Common Law, p. 32. See further *Popatlal Gokaldas Shah v. Ahmedabad Municipal Corporation*, AIR 2003 Guj 44, pp. 45, 46.
40. *Rookes v. Barnard*, (1964) AC 1129 : (1964) 2 WLR 269 (HL).
41. *Donoghue v. Stevenson*, (1932) AC 562 (HL); *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, (1964) AC 465 : (1963) 2 All ER 575; *Home Officer v. Dorset Yacht Co. Ltd.*, (1982) 3 All ER 201 (HL); *MPSRTC v.* 1970 AC 1004 (HL); *Junior Books Ltd. v. Veitchi Co. Ltd.*, 1971 Jab LJ 610 : 1971 ACJ 328. *Basantibai*, (1971) MPLJ 706 (DB) :
42. *Home Officer v. Dorset Yacht Co. Ltd.*, (1970) 2 All ER 294 · 1970 AC 1004 (HL) (LORD REID).
43. *Donoghue v. Stevenson*, (1932) AC 562 (580) · 147 LT 281 (HL) (LORD ATKIN).
44. *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*, (1984) 3 All ER 529 (534) : 1985 AC 218 (HL). See, p. 462, *post.*
45. PATON, Jurisprudence, 3rd edition. p. 425.
46. *Aikens v. Wisconsin*, 195 US 194, p. 204 (HOLMES, J); Restatement, Torts (2nd) s. 870; CHRISTIE, Cases and Materials on the Law of Torts, p. 19; WINFIELD & JOLOWICZ, Tort, 12th edition, (1984) p. 14.
47. FLEMING, Law of Torts, 6th edition, p. 661 (662).
48. *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor*, (1966) 120 CLR 145. But, see, (1937) 58 CLR 479 (493) per LATHAM, C.J.: "It has been contended that if damage is caused to any

(Footnote No. 48 Contd.)

"action for damages upon the case" available to "a person who suffers harm or loss as the inevitable consequence of unlawful, intentional and positive acts of another". But the decision has not been followed subsequently in Australia or other common law jurisdictions and the House of Lords in *Lonrho Ltd. v. Shell Petroleum Co. Ltd.*[49] emphatically ruled that it forms no part of the English Law. The present state of the English law has been pithily summed up by Prof. G. Williams as follows: "There are some general rules creating liability—and some equally general rules exempting from liability—Between the two is a stretch of disputed territory, with the courts as an unbiased boundary commission. If, in an unprovided case, the decision passes for the plaintiff, it will be not because of a general theory of liability but because the court feels that here is a case in which existing principles of liability may properly be extended."[50]

When invited to develop a new principle of liability the English Courts generally consider as to how far the existing torts within their recognised boundaries are sufficient to redress the injustice for which a new principle is sought to be developed and whether such a principle has been recognised in other commonwealth jurisdictions. Proceeding on these lines, the House of Lords declined to extend the tort of Malicious Prosecution to cover disciplinary proceedings or even civil proceedings in general though such an extension is recognised in the United States.[51] The English courts also "appear to be determined to arrest the drift towards an American style cry-baby culture in which the first reaction to misfortune is an expectant phone call to the nearest firm of solicitors."[52] This culture was elegantly described by ROUGIER, J., in *John Munroe (Acrylics) Ltd. v. London Fire and Civil Defence Authority*[53] as follows: "It is truism to say that we live in the age of compensation. There seems to be a growing belief that every misfortune must, in pecuniary terms at any rate, be laid at someone else's door, and after every mishap, the cupped palms are outstretched for the solace of monetary compensation."[54] As more recently observed by LORD HOBHOUSE: "The pursuit of an unrestricted culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of citizen."[55] This unrestricted culture of blame assumes that "for every mischance in this accident-prone world some one solvent must be liable in damages."[56] Though in India the risk is not of a drift towards the American style cry-baby culture, with the widening of the right to life guaranteed by Article 21 of the Constitution to embrace almost everything which goes to make a man's life meaningful, complete and worth living with dignity, the risk is that the blame for every misfortune may be laid at the doorstep of the State.[57]

(Footnote No. 48 Contd.)
person by the act of any other person an action will lie unless the second person is able to justify his action. Many cases show that there is no such principle in the law".

49. (1982) AC 173 : (1981) 3 WLR 33 : (1981) 2 All ER 456 (HL).
50. The Foundation of Tortious Liability, (1939) 7 CLJ 131; WINFIELD & JOLOWICZ, Tort, 12th edition, (1984), p. 15; *Dr. Mohammed v. Dr. Mehfooz Ali*, 1991 MPLJ 559.
51. *Gregory v. Portsmouth City Council*, (2000) 1 All ER 560 : 2000 AC 419 : (2000) 2 WLR 306 (HL).
52. Annual Review (All ER) 1996, p. 471.
53. (1996) 4 All ER 318.
54. (1996) 4 All ER 318, p. 332.
55. *Tomlinson v. Congbton Borough Council*, (2003) 3 All ER 1122, p. 1663 (HL).
56. *CBS Songs Ltd. v. Amstrad Consumer Electronics plc*, (1988) 2 All ER 484, p. 497 (HL) (LORD TEMPLEMAN).
57. See, pp. 56–58 *post*.

CHAPTER II

SOME GENERAL ELEMENTS IN TORTS

SYNOPSIS

1. ACT AND OMISSION

IT has already been seen that to constitute a tort there must be a wrongful act.[1] The word "*act*" in this context is used in a wide sense to include both positive and negative acts, *i.e.*, acts and omissions.[2] Wrongful acts which make a person liable in tort are positive acts and sometimes omissions. Acts and omissions must be distinguished from natural occurrences beyond human control such as lightning and earthquake for which a person cannot be held liable. They must also be distinguished from *mere* thoughts and intentions "which are by themselves harmless, hard to prove and difficult to discipline".[3] There is also a basic distinction between an act and an omission. Failure to do something in doing an act is not an omission but a bad way of performing the act. For example, if a lawyer gives an opinion without taking notice of the change in law brought about by a reported decision of the Supreme Court, he would not be guilty of an omission but of performing the act of giving his opinion in a bad way. "An omission is failure to do an act as a whole."[4]

Generally speaking, the law does not impose liability for mere omissions.[5] An omission incurs liability when there is a duty to act.[6] The point can be explained by referring to the well-known example that a person cannot be held responsible for the omission of not rescuing a stranger child whom he sees drowning, even though he can rescue him without any appreciable exertion or risk of harm to himself.[7] But the result would be different if the child is one for whose safety and welfare there is a

1. Chapter 1, title 3(A) and 3(B), pp. 11-13.
2. See also, the definition of 'act' in section 3(2), General Clauses Act, 1897.
3. SALMOND, Jurisprudence, 12th edition, (1966), p. 82.
4. CLERK & LINDSELL, Torts, 15th edition, p. 34. The purpose of the distinction between act done in a bad way and omission "is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity" *Stovin v. Wise*, (1996) 3 All ER 801 (HL), p. 820.
5. *Smith v. Little Woods Organisation Ltd.*, (1987) 1 All ER 710, p. 729 : (1987) 2 WLR 480 (HL); *Stovin v. Wise*, *supra*, p. 819.
6. See, Chapter XIX, title 1(B)(i)(f), p. 474.
7. "A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another?" *Stovin v. Wise*, *supra*, p. 819.

duty laid on the person who finds him drowning. Therefore, in the above example, a parent or guardian will be held liable for failure to attempt a rescue, for it would then be a case of an omission where there is a duty to act. Even in those cases where there is no duty to rescue another, if a person starts the rescue work, he may be held liable for not properly performing the work if he leaves the other worse off than he would otherwise have been.[8] Here, the liability arises not because of any omission but for doing the act of rescue in a bad way. Another example of an actionable omission can be found in the duty of an occupier to abate a natural hazard. A person on whose land a hazard naturally occurs and which threatens to encroach on to another's land thereby threatening to cause damage, is under a duty, if he knows or ought to know of the risk of encroachment, to do what is reasonable in all the circumstances to prevent the risk of the known or foreseeable damage to the other person or his property, and is liable in nuisance if he does not.[9]

2. VOLUNTARY AND INVOLUNTARY ACTS

According to a theory propounded by BROWN and accepted amongst others by AUSTIN, STEPHEN and HOLMES a voluntary act may be distinguished from an involuntary act by dividing the former into "(1) a willed muscular contraction, (2) its circumstances, and (3) its consequences"[10]. An act is innocuous or wrongful because of the circumstances in which it is performed and the consequences which it produces. For instance, "to crook the forefinger with a certain force is the same act whether the trigger of a pistol is next to it or not. It is only the surrounding circumstances of a pistol loaded and cocked, and of a human being in such relation to it, as to be manifestly likely to be hit that make the act a wrong."[11] An act is involuntary when the muscular contraction is not willed. This theory has not been accepted by some others for the reasons that it rests upon dubious psychology, it is inappropriate for the problem of omissions, and it imposes upon the meaning of the term *"act"* a limitation which is contrary to the common usage of speech.[12] In common speech one includes all the relevant circumstances and consequences under the name *"act"*. The act of murdering a person by shooting at him is one act and not merely the muscular contraction of pressing the trigger. The wrongful act of trespass on land includes the circumstance that the land belongs to another, and not merely the bodily movement by which the trespasser makes his entry on it. According to this view, "an act has no natural boundaries" and "it is for the law to determine in each particular case what circumstances and what consequences shall be counted within the compass of the act with which it is concerned."[13] Omissions like positive acts may also be voluntary or involuntary. When a parent fails to rescue his child because he has fallen asleep or because he is suffering from insanity, the omission is involuntary, though it does not involve any question of muscular contractions. The common feature of involuntary acts and omissions according to this view is "not in the absence of any actual exercise of will, but in the lack of ability to control one's behaviour; involuntary acts are those where the actor lacks the power to control his

8. CLERK & LINDSELL, Torts, 15th edition, p. 35, citing the *Ogopogo*, (1970) 1 Lloyd's Rep. 257 (affirmed in (1971) 2 Lloyd's Rep. 410 : (1972) 22 DLR 545) and distinguishing, *East Suffolk Catchment Board v. Kent*, (1941) AC 74, where the plaintiff was not worse off.
9. *Leakey v. National Trust for Places of Historic Interest or National Beauty*, (1980) 1 All ER 17 : 1980 QB 485 : (1980) 2 WLR 65 (CA); *Goldman v. Hargrave*, (1966) 2 All ER 989 (PC) : (1967) 1 AC 645; *Stovin v. Wise*, (1996) 3 All ER 801, pp. 819, 820 (HL).
10. SALMOND, Jurisprudence, 12th edition, (1966), p. 353.
11. HOLMES, The Common Law, p. 46.
12. SALMOND, Jurisprudence, 12th edition, (1966), pp. 354, 355.
13. SALMOND, Jurisprudence, 12th edition, (1966), p. 354.

actions and involuntary omissions are those where the actor's lack of power to control his actions renders him unable to do the act required".[14] An involuntary act does not give rise to any liability. For example, an involuntary act of trespass is not a tort.[15]

In *Olga Tellis v. Bombay Municipal Corporation*,[16] the Supreme Court referring to the inordinate helplessness of pavement dwellers of Bombay observed: "The encroachments committed by those persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice." These observations cannot be understood to mean that an act committed out of helplessness arising out of poverty is an involuntary act under the Law of Torts. The Supreme Court in the sentence following the above observations said that trespass is a tort, and pointed out that necessity is a plausible defence.[17] Had the court intended to lay down that the encroachments were involuntary in the sense known to the Law of Torts and for that reason not actionable, there was no question of suggesting necessity as a defence.

3. MENTAL ELEMENTS

Even a voluntary act, except in those cases where the liability is strict, is not enough to fasten liability and it has to be accompanied with requisite mental element, *i.e.,* malice, intention, negligence or motive to make it an actionable tort assuming that other necessary ingredients of the tort are present.

3(A) Malice

Malice in the popular sense means spite or ill-will. But in law malice has two distinct meanings: (1) Intentional doing of a wrongful act, and (2) Improper motive.[18] In the first sense, malice is synonymous with intention. In the second sense, malice refers to the motive and in this sense it includes not only spite or ill-will but any motive which the law disapproves. Malice in the first sense was described by BAYLEY J., in the following words: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it out of *malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery, without knowing the owner, I do it out of *malice*, because it is a wrongful act, and done intentionally."[19] The word "*wrongful*" imports the infringement of some right, *i.e.,* some interest which the law recognises and protects. Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense.[20] A wrongful act, done knowingly and with a view to its injurious consequences, may be called malicious. But such malice derives its essential character from the circumstances that the act is intentionally done and constitutes a violation of the law.[21] Here also, the use of the word "*malice*" is in the first sense *i.e.,* intentional

14. SALMOND, Jurisprudence, 12th edition, (1966), pp. 354 (355).
15. STREET, Torts, 6th edition, p. 17.
16. (1985) 3 SCC 545, pp. 584, 585 : 1986 Cri LR 23 : AIR 1986 SC 180.
17. See, text and footnote 94, p. 98.
18. SALMOND AND HEUSTON, Torts, 20th edition, (1992), p.20.
19. PER BAYLEY, J., in *Bromage v. Prosser*, (1825) 4 B & C 247, 255.
20. PER BOWEN, L.J., in *Mogul Steamship Company v. McGregor, Gow & Co.*, (1889) 23 QBD 598, 612 : (1892) AC 25.
21. PER LORD WATSON in *Allen v. Flood*, (1898) AC 1 : 14 TLR 125.

wrong doing which is also known as "*malice in law*". Thus, "*Malice in law*" means an act done wrongfully, and without reasonable and probable cause, and not, as in common parlance, an act dictated by angry feeling or vindictive motive.[22] "*Malice in law*" is "*implied malice*" when from the circumstances of the case, the law will infer malice. Malice in the second sense, *i.e.*, improper motive, is sometimes known as "*express malice*", "*actual malice*" or "*malice in fact*" which are synonymous expressions. Malice in this sense, *i.e.*, improper motive, is for example, relevant in the tort of malicious prosecution. The topics of "*Intention*" and "*Motive*" are hereinafter discussed separately.[23]

3(B) Intention, Negligence and Recklessness

Intention is an internal fact, something which passes in the mind and direct evidence of which is not available. "It is common knowledge that the thought of man shall not be tried, for the devil himself knoweth not the thought of man."[24] This dictum of BRIAN C.J., only means that no one can be sure of what was in another's mind because what a person thinks can be inferred only from his conduct. An act is intentional as to its consequences if the person concerned has the knowledge that they would result and also the desire that they should result.[25]

It is a case of negligence when the consequences are not adverted to though a reasonable person would have foreseen them.[26] It is "*recklessness*" when the consequences are adverted to though not desired and there is indifference towards them or willingness to run the risk.[26] Recklessness is sometimes called "Gross negligence" but very often and more properly it is assimilated with intention.[26] It is sometimes said that "a party must be considered in point of law to intend that which is the necessary or the natural consequence of that which he does".[27] This is too wide a statement as it fails to distinguish between intentional and negligent wrong doing.[28]

3(C) Motive

Motive is the ulterior object or purpose of doing an act. It differs from intention in two ways. First, intention relates to the immediate objective of an act, whereas, motive refers to the ulterior objective. Secondly, motive refers to some personal benefit or satisfaction which the actor desires whereas intention need not be so related to the actor.[29] When A poisons B, the immediate objective is to kill B, and so this is A's intention. The ulterior objective of A may be to secure B's estate by inheritance or under a will executed by him and this objective will be A's motive. Motive is generally irrelevant in tort. In *Allen v. Flood*,[30] LORD WATSON said: "Although the rule may be otherwise with regard to crimes, the law of England does not take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability

22. *Stockley v. Hornidge*, (1837) 8 C & P 11; *Collector of Sea Customs v. P. Chithambaram*, ILR (1876) 1 Mad 89 (FB); *Sova Rani Dutt v. Debabrata Dutt*, AIR 1991 Cal 186, p. 189.
23. See, titles 3(B) and 3(C), *infra*.
24. PER BRIAN, C.J., in *Year Book Pasch*. 17 Edw., 4 fol. 2, pl. 2.
25. SALMOND, Jurisprudence, 12th edition, (1966), p. 367 (footnote); CLERK and LINDSELL, Torts, 15th edition, p. 44; WINFIELD & JOLOWICZ, Tort, 12th edition, (1984), p. 44.
26. CLERK and LINDSELL, Torts, 15th edition, p. 44. Negligence as a separate tort is dealt with in Chapter XIX.
27. *R. v. Harvey*, (1823) 2 B & C 257 (264).
28. SALMOND, Jurisprudence, 12th edition, (1966), p. 371.
29. SALMOND, Jurisprudence, 12th edition, (1966), p. 372.
30. (1898) AC 1, 92; *Nan Kee v. Au Fong*, (1934) 13 Ran 175 : AIR 1935 Rang 73(2).

to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent." An act which does not amount to a legal injury cannot be actionable because it is done with a bad motive.[31] It is the act, not the motive for the act, which must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.[32] The exceptional cases where motive is relevant as an ingredient are torts of malicious prosecution, malicious abuse of process and malicious falsehood. Motive is also relevant in the torts of defamation, nuisance and conspiracy. In some cases there may be a plurality of purposes and it may become necessary to decide as to what is the predominant purpose. For example, if persons combine to protect their own interests and to cause damage to another person, they would be liable for the tort of conspiracy if the predominant purpose is to cause damage and damage results; but if the predominant purpose is protection of their legitimate interests, they would not be liable even if damage is caused to another person.[33]

Cutting off underground water supply.—A, sank a well on his land and thereby cut off the underground water-supply from his neighbour B, and B's well was dried up. It was not unlawful for a land-owner to intercept on his own land underground percolating water and prevent it from reaching the land of his neighbour. The act did not become unlawful even though A's motive in so doing was to coerce B to buy his land at his own price. A, therefore, was not liable to B, however improper and malicious his motive might be.[34]

3(D) Distinctions Illustrated

The distinctive features of a voluntary act and characteristic of different mental elements have been noticed above. These are highlighted by an admirable illustration given by PROF. STREET: "If a man throws a stone at a woman, his trespass to her person is intentional; that he threw it because she had jilted him would be immaterial in determining his liability in trespass—that would be his motive. If he did not throw the stone for the purpose of hitting her but ought to have foreseen that it was likely that the stone would hit her, his act would be unintentional but nevertheless negligent. If the stone hit her solely because it rebounded off a tree at which he had thrown it, his conduct would be voluntary; and the hit would be accidental. But, if, while he was holding the stone in his hand, a third party seized his arm and by twisting it compelled him to release his hold on it, whereupon it fell on the woman, his conduct would be involuntary and could never give rise to liability on his part."[35] Two comments here are necessary. In the case where the stone thrown at a tree rebounds and hits the woman it is assumed that the risk that the stone on rebound may hit the woman could not be reasonably foreseen which negatives negligence, and, therefore, it is an accident though the act of throwing the stone is voluntary. In this case also there will be no liability.[36] In the last case, where a third person twists the arm of the person holding the stone and the stone gets released, the act of the person holding the stone is involuntary and so he would not be liable for trespass;

31. *Stevenson v. Newnham*, (1853) 13 CB 285, 297; *Vishnu v. T.L.H. Smith Pearse*, ILR (1949) Nag 232 : AIR 1949 Nag 362.
32. PER LORD MACNAGHTEN in *Mayor & C. of Bradford v. Pickles*, (1895) AC 587, 601.
33. *Crofter Handwoven Harris Tweed Co. v. Veitch*, (1942) AC 435 (445) : 166 LT 173 : (1942) 1 All ER 142 (HL).
34. *Mayor & C. of Bradford v. Pickles*, (1895) AC 587.
35. STREET, Torts, 6th edition, p.16.
36. *Fowler v. Lanning*, (1959) 1 All ER 290 : (1959) 1 QB 426; *Letang v. Cooper*, (1964) 2 All ER 929 : (1965) 1 QB 232 (CA).

but, the person twisting the arm and compelling the release of the stone so that it may hit the woman will be guilty of trespass.

4. MALFEASANCE: MISFEASANCE: NONFEASANCE

The term "*malfeasance*" applies to the commission of an unlawful act. It is generally applicable to those unlawful acts, such as trespass, which are actionable *per se* and do not require proof of intention or motive. The term *"misfeasance"* is applicable to improper performance of some lawful act for example when there is negligence. The term *"non-feasance"* applies to the omission to perform some act when there is an obligation to perform it.[37] Non-feasance of a gratuitous undertaking does not impose liability; but misfeasance does.[38] Where there is a duty towards the individual injured, to do the act by the omission whereof the injury is caused, the non-feasance of such an act gives rise to a cause of action to the same extent as a misfeasance of an act of which there is a duty to perform in a particular manner.[39] The terms malfeasance, misfeasance and non-feasance are of very wide import but they cannot cover a case of breach of public duty which is not actuated with malice or bad faith such as defective planning and construction of a *bundh*.[40]

5. FAULT

It has been seen that damage caused to a person when no legal right is violated does not give rise to any tortious liability even if the act causing the damage is done intentionally with an improper motive.[41] It has also been noticed that mental element such as intention, negligence, malice or motive in association with an act or omission which is violative of a right recognised by law plays an important role in creating liability.[42] Tortious liability here has an element of fault to support it. There is, however, a sphere of tortious liability which is known as absolute or more properly, strict, where the element of fault is conspicuously absent. One of the important examples of strict liability is the rule in *Rylands v. Fletcher*,[43] that the occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape and is liable for the direct consequences of its escape even if he has not been guilty of any negligence. A more important example of strict liability is the rule laid down in *M.C. Mehta v. Union of India*,[44] that an enterprise engaged in a hazardous or inherently dangerous activity is strictly and absolutely liable for the harm resulting from the operation of such activity. Another example of liability without fault is the liability of a master for the tort committed by his servants in the course of employment. There are also many duties and liabilities imposed by statutes on employers, *e.g.*, the Factories Act, the Workmen's Compensation Act, where the element of fault is absent. A large increase in motor accidents gave rise to the view,[45] that the victims and their dependants should be allowed certain amount of

37. *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*, (1994) 4 SCC 1 : JT 1994 (3) SC 492, p. 504.
38. *Elsee v. Gatward*, (1793) 5 TR 143.
39. *Kelly v. Metropolitan Railway Co.*, (1895) 1 QB 944 : 64 LJQB 658 : 72 LT 551.
40. *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*, *supra*, p. 504 (JT).
41. See, title 3(C), Chapter 1, p. 13.
42. Title 3, *supra*.
43. *Rylands v. Fletcher*, (1868) LR 3 HL 330 : LRI Ex. 265 . See further, Chapter XIX, title 2B.
44. AIR 1987 SC 1086 : (1987) 1 Comp LJ 99 (SC) : (1987) 1 Supreme 65 : (1987) 1 SCC 395. See further, Chapter XIX, title 2(C), p. 502.
45. *Kamla Devi v. Krishanchand*, AIR 1970 MP 168 : 1970 ACJ 310 (MP), p. 313 : 1970 Jab LJ 310 : 1970 MPLJ 273; *Bishan Devi v. Sirbaksh Singh*, AIR 1979 SC 1862 : (1980) 1 SCC 273 :

(Footnote No. 45 Contd.)

compensation on no fault basis without prejudice to their right of getting higher compensation on the principle of fault and this was first implemented in India by the Motor Vehicles (Amendment) Act, 1982. Damages from radioactive properties of nuclear matter to person or property of third parties highlighted in international conventions led to imposition of strict liability by the Nuclear Installation Act, 1965 (U.K.).[46] Thus, at one extremity are the situations where damage though intentionally caused is not actionable and at the other extremity are the situations where the law imposes strict liability without any fault of the defendant. Between these two extremities lies the area where existence of fault in the form of intention, negligence or motive is essential to fasten liability on the wrongdoer. As stated by HOLMES: "As the law on the one hand allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them, so at the other extreme, it may on the grounds of policy throw the absolute risk of certain transactions on the person engaging in them, irrespective of blameworthiness in any sense. Most liabilities in tort lie between these two extremes, and are founded on the infliction of harm which the defendant had a reasonable opportunity to avoid at the time of acts or omissions which were its proximate cause."[47] The sphere of strict liability falling at one extremity is not insignificant and cannot be ignored as a mere aberration and a theory propounded, as was done by SALMOND,[48] that fault is the basis of all tortious liability. The views of SALMOND have not been shared by others.[49] Apart from cases of strict liability, the rule that damages allowable are proportioned to the damage or loss and not fault also negatives the theory of fault. For example, slight negligence may unfortunately cause severe damage to a plaintiff and the defendant may have to pay huge amount as compensation; whereas, gross negligence may fortunately cause insignificant damage and the plaintiff may then be allowed only nominal compensation. Moreover, prevalence of insurance both optional and compulsory[50] to cover risk and liability has diluted the deterrent factor in the award of compensation. This is not to say that we have reached the stage when the element of fault can be ignored. It has already been stated that the wide area falling within the two extremities of no liability and strict liability is covered by torts where fault in the form of intention, negligence or motive is essential to fasten liability. There are also instances where situations originally falling within the sphere of strict liability have moved upwards and are now embraced within the area of fault liability. For example, the tort of trespass to person which was initially thought to be of strict liability has now come to be recognised as one requiring negligence of the defendant as an essential ingredient.[51] Further, although the practice of insuring risk and liability is growing (it is compulsory in respect of accidents arising out of use of motor vehicles) it has not become so wide as to cover all forms of risks and liabilities and the award of aggravated and exemplary damages[52] has the tendency of deterring the defendant to repeat and others

(Footnote No. 45 Contd.)
(1980) 1 SCR 300 : 1979 ACJ 496 (SC); *Kashiram Mathur v. Sardar Rajendra Singh*, AIR 1983 MP 24 : 1983 ACJ 152 (MP), p. 163 : 1982 MPLJ 803 : 1983 Jab LJ 113.
46. *Blue Circle Industries Plc. v. Ministry of Defence*, (1998) 3 All ER 385, p. 404 : (1999) 1 WLR 295 : 1999 Eny.L.R. 22 (CA).
47. HOLMES, The Common Law, p. 116, SETALVAD, The Common Law in India, p. 108.
48. SALMOND, Torts, 6th edition, pp. 12, 13.
49. POLLOCK, A Plea for Historical Interpretation, (1923) 39 LQR 164 (167); WINFIELD and JOLOWICZ, Tort, 12th edition, (1984), p. 25; SALMOND & HEUSTON, Torts, 20th edition, (1992), p. 24, CLERK & LINDSELL, Torts, 15th edition, pp. 10 (11).
50. For example, section 93 of the Motor Vehicles Act, 1939 as amended by Act 47 of 1982 provides for compulsory insurance to meet claims, arising both on the basis of fault principle and no fault principle.
51. *Fowler v. Lanning*, (1959) 1 All ER 290 : (1959) 2 WLR 241; *Letang v. Cooper*, (1964) 2 All ER 929 : (1964) 3 WLR 575 (CA).
52. *Cassell & Co. Ltd. v. Broome*, (1972) AC 1027 : (1972) 2 WLR 645 (HL).

in similar situations to commit the wrongs for which damages are awarded. In view of these diversities all that can be said is that if one has to discern some common factor in tortious liabilities, that factor is flexible public policy, and not fault, which makes the courts[53] and the legislature[54] to recognise new concepts of right and duty to meet the needs of advancing civilisation. When public policy influenced by social justice or similar other considerations requires that the plaintiff be compensated irrespective of fault, the law provides for strict liability and where there are no such considerations, public policy requires that the defendant should not be made to pay for the loss arising from an event which he could not have avoided and so the law provides liability on principle of fault.

53. "The conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adopt itself to the changing circumstances of life." PER LORD MACMILLAN in *Donoghue v. Stevenson*, (1932) AC 562 (619) ; 48 TLR 494 (HL). See, further observations of BHAGWATI C.J., in *M.C. Mehta v. Union of India*, AIR 1987 SC 1086 : (1987) 1 SCC 395, p. 420 and of SAHAI, J., in *Jay Laxmi Salt Works v. State of Gujarat*, (1994) 4 SCC 1 : (1994) 3 JT 492, p. 501, which are quoted at p. 4 *ante*.
54. For example, The Workmen's Compensation Act, The Motor Vehicles (Amendment) Act, 1982.

CHAPTER III

PERSONAL CAPACITY

SYNOPSIS

All persons have the capacity to sue and be sued in tort. This, however, is a general rule and is subject to modification in respect of certain categories of persons.

1. CONVICTS AND PERSONS IN CUSTODY

UNDER the Forfeiture Act, 1870,[1] a convict whose sentence was in force and unexpired, and who was not "lawfully at large under any license" could not sue for an injury to his property, or for recovery of a debt. This disability has been removed by the Criminal Justice Act, 1948.[2] Under the English law, a convicted person, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication.[3] The conviction and sentence by a court and rules of prison discipline curtail the liberty of a convict, but, subject to that curtailment, the courts remain the ultimate custodians of his rights and liberties in the same manner as they are in respect of other citizens.[4] A convict can, therefore, under English law sue for wrongs to his person and property like any other citizen. The Indian law is the same. "Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon conviction, to live in a prison house entails by its force the deprivation of fundamental freedoms like the rights to move freely throughout the territory of India or the right to practise a profession. A man of profession would thus be stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise, a prisoner or even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except

1. 33 & 34 Vic., c. 23, ss. 8, 30.
2. 11 & 12 Geo., VI, c. 58, Sch. 10, Part I.
3. *Raymond v. Honey*, (1982) 1 All ER 756, p. 759 : 1983 AC 1(HL).
4. *R. v. Hull Prison Board of Visitors, ex parte St. German*, (1979) 1 All ER 701 (CA), p. 716; *Leach v. Parkhurst Prison Deputy Governor*, (1988) 1 All ER 485 (HL), p. 501; *Regina v. Deputy Governor of Parkhurst Prison*, (1991) 3 WLR 340 (HL).

according to procedure established by law."[5] Conviction of a person, thus, does not draw any iron-curtain between him and his rights and he is not reduced to a non-person.[6] A convict can, therefore, sue in tort for vindication of his right which is invaded by a tortious act committed by another. He can thus sue for battery or assault if prison authorities apply excessive force to enforce prison discipline or apply force for an improper purpose.[7] A convict was attacked by another convict in Jail and killed due to failure of Jail authorities to protect him. In a petition under Article 32 of the Constitution by the dependants of the deceased they were awarded Rs. 1,00,000 as compensation against the state for violation of the fundamental right of life protected under Article 21.[8]

The state has a higher responsibility in respect of persons in its custody to ensure that they are not deprived of their right to life.[9] The same principle is applied to a patient detained in a Mental Health Hospital. Where there was a real and immediate risk of a detained patient committing suicide, there was an operational obligation on the authorities to do all that could be expected to prevent it. When a patient absconded because of negligence of the authorities and committed suicide the public authority responsible for the hospital was held liable in damages to the daughter of the patient for deprivation of right to life under the Human Rights Act, 1998 (U.K.).[10]

Among the rights which, in part atleast survive to a prisoner are "three important rights closely related but free-standing, each of them calling for appropriate legal protection : the right of access to a court, the right of access to legal advice, and the right to communicate confidentially with a legal advisor under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the end which justify the curtailments".[11] Further, a convicted person is not deprived of his fundamental right of freedom of speech and, subject to rules relating to prison discipline, he cannot merely communicate with his friends and relations but also with a journalist with a request to further investigate the case for proving his innocence and for showing that his conviction has resulted in miscarriage of justice.[12]

A member of Parliament as an undertrial prisoner is not above the law and is subject to jail discipline.[13] But if he won the election contesting from jail he can be allowed to take oath as M.P. but he has to be brought back to jail after taking oath.[14]

But a prisoner has no 'residual liberty' to sue for false imprisonment for breach of prison rules *e.g.*, when he is segregated in breach of these rules but he can challenge the segregation by a public law remedy *e.g.*, a writ petition; and if conditions of

5. *D.B.Y. Patnaik v. A.P.*, AIR 1974 SC 2092, p. 2094 : (1975) 3 SCC 185 : 1975 Cri LJ 556; see further, *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610, pp. 618, 619 : (1997) 1 SCC 416; *State of Andhra Pradesh v. Challa Ramkrishna Reddy*, (2000) 6 JT 334, pp. 345 to 347 : AIR 2000 SC 2083, pp. 2088 to 2092 : (2000) 5 SCC 712.
6. *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675, p. 1727 : (1978) 4 SCC 494. For directions of the Supreme Court for jail reforms, see, *Rama Murthy v. State of Karnataka*, AIR 1997 SC 1739 : (1997) 2 SCC 642. For direction for payment of equitable wages to prisoners from whom work is taken, see, *State of Gujarat v. Hon'ble High Court of Gujarat*, AIR 1998 SC 3164.
7. *R. v. Deputy Governor of Parkhurst Prison*, (1990) 3 All ER 687 (CA), p. 709.
8. *Smt. Kewal Pati v. State of U.P.*, (1995) 3 SCC 600 : (1995) 2 SCALE 729 : 1995 ACJ 859.
9. See text and footnote 42, pp. 50, 51.
10. *Savage v. South Essex Partnership NHS Foundation Trust*, (2009)1 All ER 1053 (H.L.).
11. *R. v. Secretary of State for the Home Department, exparte Daly*, (2001) 3 All ER 433, p. 437 : (2001) UK HL 26 : (2001) 2 AC 532 : (2001) 2 WLR 1622 : (2001) 3 All ER 433 (H.L.).
12. *R. v. Secretary of State for the Home Department*, (1999) 3 All ER 400 (HL).
13. *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav*, (2005) 3 SCC 284 : AIR 2005 SC 972 : (2005) 3 SCC 307 : AIR 2005 SC 4041.
14. *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav*, (2005) 3 SCC 311.

detention are so intolerable that his health suffers he may also have a private law remedy of suing in negligence.[15]

2. ALIEN ENEMY

By an alien enemy is meant a person of enemy nationality or a person residing in or carrying on business in enemy territory, whatever his nationality.[16] Even a British subject or a neutral residing voluntarily or carrying on business in enemy territory is in the same position as a subject of hostile nationality and he will be treated as an enemy alien.[17] An enemy alien cannot sue in his own right.[18] He cannot maintain an action unless by virtue of an Order in Council, or unless he comes into the British Dominions under a flag of truce, a cartel, a pass, or some other act of public authority putting him in the King's peace.[19] An alien enemy residing within the realm by the express or tacit licence of the Crown is temporarily free from his enemy character and can invoke jurisdiction of courts.[20] Similar principles, it would seem, apply in India. Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in any court otherwise competent to try the suit, as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such court.[21] Every person residing in a foreign country, the Government of which is at war with India and carrying on business in that country without a licence on that behalf granted by the Central Government is deemed to be an alien enemy residing in a foreign country.[22]

3. HUSBAND AND WIFE

The common law relating to married women suffered from serious anomalies. A married woman could not sue for any tort committed by a third person unless her husband joined with her as plaintiff. She could also not be sued for a tort committed by her unless her husband was made a defendant. Further, she could not sue her husband and the husband could not sue her for any tort committed by one against the other. These anomalies have been by and large removed by legislation. By the Married Women's Property Act, 1882[23] and the Law Reform (Married Women and Tortfeasors) Act, 1935,[24] a married woman can sue for any tort committed by a third person and can also be sued for any tort committed by her without joining her husband who cannot be made liable or made party to a suit simply because he is the husband. Finally, by the Law Reform (Husband and Wife) Act, 1962,[25] each of the parties to a marriage has the same right of action in tort against the other as if they were not married but the court has a discretion to stay the proceedings to prevent them from using it as a forum for trivial domestic disputes without any chance of

15. *Hague v. Deputy Governor of Parkhurst Prison*, (1991) 3 All ER 733 (HL) : (1991) 3 WLR 340 (HL).
16. *Scotland v. South African Territories (Limited)*, (1917) 33 TLR 255.
17. *Porter v. Freudenberg*, (1915) 1 KB 857, p. 869; *Sovracht (VO) v. Van Udens Scheepvarten Agentuur Maatschappij (N.V. Gabr.)*, (1943) AC 203 (HL).
18. *De Wahl v. Braune*, (1856) 1 H & N 178.
19. *The Hoop*, (1799) 1 Rob 196, 201.
20. *Johnstone v. Pedlar*, (1921) 2 AC 262 : 37 TLR 870 : 90 LJPC 181 : 125 : LT 809.
21. Civil Procedure Code, Act V of 1908, s. 83.
22. Explanation to s. 83 Civil Procedure Code. But, see, *Manaseeh Film Co. v. Gemini Picture Circuit*, AIR 1944 Mad 239.
23. 45 & 46 Vic., c. 75, s. 1.
24. 25 & 26 Geo., V., c. 30, s. 1.
25. 10 & 11 Eliz. 2, c. 48.

substantial benefit to either of them. The aforesaid anomalies removed by legislation resulted from the doctrine of the common law that marital status made the husband and wife one person in the eye of law, a doctrine which was used to reduce the wife to a subordinate position. Marital status of Hindus, Buddhists, Sikhs, Jains and Muslims in India is governed by their personal laws and not by the common law. Neither does marriage under these personal laws affect the capacity of the parties for suing or for being sued, nor does it confer any protection to any of the spouses for any tortious act committed by one against the other. As regards other persons, *e.g.*, Christians who in respect of the marital status may have been subject to the common law, the anomaly to some extent was removed by the Married Women's Property Act, 1874, under which a married woman to whom the Act applies can sue or be sued alone. Even if there was ever any anomaly in the Indian law similar in any manner to those in the common law, it could not survive the impact of the Constitution which, under Article 14, embodies a guarantee against arbitrariness and unreasonableness.[26] The legal position, therefore, appears to be that marriage has no effect on the rights and liabilities of either of the spouses in respect of any tort committed by either of them or by a third party. The wife can sue the husband for any tort committed by him against her and the husband can sue the wife for any tort committed by her against him.[27] The wife against whom a tort has been committed by another person can sue him without joining the husband and similarly the husband can sue for any tort committed against him without joining the wife. Each of the spouses can similarly be sued in tort by a third party without joining the other as a party. Further, a conspiracy between husband and wife is capable of giving rise to tortious liability.[28]

4. CORPORATION

A Corporation is a legal person. It may, like the State Bank of India, a University or a Metropolitan Council, be created by an Act of the legislature; or it may, like a company be created under an Act of the legislature. The common features of Corporations are a name, perpetuity of existence and capacity to sue and be sued.

Suits by Corporations.—A Corporation cannot obviously bring a suit for torts which are only wrongs against living persons, *e.g.*, assault and false imprisonment. It cannot also sue for a tort committed essentially against its shareholders or employees unless the tort has also some impact on the governance or business or property of the Corporations.[29] This is for the reason that a Corporation's personality is different and distinct from the individuals constituting it and the employees acting for it. Subject to these general reservations, a Corporation can sue for torts committed against itself. A Corporation can thus sue for malicious presentation of a winding-up petition[30] or a libel charging it with insolvency or with dishonest or incompetent management.[31] It was once held that a Corporation cannot maintain an action for libel charging it with corruption for it is only individuals and not the Corporation who can be guilty of such an offence.[32] However, certain authorities show that this view is erroneous and

26. *Ajay Hasia V. Khalid Mujib*, AIR 1981 SC 487, pp. 498, 499 : (1981) 1 SCC 722.
27. See, *Church v. Church*, (1983) 133 NLJ 317, where damages were allowed in an action for battery between spouses; cited in WINFIELD and JOLOWICZ, Tort, 12th edition, p. 690, footnote 39.
28. *Midland Bank Trust Co. Ltd. v. Green* (No. 3), 1979 Ch. 496 : 1982 Ch 529 (CA).
29. *Bognor Regis. UDC v. Campion*, (1972) 2 QB 169 : (1972) 2 WLR 983.
30. *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 QBD 674.
31. *Metropolitan Saloon Omnibus Co. v. Hawkins*, (1889) 4 Hd No. 87 : 28 LJ Ex 201.
32. *Mayor etc. of Manchester v. Williams*, (1891) 1 QB 94.

that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business.[33]

A limited liability company, no less than an individual, can maintain an action for slander without proof of special damage, where the words are calculated to injure its reputation in relation to its trade or business.[34]

Suits against Corporations.—The existence and extent of the liability of a corporation in actions of tort were at one time a matter of doubt, due partly to technical difficulties of procedure and partly to the theoretical difficulty of imputing wrongful acts or intentions to fictitious persons.[35]

A corporation is undoubtedly liable for torts committed by its agents or servants to the same extent as a principal is liable for the torts of his agent or an employer for the torts of his servant, when the tort is committed in the course of doing an act which is within the scope of the powers of the corporation. It may thus be liable for assault, false imprisonment, trespass, conversion, libel or negligence.[36] It was thought at one time that a corporation could not be held liable for wrongs involving malice or fraud on the ground that to support an action for such a wrong it must be shown that the wrong-doer was actuated by a motive in his mind and that "a corporation has no mind".[37] But the alter ego doctrine developed later has solved the difficulty. In the words of VISCOUNT HALDONE LC: "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."[38] The doctrine stated above attributes to the corporation the mind and will of the natural person or persons who have management and control of the actions of the corporation in relation to the act or omission in point.[39] By applying this doctrine of attribution as further explained by the Privy Council,[40] a company may be held liable for the fault of an employee acting in the course of employment even though the employee acted contrary to the orders of the company[41] or with a corrupt purpose.[42] It is now settled that a corporation is liable for wrongs even of malice and fraud. A corporation, therefore, may be sued for malicious prosecution or for deceit.[43]

33. *Derbyshire County Council v. Times News Papers Ltd.*, (1993) 1 All ER 1011, p. 1017 : 1993 AC 534 (HL). See further, *D. & L. Caterers Ltd. v. D'Ajou*, (1945) 1 KB 364; *National Union of General and Municipal Workers v. Gillan*, (1946) KB 81 : (1945) 2 All ER 543; *Willis v. Brooks*, (1947) 1 All ER 191 : 62 TLR 745; *South Heton Coal Co. Ltd. v. N.E. News Association Ltd.*, (1894) 1 QB 133.
34. *D. & L. Caterers. Ld. v. D'Ajou*, (1945) 1 KB 364 : 114 LJKB 386 (CA).
35. PER LORD BRAMWELL in *Abrath v. North Eastern Railway Co.*, (1883) 11 App. Cas 247 : 55 LT 63.
36. *Mersey Docks Trustees v. Gibbs*, (1866) LR 1 HL 93; *Criminal Justice Society v. Union of India & Others*, AIR 2010 Del 194. In a Public Interest Litigation, the Delhi High Court awarded compensation to a widow, whose husband succumbed to injuries as a result of falling in a pit on the road which was meant to be covered by the Municipal Corporation. On account of negligence, the Municipal Corporation was held liable for the acts of its agents.
37. *Stevens v. Midland Counties Ry. Co.*, (1854) 10 Ex. 352.
38. *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, (1915) AC 705, p. 713 : 113 LT 195 (HL).
39. *EL A Jou v. Dollar Land Holdings plc.*, (1994) 3 All ER 685 (CA), pp. 695, 696 : (1994) 1 BCLC 464.
40. *Meridian Global Funds Management Asia Ltd. v. Securities Commission*, (1995) 3 All ER 918 (PC), pp. 922 to 926 : (1995) 2 AC 500 : (1995) 3 WLR 413 (PC), see further G.P. SINGH, Principles of Statutory Interpretation, 10th edition, pp. 864 to 871.
41. *Re Supply of Ready Mixed Concrete (No. 2)*, (1995) 1 All ER 135 (HL).
42. *Meridian Global Funds Management Asia Ltd. v. Securities Commission*, *supra*, p. 926.
43. *Barwick v. English Joint Stock Bank*, (1867) LR 2 Ex. 259; *Citizen Life Assurance Co. v. Brown*, (1904) AC 423; *Ahmedabad Municipality v. Panubhai*, (1934) 37 Bom LR 468; *M.P. Trust v. Safiulla and Co.*, AIR 1965 Mad 133.

It is also settled that an action for a wrong lies against a corporation where the thing done is within the purpose of the incorporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual.[44]

A corporation which is created by a statute is subject only to the liabilities which the Legislature intended to impose upon it. The liability must be determined upon a true interpretation of the statute under which it is created.[45] A corporation is liable even if it is incorporated for public duties from the discharge of which it derives no profit.[46] A government authority or corporation created by a statute is liable like any private body unless otherwise provided by statute.[47] It has thus been held that a Development Authority is liable to a consumer under the Consumer Protection Act 1986.[48]

There is a difference of opinion on the question whether a corporation is liable for a tortious act of its servants which is *ultra vires* the Corporation. One view is that the corporation is not liable[49] the reasoning being that the corporation could not have

44. A corporation is held liable for libel (*Whitfield v. South Eastern Railway Company*, (1858) El Bl & El 115; *Nevill v. Fine Arts & General Ins. Co.*, (1895) 2 QB 156; *Citizens' Life Assurance Co. v. Brown*, (1904) AC 423) : 20 TLR 497; for acts of misfeasance by its servants (*Green v. London General Omnibus Co.*, (1859) 7 CBNS 290); for fraudulently trading in the name of another (*Lawson v. The Bank of London*, (1856) 18 CB 84); for false imprisonment, *Goff v. Great Northern Railway Company*, (1861) 3 E & E 672; *Lambert v. Great Eastern Railway*, (1909) 2 KB 776); for malicious prosecution (*Edwards v. Midland Railway Co.*, (1880) 6 QBD 287; *Cornford v. Carlton Bank Limited*, (1899) 1 QB 392, (1900) 1 QB 22; *Rayson v. South London Tramways Company*, (1893) 2 QB 304 : 69 L.T. 491; *Mg. Kyaw Nyun v. Maubin Municipality*, (1925) 4 Burma LJ 139; *Chhaganlal v. Thana Municipality*, (1931) 34 Bom LR 143, 56 Bom 135; *contra, Stevens v. Midland Counties Railway Co.*, (1854) 10 Ex. 352; *Henderson v. The Midland Railway Company*, (1871) 24 LT 881; *Abrath v. North Eastern Railway Co.*, (1886) 11 App Cas 247; *C.S. Co-operative Credit Society Ltd. v. Becharam*, (1938) 42 CWN 1219; for fraud (*Mackay v. Commercial Bank of New Brunswick*, (1874) LR 5 PC 394; *Houldsworth v. City of Glasgow Bank*, (1880) 5 App Cas 317; for distress (*Smith v. The Birmingham Gas Company*, (1834) 1 A & E 526); for trespass (*Maund v. The Monmouthshire Canal Company*, (1842) 4 M & G 452); for assault (*Eastern, Counties Railway Co. v. Broom*, (1851) 6 Ex. 314; *Butler v. Manchester, Sheffield, and Lincolnshire Railway Co.*, (1888) 21 QBD 207); for conversion (*Yarborough v. The Bank of England*, (1812) 16 East 6); for nuisance (*Borough of Bathurst v. Macpherson*, (1879) 4 App Cas 256); for negligence (*Gilbert v. Corporation of Trinity House*, (1886) 17 QBD 795; *The Rhosing* (1885) 10 PD 131; *Dormont v. Furnes Railway Co.*, (1883) 11 QBD 496; *Scott v. Mayor of Manchester*, (1856) 1 H & N 59; *Cowley v. Mayor, etc. of Sunderland*, (1861) 6 H & N 565; *Mersey Docks Trustees v. Gibbs*, (1866) LR 1 HL 93; *McCelland v. Manchester Corporation*, (1912) 1 KB 118).

A trade union registered under the Trade Union Acts, 1871 and 1876 (34 & 35 Vic., c. 31 and 39 & 40 Vic., c. 20) may be sued in its corporate name : *Taff Vale Ry. v. Amalgamated Society of Railway Servants*, (1901) AC 426. But this decision has been overruled by s. 4 of the Trade Disputes Act, (1906), (6 Edw. VII, c. 47), which says that no Court is to entertain any action for tort brought against a trade union or against any members on behalf of themselves and all other members of the union.

45. *Mersey Docks Trustees v. Gibbs*, (1866) LR 1 HL 93, 104.
46. *Mersey Docks Trustees v. Gibbs, (1866) LR 1 HL 93, 104*; *The Bearn*, (1906), p. 48.
47. *Lucknow Development Authority v. M.K. Gupta*, AIR 1994 SC 787 : (1994) 1 SCC 243 : (1994) 80 Com Cases 714.
48. *Lucknow Development Authority v. M.K. Gupta, AIR 1994 SC 787 : (1994) 1 SCC 243 : (1994) 80 Com Cases 714; Ghaziabad Development Authority v. Balbir Singh*, AIR 2004 SC 2141 : (2004) 5 SCC 65 : (2004) 121 Com Cases 409.
49. The leading case on the subject is *Poulton v. London and S.W. Ry. Co.*, (1867) LR 2 QB 534. In that case a station-master in the employ of the defendant company arrested the plaintiff for refusing to pay the freight for a horse that had been carried on the defendant's railway. The railway company had authority under the Act of Parliament to arrest a person who did not pay his fare but none to arrest a person for non-payment for the carriage of goods. It was held that the railway company was

(Footnote No. 49 Contd.)

empowered the servant to do an act which it itself has no power to do. This view was taken at a time when the basis of vicarious liability was thought to be an *"implied authority"* of the master for doing the tortious act. It is now accepted that the real test for determining the master's vicarious liability is not the existence of any implied authority but the commission of the tort by the servant "in the course of employment". The prevailing view, therefore, is that a corporation is vicariously liable for a tortious act of its servants even though it is *ultra vires* provided it is done in the course of employment.[50] Apart from vicarious liability, a corporation will be directly liable for a tortious act, even if it is *ultra vires* its powers, if it is authorised or ratified by those who constitute the "directing mind and will of the corporation."[51] In *Campbell v. Paddington Corporation,*[52] a stand was erected in a highway in pursuance of a resolution passed by the borough council which constituted a public nuisance and which the corporation had no power to erect. In a suit by a person who suffered special damage the corporation was held liable as the act was authorised by its council: "To say that, because the borough council had no legal right to erect it, therefore, the corporation cannot be sued, is to say that no corporation can ever be sued for any tort or wrong. The only way in which this corporation can act is by its council, and the resolution of the council is the authentic act of the corporation. If the view of the defendants were correct no company could ever be sued if the Directors of the Company after resolution did an act which the Company by its Memorandum of Association had no power to do."[53] The view taken in this case has met the approval of the leading text-books.[54]

In India it has been laid down that: "Whatever difference of opinion there may be on the question of the abstract legal doctrine as to how far an agent or servant of a corporation can be said to act within the scope of his employment in respect of a tort which is *ultra vires* the corporation, it seems to be clear that there is consensus of authority for holding that a corporation cannot be immune from liability in respect of torts brought about at its instance on the ground that the act was not *intra vires* the corporation".[55]

Foreign corporations.—A foreign corporation (*i.e.*, a corporation created by the law of any foreign country) may sue and be sued for a tort, like any other corporation.[56] A multinational corporation having subsidiaries in different countries

(Footnote No. 49 Contd.)
not liable. The company having no power itself to arrest for such non-payment, it could not give the station-master any power to do the act. The plaintiff's remedy for the illegal arrest in such a case would be against the station-master only.

50. WINFIELD and JOLOWICZ, Tort, 12th edition, p. 692, SALMOND and HEUSTON, Torts, 20th edition, p. 442; CLERK and LINDSELL, Torts, 15th edition, p. 136. But the Corporation may not be liable if the appointment of the servant is itself *ultra vires*.
51. *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, (1915) AC 705, p. 713 : 113 LT 195 (HL). In this case a corporation was held guilty of "actual fault" within the meaning of the Merchant Shipping Acts. See further, p. 35, *supra*.
52. (1911) 1 KB 869 : 104 LT 394.
53. (1911) 1 KB 869, p. 875.
54. CLERK & LINDSELL, Torts, 15th edition, p. 137; WINFIELD & JOLOWICZ, Tort, 12th edition, p. 693; SALMOND & HEUSTON, Torts, 20th edition, p. 422.
55. *Tiruveriamuthu Pillai v. Municipal Council*, AIR 1961 Mad 230 : (1961) Mad 514 : 1961 Kerala LT 153 : 74 MLW 104: The plaintiff's dog was killed by the employee of a Municipal Council in the course of the discharge of his function of killing stray dogs in the Municipal town expressly authorised by the Council. In an action by the plaintiff for damages against the Council for the loss of the dog, *held*, that the Council was liable for the unlawful act of having brought about the destruction of the plaintiff's dog and the fact that the Council acted in excess of its statutory powers was not a defence to the action but was only an aggravating circumstance.
56. *Henriques v. Dutch West India Company*, (1728) 2 Ld. Raym 1532; *Newby v. Colts Patent Firearms Co.*, (1872) LR 7 QB 293.

and owning controlling shares in the subsidiaries may be held liable for a tort committed by a subsidiary company by piercing the veil of incorporation on the reason that the parent company constitutes the directing mind and will of the subsidiary company. It is on this basis that Union Carbide Corporation (UCC), a multinational registered in USA, was held liable by SETH, J., of the Madhya Pradesh High Court for the Bhopal gas disaster which resulted from leakage of poisonous gas from a plant owned by Union Carbide India Ltd. (UCIL), which is a subsidiary of UCC.[57]

Idols.—The liability of the estate of an idol for wrongs committed by its *shebait* (the person in charge of the idol) is analogous to the liability of a corporation.[58]

4A. HIGHWAY AUTHORITY

Under the common law public bodies charged with the duty of keeping public roads and bridges in repair and liable to an indictment for breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair. This anomalous rule of the common law which "resulted in injustice to many people"[59] has been abrogated in the United Kingdom by the Highways (Miscellaneous Provisions) Act, 1961. The law is now to be found in the Highways Act, 1980 section 41 of which lays down a statutory obligation on the highway authority to maintain the highway.[60] As a result of this Act, an action lies against a highway authority for damage due to non-repair; the authority, however, can plead as defence that it had taken such care as in all the circumstances was reasonably required to secure that the part of the highway in question was not dangerous for traffic; the Act also enumerates certain matters which the court has to take into account for the purpose of this defence. The common law duty to repair was absolute and so is the statutory duty but subject to the availability of the defence allowed by the Act.[61] The duty is to put the road in such good repair as renders it reasonably passable for the ordinary traffic at all seasons of the year without danger caused by its physical condition; but the duty does not extend to remove or prevent the formation of snow or ice on the highway.[61] The duty to maintain the highway under section 4 does not require the Highway Authority to place on or near the highway sufficient signs giving warning to motorists that they were approaching a dangerous part of the road.[62] The statutory duty does not also extend to carrying out work on land not forming part of the highway and the highway authority may also not be held to be in breach of its common law duty of care in failing to cause an obstruction to be removed which restricted visibility and which contributed to an accident resulting in personal

57. *Union Carbide Corporation v. Union of India*, 1988 MPLJ 540. See, PROF. D.V.N. REDDY, Industrial Disasters Responsibility of Transnational Corporations and the Home and Host States, (1992) Vol. 5, *Central Indian Law Quarterly* 170, pp. 171 to 175. PROF. REDDY states at p. 173: "The present trend in developed states especially in the USA, is to hold the parent company liable to make reparations for the environmental damage caused by their under capitalized subsidiaries engaged in ultrahazardous industrial activities" and cites *Taylor v. Standard Gas and Electronic Company*, 306 USA (1939), p. 309 in support.
58. *Raja Pramada Nath Roy v. Shebait Purna Chandra Roy*, (1908) 7 CLJ 514.
59. PER LORD MOLSON introducing the Bill to amend the common law rule. See, SALMOND & HEUSTON, Torts, 18th edition, p. 86.
60. The Act as expressed in section 58 (3) binds the crown.
61. *Goodes v. East Sussex County Council*, (2000) 3 All ER 603, pp. 608-610 : (2000) 1 WLR 1356 : 2000 RTR 366 (HL).
62. *Gorringe v. Calderdale Metropolitan Borough Council*, (2004) 2 All ER 326 (HL).

injury.[63] The Act has been construed to confer a right of action only to users of the highway who could prove that they had suffered physical injury to person or property while using the highway when it was in a dangerous condition due to want of repair or maintenance, and it has been held that the Act confers no right of action for purely economic loss resulting from the highway being in dangerous condition.[64]

The rule of the common law as existed before the Act was not based on any principle of justice, equity and good conscience and should not have been applied in India; but, it was followed in some cases.[65] Its abrogation in the country of its origin on the ground that it was anomalous and unjust now leaves hardly any justification for its further application in India.[66] Other common law countries have also departed from the common law rule and are inclined to apply the general principle of negligence to a highway authority.[67]

Under the Indian law, the duty to repair and maintain a highway laid on a local authority or a Government is governed by statutory enactments and the question whether in a particular case a suit lies for damage due to non-repair would depend upon the construction of the relevant statutory provision and not on any principle of the common law and *prima facie* there is no reason to deny liability unless it is expressly or by necessary implication negatived by the statute.[68] If in a given case the relevant Indian statute is silent in any matter and it is necessary to look beyond its provisions for guidance, rules of English law as now contained in the Highways Act, 1980 and not the rules of the common law may be taken notice of and applied for the Act is consistent with the principles of justice, equity and good conscience. In one of the cases, Highways department of the State of Tamil Nadu was held liable by the Supreme Court for negligence when a public transport vehicle plunged into a river on collapse of culvert on the highway.[69]

It has also been held by the House of Lords that the existence of the broad public law duty in section 39 of the Road Traffic Act that 'each local authority must prepare and carry out a programme of measures designed to promote road safety' did not generate a common law duty of care and a private law action for damages.[70]

63. *Stovin v. Wise*, (1996) 3 All ER 801 : 1996 AC 923 : (1996) 3 WLR 388 (HL).
64. *Wentworth v. Wiltshire Country Council*, (1993) 2 All ER 256 : 1993 QB 654 : (1993) 2 WLR 175 (CA).
65. *Achratlal v. Ahmedabad Municipality*, (1904) 6 Bom LR 75 : ILR 28 Bom 340; *Mohanlal v. Ahmedabad Municipality*, (1937) 40 Bom LR 552 : ILR (1938) Bom. 696; *District Board, Badaun v. Sri Niwas*, (1942) ALJR 619; *Rahim Bakhsh v. Municipal Board, Bulandshahr*, (1939) ALJR 101 : AIR 1939 All 213.
66. See, Chapter 1, title 1, pp. 2, 3 and 4.
67. *Brodie v. Singleton Shire Council*, (2001) 75 ALJR 992, pp. 1006, 1007, 1021-1026 (Australia).
68. *Subramanyam v. District Board*, AIR 1941 Mad 733; *District Board, Manbhum v. Shyamapada*, AIR 1955 Pat 432.
69. *S. Vedantacharya v. Highway Department of South Arcot*, (1987) 3 SCC 400 : 1987 SCC (Cri) 559. For a case where proper arrangement was not made for lighting a street and the Cantonment Board was held liable, see, *Dr. C.B. Singh v. The Cantonment Board, Agra*, 1974 ACJ 248 (All); See also, *Marakkar & Another v. State of Kerala*, AIR 2010 (NOC) 562 (Ker), wherein death occurred due to injuries suffered on account of pot holes in the road maintained by Public Works Department. PWD held liable for compensation; *Smt. Selvi v. State of Tamil Nadu & Others*, AIR 2010 (NOC) 255(MAD), wherein a child died by falling into sewage line as a manhole was left open. Metro water supply and sewage board was held responsible and liable for payment of compensation. *U.P.Sharma v. Jabalpur Corporation & Others*, AIR 2010 (NOC) 919 (M.P.), wherein a man skidded from his motorcycle because of sand lying on public street and suffered injuries. Failure was held to be on part of Municipal Corporation and was thus held liable for payment of compensation; See further on similar issue, *P. Ravichandran v. Government of Tamil Nadu*, (2012) 109 AIC 875 (Mad) : (2011) 6 CTC 636.
70. *Gorringe v. Calderdale Metropoliton Borough Council*, (2004) 2 All ER 326 (HL). See further *Stovin v. Wise*, (1996) 3 All ER 801 (HL) and *Rajkot Municipal Corporation v. Manjulaben Jayantilal Nakum*, AIR 1998 SC 640 discussed at pp. 475, 476; See further, *Regional Transport Officer v. P.S.Rajendran* (2010) 2 LW 440 (Madras High Court).

5. UNINCORPORATED ASSOCIATIONS

Unincorporated Associations have no corporate existence and are not legal persons. They cannot, speaking generally, sue or be sued in their name. Any member or officer of such an association has to be sued personally for tort committed by him or authorised by him.[71] The provisions of Order I, Rule 8 of the Code of Civil Procedure, 1908, may be availed of if all the members or a number of them have to be sued. A partnership firm though not a legal entity can sue or be sued in the firm name under Order XXX of the Code of Civil Procedure. An association which is registered as a society under the Societies Registration Act, 1860 can, as provided in section 6 of the said Act, sue or be sued in the name of its President, Chairman or Principal Secretary, *etc.*, as may be determined by its rules or regulations or by a resolution of the Governing Body when there is no provision on that point in the rules or regulations.[72]

6. TRADE UNIONS

The English law in the context of trade unions gave recognition to a theory that there may exist a legal entity without any corporate existence. In *Taft Vale Ry. v. Amalgamated Society of Railway Servants*,[73] it was held that a registered trade union, though not a corporate body was a legal entity, and could be sued in tort for the wrongful acts of its officers. Similarly, in *Bonsor v. Musicians Union*,[74] an action by a member against a trade union for wrongful expulsion was upheld on the ground that the trade union was a legal entity distinct from its members. The Indian Law on this point presents no such anomaly for section 13 of the Trade Unions Act, 1926,[75] expressly provides that every registered Trade Union shall be a body corporate with all attributes of a legal personality. Section 18 of the Act, however, enacts that no suit shall lie against a registered Trade Union, its members or officers in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union was a party on the ground only that such act induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or labour as he wills.

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71. *Brown v. Lewis*, (1896) 12 TLR 455; *Bradley Egg Farm Ltd. v. Clifford*, (1943) 2 All ER 378, *Prole v. Allen*, (1950) 1 All ER 476.
72. AIR 1974 Punj 256 : (1974) 76 Pun LR 416 : ILR (1976) 1 Punj 279. See also, ILR (1976) 1 Cal 57.
73. (1901) AC 426 : 85 LT 147 (HL). It was also held that a registered Trade Union has a right to sue; see, *National Union of General and Municipal Workers v. Gillan*, (1946) KB 81 : (1945) 2 All ER 593; *Willis v. Brooks*, (1947) 1 All ER 191; *B.M.T.A. v. Salvadori*, (1949) Ch 556. Sec. 2(1) of the Trade Union and Labour Relations Act, 1974 provides that a Trade Union shall not be treated as a corporate body though it can sue or be sued in its name. After this legislation it has been held that a trade union has no sufficient personality to be a plaintiff in a libel action; *Electrical and Plumbing Union v. Times News Papers*, (1980) QB 585 : (1980) 3 WLR 98. For an action against an unregistered Union where liability was imposed see, *Heatons Transport (St. Helens) Ltd. v. Transport and General Workers Union*, (1973) AC 15 : (1972) 3 WLR 431 (HL).
74. (1956) AC 104 (HL).
75. This corresponds to sections 13 and 14 of the Trade Union and Labour Relations Act, 1974 and sections 15 and 16 of the Employment Act, 1982. The provisions of the English Acts are different in scope. The English law now treats trade unions as natural persons subject to rule of law with certain qualifications. SALMOND and HEUSTON, Law of Torts, 20th edition, p. 424.

7. INSOLVENT

Liability for a tort committed by an insolvent is not a debt provable in insolvency and is not discharged by insolvency. But an insolvent may be sued for a tort committed by him either before or during insolvency, and if a decree is obtained against him, the amount awarded is a debt provable in insolvency.

As regards torts committed against an insolvent, a distinction is to be drawn between torts to the person and torts to property. A right of action in respect of a tort resulting in injury exclusively to the insolvent's property passes to the Official Assignee or Receiver for the benefit of his creditors. But a right of action in respect of a tort exclusively to the person, reputation or feelings of the insolvent, such as an assault or defamation,[76] seduction of a servant,[77] remains with the insolvent, and the Official Assignee or Receiver cannot intercept the proceeds so far as they are required for the maintenance of the insolvent or his family. But where a tort causes injury both to the person and property of the insolvent, the right of action will be split and will pass, so far as it relates to the property, to the Official Assignee or Receiver, and will remain in the insolvent so far as it relates to his person.[78] In such a case either the cause of action is divided between him and the trustee or they may join together in one action in which case damages will be assessed under two separate heads.[79]

8. THE STATE AND ITS OFFICERS

8(A) English Law

It is an ancient and fundamental principle of the English Constitution that the King can do no wrong. This maxim means, first, whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people: for this doctrine would totally destroy the constitutional independence of the Crown; and, secondly, that the prerogative of the Crown extends not to do any injury.[80] "He (The King) is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong; that which the sovereign does by command to his servants, cannot be a wrong in the sovereign because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command".[81] So the Crown was not liable in tort at common law for wrongs committed by its servants in the course of employment not even for wrongs expressly authorised by it.[82] Even the heads of the department or superior officers could not be sued for torts committed by their subordinates unless expressly authorised by them;[83] only the actual wrongdoer could be sued in his personal capacity. In practice, the action against the officer concerned was defended by the Treasury Solicitor and the

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76. *Howard v. Crowther*, (1841) 8 M & W 601.
77. *Hodgson v. Sidney*, (1866) LR 1 Ex. 313.
78. *Beckham v. Drake*, (1849) 2 HC 579, 632.
79. *Wilson v. United Counties Bank*, (1920) AC 102 : 122 LT 76.
80. *Blackstone*, Vol. I, p. 246.
81. *Tobin v. The Queen*, (1864) 16 CB (NS) 310, 354.
82. *Canterbury (Viscount) v. A.H. General*, (1842) 1 Ph 306; *High Commr. for India & Pakistan v. Lall*, (1948) 50 Bom LR 649 : AIR 1948 PC 121; 75 IA 225; *Union of India v. F. Gian Chand Kasturi Lal*, (1954) 56 PLR 68 : AIR 1954 Punj 159 : ILR (1954) Punj 602.
83. *Raleigh v. Goschen*, (1898) 1 Ch 73 : 77 LT 429; *Bainabridge v. The Postmaster General*, (1906) 1 KB 178. Subject to a statutory provision a government department enjoyed crown immunity, *Minister of Supply v. British Thompson-Houston Co.*, (1943) KB 478.

judgment was satisfied by the Treasury as a matter of grace. Difficulty was, however, felt when the wrongdoer was not identifiable.[84] The increased activities of the Crown have now made it the largest employer of men and the largest occupier of property. The above system was, therefore, proving wholly inadequate and the law needed a change which was brought about by the Crown Proceedings Act, 1947.[85] Nothing in the Act authorises proceedings in tort against the Crown in its private capacity (s. 40), or affects powers or authorities exercisable by virtue of the prerogative of the Crown or conferred upon the Crown by statute (s.11(1)). Subject to this, the Act provides that the Crown shall be subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject (1) in respect of torts committed by its servants or agents, provided that the act or omission of the servant or agent would, apart from the Act, have given rise to a cause of action in tort against that servant or agent or against his estate; (2) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; (3) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property. Liability in tort also extends to breach by the Crown of a statutory duty. It is also no defence for the Crown that the tort was committed by its servants in the course of performing or purporting to perform functions entrusted to them by any rule of the common law or by statute. The law as to indemnity and contribution as between joint tort-feasors shall be enforceable by or against the Crown and the Law Reform (Contributory Negligence) Act, 1945,[86] binds the Crown. Although the Crown Proceedings Act preserves the immunity of the Sovereign in person and contains savings in respect of the Crown's prerogative and statutory powers, the effect of the Act in other respects, speaking generally, is to abolish the immunity of the Crown in tort and to equate the Crown with a private citizen in matters of tortious liability. The Crown is now vicariously liable for torts committed by its servants in the course of their employment if committed in circumstances which would render a private employer liable. So in *Home Office v. Dorset Yacht Co.*,[87] the Crown was held liable for the damage caused by runaway borstal trainees who escaped because of the negligence of the borstal officers in the exercise of their statutory function to control the trainees.

The European Court of Justice holds the member states liable for damages for breach of community law on the basis of a principle not expressly mentioned but inherent in the system of the Treaty. A state can be held liable irrespective of which organ of the state was responsible for the breach, the legislature, the executive or the judiciary. The right to damages is dependent on three conditions. First, the rule of law which was infringed must have intended to confer rights on individuals. Secondly, the breach of this rule of law must have been sufficiently serious. Finally there must have been a direct causal link between breach of the obligation imposed on the state and the damage which was sustained by the injured parties.[88]

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84. *Royster v. Cavey*, (1947) KB 204 : (1946) 2 All ER 642.
85. 10 & 11 Geo., VI, c. 44.
86. 8 & 9 Geo., VI, c. 28.
87. *Home Office v. Dorset Yacht Co.*, (1970) AC 1004 : (1970) 2 All ER 294 (HL). See further, *M. v. Home Office*, (1993) 3 All ER 537 (HL), p. 553 : (1994) 1 AC 377 : (1993) 3 WLR 433, where the title '8(A) English Law' from 23rd edition of this book is quoted with approval in *State of Andhra Pradesh v. Challa Ramkrishna Reddy*, AIR 2000 SC 2083, p. 2088 : (2000) 5 SCC 712.
88. Cases C-46 and 48/93 *Brasserie du Pecheur SA v. Germany; R v. Secretary of State for Transport Exp. Factortome Ltd.*, (1996) 1 ECR 1029; *R v. Secretary of State for Transport Exparte Factortome Ltd.*, (1999) 4 All ER 906, p. 916 (HL).

The English law is likely to develop further because of enforcement of the Human Rights Act, 1998 from 2nd October, 2000. The Act gives effect to the European Convention on Human Rights. The Act provides that it is unlawful for any public authority[89] to act in a way which is incompatible with a convention right and a person who considers that his rights have been violated can sue the public authority for damages. Many of the convention rights are also recognised by the common law which also provides remedies for their infringement. A claim under the Act will directly arise when the right infringed is recognised by the Act as a convention right but is not recognised by the common law.

8(B) Indian Law

(i) Historical Background

The maxim that the King can do no wrong and the resulting rule of the common law that the Crown was not answerable for the torts committed by its servants have never been applied in India[90]. The Crown assumed the sovereignty of British India, which was till then administered by the East India Company, by the Government of India Act, 1858. Section 65 of this Act, which is the parent source of the law relating to the liability of the Government, provided that : "All persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State for India as they could have done against the said Company." This provision was continued by the succeeding Government of India Acts,[91] and is also continued by Article 300(1) of the Constitution of India which reads : "The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by an Act of Parliament or of the legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted." It may be mentioned that the Heads of State, *i.e.*, the President of India, and the Governors of States have personal immunity and they are not answerable to any court, as provided in Article 361, for the exercise and performance of the powers and duties of their offices.

The Union of India and the States of the Union are juristic persons and they can sue and be sued but the extent of their liability by the chain of Constitution Acts beginning with the Act of 1858 and ending with the Constitution is the same as was of the Secretary of State for India in Council under section 65 of the Act of 1858 and the words in that section "all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, and legal equitable as they could have done against the said Company" by incorporation apply to the Union and the States as they applied to the East India Company. In other words, the extent of liability of the Union and the States under Article 300(1) of the Constitution is the same as was the liability

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89. For meaning of 'public authority' as defined in the Act see *Poplar Housing and Regeneration Community Association Ltd. v. Donghue*, (2001) 4 All ER 604 : (2001) 3 WLR 183 : (2001) 2 FLR 284; *R (on the application of Heather) v. Leonard Cheshire Foundation*, (2002) 2 All ER 936 (CA).
90. *Union of India v. Ashok Kumar*, (2010) 3 All LJ 390 : (2010) 79 ALR 430; In *State of Bihar v. Abdul Majid* 1954 SCR 786 : AIR 1954 SC 245, Supreme Court upheld the right of a government servant to sue the government for recovery of arrears diluting the concept of immunity.
91. Government of India Act, 1915, section 32; Government of India Act, 1935, section 176(1).

of the East India Company. But this statement is subject to the new liabilities imposed by the Constitution[92] or laws made under it.

The oft quoted authority on the construction of section 65 of the 1858 Act is the decision of the Supreme Court of Calcutta rendered in 1861 in the case of *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India*.[93] In that case a servant of the plaintiff company was proceeding on a highway in Calcutta driving a carriage drawn by a pair of horses. Due to the negligence of the servants of the Government employed in the Government Dockyard at Kidderpore in carrying a piece of iron funnel needed for repair of a steamer, an accident happened in which one of the horses driving the plaintiff's carriage was injured. The plaintiff company sued the Secretary of State for India for damages for the damage caused due to the negligence of the servants of the Government. In holding that for such an accident caused by the negligence of its servants in doing acts not referable to Sovereign powers the East India Company would have been liable and so the Secretary of State for India was liable, PEACOCK, C.J., who delivered the judgment of the court, drew a distinction between the acts done by the public servants in the delegated exercise of sovereign powers and acts done by them in the conduct of other activities and made the following pertinent observation "In determining the question whether the East India Company would, under the circumstances, have been liable to an action under the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong would have no force. The East India Company were not Sovereigns and, therefore, could not claim all the exemptions of a Sovereign; and they were not the public servants of Government and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons, but they were a Company to whom sovereign powers were delegated and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of Government, and partly on their own account, which without any delegation of Sovereign rights might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."[94]

The tort in the case of *Peninsular and Oriental Steam Navigation Co.*,[95] was committed by the servants of the Government in the course of a trading activity and the case was not directly concerned with acts done in the exercise of sovereign powers. The Madras[96] and Bombay[97] High Courts, therefore, did not accept the reservation made by PEACOCK, C.J., that the Government was not liable if the tort was committed in the exercise of sovereign powers and the view expressed by these High Courts was that the Government would also be liable for torts committed in the exercise of sovereign powers except when the act complained of amounted to an act

92. See, title 8(B)(iii) Public Law Wrongs, pp. 47 to 62.
93. (1868-1869) 5 Bom HCR App 1 P. 1 (Curiously the case is not reported in any Calcutta Law Journal.)
94. (1868-1869) 5 Bom HCR App 1 P. 1
95. (1868-1869) 5 Bom HCR App 1 P. 1
96. *Secretary of State for India v. Hari Bhanji*, ILR (1882) 5 Mad 273.
97. *Rao v. Advani*, (1949) 51 Bom LR 342, p. 396-7 : AIR 1949 Bom 277. In appeal to the Supreme Court MUKERJEE, J., alone dealt with this question and he approved the view of the Madras and Bombay High Courts, see, *Province of Bombay v. K.S. Advani*, (1950) SCR 621, p. 696 : AIR 1950 SC 222 : 1950 SCJ 451. Law Commission of India in its first report in 1956 also accepted this view. This view also finds support from two Privy Council decisions *viz* : *Forester v. Secretary of State for India in Council*, (1872) 1 IA Supp. 10 and *Secretary of State for India v. Moment*, (1912) 40 IA 48.

of State.[1] The Calcutta High Court,[2] however, followed the view taken by PEACOCK, C.J.

(ii) Sovereign Immunity

The point as to how far the State was liable in tort first directly arose before the Supreme Court in *State of Rajasthan v. Vidyawati*.[3] In that case the claim for damages was made by dependants of a person who died in an accident caused by the negligence of the driver of a jeep maintained by the Government for official use of the Collector of Udaipur while it was being brought back from the workshop after repairs. The Rajasthan High Court took the view that the State was liable, for "the State is in no better position in so far as it supplies cars and keeps drivers for its civil service". The Supreme Court endorsed the view taken by the High Court; SINHA, C.J., in delivering the judgment of the court quoted approvingly the judgment of PEACOCK, C.J., but he also "from the point of view of first principles" made the following observations : "The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the Sovereign has been held liable to be sued in tort or in contract and the common law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle or in public interest, that the State should not be held liable vicariously for the tortious act of its servant".[4]

The question of liability of the State again came up for decision before the Supreme Court in *Kasturilal Ralia Ram Jain v. State of U.P.*[5] In this case, a partner of Kasturilal Raliaram, a firm of jewellers of Amritsar, went to Meerut for selling gold and silver. He was taken into custody at Meerut by police constables on the suspicion of possessing stolen property. He was kept in police lock-up and the gold and silver recovered from him on search were kept in the custody of the police in the police Malkhana. He was released on the next day and sometime later the silver seized from him was returned. The gold could not be returned to him as the Head-constable-in-charge of the Malkhana misappropriated it and fled to Pakistan. A suit was filed against the State of U.P. for return of the ornaments or in the alternative for compensation. It was found that the police officers had failed to follow the U.P. Police Regulations in taking care of the gold. The Supreme Court held the State not liable on the view that the tort was committed by the police officers in the exercise of delegated sovereign powers. The court speaking through GAJENDRAGADKAR, C.J., fully approved the decision of PEACOCK, C.J., in the case of *Peninsular and Oriental Steam Navigation Co.*,[6] stating *per incuriam* that it "enumerated a principle which has been consistently followed in all subsequent decisions"[5] and observed : "It must be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servant, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the court must always find that the impugned act was committed in the

1. For Act of State, see, title 1, Chapter VI.
2. *Nobin Chunder Dey v. Secretary of State for India*, ILR (1875-76) 1 Cal 11 : 24 CWR 309.
3. AIR 1962 SC 933 : (1963) 1 SCJ 307 : (1962) 2 SCA 362 : (1958-65) ACJ 296. **Followed in** *Kanti Devi v. State of U.P.* (2012) 1 All LJ 481 : (2011) 75 ACC 816.
4. (1958-65) ACJ 296, p. 304.
5. AIR 1965 SC 1039 : (1965) 2 Cri LJ 144 : (1965) 1 SCWR 955.
6. Footnote 93, p. 44, *supra*.

course of an undertaking or employment which is referable to the exercise of delegated sovereign power".[7] In upholding the defence of immunity pleaded by the State of U.P., GAJENDRAGADKAR, C.J., further said : "The act of negligence was committed by police officers while dealing with the property of Ralia Ram which they had seized in the exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers, and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employees of the respondent during the course of their employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained."[7] It may also be mentioned that *Vidyawati's case*[8] was distinguished as being confined to tortious liability not arising from the exercise of sovereign power.

The decision of the Supreme Court in *Kasturilal's case*[9] is not satisfactory and has been criticised by a leading constitutional authority of the country.[10] It proceeds upon a wrong impression that the decision of PEACOCK, C.J.,[11] was uniformly followed by failing to take notice that it was dissented to by the Madras and Bombay High Courts;[12] it fails to appreciate that when in modern times there is no logical or practical basis for the rule of State immunity which has been abolished even in the country of its origin,[13] more reasonable view to take in the context of our Constitution was that the State will always be liable for the torts committed by its servants in the course of employment except when the act complained of amounted to an act of State; and it omits to consider that even if the statutory power to arrest, search and seize the property recovered may be described to pertain to the sphere of sovereign powers, the duty to take care for the protection of the property and the obligation to return the same to the rightful claimant after the necessity to retain them ceases were more in the nature of the duties of a statutory or a contractual bailee and did not fall within the sphere of sovereign powers.[14]

Although the decision of the Supreme Court in *Kasturilal's* case is yet to be overruled, subsequent decisions of the court have greatly undermined its authority and attenuated the sphere of sovereign immunity. As observed by a three judge bench "much of its efficacy as a binding precedent has been eroded"[15]

In *State of Gujarat v. Memon Md.*,[16] certain goods seized under the Sea Customs Act were not properly kept and were disposed of by order of a Magistrate. On a suit

7. AIR 1965 SC 1039 : (1965) 2 Cri LJ 144 : (1965) 1 SCWR 955.
8. Footnote 3, p. 45, *supra*.
9. Footnote 5, p. 45, *supra*.
10. SEERVAI, Constitutional Law of India, 2nd edition, pp. 1137-39, 1992.
11. Footnote 93, p. 44, *supra*.
12. Text and footnotes 96 and 97, p. 44, *supra*.
13. *State of Rajasthan v. Vidyawati*, AIR 1962 SC 933 : (1963) 1 SCJ 307 : (1962) 2 SCA 362 : (1958-65) ACJ 296, p. 304; *Shyam Sunder v. State of Rajasthan*, AIR 1974 SC 890 : 1974 ACJ 296 : (1974) 1 SCC 690, p. 695 ("Today, hardly any one agrees that the stated ground for exempting the sovereign from suing is either logical or practical"). See further, *N. Nagendra Rao & Co. v. State of Andhra Pradesh*, AIR 1994 SC 2663 : (1994) 5 JT 572 and *Common Cause a Registered Society v. Union of India*, AIR 1999 SC 2979 : (1999) 6 SCC 667, which contains an elaborate discussion to show that KASTURILAL was not correctly decided and the doctrine of sovereign immunity has no relevance in the present day context.
14. See, text and footnotes 16 to 19, pp. 46-47, *infra*.
15. *Common Cause, a Registered Society v. Union of India, supra*, p. 3002, see to the same effect *State of Andhra Pradesh v. Challa Ramkrishna Reddy*, AIR 2000 SC 2083, p. 2090 : (2000) 5 SCC 712.
16. AIR 1967 SC 1885 : (1967) 2 SCWR 387 : (1968) 1 SCJ 273.

for the value of the goods against the State, the Supreme Court held that when the seizure was illegal there arose bailment and a statutory obligation to return the goods and the suit was maintainable. Similarly in *Smt. Basava Kom Dyamogonda Patil v. State of Mysore*,[17] certain articles seized by the police were produced before a Magistrate who directed the Sub-Inspector to keep them with him in safe custody to get them verified and valued by a goldsmith. The articles were lost while they were kept in the police guard-room. In a proceeding taken under section 517 of the Code of Criminal Procedure, 1898, the Supreme Court held that when "there is no *prima facie* defence made out that the State or its officers had taken due care and caution to protect the property,"[18] the court can order the State to pay the value of the property to the owner. The court also observed: "As the seizure of property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases."[19]

(iii) Public Law Wrongs

The cases of *Rudul Shah v. State of Bihar*,[20] *Sebastin M. Hongray v. Union of India*,[21] *Bhim Singh v. State of J & K*[22] and SAHELI *a Woman's Resources Centre v. Commr. of Police, Delhi*,[23] lead to the inference that the defence of sovereign immunity is not available when the State or its officers acting in the course of employment infringe a person's fundamental right of life and personal liberty as guaranteed by Article 21 of the Constitution. In the case of *Rudul Shah v. State of Bihar*,[24] which arose on a petition under Article 32 of the Constitution complaining prolonged detention of the petitioner even after his acquittal, the Supreme Court directed the State to pay Rs. 30,000 as interim measure without precluding the petitioner from bringing a suit to recover further damages. The court while overruling the objection that the petitioner should be left entirely to the remedy of a suit and no damages or compensation should be allowed even as an interim measure observed : "The petitioner can be relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But where the court has already found, as in the present case, that the petitioner's prolonged detention in prison after his acquittal was wholly unjustified and illegal, there can be no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit."[24] In the case of *Sebastin M. Hongray*,[25] where two persons were taken into custody by Army authorities in Manipur but were not produced in obedience to a writ of *habeas corpus* and it was held that those persons must have met an unnatural death while in Army custody, the Supreme Court directed the Union of India to pay exemplary costs of rupees one lac each to the wives of those persons. Although the word compensation is not used in the decision, it is obvious that the court awarded compensation[26] to the dependants against the Union of India for the action of the army authorities in murdering the two persons. *Bhim Singh's*

17. AIR 1977 SC 1749 : 1977 Cri LJ 1141 : (1977) 2 SCJ 289.
18. AIR 1977 SC 1749 , p. 1752.
19. AIR 1977 SC 1749 , p. 1751. The Gauhati High Court in *State of Assam v. Nizamuddin Ahmad*, AIR 1999 Gau 62 followed *Kasturilal* without adverting to cases in footnotes 16 and 17 above.
20. AIR 1983 SC 1086 : 1983 Cri LJ 1644 : (1983) 4 SCC 141 : (1983) 3 SCR 508.
21. (1984) 3 SCC 82 : AIR 1984 SC 1026.
22. (1985) 4 SCC 677 : AIR 1986 SC 494 : 1986 All LJ 653 : 1986 Cri LJ 192.
23. AIR 1990 SC 513 : AIR 1984 SC 1026 : (1990) 1 SCC 422.
24. AIR 1983 SC 1086 : (1983) 4 SCC 141 : 1983 Cri LJ 1644 : (1983) 3 SCR 508.
25. (1984) 3 SCC 82 : AIR 1984 SC 1026; See also, *Priya v. State of Tamil Nadu* (2011) 1 MWN (Cri) 462.
26. See, *Bhim Singh v. State of J. & K.*, (1985) 4 SCC 677, p. 686 : AIR 1986 SC 494 : 1986 All LJ 653 : 1986 Cri LJ 192.

case[27] was also a case under Article 32 of the Constitution. The petitioner who was an MLA was illegally arrested and detained to prevent him from attending the assembly session and the Supreme Court directed the State of Jammu and Kashmir to pay Rs. 50,000 as compensation to the petitioner. In the case of SAHELI[28] the Supreme Court in a public interest writ petition allowed Rs. 75,000 as damages against the Delhi administration to the mother of a child of nine years who died due to beating and assault by a Delhi police officer. The court made a reference to *State of Rajasthan v. Mst. Vidyawati*[29] and *Peoples Union of Democratic Rights v. Police Commissioner, Delhi*[30] and observed: "It is well settled now that the State is responsible for the tortious acts of its employee".[31] The cases of Rudul Shah and Bhimsingh were approved by a Constitution Bench of the Supreme Court in *M.C. Mehta v. Union of India*,[32] which laid down that compensation for violation of fundamental rights can be allowed in exceptional cases under the writ jurisdiction but normally the party aggrieved should seek his remedy by a suit in the civil court.

The Supreme Court cases discussed above[33] did not refer to the doctrine of sovereign immunity or the case of *Kasturilal* on which the following submission was made in the 22nd edition of this book at p. 46 : "'It is submitted that that case, even if not overruled, can be distinguished on the ground that it did not consider the nature of liability of the State when there is deprivation of a fundamental right. The liability of the State to pay compensation for deprivation of the fundamental right of life and personal liberty (or any other fundamental right for that matter) is a new liability in public law created by the Constitution and not vicarious liability or a liability in tort. For this reason, this new liability is not hedged in by the limitations, including the doctrine of sovereign immunity, which ordinarily apply to State's liability in tort. This view is strongly supported by the decision of the Privy Council in *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*.[34] Section 1 of the Constitution of Trinidad and Tobago recognises amongst other "the right of the individual of life, liberty, security of person and the right not to be deprived thereof except by due process of law". Any person alleging contravention of this right and other human rights and freedoms recognised under sections 1 and 2 can apply under section 6 for redress to the High Court which is empowered to issue appropriate orders, writs and directions for enforcement or securing the protection of provisions of the aforesaid sections. The appellant who was a barrister was committed to seven days imprisonment by a judge of the High Court which committal was set aside by the Privy Council[35] in appeal on the ground that particulars of the specific nature of the contempt were not told to the appellant and the judge had thereby failed to observe a fundamental rule of natural justice. The appellant had in the meantime applied for

27. *Bhim Singh v. State of J. & K.*, (1985) 4 SCC 677, p. 686 : AIR 1986 SC 494 : 1986 All LJ 653 : 1986 Cri LJ 192.
28. *SAHELI a Woman's Resources Centre v. Commr. of Police, Delhi*, AIR 1990 SC 513 : (1990) 1 SCC 422.
29. AIR 1962 SC 933 : 1962 Supp (2) SCR 989; See also, *S. Anand v. State of Tamil Nadu* (2012) 5 Mad LJ 772.
30. (1990) 1 SCC 422 : AIR 1980 SC 513. In this case a labourer was beaten to death by Delhi Police and compensation of Rs. 75,000 was allowed.
31. AIR 1990 SC 513, p. 516. See further, *State of Maharashtra v. Ravikant S. Patil*, (1991) 2 SCC 373 : (1990) 1 SCC 422, where in a case of illegal handcuffing and parading a person by a police sub-inspector the State was directed to pay Rs. 10,000 as compensation.
32. (1987) 1 SCC 395, pp. 408, 409 : AIR 1987 SC 965.
33. See, text and footnotes 19 to 32, *supra*.
34. *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, (1978) 2 All ER 670 : 1979 AC 385(PC).
35. *Maharaj v. Attorney-General of Trinidad and Tobago*, (1977) 1 All ER 411 : 1979 Crim LR 355 : 122 SJ 179 (PC).

redress under section 6 on the ground that he was deprived of his liberty without due process of law. This application was dismissed by the High Court, but appellant again came up in appeal, to the Privy Council. The Privy Council held[36] that section 6 of the Constitution impliedly allowed the High Court to award compensation as that may be the only practicable form of redress in some cases. The Privy Council also held that as the appellant's committal was in violation of the rules of natural justice, he was deprived of his liberty without due process of law in contravention of section 1 of the Constitution and was entitled to claim compensation from the State under section 6 thereof. In meeting the argument that a judge cannot be made personally liable for anything done or purporting to be done in the exercise or purported exercise of his judicial functions, LORD DIPLOCK speaking for the majority observed : "The claim for redress under section 6(1) for what has been done by a judge is a claim against the State for what has been done in the exercise of judicial power of the State. This is not vicarious liability : it is liability of the State itself. It is not a liability in tort at all : it is a liability in public law of the State, not of the judge, which has been created by sections 6(1) and (2) of the Constitution".[37] As to the measure of compensation LORD DIPLOCK said : "The claim is not a claim in private law for damages for the tort of false imprisonment under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration."[38]

The above submission was accepted by the Supreme Court in *Nilabati Behra v. State of Orissa*.[39] In that case the petitioner's son died as a result of injuries inflicted on him while he was in police custody. A letter sent by the petitioner to the Supreme Court was treated as a petition under article 32 of the Constitution. The Supreme Court directed the State of Orissa to pay Rs. 1,50,000 as compensation to the petitioner. In directing so VERMA, J, observed: "Award of compensation in a proceeding under Article 32 by this court or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies."[39] VERMA J. further explained: "It is sufficient to say that the decision of this court in *Kasturilal* upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights when the only practicable mode of enforcement of the fundamental rights can be the award of compensation."[40] Concurring with VERMA J, DR. ANAND J. in the same case

36. *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, (1978) 2 All ER 670 : 1979 AC 385 (PC).
37. *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, (1978) 2 All ER 670, p. 679.
38. *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, (1978) 2 All ER 670, p. 680 See also, *Prempal v. Commissioner of Police* (2010) 168 DLT 285, wherein the Delhi High Court awarded compensation for undue harassment, torture, illegal detention, false implication and loss of earning.
39. AIR 1993 SC 1960, p. 1969 : (1993) 2 SCC 746.
40. AIR 1993 SC 1960, pp. 1967, 1968. See further, *Charanjit Kaur v. Union of India*, AIR 1994 SC 1491 : (1994) 2 SCC 1 (L.Rs. of an army officer who died in mysterious circumstances giving rise

(Footnote No. 40 Contd.)

observed : "The purpose of the public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights—This court and the High Court being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 32 of the Constitution of India are established to have been flagrantly infringed by calling upon the state to repair the damage done by its officers to the fundamental rights of the citizens, notwithstanding the right of the citizen to the remedy by way of a suit or criminal proceedings. The state of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law through appropriate proceedings. Of course relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of fundamental rights of the citizen and no other form of appropriate remedy in the facts and circumstances of the case is possible."[41] Dr. ANAND J. also observed : "There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his rights to life."[42]

(Footnote No. 40 Contd.)

to inference of acts of omissions and commissions of the concerned authorities, allowed Rs. 6 lakhs under Article 32 as compensation as also the special family pension and the children allowance); *Inder Singh v. State of Punjab*, AIR 1995 SC 312 1949 : (1995) 3 SCALE 418 : (1994) 3 SCC 275 (L.Rs. of each of the seven persons abducted and presumably killed by Punjab Police were awarded Rs. 1.5 lakhs under Article 32 as compensation against the State); *Punjab and Haryana High Court Bar Association v. State of Punjab*, 1996 (4) SCALE 416, pp. 420, 421 : (1996) 4 SCC 742 : (In this case an advocate K was abducted by the police of Punjab and killed. An innocent person H was falsely implicated by the police as the killer. Following *Nilbati Behra's* case, the parents of advocate K were awarded 10 lacs as compensation and the innocent person 2 lacs from the State of Punjab in a public interest petition under Article 32); *Peoples Union for Civil Liberties v. Union of India*, AIR 1997 SC 1203 : (1997) 3 SCC 433 (In this case following *Nilabati Behra* compensation of Rs. 1 lac was allowed to dependants of a person who was abducted and shot dead in a false encounter by police); *Postsangbam Ningoi Thokchan v. General Officer Commanding*, AIR 1997 SC 3534 (Following *Nilbati Behra* mothers of boys who were taken into custody by army authorities and who very likely suffered custodial death were each awarded Rs. 1,25,000.); *Punjab and Haryana High Court Bar Association v. State of Punjab*, JT 1997 (10) SC 502 : (1996) 4 SCC 742 (Following *Nilbati Behra* parents of an advocate who was abducted with his wife and child and very likely killed by the police were allowed 10 lakhs and a person falsely implicated by the police for the crime allowed 2 lakhs as compensation); *Milkiat Singh v. State of U.P.*, AIR 1999 SC 1522 : (1999) 9 SCC 351 (Father of a Sikh youth who was taken in custody by police and later shown to be killed in encounter was allowed Rs. 5 lakhs as compensation); *Veena Sippy v. Narayan Dumbre* (2012) 114 (2) Bom LR 1103 : (2012) 3 AIR Bom R 30 (Following *Nilbati Behra*, petitioner was held entitled to seek compensation for violation of her fundamental rights under Article 21 of the Constitution on grounds of her illegal detention by police authorities); *Damji Tingsa Pada v. Nagpur Central Jail* (2012) 1 AIR Bom R 279 (The petitioner was detain beyond the period he was liable to be detained. He was held entitled to compensation); *Ganeshan v. State of Tamil Nadu & Others* (2012) 2 CTC 848, (parents of the deceased claimed compensation under Art.226 on the ground that their only son died in a petrol bomb blast caused by some political party. Claim was allowed by holding the State was bound to protect his life and liberty).

41. AIR 1993 SC 1960, pp. 1972, 1973 : (1993) 2 SCC 746. *Neelbati Behra* and DR. ANAND J.'s observation in this case were relied upon by the court of appeal of New Zealand in the case of *Simpson v. Attorney General (Baigent's case)*, 1994 NZLR although the New Zealand Bill of Rights Act, 1990 does not contain any provision to provide a remedy for infringement of the Rights. *Baigent's* case has not been followed in Australia. The view in Australia is that a constitution is not to be construed as conferring a right to get damages additional to those provided by the common law : *Kruger v. The Commonwealth*, (1997) 71 ALJR 991 pp. 1003 (BRENNAN C.J.), 1047, 1048 (GAUDRON, J.), 1061 (GUMMOW J.).
42. AIR 1993 SC 1960, p. 1972 : (1993) 2 SCC 746. These observations were quoted and relied upon by the House of Lords (LORD BENGHAM) in *R (on the application of Amin) v. Secretary of State for the Home Department*, (2003) 4 All ER 1264, p. 1280 and it was held: "such persons must be

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Nilbati Behra's case was followed in *D.K. Basu v. State of West Bengal*,[43] which lays down general principles relating to custodial death cases. The judgment in this case was delivered by DR. ANAND J., who reviewed the earlier authorities. It was reiterated that the relief of compensation against the state based "on the principles of strict liability" under the public law is one to which the defence of sovereign immunity does not apply and that this relief is in addition to the traditional remedies and the compensation awarded in a given case is adjusted against any amount awarded to the claimant by way of damages in civil suit. It was also held that in the assessment of compensation under Article 32 or 226 "the emphasis has to be on the compensatory and not on the punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal court in which the offender is prosecuted, which the state in law is duty bound to do."[44] It may be here mentioned that DR. ANAND J., in *Nilbati Behra* had observed that "the compensation against the state under Article 32 or 226 was in the nature of "exemplary damages"[45] As exemplary damages are not compensatory but punitive,[46] there is some contradiction on this point between *Nilbati Behra* and *D.K. Basu* where it was said that in assessing compensation stress has to be on compensatory element and not on the punitive element.

In *State of Andhra Pradesh v. Challa Ramakrishna Reddy*[47] a prisoner in jail as under trial died as a bomb was thrown by some miscreants in the cell where he was lodged. In a suit by the dependants of the deceased against the state it was found that the jail authorities were negligent in properly guarding the jail inspite of warning that some miscreants were likely to make an attempt on the life of the prisoner. On these facts the doctrine of sovereign immunity was held to have no application as this was a case of a violation of the fundamental rights under Article 21 and it made no difference that the claim was laid through a suit and not under Article 32 or 226.

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protected against violence or abuse at the hands of state agents. They must be protected against self harm [See *Reeves v. Commissioner of Police of the Metropolis*, (1999) 3 All ER 87]. Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm (p. 1280)". The House of Lords further held that when death occurs in custody there is also a duty to hold a public enquiry with opportunity for relatives of the deceased to participate "to ensure as far as possible that the full facts are brought to light that the suspicion of deliberate wrongdoing (if unjustified) is allayed, that dangerous practices and procedures are rectified and that those who have lost their relative may atleast have the satisfaction of knowing that lessons learned from his death may save the lives of others" (p. 2181). See further *R (on the application of Middeton) v.West Somerset Coroner*, (2004) 2 All ER 465 (HL) (Coroners investigation as now read compatible with Human Right Act, 1998). *R (on the application of JL) v. Secretary of State for Justice*, (2009) 2 All ER 521 (HL) (prisoner in custody attempting suicide suffering serious injury enhanced investigation required by the State); *R (on the application of D) v. Secretary of State for Home Department*, (2006) 3 All ER 946 (HL). In India also by Criminal Procedure (Amendment) Act, 2005, section 176 of the Cr.P.C. has been amended to provide that in the case of death or disappearance of a person, or rape of a woman while in the custody of the police, there shall be a mandatory judicial enquiry in which relations of the victim will be allowed to be present and in case of death, examination of the dead body shall be conducted within twenty four hours of death.

43. AIR 1997 SC 610 : (1997) 1 SCC 416; See also, *Court on its own Motion v. State*, ILR (2010) 6 Del 193.
44. AIR 1997 SC 610, p. 628; See also, *Secretary, Home Department v. Damayanthi*, (2011) 4 CTC 746; *S. Anand v. State of Tamil Nadu*, (2012) 5 Mad LJ 772.
45. AIR 1993 SC 1960, p. 1973 : (1993) 2 SCC 746.
46. See, pp. 202 to 205, *post*.
47. AIR 2000 SC 2083 pp. 2090, 2091 : (2000) 5 SCC 712. This case was followed by the Punjab and Haryana High Court in holding that when on a false report lodged by a food inspector the plaintiff was prosecuted and had to remain in jail for 7 days, the state was vicariously liable for the tort of malicious prosecution along with the food inspector : AIR 2004 P&H 113, p. 115 (para 11).

Nilabati Behra's case was also followed in *Consumer Education and Research Centre v. Union of India*.[48] In this case which was a petition under Article 32, it was held that "right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a fundamental right under Article 21"[49] and directions were issued for examination of workers engaged in asbestos industry and for payment of compensation of Rs. one lakh to each worker found suffering from occupational health hazards. After referring to the case of *Nilabati Behra*, K. RAMASWAMY J. observed: "It is, therefore, settled law that in public law claim for compensation is a remedy available under Article 32 or 226 for the enforcement and protection of fundamental and human rights. The defence of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the Constitution or the law."[50]

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48. AIR 1995 SC 922 : (1995) 3 SCC 42.

49. AIR 1995 SC 922, p. 940.

50. AIR 1995 SC 922, p. 941. This case apparently extends the protection under Article 32 to cover every company and every person. To this extent it is of doubtful validity, for in two earlier constitution bench decisions, *viz. P.D. Shamdasani v. Central Bank of India*, AIR 1952 SC 59 : 1952 SCR 391 and *Smt. Vidya Verma v. Dr. Shiv Narain Verma*, AIR 1956 SC 108 : (1955) 2 SCR 283 it was held that the fundamental right under Article 21 is available only against the State and its instrumentalities and not against private persons, and the remedy under Article 32 cannot be invoked against private individuals for violation of Article 21. Further, in *M.C. Mehta v. Union of India*, AIR 1987 SC 965: (1987) 1 SCC 395, a Constitution Bench of the Supreme Court declined to decide whether a private corporation was 'state' within Article 12 and therefore subject to the discipline of Article 21 and for this reason no relief was granted against the corporation under Article 32. The entire judgment proceeds on the basis that Article 21 is not available against private persons and corporations not coming within the definition of state under Article 12. The same view had been expressed in *ADM, Jabalpur v. V.S. Shukla*, AIR 1976 SC 1207, p. 1233 (para 80) and p. 1361 (para 521) : (1976) 2 SCC 521.

In *Indian Council for Enviro Legal Action v. Union of India*, AIR 1996 SC 1446 : (1996) 2 SCALE 44, pp. 72, 73, directions were issued against the Central Government to exercise its statutory powers under sections 3 and 5 of the Environment (Protection) Act, 1986, to take remedial measures to restore the soil, water sources and the environment in general of the affected areas and to recover cost of the same from Polluting industries. The Rajasthan Pollution Control Board was directed to enforce the closure of the industries till such time as they did not comply with the directions and obtain requisite permissions and consents of the relevant authorities. As regards damages to the villagers of the affected areas, the Court observed that it was open to them or to any organisation on their behalf to institute suits in appropriate civil court. This case thus proceeds on the lines of the *Mehta* case and does not extend Articles 21 and 32 for awarding damages against private companies and industries.

In *M.C. Mehta v. Kamalnath*, AIR 2000 SC 1997 : (2000) 7 JT 19 : (2000) 6 SCC 213, the court in a petition under Article 32 set aside a lease of ecologically fragile land granted by the Himachal Pradesh Government to Kamalnath and directed the Govt. to take over the area and restore it to its original natural condition and to recover the cost of restitution as compensation from Kamalnath. This case is also on the lines as the case of *Indian Council for Enviro Legal Action (supra)*. The real violation of Article 21 in this case was by the state in granting the lease under which Kamalnath acted and his acts damaging the environment were thus done under the authority of the state. After cause was shown exemplary damages of Rs. 10 lakhs were imposed (AIR 2002 SC 1515) by a two judge bench. This case is of doubtful authority as it ignores the three judge bench case of common cause a registered *Society v. Union of India*, AIR 1999 SC 2979 discussed at pp. 55, 56.

In *Lata Wadhwa v. State of Bihar*, AIR 2001 SC 3218 : (2001) 8 SCC 197 compensation was allowed under Article 32 against the Tata Iron and Steel Company and in *M.S. Grewal v. Deepchand Sood*, AIR 2001 SC 3660 : (2001) 8 SCC 151 in a petition under Article 226

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In *Nalinikant Sinha v. State of Bihar*,[51] Sinha a senior employee was not considered for promotion and a junior was promoted. The Government later realised the mistake and *Sinha* was given notional promotion from the date the junior was promoted but was denied difference of salary on the ground that the rules did not permit the award of difference as *Sinha* had not worked on the post of promotion before his actual promotion. In a claim by *Sinha* for difference in salary and compensation for mental anguish and suffering the Supreme Court negatived the claim for mental anguish and suffering holding that it was not a legal claim allowable in law,[52] but allowed the claim for difference in salary with interest "having regard to the facts and justice of the case and without this decision constituting a precedent".[53]

In two public interest petitions under Article 32 of the Constitution two ex-central ministers who had arbitrarily allotted petrol pumps and shops/stalls from discretionary quota by *mala fide* exercise of their power were ordered to pay damages to the Government to the tune of 50 lacs in one case and 60 lacs in the other case.[54] The two ministers were found guilty of the tort of misfeasance in public office and liable to pay exemplary damages. The court relied upon *Nilbati Behra's* case[55] for the proposition that damages can be awarded under Article 32 of the Constitution. With reference to these cases the following submission was made in the 23rd edition of this book[56] : "The fundamental rights in Part III of the Constitution are against the State as defined in Article 12 and damages under Article 32 in enforcing fundamental rights can be awarded against the State. But the State has no fundamental right which can be enforced by award of damages to the State under Article 32. Further, Article 32 cannot be used for enforcing a liability in tort which is entirely different from a liability arising from violation of a fundamental right and this aspect was highlighted in *Nilbati Behra's* case. It is submitted that in these two cases[57] *Nilbati Behra's* case was wrongly applied and damages in these cases could not have been awarded in Article 32 petitions."

A review petition decided by a bench of three judges in one of the two aforementioned cases, which related to allotment of petrol pumps, justifies the above submission to a large extent. The court agreed that the orders of allotment were wholly arbitrary but it set aside the award of damages holding that the tort of misfeasance in public office was not established and that the State could not be awarded compensation in a petition under Article 32 for violation of fundamental right of a citizen by its officers. The question relating to misfeasance of public office

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compensation against a Public School was allowed under the Fatal Accidents Act. But in both these cases objections regarding the tenability of petitions though raised were not pressed.
There is yet no constitution bench decision departing from the earlier constitution bench decisions which restricted the availability of Article 21 against the state and its instrumentalities only.

51. *Nalini Kant Sinha v. State of Bihar*, AIR 1993 SC 1358 : 1993 Supp (4) SCC 748.

52. *Nalini Kant Sinha v. State of Bihar*, AIR 1993 SC 1358, p. 1360.

53. *Nalini Kant Sinha v. State of Bihar*, AIR 1993 SC 1358, p. 1359. There may, however, be circumstances such as delay or large SCALE revision of seniority to disentitle back wages of the higher post and the court may grant only notional promotion, seniority and pay fixation of the higher post on that basis; see, *Paluru Ramkrishnaiah v. Union of India*, AIR 1990 SC 166, p. 175 : (1989) 2 SCC 541; *Telecommunication Engineering Service Association v. Union of India*, 1994 Supp (2) SCC 22 : JT 1994 (7) SC 58, pp. 60, 61.

54. *A Common Cause a Registered Society v. Union of India*, AIR 1996 SC 3538 : 1996 (7) SCALE 156, (1996) 8 SCALE 127 : AIR 1997 SC 1886; *Shivasagar Tiwari v. Union of India*, (1996) 7 SCALE 643; (1996) 8 SCALE 338 : AIR 1997 SC 1483. The facts of these cases are discussed under the head Misfeasance in public office.

55. AIR 1993 SC 1960, pp. 1966, 1969 : (1993) 2 SCC 746.

56. 23rd edition, pp. 49, 50.

57. See cases in footnote 54.

arising in this case has been discussed elsewhere.[58] On the question of State's right to be compensated under Article 32 the court said : "The State itself cannot claim the right of being compensated in damages against its officers on the ground that they had contravened or violated the fundamental right of a citizen the whole thing has to be examined in the context of Article 32 of the Constitution under which relief to a person or citizen can be granted only against the Union of India or the State or its instrumentalities but the State cannot legally claim that since one of its ministers or officers had violated the fundamental right of a citizen or had acted arbitrarily, it should be compensated by awarding exemplary damages against that officer or minister."[59] The court fully accepted the judgment and the principles in *Nilbati Behra*. Indeed the court after quoting the passage extracted above[60] from the judgment of DR. ANAND J, in that case observed that it was "a classic exposition of the realm of 'public law'".[61] The case of *Nilbati Behra* and the Privy Council case of *Maharaj v. Attorney General,* which it approvingly followed clearly lay down that the violation of a fundamental right gives rise to a strict liability of the State in public law which is not vicarious liability in tort. Damages under Article 32 or 226 for violation of a fundamental right are allowed against the State and not against the officer whose action resulted in violation of the citizen's fundamental right, though the State can in suitable cases indemnify itself by recovering the loss from the delinquent officer by taking appropriate proceedings against him. The court was, therefore, right in observing in the judgment in disposing of the review petition that award of damages to the Government in a petition under Article 32 will not be permissible also for the reason that it would amount to directing the Government to pay damages to itself.[62] Whether it be a case of custodial death or wrongful detention or medical negligence the foundation of a petition under Article 32 is violation of the fundamental right of Article 21 by the State and not the tort committed by its officers. The court also held that exemplary damages cannot be allowed in all cases.[63]

The review petition in the other case also came up later before another three judge bench of the Supreme Court. They quashed the award of damages on the ground that the minister was old and ailing and it would be gross hardship to continue that part of the order.[64] They, however, doubted the correctness of the decision of the three judge bench in the earlier review case and observed that its correctness can be appropriately considered by a constitution bench in some other case. The legal position thus is that the decision of the three judge bench in the case of *common cause*[65] still remains the law declared under Article 141.

The distinction between tort by the officers for which the State may be vicariously liable and the primary and strict liability of the State for the public law wrong of violation of a fundamental right has sometimes not been maintained and cases of public law wrongs redressed under the public law remedies by applications under Article 32 or 226 have at times been, it is submitted in accurately, referred to as cases of tort. In *Chairman Railway Board v. Mrs. Chandrima Das*[66] where a Bangladeshi woman was gang raped by employees of the Indian Railway, the court rightly held that it was a case of violation of the fundamental right of the Bangladeshi woman

58. See pp. 349, 350, *post.*
59. *Common Cause a Registered Society v. Union of India,* AIR 1999 SC 2979, p. 3020 : (1999) 6 SCC 667.
60. See, text and footnote 39, p. 49.
61. *Common Cause a Registered Society v. Union of India,* AIR 1999 SC 2979, p. 2997 : (1999) 6 SCC 667.
62. *Common Cause a Registered Society v. Union of India,* AIR 1999 SC 2979, p. 3020.
63. See, p. 203, *post.*
64. *Sheila Kaur v. Shiv Sagar Tiwari,* AIR 2002 SC 2868 : (2002) 10 SCC 667.
65. *Common cause a registered Society v. Union of India,* AIR 1999 SC 2979 : (1999) 6 SCC 667; See also, *Court on its own Motion v. State of Himachal Pradesh,* AIR 2010 (NOC) 866 (H.P.).
66. AIR 2000 SC 988 : (2000) 2 SCC 465.

under Article 21, which applies also to non-citizens and the High Court was right in allowing compensation of Rs. 10 lakhs against the Railway in a public interest petition under Article 226 as the "state was under a constitutional liability to pay compensation to her."[67] But in the course of discussion some earlier cases relating to violation of fundamental right awarding compensation under Article 32 or 226 have been described as cases "in the realm of tort"[68] and there is also some reference to vicarious liability of the State.[69] As submitted earlier, the liability enforced under Article 32 or 226 for violation of a fundamental right is the primary and strict liability of the State and not its vicarious liability for the tort committed by its officers.[70]

In *Jay Laxmi Salt Works (P.) Ltd. v. The State of Gujarat,*[71] damage to the plaintiff was caused by over flow of water because of a reclamation bundh erected by the State for reclamation of vast area of land from saltish water of sea. It was found that the act of planning and construction of the bundh was done in a negligent manner which resulted in damage to the plaintiff. But the suit was held to be barred by the High Court under Article 36 of the Limitation Act, 1908. In appeal before the Supreme Court it was held that this was not purely a case of negligence which would be covered by the terms malfeasance, misfeasance and non-feasance used in Article 36 but also failure to discharge a *public law duty* and will be governed by Article 120 of the Limitation Act. The court did not refer to any provision of the Constitution or elaborate the concept of public law duty. In a welfare state all acts of the state are directed in public interest for welfare of the people. But can it be said that mistake or negligence in performance of every act by the Government would be violation of a public law duty liable to be redressed in an action for damages.

Although the cases of *Nilbati Behra* and *D.K. Basu* discussed above at pages 51 to 53, which laid the basis for the concept of public law wrong, related to violation of Article 21, the observations in them are general that violation of fundamental rights will be public law wrong redressable under Article 226 and 32. A three judge bench of the Supreme Court, however, in *Hindustan Papers Corporation v. Ananta Bhattacharjee*[72] has held that "the public law remedy for the purpose of grant of compensation can be resorted to only when the fundamental right of a citizen under Article 21 is violated and not otherwise". The court further said that "it is not every violation of the provisions of the constitution or a statute which would enable the court to direct grant of compensation."

Having regard to the very wide area which is covered by Article 21; which is made wider and wider as a result of its extension by 'judicial extrapolation',[73] coupled with the fact that the Constitution does not expressly provide for grant of damages either under Article 32 or 226 it cannot be held that any breach of any right under Article 21 will sound in damages in public law. The law on this point is in a developing stage. If in a new situation not covered by an authority of the Supreme Court a question of this nature arises it may be seen as to how far the new situation resembles to those situations in which damages have been allowed in public law and

67. AIR 2000 SC 988, p. 999 (para 38).
68. AIR 2000 SC 988, p. 993, 994 (paras 9 & 10).
69. AIR 2000 SC 988, p. 1000 (para 43).
70. See text and footnotes 37, (p. 49), 39, (p. 49), 43, (p. 51), 61, (p. 54).
71. (1994) 4 SCC 1 : JT 1994 (3) SC 492 : 1994 ACJ 902. Followed in a case of negligence of municipal corporation in failing to discharge duty of care towards persons swimming in a swimming pool maintained by the corporation resulting in death of a person by drowning : *Popatlal Gokaldas Shah v. Ahmedabad Municipal Corporation,* AIR 2003 Guj 44 : (2004) 9 SCALE 46.
72. (2004) 6 SCC 213, p. 216.
73. See, G.P. SINGH, Principles of Statutory Interpretation, 12th edition, p. 267.

in tort law and whether it would be just and reasonable to award damages in the new situation. Instead of laying down a broad general principle to cover all situations where damages can be allowed, it may be better to develop the law incrementally by taking analogy from the decided cases both under public law and private law of torts. This is the method which is now adopted in deciding cases of negligence in tort law which are not covered by authority. Further, extension of fundamental rights under Articles 21 and 32 against private persons, apart from being of doubtful validity,[74] may open a Pandora's box and flood the Supreme Court with petitions seeking damages. Rights to life and personal liberty against private persons are already covered by common law and statute law and private law remedies are available for violations of these rights. The courts must also be astute to guard against the trend that the blame for every misfortune must be laid at the doorstep of the State under Article 21 lest every wrong or offence against the person or property becomes redressable as a public law wrong against the State on the ground that it was not sufficiently vigilant in protecting the person or property of the victim. It may be worthwhile that the Supreme Court lays down the parameters as to when the State can be made liable, if at all, for public law wrong as distinguished from the tort of negligence, in cases where the wrong is done not by the State or its officers but by a third person who was not acting as agent of or in collusion with the State or its officers.[75] It is submitted that a distinction may also be drawn between strict liability of the state to pay damages for violation of fundamental right under Article 21 and its duty as a welfare state to provide relief to its needy citizens. The Supreme Court has, it is submitted, rightly deprecated the tendency to grant huge sums as damages under Article 226 in cases where the facts are disputed and there has been no trial of the issues involved[76] or where there is a minor infraction of Public Duty.[77]

The Madras High Court[78] in a public interest petition under Article 226 of the Constitution held that damages for injury to property of citizens in riot, when there was virtual breakdown of law and order, can be claimed against the State Government. The High Court in that case allowed Rs. 33.39 lakhs as compensation against the State to 39 Sikh families as it had failed to protect the properties of these families in the riots let loose in Coimbatore in the wake of the former Prime Minister, Indira Gandhi's assassination on October 31, 1984. In the view of the High Court, deprivation of property resulted in deprivation of means of livelihood violating Articles 21 and 300A of the Constitution. A similar petition filed in the Delhi High Court[79] was also allowed on similar reasoning. A petition filed in the Supreme Court for obtaining similar benefits to other Sikh riot victims in the entire country was remanded by the Supreme Court to the High Courts of Delhi,[80] Rajasthan, Orissa, Punjab and Haryana, Himachal Pradesh, Patna, Madhya Pradesh, Allahabad and Bombay for appropriate action without expressing any opinion on merits of the petition. The Kerala High Court[81]

74. See, footnote 50, p. 52.
75. See text and footnotes 78 to 82, *infra*.
76. *Chairman Grid Corporation of Orissa Ltd. v. Shrimati Sukmani Das*, AIR 1999 SC 3412 : (1999) 7 SCC 298; *A.K. Singh v. Uttarakhand Jan Morcha*, AIR 1999 SC 2193 p. 2195 : (1999) 4 SCC 476, *Tamil Nadu Electricity Board v. Sumathi*, AIR 2000 SC 1603 : (2000) 4 SCC 543; *N.Ulingappa v. APCPDCL*, AIR 2012 AP 149.
77. *Rabindra Nath Ghosal v. University of Calcutta*, AIR 2002 SC 3560 : (2002) 7 SCC 478.
78. *R. Gandhi v. Union of India*, AIR 1989 Mad 205. For another case of communal riot where the State was held liable to compensate the victims, see, *M/s. Inder Puri General Store v. Union of India*, AIR 1992 J & K 11 (Article 21 applied). But, see, *Nathulal Jain v. State of Rajasthan*, AIR 1993 Raj 149 (A person not suffering any injury cannot maintain a public interest petition for riot victims).
79. *Bhajan Kaur v. Delhi Administration*, 1996 AIHC 5644 (Delhi).
80. *S.S Ahluwalia v. Union of India*, AIR 2001 SC 1309 . (2001) 4 SCC 452.
81. *P. Gangadharan Pillai v. State of Kerala*, AIR 1996 Ker 71.

allowed damages to a petitioner under Article 226 whose hotel was ransacked by a mob on the ground that inaction by the police to render protection to the petitioner's hotel violated his fundamental right under Article 19(1)*g* of the Constitution. In all these cases the deprivation of life or property was not directly by the State or its officers but by third parties whose acts were facilitated because of the negligence or inaction of the officers of the State. As a criticism of these cases it may be said that when the third parties were not acting as agents of or in collusion with the State or its officers, there was no deprivation by the State or its officers of any fundamental right of life or right to property and the State could be made liable, if at all, only in private law for the tort of negligence[82] unless it could be said that it was reasonably foreseeable in the circumstances that a riot like situation may emerge and so the state was under a primary duty for making adequate arrangements of its law enforcement machinery for protection of life and property of its citizens which it failed to perform. It was, however, rightly held that *Kasturilal's* case has no application when there is infringement of Article 21 of the Constitution.

Guidance in this respect can be taken from Strasbourg jurisprudence as developed in interpreting right to life in Article 2 of the European Convention which is briefly expressed: 'Everyone's right to life shall be protected by law'. The article as interpreted also involves a positive obligation of the State to take preventive operational measures "*when the authorities know or ought to have known at the time the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party*". It is sufficient for the party complaining of the violation of this obligation "to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge. This is a question to be answered in the light of all the circumstances of the case".[83]

Following the case of *Rudul Shah* the Himachal Pradesh High Court[84] allowed a petition against the State for award of compensation under Article 226 of the Constitution by dependants of two persons who died during surgical operation in a Government hospital because of negligence of the hospital staff in that they were administered nitrous oxide in place of oxygen. As the hospital staff were employees of the State, the High Court, it is submitted rightly treated it to be a case of deprivation of life violating the fundamental right under Article 21 of the Constitution and not purely a case of negligence. The Orissa High Court in *Dharnidhar Panda v. State of Orissa*[85] held the state vicariously liable in a writ petition when as a result of collapse of a portion of a school building two children died. The responsibility for maintenance of school building lay on the Village Education Committee which acted as agent of the State Government. In *Y. Krishnappa v. The State*,[86] a learned Single Judge of the Madras High Court allowed Rs. 20,000 as compensation under Article 21 for delay in investigation without quashing the investigation for mental agony and anguish of the accused. And in *C.*

82. See text and footnote 75, p. 56.
83. *Osman v. U.K.*, (1998) 5 BHRC 293 (paras 115, 116) referred in *Re Officer L*, (2007) 4 All ER 965 para 19 pp. 975, 976 (H.L.); *Van Colle v. Chief Constable of Hertfordshire Police*, (2008) 3 All ER 977 paras 29 to 32 (H.L.); *Re E (a child)*, (2009) 1 All ER 487 paras 45 to 48 (H.L.). (This case also discusses the sufficiency of the measures adopted by the authorities to prevent a riot like situation. The case is in the context of Article 3 of the European Convention which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment which corresponds to Article 7 of the International Covenant on Civil and Political Rights enforced in India by the Protection of Human Rights Act, 1993).
84. *Smt. Kalawati v. State of Himachal Pradesh*, AIR 1989 HP 5.
85. AIR 2005 Ori 36 : 2006 ACJ 487.
86. (1993) Cr. LJ 3646 (Mad).

Chinnathambi v. State of Tamil Nadu,[1] another learned judge of the Madras High Court allowed Rs. 1,50,000/- under Article 226 of the Constitution to the dependants of each of the two children who died as a result of collapse of a water tank in a government school. In this case also Article 21 was applied. The Delhi High Court granted compensation to a widow, whose husband died as a result of bomb blast that took place at a cinema hall. State was held liable to compensate the family of the deceased. The Orissa High Court granted compensation on account of the death of a young girl who was raped and murdered within the school premises, by a school teacher.[2]

(iv) Limitations of Sovereign Immunity

The sovereign functions within which the immunity of the State survives in an ordinary tort action are also vague. But there can be no doubt in respect of certain matters. Trading and commercial activities of the State, for example running of railways,[3] are outside the scope of sovereign functions. This in fact was the decision in the *Peninsular and Oriental Steam Navigation Company's* case,[4] which was approved in *Kasturilal's* case.[5] Again welfare activities like famine relief work[6] or routine Governmental activity like maintenance of vehicles for use of officials,[7] or any service or facility to the consumer covered by the Consumer Protection Act 1986[8] or running of a hospital[9] do not fall within the area of immunity which is limited to the traditional sovereign functions. In *Shyamsunder v. State of Rajasthan,*[10] a truck belonging to the Public Works Department was engaged in famine relief work when an accident happened because of the negligence of the driver. In holding that the State was liable the Supreme Court observed : "It is not possible to say that famine relief work is a sovereign function of the State as it has been *traditionally* under stood." The question as to what are traditional sovereign functions of the State was considered by the Supreme Court in another context in *State of Bombay v. Hospital Mazdoor Sabha*[11] and *Nagpur Corporation v. Its Employees*,[12] and in both these cases the court referred with approval to Lord Watson's observation on this point in *Coomber v. Justice of Berks.*[13] These cases show that traditional sovereign functions are the making of laws, the administration of justice, the maintenance of order, the repression of crime, carrying on of war, the making of treaties of peace and other consequential functions.[14] Whether this list be wide or narrow it is at least clear

1. AIR 2001 Mad 35.
2. *Biranchi Narayan Sahu v. State of Orissa,* (2011) 105 AIC 680
3. *Chairman Railway Board v. Chandrima Das,* AIR 2000 SC 988, p. 1000 : (2000) 2 SCC 465.
4. 5 Bom HCR App 1.
5. AIR 1965 SC 1039 : (1965) 2 Cri LJ 144 : (1965) 1 SCWR 955.
6. *Shyam Sunder v. State of Rajasthan,* AIR 1974 SC 890 : (1974) 1 SCC 690 : 1974 ACJ 296.
7. *State of Rajasthan v. Vidyawati,* AIR 1962 SC 933 : (1963) SCJ 307 : (1962) 2 SCA 362. See, text and footnote 3, p. 45.
8. *Lucknow Development Authority v. M.K. Gupta,* AIR 1994 SC 787, p. 796 : (1994) 1 SCC 243. See also *Ethiopian Airlines v. Ganesh Narain Saboo* (2011) 8 SCC 539, para 81 : AIR 2011 SC 3495; *Indopol Flour Mills v. State of U.P.* (2011) 4 All LJ (NOC 508) 142.
9. *Achutrao Haribhau Khodwa v. State of Maharashtra,* AIR 1996 SC 2377 : (1996) 2 SCALE 328, p. 334; *State of Haryana v. Smt. Santra,* AIR 2000 SC 1888 : (2000) 5 SCC 182 (Failure of sterilisation operation in government hospital); *The Joint Director of Health Services v. Sahai,* AIR 2000 Mad 305; *Dr. M.K. Gourikutty v. M.K. Raghavan,* 2001 Ker 398.
10. AIR 1974 SC 890 : (1974) 1 SCC 690, (696) : 1974 ACJ 296.
11. AIR 1960 SC 610 : 1960 SCJ 679 : (1960) 2 SCA 243.
12. AIR 1960 SC 675 : (1960) 1 SCA 596 : (1960) 2 SCR 942.
13. (1883) 9 AC 61.
14. *Ad hoc Committee, The Indian Insurance Companies Association Pool v. Radhabai Babulal,* 1976 ACJ 362, at p. 366 : AIR 1976 MP 164 : 1976 Jab LJ 394 (Medical relief work undertaken by the State through a primary health centre is not a traditional sovereign function), see further, **(Footnote No. 14 Contd.)**

that the socioeconomic and welfare activities undertaken by a modern State are not covered by the traditional sovereign functions.[15] Further, although carrying on of war is a traditional sovereign function it will not be correct to say that in all cases when a tort is committed by a member of the defence services in the course of employment the State would succeed in pleading its immunity. This follows from the ruling of the Supreme Court in *Pushpa Thakur v. Union of India.*[16] In that case the facts as found by the High Court[17] were that on 28th August 1972, a military truck coming from the side of Delhi, due to negligence of the driver, went on the wrong side of the road and hit a culvert. Four persons including the appellant who were sitting on the culvert sustained severe injuries. The truck in question was part of the First Armed Division. This Division had moved to Ferozepur during the 1971 Indo-Pak War. When the war was over, this Division was ordered to move back to its permanent location at Jhansi and it was during this movement that the truck met with an accident. At that time, the truck was carrying rations and also some sepoys. On these facts the High Court held[18] that the accident occurred during the exercise of sovereign functions of the State and consequently the Union of India could not be held liable. The Supreme Court, overruling the High Court, in a very brief order said: "We are of the view that on the facts and circumstances of the case the principle of sovereign immunity of the State for the acts of its servants has no application and the High Court was in error in rejecting the claim of the appellant for compensation on that ground."[19] It will be seen that the truck involved in the accident was engaged in carrying ration and sepoys within the country during peace time in the course of movement of troops after the hostilities were over and this is a routine duty not directly connected with carrying on of war, the traditional sovereign function. It was probably for this reason that the Supreme Court negatived the plea of State immunity. The decision of the Supreme Court is in line with the view taken by the High Court of Australia that

(Footnote No. 14 Contd.)
Commandant of 74 Bn. B.S.F. v. Pankajini Kundu, 1984 ACJ 660 (at p. 663) : AIR 1984 Cal 405 : (1985) 1 TAC 126, *State of U.P. v. Hindustan Lever ltd.,* AIR 1972 All 486 : 1972 All LJ 501; *N. Nagendra Rao & Co. v. The State of Andhra Pradesh,* AIR 1994 SC 2663 : JT (1994) 5 SC 572, p. 598 : (1994) 6 SCC 205; *Chief Conservator of Forests v. Jagannath Maruti Kondhare,* AIR 1996 SC 2898; *Agriculture Produce Market Committee v. Ashok Harikuni,* AIR 2000 SC 3116, p. 3125 : (2000) 8 SCC 61 (Defence of the country, raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory).

15. In *Secretary of State v. Cockcraft,* AIR 1915 Mad 993 : 27 IC 723 : ILR 39 Mad 352; and *Krishnamurthy v. State of Andhra Pradesh,* (1960) 2 And WR 502 : AIR 1961 AP 283 : 1960 Andh LT 1053, it was held that maintenance of a highway was a sovereign function and so the Government was not liable for negligence of its servants in repairing or maintaining a highway or a culvert. These cases require reconsideration as maintenance of a highway cannot be called a traditional sovereign function. See further title 4A. Highway Authority, pp. 38, 39, *supra.*
16. (1984) ACJ 559 : (1984) 2 TAC 308 : (1985) 1 ACC 96 : AIR 1986 SC 1199 overruling (1984) ACJ 401 (Punjab and Haryana) : (1964) 86 Pun LR 143. The Full Bench decision of the Punjab and Haryana High Court in *Bakshi Amrik Singh v. The Union of India,* (1974) ACJ 105 : ILR (1973) 1 Punj 163, which was the basis for deciding 1984 ACJ 401 must also be taken to be overruled. See further, the following cases where immunity was rightly negatived : *Union of India v. Savita Sharma,* AIR 1979 J &K 6 : 1979 ACJ 1 : 1979 TAC 54; *Satya Wati Devi v. Union of India,* AIR 1967 Delhi 98 : (1968) 69 Pun LR (D) 125 : 1968 ACJ 119; *Nandram Heeralal v. Union of India,* AIR 1978 MP 209 : 1978 ACJ 215 : 1978 TAC 289; *Iqbal Kaur v. Chief of Army Staff,* AIR 1978 All 417 : 1978 All LJ 654 : 1978 All WC 559; *Union of India v. Smt. Jatto,* AIR 1962 Punjab 315 : (1962) 64 Pun LR 318 : ILR (1962) 1 Punj 708; *Union of India v. Sugrabai,* AIR 1969 Bom 13 : ILR (1968) Bom 998 : 70 Bom LR 212; *Union of India v. Bhagwati Prasad Misra,* AIR 1957 MP 159 : 1957 Jab LJ 765 : ILR (1957) MP 43; *Rooplal v. Union of India,* AIR 1972 J & K 22; *Union of India v. Abdul Rehman,* AIR 1981 J & K 60 : 1982 Srinagar LJ 17 : 1981 ACJ 348 : 1981 Kash LJ 279.
17. *Union of India v. Pushpa Thakur,* (1984) ACJ 401 (p. 403) : (1984) 86 Pun LR 143.
18. *Union of India v. Pushpa Thakur,* (1984) ACJ 401, p. 404 : (1984) 86 Pun LR 143.
19. (1984) ACJ 559 (SC) : (1984) 2 TAC 308 : (1985) 1 ACC 76. Followed in *Usha Agarwal v. Union of India,* 1985 ACJ 834 : AIR 1985 (P&H) 279 : 1985 (2) 88 Pun LR 197.

there are no sufficient policy reasons to deny the general applicability of the law of negligence to routine military duties in time of peace.[20] On the same reasoning although maintenance of order and repression of crime (which will include power to arrest, search and seize as held in *Kasturilal's case*)[21] are traditional sovereign functions, torts committed by security personnel in the course of routine duties will not qualify for giving protection to the State on the ground of State immunity.[22] But when the act complained of is directly connected with the maintenance of order, the State may succeed in claiming immunity. For example, where the police while regulating a procession made lathi charge and caused damage to the property of the plaintiff, it was held that the State was not liable.[23] Similarly, when some police personnel assaulted members of a mob for dispersing it when there was an apprehension of an attack on the office of the S.D.O. by the mob, the State was held to be not liable.[24] However, in *State of Madhya Pradesh v. Shantibai*, two women who were standing on the roof of their house were injured when police fired in the air to control a mob indulging in violence after lathi-charge and teargas had failed to be effective, the High Court allowed compensation and negatived the defence of sovereign immunity. The women were innocent victims and they were hit by the bullets fired by the police though "unwittingly".[25] But even in cases where use of police lathi-charge or firing is justified the State, generally, does not intend to deny compensation to the victims or to the dependents in case of death. It is on this basis that the Supreme Court allowed payment of Rs. 20,000 in case of death and Rs. 5,000 for personal injury.[26]

It was stated in the *Peninsular and Oriental Steam Navigation Company's* case that sovereign powers are those powers "which cannot be lawfully exercised except by a sovereign or by a private individual delegated by a sovereign to exercise them."[27] This test is applied in some cases for deciding the question whether the tort was committed in the protected field of sovereign immunity, but the test is not satisfactory and cannot, at any rate, be applied to all cases. In India no private individual can carry on undertakings like the Railways but it does not follow that these undertakings are carried on by the Government in the exercise of traditional sovereign powers and the State shall not be liable for torts committed by servants of these undertakings in the course of employment. These undertakings are in the nature of commercial and public utility undertakings[28] and as they do not fall within the traditional sovereign functions they are outside the protected area. Further, no private individual has the power to raise and maintain an army or a police force, but as already seen,[29] the law is not that all torts committed by an Army Officer or a Police

20. *Groves v. Commonwealth*, (1982) 41 ALR 193.
21. AIR 1965 SC 1039 : (1965) 2 Cri LJ 144 : (1965) 1 SCWR 955 : (1965) 1 SCR 375.
22. For example, see, *Union of India v. Abdul Rehman*, AIR 1981 J & K 60 : 1982 Srinagar LJ 17 : (1981) ACJ 348 : 1981 Kash LJ 279; *Commandant of 74 Bn. B.S.F. v. Pankajini Kundu*, (1984) ACJ 660 (Calcutta) : AIR 1984 Cal 405 : (1985) 1 TAC 126.
23. *State of Madhya Pradesh v. Chirojilal*, AIR 1981 MP 65 : 1981 Jab LJ 351; The reasoning is that the function of the State to regulate processions is delegated to the police by section 30 of the Police Act and the function to maintain Law and Order, including quelling of riot, is delegated to the authorities specified by section 144, Cr.P.C. These functions cannot be performed by private individuals. They are the powers exercisable by the State or its delegates only and by their very nature these functions are to be regarded as 'Sovereign functions' of the State.
24. *State of Orissa v. Padmalochan*, AIR 1975 Ori. 41 : ILR (1974) Cut 103.
25. AIR 2005 M.P. 66; See also, *Smt. Harimaya Dayal v. Union of India & others*, AIR 2010 (NOC) 561 (GAU); *Jeetindera Singh v. State of H.P.* AIR 2012 HP 61 : (2012) 113 AIC 332.
26. AIR 1987 SC 355, p. 356 : (1987) 1 SCC 265.
27. (1868-69) 5 Bom HCR, Appendix 1, p. 1 at p. 14.
28. *Govt. of India v. Jeevraj Alva*, AIR 1970 Mysore 13 : 1970 ACJ 221 : (1969) 1 Mys LJ 244.
29. Text and footnotes 16 to 23, pp. 59, 60, *supra*.

Officer in the course of employment fall within the area of State immunity. There has to be a close nexus between the act complained of and one of the traditional sovereign functions of the State such as carrying on of war, maintenance of order or repression of crime before it can be said that the State will not be liable for torts committed in the course of employment by a member of the Defence services or police force.[30]

It must also be noticed that the State cannot succeed in pleading its immunity by merely showing that the tort was committed by its servants in the course of discharge of statutory functions. "The statutory functions must be referable to the traditional concept of Government activity in which the exercise of the sovereign power was involved"[31] to enable the State to claim immunity. This was clearly laid down by the Supreme Court in *Kasturilal's* case.[32] This legal position has now been strongly affirmed by the Supreme Court in *N. Nagendra Rao & Co. v. The State of Andhra Pradesh*.[33] In this case the appellant carried a business in fertilisers and foodgrains. Huge stock of fertilisers and foodgrains was seized from the appellant's premises. In proceedings taken under section 6A of the Essential Commodities Act, 1955, no serious violation of any Control order was found and only nominal portion of the stock seized was confiscated and the rest was ordered to be released. The appellant, when he went to take the delivery found that the stock had been spoilt both in quantity and quality. The appellant, therefore, instead of taking delivery of the stock sued for compensation against the State. The Trial Court found negligence on the part of the officers and decreed the suit in part. The High Court did not interfere with the finding of negligence but dismissed the suit relying upon *Kasturilal*. In the Supreme Court the appeal was heard by two judges who could not overrule *Kasturilal* (which is a decision of a Constitutional Bench) but they pointed out in an elaborate discussion that it was not correctly decided and that the doctrine of sovereign immunity has no relevance in the present day context. Distinguishing *Kasturilal* the Court, overruling the High Court, observed that maintenance of law and order may be an inalienable sovereign function of the State in the traditional sense but power of regulating and controlling essential commodities as conferred by the Essential Commodities Act and the orders made thereunder did not pertain to that area and the State cannot claim immunity if its officers are negligent in exercise of those powers.[34]

Even in those cases where the State is protected from vicarious liability on the doctrine of sovereign immunity, the public servant committing the tort is not protected.[35] It is also no defence for the public servant to say that the wrong was committed in the course of discharging some statutory function or carrying out the

30. Text and footnotes 16 to 23, pp. 59, 60, *supra*.
31. *State of U.P. v. Hindustan Lever Ltd.*, AIR 1972 All 486, (p. 491) : 1972 All LJ 501 (A deposit made on behalf the plaintiffs in a Government sub-treasury was not credited to their account as it was embezzled by the treasurer and the accountant of the sub-treasury. In a suit by the plaintiffs it was held that even assuming that the treasurer and the accountant committed the wrong in the course of discharge of statutory functions (under rules made by virtue of s. 151, Government of India Act, 1935), the State was liable as running a sub-treasury was in the nature of a banking business and did not pertain to the traditional sovereign activity.)
32. *Kasturilal Ralia Ram Jain v. State of U.P.*, AIR 1965 SC 1039, p. 1946 : (1965) 2 Cri LJ 144 : (1965) 1 SCWR 955 : "The question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign power of the State to such public servant.". Followed in *Ganesh Prasad v. Lucknow Development Authority*, (2012) 90 ALR (SUM 9) 5 : (2011) 89 ALR (SUM 64) 31).
33. AIR 1994 SC 2663 : JT 1994 (5) SC 572 : (1994) 6 SCC 205.
34. JT 1994 (5) SC 572 , p. 600.
35. *State of U.P. v. Tulsi Ram*, AIR 1971 All 162 : 1970 All Cri R 429 : 1970 All WR (HC) 160.

orders of superiors.[36] Superior Officers are not liable on the basis of vicarious responsibility for there is no relationship of master and servant between them and their subordinate; but a superior officer is liable directly if the wrong committed by the subordinate is expressly authorised by him.[37] Further, although no action lies for doing that which is authorised by the legislature, if it be done without negligence, but an action lies for doing that which the legislature has authorised if it be done negligently.[38] In cases where a statutory discretion is conferred, the person entrusted with the discretion is not liable if the discretion is exercised with due care and there is merely an error of judgment; but there would be liability if he "either unreasonably failed to carry out his duty to consider the matter or reached a conclusion so unreasonable as again to show failure to do his duty."[39]

9. FOREIGN SOVEREIGNS

English courts have no jurisdiction over an independent foreign sovereign personally and the properties of a foreign sovereign State unless they submit to the jurisdiction of the Court.[40] For this purpose all sovereigns are equal. The independent sovereign of the smallest State stands on the same footing as the monarch of the greatest. No Court can entertain an action against a foreign sovereign for anything done, or omitted to be done, by him in his public capacity as representative of the nation of which he is the head.[41] Mere residence in a foreign territory does not lead to a waiver of immunity or submission to local Courts.[42] Even if such a sovereign is a British subject, and has exercised his rights as such subject, he cannot be made to account for acts of State done by him in his own territory, in virtue of his authority as a sovereign.[43] As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise by means of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property, be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.[44] This sovereign immunity may not be available upon termination of sovereign status, *e.g.*, abdication.[45] Where the *de jure* sovereign of a foreign country (Emperor of Abyssinia) brought an action to recover a sum of money from a company and the company proved that a claim in respect of the money had been made by another foreign Sovereign State (King of Italy), it was held that the court had no jurisdiction to decide the rights of the plaintiff, having regard to the claim by the other foreign State.[46]

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36. *Venkappa v. Devamma*, (1956) Mad 1381.
37. *Mersey Docks Trustees v. Gibbs*, (1866) LR 1 HL 93, p. 124.
38. *Geddis v. Proprietors of Bann Reservoir*, (1873) 3 AC 430 (HL), pp. 455-456 (LORD BLACKBURN) referred to in *Home Office v. Dorset Yacht Co.*, (1970) 2 All ER 294 : (1970) AC 1004 (HL). *Lucknow Development Authority v. M.K. Gupta*, AIR 1994 SC 787: (1994) 1 SCC 243.
39. *Home Office v. Dorset Yacht Co.*, (1970) 2 All ER 294 : (1970) AC 1004 (HL) (LORD REID).
40. *Mighell v. Sultan of Johore*, (1894) 1 QB 149; *Duff Development Co. v. Kelantan Government*, (1924) AC 797; *The Christina*, (1938) AC 485; *The Arantzazu Mendi*, (1939) AC 256.
41. *De Habar v. The Queen of Portugal*, (1851) 17 QB 171 *Wadsworth v. Queen of Spain*, 20 LJQB 488; *Gladstone v. Ottoman Bank*, (1863) 1 H & M 505.
42. *Mighel v. Sultan of Johore*, (1894) 1 QB 149.
43. *Duke of Brunswick v. The King of Hanover (King)*, (1848) 2 HLC 1.
44. *The Parlement Belge*, (1880) 5 PD 197, 217.
45. *Munden v. Brunswick*, (1847) 10 QB 656.
46. *Haile Selassie v. Cable and Wireless Ltd.*, (1938) 1 Ch 545.

Unlike Great Britain, most countries did not accept the doctrine of absolute immunity and they tended to distinguish between *acts jure imperii* and *acts jure gestionis*.[47] The absolute immunity doctrine was producing great injustice in the changed conditions when sovereign States are more and more indulging in commercial and trading activities. The English courts, therefore, felt the necessity of taking more restricted view of sovereign immunity. The Privy Council in *Philippine Admiral (owners) v. Wallen Shipping (Hong Kong) Ltd.*,[48] abandoned the absolute theory and applied the restrictive theory in respect of actions *in rem* observing that the trend of opinion in the world since the war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions. The Court of Appeal[49] under the leadership of LORD DENING applied the restrictive theory also to actions *in personam* holding that there is no ground for granting immunity if the dispute concerns commercial transactions of a foreign State. Finally the House of Lords in *The Congreso Del Partido*[50] approved the restrictive theory requiring the court to analyse the nature of the obligation and breach in question to decide whether it pertained to private law or was of "Governmental" character. Parliament has also intervened by enacting the State Immunity Act, 1978 which applies to causes of action arising after November 21, 1978. The immunity under the Act covers proceedings which relate to anything done in the exercise of "sovereign authority". Acts done under statutory authority are thus not protected.[51] Speaking generally trading transactions are not protected under the Act but what is more important for our purposes is that immunity does not apply to: (a) an action or omission in U.K. causing death or personal injury; and (b) obligations arising out of the ownership, possession or use of property in U.K. But the Act does not apply to 'proceedings relating to anything done by or in relation to the armed forces of a state while present in the United Kingdom'. The immunity relating to armed forces covered by this exception is decided in accordance with the common law relating to State immunity.[52] A member of the US Air Force sustained injury through treatment by US medical personnel at a US base hospital in England and he brought a suit for damages against the United States' government in England. The suit was dismissed on the ground of state immunity that the activities of the United States which gave rise to the suit fell within the area of *Jure imperii*.[53] Where the immunity applies, it covers an official of the State in respect of acts performed by him in an official capacity.[54] The state immunity is unaffected by the European convention for the Protection of Human Rights and Fundamental Freedoms which is enforced in the United Kingdom by the Human Rights Act, 1998 from 2nd October, 2000.[55] But the Court of Appeal in another decision unanimously held that in a case where a systematic torture was carried out in a state's prison by its officials, the immunity from civil proceedings for compensation for acts of torture will apply only to the state and not to its officials.[56]

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47. CHESHIRE, Private International Law, 6th edition, page 89, Footnote 2.
48. (1976) 1 All ER 78 (PC).
49. *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*, (1977) 1 All ER 881, pp. 891, 892 : 1977 QB 529 : (1977) 2 WLR 356 (CA).
50. (1983) AC 244 (HL); *Holland v. Lampen Wolfe*, (2000) 3 All ER 833, p. 844 (HL).
51. *Kuwait Airways Corp. v. Iraqi Airways Co.*, (1995) 3 All ER 694 : (1955) 1 WLR 1147 (HL).
52. *Holland v. Lampen Wolfe*, (2000) 3 All ER 833, p. 844 : (2000) 1 WLR 1573 (HL).
53. *Littrell v. United States of America*, (1994) 4 All ER 203 : (1995) 1 WLR 82 : (1993) 137 SJ L.B. 278 (CA).
54. *Holland v. Lampen Wolfe*, (2000) 3 All ER 833, p. 843.
55. *Holland v. Lampen Wolfe*, (2000) 3 All ER 833, pp. 847, 848.
56. *Jones v. Minister of Interior (Kingdom of Saudi Arabia)*, (2005) 2 WLR 808. For comments on this case see (2005) 121 Law Quarterly Review, pp. 353-359.

If an international organisation formed by an agreement of Sovereign States is given a corporate status by the law of the United Kingdom, the organisation becomes a distinct legal entity from its members who cannot be made liable for the debts of the organisation.[57] So if the organisation is by law also given legal immunity, the result is that neither the organisation nor the member States can be sued.[57] Agreements or treaties entered into by Sovereign States, unless incorporated in law by statute, cannot be enforced in municipal courts either by the member States or by a third party.[58]

In India as provided in s. 86 of the Code of Civil Procedure a foreign State cannot be sued except with the consent of the Central Government certified in writing by a Secretary to that Government. A tenant of immovable property can, however, sue without such consent the foreign State from whom he holds or claims to hold the property. Consent to sue cannot be given unless it appears to the Central Government that the foreign State: (a) has instituted a suit in the court against the person desiring to sue it, or (b) by itself or another, trades within the local limits of the jurisdiction of the court, or (c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or (d) has expressly or impliedly waived the privilege accorded to it.[59] The immunity under section 86 also covers foreign corporations which are state owned and are like government departments even though they carry on commercial or trading activities.[60] Having regard to the modern trend of taking a restricted view of State immunity the Supreme Court has ruled that consent to sue should generally be granted if conditions mentioned in the section are satisfied.[61]

10. AMBASSADORS

The law on the privileges and immunities of diplomatic representatives in the United Kingdom is contained in the Diplomatic Privileges Act, 1964, which gives the force of law to the relevant provisions of the Vienna Convention on Diplomatic Relations, 1961. In India, any Ambassador or envoy of a foreign State, any High Commissioner of a Commonwealth country and any such member of their staff, as the Central Government may specify, cannot be sued except with the consent of the Central Government certified in writing by a secretary to the Government. The provisions of section 86 of the Code of Civil Procedure apply in this respect as they apply in relation to a foreign State and permission to sue can be granted on grounds on which a foreign State can be allowed to be sued.[62]

57. *Maclaine Watson & Co. Ltd. v. Department of Trade & Industry*, (1989) 3 All ER 523 (HL).
58. *Maclaine Watson & Co. Ltd. v. Department of Trade & Industry*, (1989) 3 All ER 523 (HL).Regarding United Nations, see *A.G. Nissan*, (1969) 1 All ER 629 (HL), p. 647. For reparation of the injuries suffered in the service of United Nations, see, (1949) ICJR 174.
59. Section 86, Code of Civil Procedure, 1908.
60. *Veb Deautfracht Seereederei Rostock (D.S.P. Lines) a Department of the German Democratic Republic v. New Central Jute Mills Co. Ltd.*, AIR 1994 SC 516 : (1994) 1 SCC 282. See further, *Arab Republic of Egypt v. Gamal-Eldin*, (1996) 2 All ER 237 (Activity of organising medical relief for its nationals is not commercial activity and is within state immunity).
61. *Harbhan Singh Dhalla v. Union of India*, AIR 1987 SC 9 : 1986 JT 765 : (1986) 4 SCC 678 : (1986) 4 Supreme 258; *Shanti Prasad Agarwalla v. Union of India*, AIR 1991 SC 814 : 1991 Supp (2) SCC 296.
62. See, text and footnotes 60 and 61, *supra*.

11. MINOR

The normal age of majority in India is 18 years, but if a guardian is appointed before that age by a court or property is taken under superintendence by a court of wards, the age of majority is 21 years.[63] The criminal law confers immunity on minors of tender years; a child below 7 years cannot at all be held liable for any offence,[64] and a child between the ages of 7 and 12 is not liable unless he had attained sufficient maturity to judge the nature and consequence of his conduct on the occasion.[65] As regards contracts a minor is incompetent to contract and an agreement entered into with him is void.[66] The law of torts makes no special provision for minors.

Pre-natal injuries

A minor can sue for all torts committed against him like any other person except that he has to bring his suit through a next friend. The preponderance of authority now is that a minor can also sue for pre-natal injuries.[67] The difficulty, that at the time the injury is inflicted, there is no legal person, for the fetus is not a legal person is met either by holding that the cause of action arises on the birth of the child who is deformed or by fictionally attributing personality to the fetus as is done in cases where a posthumous child is held entitled to claim under the Fatal Accidents Act,[68] Workmen's Compensation Act[69] or under a Will[70] in accordance with the maxim *Nasciturus pro jam nato habetur*.[71] On the recommendation of the Law Commission the British Parliament passed the Congenital Disabilities (Civil Liability) Act, 1976, section 1 of which provides that a person responsible for an occurrence affecting the parent of a child, causing the child to be born disabled, will be liable to the child if he would have been liable in tort to the parent affected.[72] There is no liability for a pre-conceptional occurrence if the parents accepted the particular risk. There are also other exceptions and qualifications in the Act. It further appears that a deformed child cannot claim damages either under the Act or under general law when the deformity resulted because of an infectious disease suffered by the mother during pregnancy and the fault of the doctor was in not advising the mother of the desirability of abortion for although the doctor owed a duty to the mother to advise her of the infection and its potential and serious effects and on the desirability of the abortion in those circumstances, it did not follow that the doctor was under legal obligation to the fetus to terminate its life or that a fetus had a legal right to die; such a claim for 'wrongful life' would be contrary to public policy as a violation of sanctity of human life.[73] When the pregnancy and birth follow a sterilisation operation, the mother can claim in full the financial damage sustained by her as the

63. The Indian Majority Act, 1875.
64. Section 82, Indian Penal Code.
65. Section 83, Indian Penal Code.
66. Section 11, Indian Contract Act, 1872; *Mohori Bibee v. Dharmodas Ghose*, (1903) 1 ILR 30 Cal 539 (PC).
67. *Montreal Tramways v. Leveille*, (1933) 4 DLR 377; *Pinchin v. Santam Ins.*, 1963 (2) SAF 254; *Watt v. Rama*, (1972) VR 353; *Duval v. Seguin*, (1973) 40 DLR 3d 666 (Ont. CA); *B. v. Islington Health Authority*, (1991) 2 WLR 501 (QBD), *De Martell v. Merton and Sutton Health Authority*, (1992) 3 All ER 820 : (1991) 1 All ER 825 (QBD).
68. *The George and Richard*, (1871) LR 3 Ad & Ecc 466.
69. *Williams v. Ocean Coal*, (1907) 2 KB 422 (CA).
70. *Villar v. Gilbey*, (1907) AC 139. See further, section 99(i) of the Indian Succession Act, 1925.
71. SALMOND, Jurisprudence, 12th edition, p. 301; FLEMING, Torts, 6th edition, pp. 153, 154.
72. Even before the Act, many cases were decided on the footing that such a liability is recognised by the law. For example see *Distillers Co. (Biochemicals) Ltd. v. Thompson*, (1971) 1 All ER 694 : (1971) 2 WLR 441 (HL); *McKay v. Essex Area Health Authority*, (1982) 2 All ER 771, p. 779: (1982) 2 WLR 890 : 1982 QB 1166 (CA).
73. *McKay v. Essex Area Health Authority*, (1982) 2 All ER 771 : (1982) 2 WLR 890 : 1982 QB 1166 (CA).

result of the negligent failure to perform the sterilisation operation properly, regardless of whether the child was healthy or abnormal and she is entitled to damages for loss of earnings, pain and suffering and loss of amenities including extra care the child would require in case of being born deformed.[74] But the deformed child in these circumstances would not be entitled to sue for damages as it could not be said that there was any injury caused to the fetus or to the parents by the negligence of the doctor which caused the deformity. In the absence of any Indian Act, the Indian courts can take guidance from the English Act in deciding suits by minors relating to congenital disabilities. The Supreme Court in *Union Carbide Corporation v. Union of India*,[75] referred to the English Act and held that those who were yet unborn at the time of the Bhopal gas leak disaster and who are able to show that their congenital defects are traceable to the toxicity from the gas leak inherited or derived congenitally will be entitled to be compensated. Indeed, father of a girl child conceived and born after the disaster who died after four months showing symptoms of gas effect because the mother had inhaled the gas was allowed compensation of Rs.1.5 lakh by the Supreme Court.[76]

No protection but age taken into account.—A minor enjoys no special protection in a suit filed against him for a tortious act. But his age has to be taken into account when any mental element such as intention, malice or negligence on his part is relevant for deciding his liability. In *Tillander v. Gosselin*,[77] a child aged 3 years dragged another child of the same age for several feet and caused extensive injuries but as intention or negligence could not be imputed to him because of his tender age, he was not held liable. In *Me Hale v. Watson*,[78] a minor aged 12 threw a metallic dart towards a post made of hard wood hoping that its sharp end would stick; but instead of sticking, the dart bounced and hit a girl standing close by. The High Court of Australia absolved the minor of liability for negligence as a boy of his age could not be expected to foresee the risk involved. In holding so the court applied the principle that where an infant defendant is charged with negligence, his age is a circumstance to be taken into account and the standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience.[79] The result of the case would have been different if the dart had been thrown towards the girl. The Australian case was followed by the court of appeal in *Mullin v. Richards*.[80] In this case two fifteen year old girls M and R were engaged in playing around with plastic rulers as if they were fencing when one of the plastic rulers snapped and a fragment entered M's right eye as a result of which she lost all her useful eye sight. M brought proceedings for negligence against R which were dismissed by the court of appeal on the ground that the accident was not foreseeable. In holding so and adopting the test laid down in the Australian case HUTCHISON, L.J. observed : "The question for the judge is not whether actions of the defendant were such as an ordinarily prudent and reasonable adult in the defendant's situation would have realised gave rise to risk of injury, it is whether an ordinarily prudent and reasonable 15 year old school girl in the

74. *Emeh v. Kensington and Chelsea and Westminster Area Health Authority*, (1984) 3 All ER 1044 : 1985 QB 1012 (CA). See further pp. 225-227, *post*.
75. AIR 1992 SC 248, p. 311 : (1991) 4 SCC 584. According to a report in M.P. Chronicle of June 30, 1995, 30 children were later found suffering from congenital heart diseases because of toxic effect of the gas on their mothers.
76. *S. Said-Ud-Din v. Court of Welfare Commissioner*, (1996) 3 SCALE (SP) 28 : (1997) 11 SCC 460.
77. *Tillander v. Gosselin*, (1967) ACJ 306 (High Court of Ontario, Canada).
78. (1966) 115 CLR 199, (1968) ACJ 273 (High Court, Australia).
79. (1968) ACJ 273, p. 296. See further, American Restatement of the Law of Torts para 283 referred to at p. 294 of the report.
80. (1998) 1 All ER 920 (CA).

defendant's situation would have realised as much."[81] When contributory negligence is alleged against a minor the same principle is to be applied; "the test is, what degree of care for his own safety can an infant of the particular age reasonably be expected to take."[82] Subject to these limitations, as earlier stated, a minor is liable like any adult for the tortious acts. For example in the case of a violent assault and battery on a harmless man, the act in itself is sufficient to support the cause of action and the wrongdoer, even if a minor, is liable.[83] Infants are liable for wrongs of omission as well as for wrongs of commission. Thus infants are held liable for assault, false imprisonment, libel, slander[84] seduction, trespass,[85] wrongful detention of goods,[86] fraud,[87] embezzling money,[88] and for nuisance and injuries to their neighbours, arising from the negligent use and management of their property.

No liability in tort from void agreement.—A minor's agreement is void even if he fraudulently represents himself to be of full age[89] and so he cannot be made to repay a loan so obtained by changing the form of action to one for deceit.[90] But he can be compelled to specific restitution, when that is possible, of property obtained by false representation provided it is identifiable and still in his possession or control.[91] In the words of LORD SUMNER; "Restitution stops where repayment begins."[92]

Although an infant is liable for a tort, yet an action grounded on contract cannot be changed into an action of tort.[93] Thus, an infant was held not liable for overriding a mare which he had hired,[94] or for unskillfully driving a motor-car and damaging it.[95] But where an infant hired a mare and was expressly told that she was not fit for leaping, but she was put to a fence, and in taking it, fell upon a stake and was so injured that she died, he was held liable, for it was just as much a tort as if he had taken the mare out of the plaintiff's stable without leave.[96] If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants.[97]

81. (1998) 1 All ER 920 (CA), p. 924.
82. *Delhi Transport Corporation v. Kumari Lalita*, (1983) ACJ 253 (p. 256) : AIR 1982 Del 558 : (1986) 59 Com Cas 162. See further, *Amritsar Transport Co. v. Seravan Kumar*, (1969) ACJ 82 (Punjab) : 1969 Cur LJ 53, *Matias Costa v. Roque Augustinno Joeinto*, (1976) ACJ 92 (Goa) : AIR 1976 Goa 1 : 1976 TAC 262; *Yachak v. Oliver Blais Co. Ltd.*, (1949) AC 386; *Gaugh v. Throne*, (1966) 1 WLR 1387 (CA) : 1967 ACJ 183; *Jones v. Lawrence*, (1969) 3 All ER 267 : 1970 ACJ 358. See further Chapter XIX, title 7(B).
83. *Swaroopkishore v. Gowardhandas*, (1955) MB 355.
84. *Hodsman v. Grissel, Noy.*, 129; *Defries v. Davis*, (1835) 1 Bing NC 692.
85. Bacon.
86. *Mills v. Graham*, (1804) 1 B & P (NR) 140.
87. *In re, Lush's Trusts*, (1869) LR 4 Ch App 591.
88. *Bristow v. Eastman*, (1794) Peake NPC 291, (223).
89. *Sadik Ali Khan v. Jaikishore*, AIR 1928 PC 152 (There is no estoppel against a minor).
90. *Leslie (R) Ltd. v. Sheill*, (1914) 3 KB 607 : 111 LT 306; *Dhannumal v. Ram Chunder Ghose*, (1890) 24 Cal 265.
91. *Leslie (R) Ltd. v. Sheill*, (1914) 3 KB 607 : 111 LT 306; See also, *Ballett v. Mingay*, (1943) KB 281 : 168 LT 34 : (1943) 1 All ER 143. Where an infant was successfully sued in detinue for the non-return of a microphone and amplifier which he had hired from the plaintiff and improperly parted with it to a friend.
92. *Leslie (R) Ltd. v. Sheill*, (1914) 3 KB 607, p. 618.
93. See, cases in footnote 91, *supra*.
94. *Jennings v. Rundall*, (1799) 8 TR 335 : 4 R.R. 680.
95. *Motor House Company Limited v. Charlie Ba Ket*, (1928) 6 Ran 763.
96. *Burnard v. Haggis*, (1863) 14 CBNS 45 : 8 LT 320.
97. Per LORD KENYON in *Jennings v. Rundall*, (1799) 8 TR 335, 336 : 4 R.R. 680.

Liability of parent.—A father or a guardian is not responsible for the torts of the minor.[1] But the circumstances of a case may be such as to constitute the child the servant for the time being of the father, in which case the father may be liable as a master for the acts, neglect and default of his child, as when he sends out his son on some business with his cart and horse, and the son causes injury by negligence in driving.[2] A father may also be liable for his own personal negligence in allowing his child an opportunity of committing a wrong, as when he supplies his son with an air-gun or allows him to remain in possession of it after complaints of mischief caused by the use of the gun, and the boy afterwards accidentally wounds a person.[3]

12. LUNATIC

Insanity is a good defence in the Criminal Law when at the time of commission of the crime, the accused by reason of unsoundness of mind was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law.[4] Such a wide exemption is not admissible in the law of torts the object of which is compensation and not punishment. It may be generally stated that when the insanity is of such a grave nature that the defendant was unable to know the nature of his act, he would not be liable in tort for the act in such a case will not be a voluntary act which is necessary for constituting a tort.[5]

In cases where no specific intent or malice is an ingredient of the tort, the defendant would be liable if he knew the nature of his act, although, because of unsoundness of mind he was unable to know that what he was doing was wrong or contrary to law. This would be the position in actions for trespass,[6] conversion, defamation[7] and other torts where what is necessary to prove is only that the defendant intended to do the physical act which constitutes the tort. So a person was held liable in tort for violent assault and battery when he knew the nature of his act though because of mental disorder he did not know that it was wrong.[8] But in cases where specific intent or malice is necessary to constitute the tort, *e.g.*, malicious prosecution, deceit or libel on a privileged occasion, the defendant will escape liability if his defective mental condition negatives the existence of the required specific intent or malice, as the case may be, though he is not so incapacitated as not to know the nature of his act.[9] In dealing with cases relating to the tort of negligence, difficulty is created because the legal standard is that of a man of ordinary prudence which eliminates the personal equation and idiosyncrasies of the defendant. The defendant, therefore, may escape liability by showing that his act was not a voluntary act, *e.g.*, by proving that the act was entirely beyond his control,[10] but not merely by showing that he was unable to take proper precautions because his mental faculties were affected by disease of the mind. Thus a driver of a motor vehicle cannot escape liability by showing that he felt that his vehicle was under a remote control from

1. *Vellapandiv v. Manicka Thai*, (1970) ACJ 65 (Mad).
2. *Gibson v. O'Keeney*, (1928) NI 66.
3. *Bebee v. Sales*, (1916) 32 TLR 413; *Newton v. Edgerley*, (1959) 3 All ER 337, (1959) 1 WLR 1031. *Contrast Gorely v. Codd*, (1967) 1 WLR 19 : (1966) 3 All ER 891.
4. Section 84, Indian Penal Code; *M'Naghten's* Case (1843-60) All ER (Rep) 229.
5. *Tindale v. Tindale*, (1950) 4 DLR 263. See, Chapter 2, Title 2.
6. *Morris v. Marsden*, (1952) 1 All ER 925 : (1952) 1 T.L.R. 941; *Phillips v. Soloway*, (1957) 6 DLR (2d) 570; *Beals v. Hayword*, (1960) NZLR 131; *Squittieri v. De Santis*, (1976) 75 DLR (3d) 629.
7. *Emmens v. Pottle*, (1885) 16 QBD 354, p. 356.
8. *Morris v. Marsden*, (1952) 1 All ER 925 : (1952) 1 T.L.R. 941.
9. SALMOND and HEUSTON, Torts, 20th edition, (1992), p. 430.
10. *Roberts v. Ramsbottom*, (1980) 1 All ER 7, p. 14 : (1980) 1 WLR 823 : (1980) R.T.R. 261; *Waugh v. James K. Allen Ltd.*, (1964) 2 Lloyd's Rep. 1, p. 2.

head office,[11] or by showing that he suddenly suffered a malfunction of the mind which so clouded his consciousness that from that moment he was, through no fault of his own, unable properly to control the vehicle or to appreciate that he was no longer fit to drive.[12]

11. *Buckley and Toranto Transportation Commission v. Smith Transport Ltd.*, (1946) 4 DLR 721 (Ontario CA).
12. *Roberts v. Ramsbottam*, (1980) 1 All ER 7 : (1980) 1 WLR 823 : 1980 R.T.R. 261.

CHAPTER IV

FOREIGN TORTS

TORTS committed abroad[1] have always been triable in English Courts, provided they expressly fulfilled the following conditions:—

(1) The wrong must be of a kind which would have been actionable as a tort had it been done in England.

(2) The wrong must have also been actionable by the law of the country where it was committed.[2] But a particular issue between the parties may be governed by the law of the country which, in respect to that issue, has the most significant relationship with the occurrence and the parties.[3]

The court has no jurisdiction to entertain an action to recover damages for a trespass to land situated abroad.[4]

No action will lie in England for an act committed in a foreign country if it either was lawful by the law of that country at the time of its commission,[5] or was excusable, or was subsequently legitimatized by virtue of *ex post facto* legislation in such country.[6] If a foreign law, *e.g.*, a law prescribing period of limitation, merely affects the remedy or procedure for enforcing the obligation, it would not be a bar to an action in England; but if the foreign law extinguishes the right it would be a bar.[7]

The act complained of should be actionable both by the law of England and by the law of the country where it was committed.[8] But it is no defence to an action for a tort committed in a foreign country that by the law of that country no action lies till the defendant has been dealt with criminally, for that is a mere matter of procedure.[9]

Quantification of damages for actionable heads of claim is a matter of procedure or remedy and is governed by the law of the forum where the action is brought.[10]

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1. A tort may be held to be committed abroad if the wrongful act is committed abroad even though the damage flowing from it is suffered in England. The entire events constituting the tort must be seen and the situs of the tort must be fixed by asking the question where in substance the cause of action arose. *Distillers Co. (Bio-Chemicals) Ltd. v. Thompson*, (1971) 1 All ER 694 : (1971) 2 WLR 441 (PC); *Diamond v. Bank of London & Montreal Ltd.*, (1979) 1 All ER 561 : (1979) 2 WLR 228 : 1979 QB 333; *Castree v. E. & R. Squibb & Sons Ltd.*, (1980) 2 All ER 589 : (1980) 1 WLR 1248.
2. *Chaplin v. Boys*, (1971) AC 356 (HL); (1969) 2 All ER 1085 : (1969) 3 WLR 322 (HL); *Metall and Rohstoff AG v. Donaldson Lufkin & Jenrette Inc.*, (1990) 1 QB 391 (CA), p. 446.
3. DICEY AND MARRIS, Conflict of Laws, 11th edition, p. 1365, approved in *Johnson v. Coventry Churchill International Ltd.*, (1992) 3 All ER 14, p. 17; *Red Sea Insurance Co. Ltd. v. Bouygues SA*, (1994) 3 All ER 749 : (1995) 1 AC 190 : (1994) 3 WLR 926 (PC).
4. *British South Africa Co. v. Companhia de Mocambique*, (1893) AC 602; *Hesperides Hotels Ltd.*, (1979) AC 508; (1978) 1 All ER 277 : (1977) 3 WLR 656.
5. *Blad v. Bamfield*, (1674) 3 Swans 604.
6. *Phillips v. Eyre*, (1870) LR 6 QB 1; *The M. Moxham*, (1876) 1 PD 107.
7. *Phillips v. Eyre*, (1870) LR 6 QB 1 (29). See also, *Black Clawson International Ltd. v. Papier Werke Waldhof Aschaffenberg A.G.*, (1975) AC 591 (HL); (1975) 1 All ER 810 (HL).
8. *Metall*, (1990) 1 QB 391, p. 446 : (1989) 3 WLR 563 : (1989) 3 All ER 14 (CA).
9. *Scott v. Seymour, (Lord)*, (1862) 1 H & C 219.
10. *Harding v. Wealands*, (2006) 4 ALL ER 1 (H.L.).

Action for assault against ex-Governor.—An action was brought for assault and false imprisonment against the ex-Governor of Jamaica, the trespass complained of having been committed during a rebellion in that island. The defendant relied on an Act of Indemnity which the Jamaica Legislature had passed. It was held that legislation, though *ex post facto*, cured the wrongfulness of his acts and prevented the plaintiffs from recovering.[11]

An action was brought against the Governor of Minorca, named Mostyn, who apparently was of opinion that he was entitled to play the part of an absolute and irresponsible despot on his small stage. One of his subjects, however, one Fabrigas did not coincide with him in this view, and he rendered himself so obnoxious that the Governor, after keeping him imprisoned for a week, banished him to Spain. For this arbitrary treatment Fabrigas brought an action at Westminster. Mostyn objected that, as the alleged trespass and false imprisonment had taken place in Minorca, the action could not be brought in England. But it was held that, as the cause of action was of a transitory and not of a local nature, it could, and £3,000 were given as damages to Fabrigas.[12]

The plaintiff was injured in a motor accident in Malta caused by the negligence of the defendant. Both the plaintiff and the defendant were British nationals, who were domiciled and normally resident in England. The damages recoverable by Maltese law would not have included compensation for pain, suffering and loss of amenities of life as under English law, but only for his expenses and money loss. It was held that the damages should be assessed in accordance with the English law.[13]

Tort Committed in Saudi Arabia and Suit in Hong Kong.—The tort was actionable in both the countries but the insurers could not sue, according to Hong Kong law *i.e., lex fori*, the tort-feasor before they had paid the injured *i.e.*, the insured but they could do so, according to *lex loci delicti i.e.*, the law of Saudi Arabia and they were allowed to exclude the *lexfori* in favour of the *lex loci delicti*.[14]

Collision-Liability under Belgian but not under English law.—By the negligence of a pilot, compulsorily taken on board, the *Halley*, a British steamer in Belgian waters, ran down a Norwegian vessel. By the Belgian law the Britisher was liable, but by the English law the fact that the pilot was on board, and that the collision was due to his negligence, exempted her. It was held that, under those circumstances no action lay against her in England.[15]

Seizure of goods under Muscat law.—British goods on board a British ship within the territorial waters of Muscat were seized by an officer of the British Navy, under the authority of a proclamation issued by the Sultan of Muscat. It was held that the seizure having been shown to be lawful by the law of Muscat no action could be maintained in England by the owner of the goods against the naval officer.[16]

11. *Phillips v. Eyre*, (1870) LR 6 QB 1.
12. *Mostyn v. Fabrigas*, (1774) 1 Cowp 161 : (1968) 2 QB 1.
13. *Boys v. Chaplin*, (1968) 1 All ER 283. This decision was upheld in appeal, (1969) 2 All ER 1085 (HL).
14. *Red Sea Insurance Co. Ltd. v. Bouygues SA*, (1994) 3 All ER 749 : (1995) 1 AC 190 : (1994) 3 WLR 926 (PC).
15. The "*Halley*" (1868) LR 2 PC 193.
16. *Carr v. Fracis Times & Co.*, (1902) AC 176 : 50 WR 257.

CHAPTER V

JUSTIFICATION OF TORTS

SYNOPSIS

THERE are certain justifications which refer only to a particular wrong, or to a small class of wrongs. These are treated in their proper places. But there are other justifications which are common to all kinds of wrongs, and to prevent the repetition of these under every wrong they are collectively treated here. Thus, in this Chapter are discussed, what SIR FREDERICK POLLOCK[1] calls "the rules of immunity which limit the rules of liability. There are various conditions which, when present, will prevent an act from being wrongful which in their absence would be a wrong. Under such conditions the act is said to be justified or excused. And when an act is said in general terms to be wrongful, it is assumed that no such qualifying condition exists". These justifications from civil liability for acts *prima facie* wrongful are based principally upon public grounds.

1. ACTS OF STATE

1(A) English Law

In accordance with British Jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.[2] And the same principle applies to a friendly alien resident in British territory.[3] But when the person or the property of a person who is not a British subject and who is not residing in British territory is injured by an act "done by any representative of Her Majesty's authority, civil or military, and which is either previously sanctioned or subsequently ratified by Her Majesty", the person injured has no remedy for such an act is an act of State.[4] An act of State is outside the ordinary law; it is essentially an exercise of sovereign

1. FREDERICK POLLOCK, The Law of Torts,15th edition., p. 78.
2. *Eshugbay Eleko v. Officer Administering, the Government of Nigeria*, 1931 AC 662 (PC), AIR 1931 PC 248: 1931 All LJ 466.
3. *Johnstone v. Pedlar*, (1921) 2 AC 262 : 125 LT 809 : 37 TLR 870 (HL).
4. STEPHEN, History of Criminal Law, Vol. II, pp. 61, 62.

power as a matter of policy or political expediency. Its sanction is not that of law, but that of sovereign power, and municipal courts must accept it without question. Ratification by the sovereign power of the act of one of its officers is equivalent to a prior command and may render such act an act of State.[5] In the oft quoted case of *Buron v. Denman*,[6] the defendant, a captain in the Royal Navy, released the slaves and set fire to the slave barracoons of the plaintiff, a Spaniard, on the West coast of Africa, outside British dominions. The defendant originally had no authority but his act was ratified by the Crown. It was held that the plaintiff had no remedy against the defendant. As between the sovereign and his subjects there can be no such thing as an act of State.[7] In *Eshugbay v. Officer Administering the Government of Nigeria*,[8] the Governor of Lagos, sanctioned the deposition of the appellant from the office of "*Etaka*" and deported him. On a challenge to the validity of the order by the appellant, one of the contentions raised was that it was an act of State. In negating this contention the Privy Council (LORD ATKIN) observed : "The phrase (Act of State) is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war, or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to the acts of the executive, directed to subjects within the territorial jurisdiction, it has no special meaning, and can give no immunity from the jurisdiction of the court to inquire into the legality of the act." The position is the same even if the wrongful act is done against a subject outside British territory[9] or against a friendly alien within British territory[10] for a subject wherever he may be owed allegiance to the Crown and a friendly alien within British territory owes temporary allegiance to the Crown. In *Johnstone v. Pedlar*, an Irishman who became a naturalised American citizen came to Ireland and took part in rebellion and was deported. He again came to Ireland and was arrested for illegal drilling, and money found on his person was confiscated. In an action for wrongful detention of the money or in the alternative for damages for conversion, the defendant raised the plea of act of State which was negatived by the House of Lords on the ground that at the time of confiscation of the money, the plaintiff, though an American citizen, owed local allegiance to the Crown because of his residence in Ireland which conferred on him local rights. Some *obiter dicta* in this case[10] favour the view that act of State is no defence unless the act is done outside the British territory. But it has been held that deportation from or detention of an alien enemy in England are acts of State.[11]

Although an act of State cannot be challenged, or interfered with by municipal courts, its intention and effect may sometimes be to modify and create rights as between the Government and individuals who are about to become subjects of the

5. *Salaman v. Secretary of State for India*, [1906] 1 KB 613, 639; *Rao v. Advani*, (1949) 51 Bom LR 342: AIR 1949 Bom 277. See, a dissertation on this subject in the (1906) 8 Bombay Law Reporter (Journal), p. 66 and also in the Allahabad Law Journal, Vols. I and II.
   See, *Buron v. Denman*, (1848) 2 Ex 167. See, *Mir Zulef Ali v. Veshvadabai Saheb*, (1872) 9 BHC 314, where a sequestration by the officers of the Government of the private property of the Angria of Kolaba was made contrary to the orders of the Court of Directors but was subsequently ratified. See, *Ross v. Secretary of State*, ILR (1914) 37 Mad 55: AIR 1915 Mad 434: 19 IA 253 as to essentials of ratification.
6. (1848) 2 Ex. 167.
7. *Walker v. Baird*, (1892) AC 491, p. 494 : 67 LT 513 (HL); *Johnstone v. Pedlar*, (1921) 2 AC 262 (HL), p. 295.
8. 1931 AC 662 (PC): AIR 1931 PC 248: 1931 All LJ 466.
9. *Attorney General v. Nissan*, (1970) AC 179, p. 213 : (1969) 2 WLR 926 (HL) (LORD REID).
10. *Johnstone v. Pedlar*, (1921) 2 AC 262 : 125 LT 809 (HL).
11. *Netz v. Ede*, [1946] Ch. 224; *R. v. Bottrik*, (1947) KB 47, p. 57 : 62 T.L.R. 570.

Government, and in such cases the rights arising therefrom may be capable of being adjudicated upon by municipal courts.[12]

1(B) Indian Law

The English law relating to Act of State was followed in India and has been followed after the Constitution as it became a part of the common law of India continued by the Constitution as existing law.[13] As held by the Supreme Court "an act of State is not available against a citizen"; it is "a sovereign act which is neither grounded on law nor does it pretend to be so"; it is "a catastrophic change constituting a new departure"; "in civil commotion, or even in war or peace, the State cannot act catastrophically outside the ordinary law and there is legal remedy for its wrongful acts against its own subjects or even a friendly alien within the State".[14] Acts of the executive Government in the name of the President in the normal course of administration (*e.g.* allotment of petrol outlets from discretionary quota of a minister) are not acts of State and are open to judicial scrutiny and their authority, validity and correctness can be examined by courts.[15]

Acts of State are directed against another sovereign State or its sovereign personally or its subjects and, being based on policy considerations and not on law administered by the municipal courts, they are not justiciable. In *Secretary of State for India in Council v. Kamachee Boye Saheba*,[16] the Tanjore Raj, which was an independent State, and its properties were taken possession of by the East India Company on behalf of the Crown declaring that the Raj lapsed to the British Government on the Raja dying issueless. In a suit filed by the widow, the Privy Council held that this was an act of State and was not open to any challenge. The question that LORD KINGSDOWN, in delivering the judgment of the Privy Council, posed and answered in favour of the Crown was in these words : "What was the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? Or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter the defence set up, of course, has no foundation".[17] But as it was the former, *i.e.*, seizure by arbitrary power, the defence of act of State succeeded. It was held by the Privy Council in another case that an order of the Governor General in Council deposing the Ruler of an Indian State was an act of State and its validity was not open to question in a court of law.[18] The Privy Council had also ruled that the acquisition of territory belonging to another State, whatever be the mode of acquisition, is an act of State and the inhabitants of that territory can avail of only such rights as against the new sovereign which the

12. *Salaman v. Secretary of State for India*, (1906) 1 KB 613.
13. *State of Gujarat v. Vora Fiddali*, AIR 1964 SC 1043, (p. 1061) : (1964) 2 SCA 563 overruling *Virendra Singh v. State of U.P.*, AIR 1954 SC 447 : 1955 SCR 415 : 1954 SCA 686 which had shown preference for the American view.
14. *H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia v. Union of India*, AIR 1971 SC 530, (p. 552) : (1971) 1 SCJ 295 : (1971) 2 SCA 257 (HIDAYATULLAH CJ) also see, p. 575; *State of Saurashtra v. Memon Haji Ismail*, AIR 1959 SC 1383 (1387) : (1960) 1 SCR 537 : (1960) SCJ 394; *B.K. Mohapatra v. State of Orissa*, AIR 1988 SC 24, pp. 28, 29 : 1987 Supp SCC 553.
15. *Common Cause, a Registered Society v. Union of India*, AIR 1999 SC 2979, p. 3003 : (1999) 6 SCC 667.
16. (1859) 7 MIA 477.
17. (1859) 7 MIA 477, (531).
18. *In re, Maharaja Madhava Singh*, (1905) ILR 32 Cal 1 (PC); 31 IA 239 (389) (PC). See further, *Saligram v. Secretary of State*, (1872) 18 Suth WR 389 : IA (Supp. Vol. 119 PC) Deposition of King of Delhi and confiscation of his property after mutiny were acts of State.

new sovereign has recognised.[19] In the famous words of LORD DUNEDIN : "When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following a treaty, it may be by occupation of territory hitherto unoccupied by a recognised Ruler. In all cases, the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign any such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, it does not give a title to those inhabitants to enforce these stipulations in the municipal courts."[20] It was on this basis that the Privy Council held in *Asrar Ahmad v. Durgah Committee, Ajmer*,[21] that when a person claims a hereditary right of his family to the office of Mutwalli in respect of a religious endowment situated in the territories ceded by a Ruler of an Indian State to the British Government, then in the absence of an express or implied recognition of such right by the British Government, he cannot rely upon any hereditary or other grant made before the cession of territory. The principle that there can be no act of State against a subject was recognised by the Privy Council in *Forester v. Secretary of State*.[22] In that case the challenge was to the resumption of the estate of Begum Samru on the allegation that the tenure had been determined and to the seizure of arms and military stores of the Begum. It was held by the Privy Council that the action of the Government did not amount to act of State. The suit in respect of the land, however, failed as the appellant failed to establish his title but the suit relating to the arms and store succeeded and a decree was passed declaring that the appellants were entitled to recover from the Government the value of the arms and military stores seized. Incidentally, this claim could only be a claim in torts for conversion of the goods seized.

The integration of Indian States, their merger with the Dominion of India and annexation of Goa, Daman and Diu by conquest, gave rise to many cases in the post Constitution period relating to the rights of the people residing in these territories as against the Government of India. The Supreme Court in dealing with these cases followed the principles laid down by the Privy Council in the cases already noticed. The points that emerge from the decisions of the Supreme Court[23] can be summed up

19. *Cook v. Sprigg*, (1915) 42 IA 229, (237-8) : AIR 1915 PC 59 : 13 All LJ 953, *Vajesinghji Joravarsinghji v. Secretary of State*, AIR 1924 PC 216 : 51 IA 357 : 22 All LJ 951. *Secretary of State v. Sardar Rustam Khan*, AIR 1941 PC 64 : 68 IA 109 : 195 IC 769; *Asrar Ahmad v. Durgah Committee Ajmer*, AIR 1947 PC 1 : 1946 All LJ 451 : 49 Bom LR 235 (PC).
20. *Vajesinghji Joravarsinghji v. Secretary of State*, AIR 1924 PC 238 : 84 IC 567 : 51 IA 357, (360, 361). Followed in *Winfat Enterprise (H.K.) Co. Ltd. v. Attorney General of Hong Kong*, (1985) 3 All ER 17 : (1985) 2 WLR 786 : (1985) AC 733 (PC).
21. AIR 1947 PC 1 : 1946 All LJ 451 : 49 Bom LR 235 (PC).
22. (1872) 1 IA (Supp) 1 (PC).
23. *Dalmia Dadri Cement Co. Ltd. v. C.I.T.*, AIR 1958 SC 816 : 1958 SCJ 1041 : 34 ITR 514. *State of Saurashtra v. Memon Haji Ismail*, AIR 1959 SC 1383 : (1960) 1 SCR 537 : 1960 SCJ 394. *Jagannath Agarwal v. State of Orissa*, AIR 1961 SC 1361 : (1962) 1 SCJ 179 : (1962) 1 SCA 226. *State of Saurashtra v. Jamadar Mohammad Abdulla*, AIR 1962 SC 445 : (1962) 2 SCJ 70 : (1962) 2 SCA 605, *Promod Chandra v. State of Orissa*, AIR 1962 SC 1288 : (1963) 1 SCJ 1 : 1962 (Suppl) (1) SCR 405, *State of Gujarat v. Vora Fiddali*, AIR 1964 SC 1043 : (1964) 2 SCA 563, *Pema Chibbar v. Union of India*, AIR 1966 SC 442 : (1966) 1 SCWR 232 : (1966) 1 SCA 918, *Vinod Kumar Shantilal Gosalia v. Gangadhar Narsinghdas Agarwal*, AIR 1981 SC 1946 : (1981) 4 SCC 226 : (1982) 1 SCR 392; *State of Haryana v. Amarnath Bansal*, AIR 1997 SC 718, p. 723. See, the summary in *Promod Chandra v. State of Orissa*, AIR 1962 SC 1288, (1299, 1300) : (1963) 1 SCJ 1 : 1962 (Suppl) (1) SCR 405. The ex-rulers are also governed by the same rules : *Amar Singhji v. State of Rajasthan*, AIR 1955 SC 504, (523) : 1955 SCA 766 : (1955) 2 SCR 303.

(Footnote No. 23 Contd.)

as follows : (1) The taking over of sovereign powers by a State in respect of new territory, be it by conquest, annexation or cession following upon a treaty, is an act of State; (2) the taking over of the full sovereign power may be spread over a number of years as a result of historical process; (3) sovereign power including the right to legislate for that territory may be acquired by a legislation in the nature of Foreign Jurisdiction Act without the territory itself merging in the new State; (4) the rights of the residents of that territory against the old State come to an end and the obligations of the old State do not pass on to the new State; (5) the residents of that territory can only enforce such rights against the new State which it has expressly or impliedly recognised or conferred by executive action or legislation and they cannot enforce a provision in the treaty of cession that their rights will not be affected by the cession and will be respected by the new State; (6) the laws in force in that territory before annexation or cession continue until abrogated by the new State but this by itself does not confer any right to the residents of that territory to enforce the rights accrued under those laws before annexation or cession against the new State; (7) the rights of the residents of that territory which are recognised or conferred by the new State after annexation or cession cannot be abrogated by the new State by justifying the abrogation as an act of State for there can be no act of State against a subject; (8) Article 372 of the Constitution continues only such orders of the Rulers of erstwhile Indian States which are legislative in nature.

The legal position that the act of State in the taking over of sovereignty of a new territory may continue for a number of years is illustrated by the historical process by which the Indian State of Junagadh was annexed to the Dominion of India. Unlike the Rulers of other Indian States, the Nawab of Junagadh did not accede to the Dominion of India after the coming into force of the Indian Independence Act, 1947. The Nawab fled to Pakistan leaving the State in a state of chaos. The Administration of Junagadh was taken over by the Government of India in November, 1947, on the request of the Nawab's Council and an Administrator was appointed for administering the State. The Administrator cancelled certain grants made by the Nawab and dispossessed the persons who were in possession by virtue of the grants. The territories comprised in the State of Junagadh were, thereafter, in January, 1949, merged with the United State of Saurashtra. In a suit by the persons dispossessed by the orders of the Administrator, the Supreme Court[24] held that the said orders arose out of and during the act of State by which the territories of Junagadh were annexed by the Dominion of India and they could not be challenged in a court of law. It was further held that though *de facto* control of Junagadh was taken over in November, 1947, the *de jure* resumption of sovereignty took place in January, 1949, when

(Footnote No. 23 Contd.)

Bhawani Shanker v. Somsunderam, AIR 1965 SC 316 : (1962) 1 Cri LJ 364 : (1962) 1 SCJ 68. *H.H. Maharaja Madhav Rao Jiwaji Rao Scindia v. Union of India*, AIR 1971 SC 530, (574) : (1971) 1 SCJ 295 : (1971) 2 SCA 257 : (1977) 1 SCC 85; *Draupadi Devi v. Union of India*, (2004) 11 SCC 425 : AIR 2004 SC 4684. See further, *Oyekan v. Adele*, (1957) 2 All ER 785 (PC); *Winfat Enterprise (HK) Co. Ltd. v. Attorney General of Hong Kong*, (1985) 3 All ER 17 : (1985) AC 733 : (1985) 2 WLR 786 (PC).

N.B. : In *Virendra Singh v. State of U.P.*, AIR 1954 SC 447 a contrary view as to the effect of an act of State was taken; but this case was overruled in *State of Gujarat v. Vora Fiddali*, AIR 1964 SC 1043. *Virendra Singh's* case was relied upon in *Vishnu Pratap Singh v. State of M.P.*, AIR 1990 SC 522 : 1990 Supp SCC 43, but the defence of act of State was not specifically taken in this case. In *Draupadi Devi v. Union of India*, (2004) 11 SCC 425 : AIR 2004 SC 4684 it is reaffirmed that the cases of *Virendra Singh, Vishnupratap Singh, supra* and *State of Punjab v. Brigadier Sukhjit Singh*, (1993) 3 SCC 459 do not lay down good law and cannot be cited as precedent.

24. *State of Saurashtra (Now Gujarat) v. Mohammad Abdulla*, AIR 1962 SC 445 : (1962) 2 SCJ 70 : (1962) 2 SCA 605.

Junagadh was merged with Saurashtra and, therefore, the act of State did not terminate till that time.[25]

The cases of *Pema Chibbar v. Union of India*[26] and *Vinod Kumar Shantilal Gosalia v. Gangadhar Narsinghdas Agarwal*[27] illustrate the application of the principle of act of State when a new territory is acquired by conquest. The Portuguese territories of Goa, Daman and Diu were annexed by the Government of India by conquest on 20th December, 1961. The President of India, on 5th March, 1962, passed an Ordinance by which the laws in force in the territories of Goa, Daman and Diu were continued until amended or repealed by a competent legislature. The Ordinance was later replaced by an Act which was given retrospective effect from 5th March, 1962. In *Pema Chibbar's* case, certain import licences granted under the Portuguese law between October 9 and December 4, 1961, were not recognised by the Military Governor in a proclamation issued on December 30, 1961. In *Vinod Kumar Shantilal's* case the right to get mining leases under the Portuguese law was not recognised and applications made for mining leases according to that law in 1959 were rejected by the officers of the Government of India. It was held in both these cases that as the rights claimed in them were not recognised by the Government of India, they could not be enforced. It was also held that the Portuguese laws were continued only from 5th March, 1962 and there was an interregnum between December 20, 1961 and 5th March, 1962. It was further held that mere continuance of the old laws did not amount to recognition by the Government of India of the rights acquired under these laws before the conquest and annexation of the Portuguese territory.

But after the residents of the old State have become subjects of the new State the act of State vanishes and they cannot be deprived of the rights recognised or conferred by the new State except in accordance with law. This rule will also apply to a sovereign of the old State who has become subject of the new State. It is on this basis that it was held that an order derecognising all the rulers of Indian States passed in September, 1960, which could not be supported under the Constitution or under any law was invalid.[28]

2. JUDICIAL ACTS

2(A) English Law

Judge.—When a Judge acts within jurisdiction no action lies for acts done or words spoken by a Judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office.[29] This doctrine has been applied not only to the superior courts, but also to Judges of inferior courts including the court of a Coroner[30] and a Court-martial.[31] It

25. *State of Saurashtra (Now Gujarat) v. Mohammad Abdulla*, AIR 1962 SC 445, p. 453. See further, *State of Saurashtra v. Memon Haji Ismail*, AIR 1959 SC 1383 : (1960) 1 SCR 537 : 1960 SCJ 394.
26. AIR 1966 SC 442 : (1966) 1 SCWR 234 : (1966) 1 SCA 918.
27. AIR 1981 SC 1946 : (1981) 4 SCC 226 : (1982) 1 SCR 392.
28. *H.H. Maharaja Madhav Rao Jivaji Rao Scindia v. Union of India*, AIR 1971 SC 530, (574) : (1971) 1 SCJ 295 : (1971) 2 SCA 257 : (1971) 1 SCC 85. To overcome this decision the constitution was amended by Constitution (26th Amendment) Act, 1971, and the Rulers were derecognised and their privileges abolished by deleting Articles 291 and 362 and by adding a new Article 363A. This amendment was upheld in *Raghunathrao Ganpatrao v. Union of India*, AIR 1993 SC 1267 : 1994 Supp (1) SCC.
29. *Anderson v. Gorrie*, (1895) 1 QB 668 (671) : 71 L.T. 382 ; *Ward v. Freeman*, (1852) 2 Ir CLR 460.
30. *Garnet v. Ferrand*, (1827) 6 B & C 611.
31. *Scott v. Stansfield*, (1868) LR 3 Ex 220.

is essential in all courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a Judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him.[32] The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of Judges, and prevent their being harassed by vexatious actions.[33] Being free from actions, he may be free in thought and independent in judgment. The principle behind the common law rule of immunity of a Judge, whether of superior court or inferior court, from an action when he acts within jurisdiction, although maliciously and contrary to good faith, has been stated to be that "if one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety-nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction."[34] This common law rule originally did not apply to magistrates and they could be made liable in an "action on the case for a tort" for acting within their jurisdiction maliciously and without reasonable and just cause but this form of action is now obsolete and magistrates also enjoy the same immunity as judges while acting within their jurisdiction.[34] This is now legislatively confirmed by section 108(2) of the Courts and Legal Services Act, 1990.

The rules of Common Law are different and not uniform when a judge acts outside his jurisdiction. "It is, of course, clear that the holder of any judicial office, who acts in bad faith, doing what he knows he has no power to do, is liable in damages."[34] This applies for all judges including the judges of a superior court.[34] If a High Court Judge or a judge of the court of appeal "does something demonstrably outside his jurisdiction" he may not be protected; to be entitled to immunity he must have acted reasonably and in good faith in the belief that the act was within his powers."[35] It is also clear that if the act is non-judicial, "no immunity arises from the fact that the doer holds the office of a judge, whether of a superior or of an inferior court."[36] Subject to what has been stated above, a judge of a superior court is entitled to protection from liability in damages in respect of what he had done while acting judicially and under the honest belief that his act was within his jurisdiction, although what he had done was outside his jurisdiction.[37] According to the view taken by the Court of Appeal the same protection is now available in law to judges of the inferior courts including magistrates.[38] But the House of Lords[39] emphatically ruled that at least magistrates do not have that protection when they act without jurisdiction or in excess of jurisdiction, although honestly and without any moral blame, and they can be made liable in actions for trespass to the person (unlawful arrest or imprisonment) or trespass to goods (unlawful distress). But now by section 108(2) of the Courts and

32. PER KELLY, C.B. in *Scott v. Stansfield*, (1868) LR 3 Ex 220, 223.
33. *Fray v. Blackburn*, (1863) 3 B & S 576.
34. *McC v. Mullan*, (1984) 3 All ER 908 (916) : (1984) 3 WLR 1227 : 81 Cri App. R 54 (HL).
35. *Sirros v. Moore*, (1974) 3 All ER 776 (788) : (1975) QB 118 : (1974) 3 W.L.R. 459 (CA).
36. *Sirros v. Moore*, (1974) 3 All ER 776, p. 789.
37. *Sirros v. Moore*, (1974) 3 All ER 776, p. 784.
38. *Sirros v. Moore*, (1974) 3 All ER 776, p. 785, (796).
39. *Mc C. v. Mullan*, (1984) 3 All ER 908 (HL), pp. 916, 917 : (1984) 3 WLR 1227.

Legal Services Act, 1990, bad faith must be proved for sustaining liability for acts done outside jurisdiction. The expression "without jurisdiction or excess of jurisdiction" is not in this context given that meaning which it has received in the context of *certiorari*, and even when an order of a magistrate has been quashed by issuance of a writ of *certiorari*, it is not conclusive in an action for damages against the magistrate that he acted without jurisdiction or in excess of jurisdiction.[40] For becoming liable for damages a magistrate acts without jurisdiction or in excess of jurisdiction : (1) when he has no jurisdiction to entertain the proceedings, *e.g.*, when he has no jurisdiction over the person, the place or the subject-matter, *i.e.*, the offence;[41] or (2) when he in the course of hearing a case within his jurisdiction is guilty of some gross and obvious irregularity of procedure, *e.g.*, when he refuses to allow the defendant to give evidence,[42] or (3) when he after conducting the trial impeccably in a case within his jurisdiction, passes an order or sentence against the defendant for which the conviction of the defendant or other determination of the complaint against him does not provide a proper foundation in law; *e.g.* when he passes a substantive sentence of imprisonment when the offence of which the defendant is convicted is one for which imposition of fine is the substantive sentence and imprisonment can be ordered only in default of payment of fine; or when he passes an order of detention of a young offender without informing him of his right to apply for legal aid which is a mandatory requirement under a statutory provision.[43] But a magistrate does not act without jurisdiction or in excess of jurisdiction when he commits an error (whether of law or fact) in deciding a collateral issue on which his jurisdiction depends or when he convicts without evidence or when he commits an error of law, even if it arose from a misconstruction of a statute, in reaching a finding of guilt.[44]

Arbitrators.—It has been held that arbitrators whom the parties by consent have chosen to be their judges, shall never be arraigned more than any other judges.[45] Arbitrators, if they act honestly, are not liable for errors in judgment, or for negligence in the discharge of the duties entrusted to them; but they are liable if they have been corrupt.[46] Some immunity is also conferred on a 'quasi arbitrator' who though not functioning under the Arbitration Act, acts upon an agreement between the parties that his decision will be binding on them.[47]

An officer executing a warrant or order of a court, which is apparently regular but which is in excess of jurisdiction of the court issuing it, is protected if he did not know that it was wrong.[48] But if he arrests a person not named in the warrant or seizes goods of a person not mentioned in the warrant, he is not protected even though his mistake is honest.[49]

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40. *Mc C. v. Mullan*, (1984) 3 All ER 908 (HL), p. 917.
41. *Mc C. v. Mullan*, (1984) 3 All ER 908 (HL), p. 920.
42. *Mc C. v. Mullan*, (1984) 3 All ER 908 (HL), pp. 916, 917.
43. *Mc C. v. Mullan*, (1984) 3 All ER 908 (HL), pp. 921, 922, 924.
44. *Mc C. v. Mullan*, (1984) 3 All ER 908 (HL), p. 920. For a more recent case where the magistrates were held liable, see, *R. v. Manchester City Magistrates Court, ex parte Davies*, (1989) 1 All ER 90 : (1989) QB 631 : (1988) 3 WLR 1357 (CA).
45. Per LORD HOLT C.J. in *Morris v. Reynolds*, (1704) 2 Ld. Raym. 857.
46. *Wills v. Maccarmick*, (1762) 2 Wils 148.
47. *Sutcliff v. Thackrah*, (1974) AC 727 : (1974) 2 WLR 295 : (1974) 1 All ER 859 (HL); *Arenson v. Casson Beckman Rutley & Co.*, (1977) AC 405 : (1975) 3 All ER 901 (HL); *Palacath v. Flanagan*, (1985) 2 All ER 161.
48. *London Corporation v. Cox*, (1867) LR 2 HL 239 (269), PER WILLES J.; *Sirros v. Moore*, (1974) 3 All ER 776 (CA), p. 785 : (1975) QB 118 (LORD DENNING M.R.).
49. *Hoye v. Bush*, (1840) 1 M & G 775.

2(B) Indian Law

The Judicial Officers Protection Act, 1850.—Under this Act no Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, can be sued in any court for any act 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 the act complained of. Similarly, no officer of any court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, can 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.[50]

This Act protects judicial officers, acting judicially, and also officers acting under their orders. It does not protect judicial officers from being sued in a civil court except in respect of acts done by them in the discharge of their judicial functions[51] but not ministerial.[52]

The Act enacts the common law rule of immunity of Judges and is somewhat wider in that unlike the common law rule it makes no distinction between judges of Superior Courts, Judges of inferior courts and Magistrates. Every person acting judicially, whether high or low, has the same protection. The principle behind the Act is the same that it is in public interest that a person holding a judicial office should be in a position to discharge his functions with independence and without fear of consequences. The Act came up for construction before the Supreme Court in *Anwar Hussain v. Ajay Kumar*[53] and the following propositions follow from that case : (1) If an act done or ordered to be done by a judicial officer in the discharge of his judicial duties is within the limits of his jurisdiction, he is protected whether or not he has discharged those duties erroneously, irregularly, or even illegally, or without believing in good faith that he had jurisdiction to do the act complained of; (2) If such an act is without the limits of the officer's jurisdiction, he is protected if, at the time of doing or ordering it, he, in good faith, believed himself to have jurisdiction to order it; (3) The expression "jurisdiction" in S. 1 of the Act does not mean the power to do or order the act impugned, but generally the authority of the judicial officer to act in the matter; (4) The Act protects a judicial officer only when he is acting in his judicial capacity and not in any other capacity; and (5) if a judicial officer arrests a person 'recklessly and maliciously' not in discharge of the duties of his office as a Magistrate but on the ground that he acted under the direction of his superior officer, he can be said to be acting in an executive capacity and not in a judicial capacity and, therefore, he is not protected under the Act.

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50. Act XVIII of 1850, s. 1. See, *Sinclair v. Broughton*, (1882) 9 IA 152 : (1883) ILR 9 Cal 341; *Girjashankar v. Gopalji*, (1905) 7 Bom LR 951 : (1906) ILR 30 Bom 241; *Moti Lal Ghose v. Secretary of State for India*, (1905) 9 CWN 495; *M. Lall Bhuyan v. Md. Sultan*, 1973 Assam LR 59 (Gauhati); *Muddada Chayanna v. G. Veerabhadra Rao*, AIR 1979 AP 253 : 1979 LS (AP) 159. For ministerial Officers acting in execution of a judicial order, see, *Ramlal Kanhaiyalal Somani v. Ajit Kumar Chatterjee*, AIR 1973 Cal 372; *Devayya Gowda v. M. Ganapati Srinivas*, AIR 1974 Mys 24 : (1973) 1 Mys LJ 197.
51. *Venkat v. Armstrong*, (1865) 3 BHC (ACJ) 47; *Parankusam v. Sturat*, (1865) 2 MHC 396; *R. Raghunada Rau v. Nathamuni*, (1871) 6 MHC 423; *Hari v. Janardan*, (1873) 10 BHC 350n. *Clarke v. Brojendra Kishore Roy Chowdhary*, (1912) ILR 39 Cal 953 : 14 Bom LR 717 : 39 IA 163 (PC).
52. *Chunder Narain v. Brojo Bullub*, (1874) 14 Beng LR 254 : Suth WR 391.
53. *Anwar Hussain v. Ajoy Kumar*, AIR 1965 SC 1651 : (1965) 2 Cri LJ 686 : (1965) 2 SCWR 78 approving *Teyen v. Ram Lal*, (1890) ILR 12 All 115; *S.P. Goel v. Collector of Stamps*, AIR 1996 SC 839, p. 845 : (1996) 1 SCC 573.

If a Magistrate fails to act reasonably, carefully, and circumspectly in the exercise of his duties, or in other words, acts recklessly in contravention of obvious or well known rules of law or procedure, and if, thereby, he does that for which he has not any legal authority, he cannot be permitted to say that at the time he thus acted, he, in good faith, believed himself to have jurisdiction to do the act complained of.[54] Wilful abuse of his authority by a Judge, that is, wilfully acting beyond his jurisdiction, is a good cause of action by the party who is injured.[55] Where a Magistrate negligently signs an arrest warrant against acquitted persons, he is not protected by S. 1 of the Judicial Officers Protection Act.[56]

The words "or other person acting judicially" as they occur in section 1 are wide words and the section will obviously cover not merely judicial officers and revenue officers manning ordinary civil, criminal, and revenue courts, but also persons functioning as Tribunals or authorities which are invested with the judicial power of the State to determine disputes which are entrusted to their special jurisdiction.[57] For example, the Registrar while deciding disputes under Co-operative Societies Act, the authority invested with jurisdiction under the Payment of Wages Act, 1936, the Commissioner under the Workmen's Compensation Act, 1923, the Claims Tribunal under the Motor Vehicles Act, 1939, will all come under the protective provisions of the Act.

The Judges (Protection) Act, 1985:—The Act was enacted by Parliament for "securing additional protection for judges and others acting judicially." Section 3 of the Act provides that "no court shall entertain or continue any civil or criminal proceeding against any person who is or was a judge for any act, thing or word committed, done or spoken by him when, or in the course of acting or purporting to act in the discharge of his official or judicial duty or function." The term "judge" is very widely defined to mean "not only every person who is officially designated as a judge, but also every person (a) who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which if not appealed against, would be definitive, or a judgment which if confirmed by some other authority would be definitive; or (b) who is one of a body of persons which body of persons is empowered by law to give such a judgment as is referred to in clause (a)." The Act confers a very wide protection which is not limited to judicial functions but also covers official functions. The Act, as it is, completely debars any private person to file any civil or criminal proceeding in a court against a judge even if he has acted outside his jurisdiction or authority and with malice provided the act complained of was done "in the course of acting or purporting to act in the discharge of his official or judicial duty or function." The remedy of a private person in such cases against a judge is only to move the Supreme Court, High Court or the Government to take suitable action against the judge for the protection conferred by the Act does not, as expressly provided in section 3(2), "debar or affect in any manner, the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority under any law for the time being in force to take

54. Per WESTROPP, J, in *Vinayak v. Bai Itcha*, (1865) 3 BHC (ACJ) 36, 46; *Vithoba Malhari v. A.K. Corfield*, (1855) 3 BHC (Appx) 1; *Queen v. Sahoo*, (1869) 11 Suth WR (Cr) 19; *Collector of Sea Customs v. Chidambara*, (1876) ILR 1 Mad 89.
55. *Amminappa v. Mohamad*, (1865) 2 MHC 443; *Reg. v. Dalsukram Haribhai*, (1866) 2 BHC 384; *Prahlad Maharudra v. A.C. Watt*, (1873) 10 BHC 346; *Calder v. Halket*, (1839) 2 MIA 293; *S. Pande v. S.C. Gupta*, AIR 1969 Pat 194 : 1968 Pat LJR 600 : 1969 BLJR 1084.
56. *State v. Tulsiram*, AIR 1971 All 162 : 1970 All WR (HC) 160 : 1970 All Cri R 429.
57. For distinction between Court, Tribunal and purely administrative bodies, see, *A.C. Companies v. P.N. Sharma*, AIR 1965 SC 1595, (1599) : (1965) 1 SCA 723 : (1965) 1 Lab LJ 433. *Engineering Mazdoor Sabha v. Hind Cycle Ltd.*, AIR 1967 SC 1494 : 1967 Cri LJ 1380 : (1967) 2 SCWR 460.

such action (whether by way of civil, criminal or departmental proceedings or otherwise) against any person who is or was a judge."

Apart from the two Acts mentioned above, judges of a court of record such as the Supreme Court and the High Courts enjoy immunity from any action for acting judicially within their jurisdiction even if the order be patently erroneous and unsustainable on merits.[58]

3. EXECUTIVE ACTS

The executive Government and the executive officers in India, in general, do not enjoy any protection except that conferred by legislative enactments which will be discussed under the title Statutory Authority.[59] The State and its officers are, however, not liable when the wrongful act falls within the purview of Act of State.[60] Subject to the above, the executive officers are always liable for torts committed by them or authorised by them.[61] The State is also vicariously liable for torts committed by its officers in the course of employment except when they are committed while discharging traditional sovereign functions.[61]

4. ADMINISTRATIVE ACTS

In every State there are administrative bodies or authorities which are required to deal with matters within their jurisdiction in an administrative manner and their decisions are described as administrative decisions. In reaching their administrative decisions, administrative bodies can and often do take into consideration questions of policy. It is not unlikely that even in this process of reaching administrative decisions, the administrative bodies or authorities are required to act fairly and objectively and would in many cases have to follow the principles of natural justice; but the authority to reach a decision conferred on such administrative bodies is clearly distinct and separate from the judicial power conferred on courts.[62] These administrative bodies or authorities which are distinct from courts, Tribunals and officers acting judicially, will not have the protection of the Judicial Officers Protection Act or the Judges (Protection) Act.[63] The question as to what are the limitations on their powers or in other words what are the grounds on which their acts or orders can be challenged are matters of administrative law. Suffice it to say, that every authority must act in good faith for the purpose for which the power is conferred, it must not proceed on a misinterpretation of the statute or law conferring the power and thereby by asking a wrong question; it must take into account matters relevant for exercise of the power; and it must not be influenced by irrelevant matters.[64] The distinction between purely administrative and *quasi*-judicial powers

58. *State of Rajasthan v. Prakash Chand*, AIR 1998 SC 1344, p. 1357 : (1994) 1 SCC 1 : 1988 Cr LJ 2012.
59. See, title 7 'Statutory Authority' *post*.
60. See, title 1 'Acts of State', *ante*.
61. See, title 8 'The State and its officers', Chapter III, p. 41.
62. *A.C. Companies v. P.N. Sharma*, AIR 1965 SC 1595 (1599) : (1965) 1 SCA 723 : (1965) 1 Lab LJ 433.
63. See, title 2 'Judicial Acts', *ante*.
64. *Associated Provincial Picture House Ltd. v. Wednesbury Corporation*, (1947) 2 All ER 680 (CA); *Padfield v. Minister of Agriculture*, (1968) 1 All ER 694 (HL), *Bromby London Borough Council v. Greater London Council*, (1982) 1 All ER 129 (CA), 153 (HL); *Holgate Mohammad v. Duke*, (1984) 1 All ER 1954 : (1984) AC 437 (HL), *Rohtas Industries Ltd. v. S.D. Agrawal*, AIR 1969 SC 707 : (1969) 2 SCJ 1 : (1969) 1 SCC 325. *Indian Express Newspapers v. Union of India*, AIR 1986 SC 515 : 1985 Tax LR 2451 : (1985) 2 SCR 287 : (1985) 1 SCC 641 (691, 692, 693); *Anisminic Ltd. v. Foreign Compensation Commission*, (1969) 1 All ER 208 (HL), *Liberty Oil Mills v. Union of India*, AIR 1984 SC 1271= (1984) 3 SCR 676 : (1984) 3 SCC 465 (494).

has now been obliterated and the authority whether purely administrative or *quasi*-judicial must follow the principles of natural justice if its order is likely to prejudicially affect the right or even the reasonable expectation of a person.[65] These are the grounds, which can be briefly described to be grounds of illegality, irrationality and procedural impropriety[66] on which generally an order of an administrative authority can be challenged and declared void under the administrative law in a proceeding under Article 32 (if a fundamental right is affected) or Article 226 or in a suit. But from mere invalidity of the order it does not follow that the authority will be liable for payment of damages in an action in tort to the aggrieved party. It was so held in *Dunlop v. Woolhara Municipal Council*,[67] where a resolution of the Council was held to be void being in breach of the rules of natural justice. But the authority may be held liable for the tort of "misfeasance by a public officer" if its action is actuated by malice;[68] or for the tort of negligence if negligence is established;[69] or for wrongful arrest and imprisonment if the void act leads to the commission of that tort.[70] But liability in negligence does not generally arise when a statutory authority erroneously misconstrues the statute and consequently takes into account irrelevant matters while passing its order under the statute.[71] The factors that militate against the imposition of liability in negligence in any given case include (a) availability of judicial review to correct an error of law, which means that usually the only effect of a negligent decision will be delay; (b) the fact that an error of law or misconstruction of a statute will only rarely amount to negligence; (c) the danger of inducing over-caution in civil servants and consequent delay; and (d) difficulty of identifying a particular case in which the authority is under a duty to seek legal advice.[72]

4A. ACTS OF GOVERNING BODY

Expulsion from club etc.—Expulsion of a member from the Club, Association or Professional organisation when the governing body acts in bad faith or in breach of the rules of natural justice may give rise to a claim for damages but such an action will be based on contract and not in tort.[73] The same will be the position in respect of expulsion of a student from an educational establishment.[74] But an expelled member

65. *In re, K. (H)* (an infant), (1967) 1 All ER 226; *R. v. Gaming Board*, (1970) 2 All ER 528 (CA); *O'Relly v. Mackman*, (1982) 3 All ER 1124 (1126, 1127), (HL); *CCSU v. The Minister for Civil Services*, (1984) 3 All ER 935 (HL); *A.K. Kraipak v. Union of India*, AIR 1970 SC 150 : (1970) 1 SCR 457 : (1969) 2 SCC 262, *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 (627, 628) : (1978) 2 SCR 621 : (1978) 1 SCC 248. The duty to hear may be negatived on grounds of national security, *CCSU v. The Minister of Civil Services, supra* and in case of urgency there may be post decisional hearing; *Maneka Gandhi v. Union of India, supra*.
66. *CCSU v. The Minister for Civil Services*, (1984) 3 All ER 935 (950, 951) (HL).
67. (1981) 1 All ER 1202 : (1982) AC 158 (PC).
68. *Dunlop v. Woolhara Municipal Council*, (1981) 1 All ER 1202, p. 1210, *David v. Abdul Cader*, (1963) 1 WLR 834 (PC). The tort will also be committed, even in absence of malice, if the Public Officer knew both that what he was doing was invalid and that it will injure the plaintiff; *Bourgoin S A v. Ministry of Agriculture*, (1985) 3 All ER 585 : (1986) QB 716 : (1985) 3 WLR 1027 (CA). See, for this tort Chapter XIII, title 5, p. 345.
69. *Home Office v. Dorset Co. Ltd.*, (1970) AC 1004 : (1970) 2 WLR 1140 (HL).
70. *Holgate Mohammed v. Duke*, (1984) 1 All ER 1054 (HL), p. 1057 : (1984) AC 437.
71. *Rowling v. Takaro Properties Ltd.*, (1988) 1 All ER 163 (PC); *Jones v. Department of Employment*, (1988) 1 All ER 725 : (1989) QB 1 : (1988) 2 WLR 493 (CA).
72. *Rowling v. Takaro Properties Ltd.*, (1988) 1 All ER 163 (PC).
73. *T.P. Daver v. Lodge Victoria*, AIR 1963 SC 1144 : (1963) 2 SCJ 465 : (1963) SCD 772, *Bonsor v. Musicians Union*, (1956) AC 104 : (1955) 3 WLR 788 (HL); *Maclean v. Workers Union*, (1929) 1 Ch 602.
74. *Herring v. Templeman*, (1973) 3 All ER 569 (CA), p. 585. Also see, *U.P. Singh v. Board of Governers Maulana Azad College*, 1982 M P L J 75 (79, 80).

of a Club or Association has no legal right of redress if he be expelled according to the rules, howsoever unfair and unjust the rules or the action of the expelling body may be, provided that it acts in good faith.[75]

5. PARENTAL AND *QUASI*-PARENTAL AUTHORITY

Parents or persons in *loco parentis* may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable.[76] This right is preserved by the Children and Young Persons Act, 1933.[77]

The old view was that the authority of a schoolmaster, while it existed, was the same as that of a parent. A parent, when he places his child with a schoolmaster, delegates to him all his own authority, so far as it is necessary for the welfare of the child.[78] The master can, therefore, inflict a moderate chastisement on his pupil or apprentice,[79] *e.g.*, a couple of smacks on the cheek.[80] The modern view is that the schoolmaster has his own independent authority to act for the welfare of the child.[81] This authority is not limited to offences committed by the pupil upon the premises of the school, but may extend to acts done by such pupil while on the way to and from the school.[82]

At a school for boys there was a rule prohibiting smoking by pupils whether in the school or in public. A pupil after returning home smoked a cigarette in a public street and next day the schoolmaster administered to him five strokes with a cane. It was held that the father of the boy by sending him to the school authorized the schoolmaster to administer reasonable punishment to the boy for breach of a school rule, and that the punishment administered was reasonable.[83]

In England section 548 of the Education Act, 1996 has abolished the authority of a member of staff of a school to give corporal punishment to a child. But it does not affect the right of the parents to inflict moderate corrective punishment and so the school, if it feels that in a particular case corporal punishment is desirable, can recommend to the parents to inflict that punishment. This provision has been held not to affect any right of the teachers and parents under the Human Rights Act, 1998.[84]

The above law relating to parental and school master's right to inflict corporal punishment on a child by way of correction may not now be consistent with change in general outlook towards methods of correction and respect for human rights of child.[85]

75. *Maclean v. Workers Union*, (1929) 1 Ch 602; *T.P. Daver v. Lodge Victoria*, AIR 1963 SC 1144 : (1963) 2 SCJ 465 : 1963 SCD 772.
76. *Regina v. Hopley*, (1860) 2 F & F 202, 206; *Winterburn v. Brooks*, (1846) 2 C & K 16; *Att. Gen. v. Edge*, (1943) IR 115.
77. 23 & 24 Geo. V, Ch 12.
78. PER COCKBURN, C.J., in *Fitzgerald v. Northcote*, (1865) 4 F & F 656, 689.
79. *Penn v. Ward*, (1835) 2 Cr M & R 338.
80. *Sankunni v. Swaminatha Pattar*, (1922) ILR 45 Mad 548.
81. *Ramsay v. Larsen*, (1965) ALR 121.
82. *Cleary v. Booth*, (1893) 1 QB 465. See, *Hunter v. Johnson*, (1884) 13 QBD 225. But a music-master of a cathedral is not justified in even moderately beating a chorister for singing at a catch club, though such singing might be injurious to his performing in the cathedral: *Newman v. Bennett*, (1819) 2 Chit 195.
83. *Rex v. Newport (Salop) Justices : Wright, Ex parte*, (1929) 2 KB 416.
84. *R (on the application of Williamson and others) v. Secretary of State for Education and Employment*, (2003) 1 All ER 385 (CA) affd. (2005) 2 All ER 1 (HL).
85. See STREET, Law of Torts, 10th Edition, pp. 95, 96.

6. AUTHORITIES OF NECESSITY

The master of a vessel on the high seas or in a foreign port has disciplinary powers not only over the crew but the passengers also. Such powers are based upon necessity and are limited to the preservation of necessary discipline and the safety of the ship.[1] The commander of an aircraft has similar powers.[2] The authority of the captain to inflict moderate punishment is not confined to a case where the vessel is at sea beyond the reach of assistance.[3]

7. STATUTORY AUTHORITY

If the Legislature authorizes the doing of an act (which if unauthorized would be a wrong) no action can be maintained for that act, on the ground that no court can treat that as a wrong which the legislature has authorised, and consequently the person who has sustained a loss by the doing of that act is without remedy, unless so far as the legislature has thought it proper to provide for compensation to him. No action lies for what is *damnum sine injuria*; the remedy is to apply for compensation, if any, provided by the statute legalising what would otherwise be a wrong. The principle is that the act is not wrongful, not because it is for a public purpose, but because it is authorised by the legislature.[4] But the underlying philosophy behind the statutory immunity is that the lesser private right must yield to the greater public interest.[5] The statutory authority extends not merely to the act authorised by the statute but to all inevitable consequences of that act.[6] If no compensation is given, that affords a reason, though not a conclusive one, for thinking that the intention of the legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others.[7] But the powers conferred by the legislature should be exercised with judgment and caution[8] so that no unnecessary damage be done.[9] If the damage could have been prevented by the reasonable exercise of the powers conferred, an action can be maintained.[10] It is negligence to

1. *Aldworth v. Stewart*, (1866) 4 F & F 957; *Hook v. Cunard Steamship Co. Ltd.*, (1953) 1 WLR 682 : (1953) 1 All ER 1021.
2. Tokyo Convention Act, 1967.
3. *Lamb v. Burnett*, (1831) 1 Cr & J 218.
4. PER BLACKBURN, J., in *Mersey Docks Trustees v. Gibbs*, (1866) LR 1 HL 93, 112; *Hammersmith Ry. v. Brand*, (1869) LR 4 HL 171; *East Fremantle Corporation v. Annois*, (1902) AC 213; *Quebec*
5. *Allen v. Gulf Oil Refinery Ltd.*, (1981) 1 All ER 353, p. 365 : (1980) QB 156 (HL) (LORD ROSKILL).
6. *Manchester Corpn. v. Farnworth*, (1930) AC 171 : 99 L.J.K.B. 83 : 142 LT 145 (HL).
7. PER LORD BLACKBURN in *Metropolitan Asylum District v. Hill*, (1881) 6 App Cas 193, at p. 203. See, *Suratee Bara Bazar Co. Ltd. v. Municipal Corporation of Rangoon*, (1927) ILR 5 Ran 722, where the whole case-law is discussed. In this case a statute imposed a duty on a Municipal Corporation to erect urinals and water-closets for public use and the Corporation selected a site for the purpose. It was held that as the Corporation had acted *bona fide* in the selection of the locality for a public latrine there was no case for an injunction as the latrine was not erected and had not become an actual nuisance by misuse or mismanagement which the Corporation was bound to prevent. See, *Nirmal Chandra Sanyal v. Pabna Municipality*, ILR (1937) 1 Cal 407, where a Corporation causing a public hackney carriage stand to be erected on any street under a statute was held not liable even if the stand became a source of nuisance to neighbours.
8. *L. & N.W. Rly. v. Bradley*, (1851) 3 Mac & G 336, 341. *V. Foucar Brothers & Co. v. The Rangoon Municipal Committee*, (1897) 3 Burma LR 12; *Bhogilal v. Ahmedabad Municipality*, (1901) 3 Bom LR 415; *Municipal Committee, Delhi v. Har Parshad*, (1892) PR No. 103 of 1892.
9. *Mersey Docks Trustees v. Gibbs*, (1866) LR 1 HL 93; *Geddis v. Proprietors of Bann Reservior*, (1878) 3 App Cas 430.
10. *H.H. The Gaekwar v. Ghandhi Katcharabhai*, (1900) 2 Bom LR 357 : (1901) ILR 25 Bom 243 : (1903) 5 Bom LR 405 : (1903) ILR 27 Bom 344 : (1903) 30 IA 60; *Bhogilal v. Ahmedabad*

(Footnote No. 10 Contd.)

carry out the work in a manner which results in damage unless it can be shown that that and that only was the way in which the duty could be performed.[11]

Where the terms of a statute are not imperative, but permissive, the fair inference is that the legislature intended that the discretion, as to the use of general powers thereby conferred, should be exercised in strict conformity with private rights.[12] On those who seek to establish that the legislature intended to take away the private rights of individuals, lies the burden of showing that such an intention appears by express words or by necessary implication.[13]

A person seeking the protection of an Act cannot claim that his conduct has any relation to the "execution of the Act," if he knowingly and intentionally acts in contravention of its provisions.[14]

Nuisance.—The defence of statutory authority plays an important part in an action of nuisance.[15] In *Manchester Corporation v. Farnworth*,[16] the plaintiff's farm was destroyed by the poisonous fumes emitted from the chimney of the Electric Power Station of the defendant Corporation which claimed to have set up the station under section 32 of the Manchester Corporation Act, 1914. The Court of Appeal allowed injunction and damages to the plaintiff. The House of Lords dismissed the appeal of the Corporation but varied the order by declaring that the plaintiff should have damages until the injunction ceased to be suspended or was dissolved, that the injunction be suspended for one year with liberty to the defendants to apply for dissolution of the injunction on establishing that all reasonable modes of preventing mischief to the plaintiff had been exhausted and on their submitting to adopt the most effective modes of avoiding such mischief and to replace them by other reasonable but more effective modes of prevention subsequently discovered. In course of his speech, LORD DUNEDIN made the following observations. "When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain commonsense application, which cannot be rigidly defined, of practical feasibility in view of situation and expense."[17] Applying this principle the House of Lords held that by callous indifference in planning the construction of the station to all but its own efficiency, the defendant failed to show that it had used all reasonable

(Footnote No. 10 Contd.)
Municipality, (1901) 3 Bom LR 415; *Rup Lal Singh v. Secretary of State for India*, (1925) 7 Pat LT 463; *Ramchand Ram Nagaram Rice and Oil Mills Ltd., Gaya v. The Municipal Commissioner of the Purulia Municipality*, (1943) ILR 22 Pat 359; *Kali Krishna Narain v. The Municipal Board, Lucknow*, (1943) ILR 19 Luck 95; *Manohar Lal Sobha Ram Gupta v. Madhya Pradesh Electricity Board*, (1975) ACJ 494 (496) (MP).
11. *Kailas Etc. Works v. Municipality, B & N*, (1968) 70 Bom LR 554.
12. PER LORD WATSON in *Metropolitan Asylum District v. Hill*, (1881) 6 App Cas 193, 213; *Canadian Pacific Railway v. Parke*, (1899) AC 535; *Provender Millers (Winchester) Ltd. v. Southampton C.C.*, (1940) 1 Ch 131 : 161 L.T. 363. See, the judgment of BOWEN, LJ *in Truman v. L.B. & S.C. Ry. Co.*, (1885) 29 Ch D 89, 108; *Faiyaz Husain v. Municipal Board, Amroha*, ILR (1939) All 237.
13. PER LORD BLACKBURN in *Metropolitan Asylum District v. Hill*, (1881) 6 App Cas 193 (208).
14. *Runchordas v. Municipal Commissioner of Bombay*, (1901) 3 Bom LR 158; ILR 25 Bom 387. The procedure laid down in a statute must be adhered to strictly; *Clarke v. Brojendra Kishore Roy*, (1909) ILR 36 Cal 433. See *Brindabun v. Minicipal Commissioner of Serampore*, (1873) 19 Suth WR 309.
15. See further text and footnotes 4-6, title 1, p. 599, Chapter XX.
16. (1930) AC 171 : 142 LT 145 (HL).
17. *Manchester Corporation v. Farnworth*, (1930) AC 171 (HL).

diligence and taken all reasonable steps and precautions to prevent the operation of the station from being a nuisance to its neighbours. The relevant principles were restated by the House of Lords in *Allen v. Gulf Oil Refining Ltd.*[18] In that case the defendant, an Oil company, which had constructed a large oil refinery, was sued by the plaintiff who lived in the neighbourhood of the refinery for damages alleging that the operation of the refinery was a nuisance. The defendant company pleaded statutory immunity under the Gulf Oil Refining Act, 1965, and this plea was decided as a preliminary issue in favour of the defendant by the trial Judge whose decision was reversed by the Court of Appeal. In further appeal, the House of Lords restored the decision of the trial Judge by holding that the Act expressly or by necessary implication conferred an authority to construct and operate a refinery and that it conferred immunity from any nuisance which could be shown to be the inevitable result of that. Explaining the extent of protection and the way that issue needed trial LORD WILBERFORCE observed : "The respondent (Pl.) alleges a nuisance, by smell, noise, vibration *etc.* The facts regarding these matters are for her to prove. It is then for the appellants (Defendants) to show, if they can, that it was impossible to construct and operate a refinery on the site, conforming with Parliament's intention without creating the nuisance alleged, or at least a nuisance. The establishment of an oil refinery *etc.*, was bound to involve some alteration of the environment and so of the standard of amenity and comfort which neighbouring occupiers might expect. To the extent that the environment has been changed from that of a peaceful unpolluted countryside to an industrial complex, Parliament must be taken to have authorised it. So far, the matter is not open to doubt. But the statutory authority extends beyond merely authorising a change in the environment and an alteration of standard. It confers immunity against proceedings for any nuisance which can be shown (the burden of so showing being on the appellants) to be the inevitable result of erecting a refinery on the site, not, I repeat, the existing refinery but any refinery, however, carefully and with however, great a regard for the interest of adjoining occupiers it is sited, constructed and operated. To the extent and only to the extent that the actual nuisance (if any) caused by the actual refinery and its operation exceeds that for which immunity is conferred, the plaintiff has a remedy".[19] The case also restates the following propositions:[20] (1) The extent of the statutory authority and immunity depends on the construction of the relevant statute; (2) Where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance; (3) The undertaker must, as a condition of obtaining immunity from action, carry out the work and conduct the operation without negligence, that is, with all reasonable regard and care for the interests of other persons; (4) Immunity from action is withheld where terms of the statute are permissive only, in which case the powers conferred must be exercised in strict conformity with private rights; (5) The absence of compensation clauses from an Act conferring powers affords an indication that the Act was not intended to authorise interference with private rights, but this indication is not conclusive; (6) The immunity extends to any nuisance which is the inevitable result of doing the act authorised by the Act.

18. (1981) 1 All ER 353 : (1981) 2 WLR 188 (HL).
19. *Allen v. Gulf Oil Refining Ltd.*, (1981) 1 All ER 353 (HL), pp. 357, 358 : (1981) 2 WLR 188.
20. *Allen v. Gulf Oil Refining Ltd.*, (1981) 1 All ER 353 (356, 357, 358) : (1981) 2 WLR 188 (HL) (LORD WILBERFORCE) 359 (LORD EDMUND DAVIES). See further *Department of Transport v. North West Water Authority*, (1983) 3 All ER 273 (HL); *Mareic v. Thames Water Utilities Ltd.*, (2002) 2 All ER 55, p. 72 (CA).

Damage to underground pipes by steam-roller.—A gas company had statutory powers to place mains and pipes under certain highways within the jurisdiction of the defendants, who were by virtue of a statute bound to repair the highways. The defendants began to use steam-rollers of considerable weight for the purpose of repairing the highways, and thereby fractured pipes belonging to the company laid under the highways. It was held that the company was entitled to an injunction restraining the defendants from using such rollers.[21]

8. INEVITABLE ACCIDENT

An 'inevitable accident', or 'unavoidable accident', is that which could not possibly be prevented by the exercise of ordinary care, caution and skill.[22] It means an accident physically unavoidable. As observed by Greene, M.R., an accident is "one out of the ordinary course of things, something so unusual as not to be looked for by a person of ordinary prudence".[23] It does not apply to anything which either party might have avoided.[24] If a man carries firearms or drives a horse, his duty is merely to use reasonable care not to do harm to others thereby; and if notwithstanding the use of such care an accident happens, he may plead that it was due to inevitable accident. "People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.[25]

All causes of inevitable accident may be divided into two classes: (1) those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause; and (2) those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, nonfeasance or of misfeasance, or in any other causes independent of the agency of natural forces. The term "*act of God*" is applicable to the former class.[26]

If, in the prosecution of a lawful act, an accident, which is purely so, arises, no action can be sustained for any injury arising therefrom.[27]

The defence of inevitable accident used to be essentially relevant in actions for trespass when the old rule was that even a faultless trespasser contact was actionable, unless the defendant could show that the accident was inevitable. In other words, the burden used to be on the defendant to show that his conduct was utterly without fault, *i.e.*, without negligence. But according to the subsequent development the burden of proving negligence whether the action be framed in trespass or negligence lies on the plaintiff.[28] Therefore, now the plaintiff's suit, whether it be in trespass or negligence, fails if he is unable to prove negligence and the court is not required to give a finding that the defendant has proved or not proved that the damage was caused because of inevitable accident. The plea of inevitable accident is thus now not relevant in these

21. *Gas Light and Coke v. Vestry of St. Mary Abbats, Kensington*, (1885) 15 QBD 1. See, *Chichester Corporation v. Foster*, (1906) 1 KB 167.
22. *The Marpesia*, (1872) LR 4 PC 212; *The Merchant Prince*, (1892), p. 179; *The Schewan; The Albano*, (1892), p. 419, 432, 434.
23. *Makin Ltd. v. L. & N.E. Rly.*, (1943) 1 All ER 362 : 168 LT 394 : 59 T.L.R. 307.
24. *Saner v. Bilton*, (1878) 7 Ch D 815; *Manchester Bonded Warehouse Co. v. Carr*, (1880) 5 CPD 507; *Manindra Nath Mukerjee v. Mathuradas Chaturbhuj*, (1945) 49 CWN 827, see, *Steiert v. Kamma*, (1891) PR No. 3 of 1891, where a servant was held not liable for breaking a lamp.
25. PER LORD DUNEDIN in *Fardon v. Harcourt-Rivington*, (1932) 146 LT 391 (392) : 48 TLR 215.
26. *Nugent v. Smith*, (1876) 1 CPD 423, 435; *Forward v. Pittard*, (1785) 1 TR 27.
27. *Davis v. Saunders*, (1772) 2 Chit 639; *Holmes v. Mather*, (1875) LR 10 Ex 261; *Stanley v. Powell*, (1891) 1 QB 86 : 39 WR 76.
28. *Fowler v. Lanning*, (1959) 1 All ER 290 : (1959) 2 WLR 241 : (1959) 1 QB 426; *Letang v. Cooper*, (1964) 2 All ER 929 (CA).

cases. As regards cases of strict liability governed by the rule of *Rylands v. Fletcher*,[29] the form of inevitable accident which is known as 'act of God' is alone relevant. Further, inevitable accident in any form is no defence to a claim based on the rule of strict liability as laid down in *M.C. Mehta v. Union of India*,[30] which is not subject to any exception. It will thus be seen that the plea of inevitable accident has now lost substantially all its utility.[31]

Damage by explosive substance.—The defendants, a firm of carriers, received a wooden case to be carried to its destination and its contents were not communicated. On an intermediate station, it was found that the contents were leaking. The case was, therefore, taken to the defendants' offices, which they had rented from the plaintiff, and a servant of the defendants proceeded to open the case for examination, but the nitro-glycerine which it contained exploded. All the persons present were killed, and the building was damaged. An action was brought by the landlord for damages suffered by parts of the building let to other tenants as well as to the defendants. The defendants admitted their liability for waste as to the premises occupied by them but disputed it as to the rest of the building. It was held that, in the first place, the defendants were not bound to know, in the absence of reasonable ground of suspicion, the contents of packages offered them for carriage, and that, without such knowledge in fact and without negligence, they were not liable for damage caused by the accident.[32]

Injury to eye.—The plaintiff's and the defendant's dogs were fighting, the defendant was beating them in order to separate them, and the plaintiff was looking on. The defendant accidentally hit the plaintiff in the eye causing him a severe injury. In an action brought by the plaintiff, it was held that the action of the defendant was a lawful and proper act in itself which he might do by proper and safe means; and that if, in doing this act, he accidentally hit the plaintiff in the eye and wounded him, it was the result of pure accident, and therefore, no action would lie.[33]

The defendant parked his saloon motor-car in a street and left his dog inside. The dog had always been quiet and docile. As the plaintiff was walking past the car, the dog, which had been barking and jumping about in the car, smashed a glass panel, and a splinter entered the plaintiff's left eye, which had to be removed. In an action for damages it was held that the plaintiff could not recover as a motor-car with a dog in it was not a thing which was dangerous in itself, and as the accident was so unlikely there was no negligence in not taking precautions against it.[34]

Injury to runaway horses.—The defendant's horses while being driven by his servant on a public highway, ran away by the barking of a dog and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. While unsuccessfully trying to turn a corner safely, the servant guided them so that without his intending it they knocked down and injured the plaintiff who was in the highway. It was held that no action was maintainable by the plaintiff for the servant had done his best under the circumstances.[35]

Injury by pellet.—The defendant, who was one of a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree and

29. (1868) LR 3 HL 330.
30. (1987) 1 SCC 395. See further, Chapter XIX title 2(c), p. 502.
31. WINFIELD and JOLOWICZ, Tort, 18th edition, p. 718.
32. *Nitro-Glycerine* case, (1872) 15 Wallace 524.
33. *Brown v. Kendal*, (1859) 6 Cussing 292.
34. *Fardon v. Harcourt-Rivington*, (1932) 48 TLR 215, 146 LT 391 : 76 S.J. 61.
35. *Holmes v. Mather*, (1875) LR 10 Ex 261, 267; *Wakeman v. Robinson*, (1823) 1 Bing 213.

accidentally wounded the plaintiff, who was engaged in carrying cartridges and game for the party. It was held that the defendant was not liable.[36] The ratio in this case has been criticised as erroneous, though the decision itself can be supported on the ground of *volenti non fit injuria*.[37]

9. EXERCISE OF COMMON RIGHTS

The exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong even if it causes damage. It is in reference to such cases that we meet with the phrase *damnum sine injuria*. *Prima facie* it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying on his trade according to his own discretion and choice.[38] Competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed.[39] Fair competition is itself no ground of action, whatever damage it may cause.[40] Right of competition exists even when the means adopted are 'unfair.' Underselling is not a wrong, though the seller may sell some article at unremunerative prices to attract customers, nor is it a wrong to offer advantages to customers who will deal with a trading company to the exclusion of its rival.[41]

Again, everyone may innocently enjoy his own property as he will, and the right is the same whatever one's motive may be, whether malicious or otherwise. No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.[42] For instance, the disturbance or removal of the soil in a man's own land, though it is the means (by percolation) of drying up his neighbour's spring or well, does not constitute the invasion of a legal right, and will not sustain an action.[43]

10. LEAVE AND LICENCE—"*VOLENTI NON FIT INJURIA*"

Harm suffered voluntarily does not constitute a legal injury and is not actionable. This principle is embodied in the maxim *volenti non fit injuria* (where the sufferer is willing no injury is done). A man cannot complain of harm to the chances of which he has exposed himself with knowledge and of his free will. The maxim *volenti non fit injuria* "is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong."[44] The maxim presupposes a tortious act by the defendant.[45] The maxim applies, in the first place, to intentional acts which would otherwise be tortious. A trespasser, having knowledge that there are spring guns in a wood, although he may

36. *Stanley v. Powell*, (1891) 1 QB 86 : 63 LT 809.
37. *Vide*, FREDERICK POLLOCK, The Law of Torts, 15th edition, p. 140; BEVEN, 3rd edition., Preface, p. vi.
38. *Hilton v. Eckersley*, (1855) 6 E & B 47, 74, 75. See also, *Interglobe Aviation Ltd. v. N. Satchidanand*, (2011) 7 SCC 463 : (2011) 7 SCALE 159.
39. PER LORD LINDLEY, in *Quinn v. Leathem*, (1901) AC 495, 539 : 85 L.T. 289 : 17 T.L.R. 749.
40. *Gloucester Grammar School*, (1410) 11 Han IV, 47.
41. *Mogul Steamship Co. v. McGregor, Gow & Co.*, (1892) AC 25 : 40 W.R. 337.
42. PER LORD WATSON in *Mayor, etc. of Bradford v. Pickles*, (1895) AC 587.
43. *Ballacorkish Silver, etc., Mining Co. v. Harrison*, (1873) LR 5 PC 49, 61. See, *Chasemore v. Richards*, (1859) 7 HLC 349; *Acton v. Blundell*, (1843) 12 M & W 324; *Baird v. Williamson*, (1863) 15 CBNS 376; *Smith v. Kenrick*, (1849) 7 CB 515.
44. *Smith v. Baker & Sons*, (1891) AC 225 : 65 L.T. 467 (HL) referred to in *Imperial Chemical Industries v. Shatwell*, (1965) AC 656; See also, *Branch Manager, National Insurance Co. Ltd. v. Agilan* (2011) 2 TN MAC 429.
45. *Wooldridge v. Summer*, (1962) 2 All ER 978 : (1963) 2 QB 43 (CA).

be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting if off,[46] for he voluntarily exposes himself to the mischief which has happened. But a person, who climbs over a wall in pursuit of a stray fowl and is shot by a spring gun, set without notice, can recover damages.[47]

The perfectly sound principle underlying this maxim is daily illustrated in common life. It protects the surgeon who amputates a limb; the football player, boxer, or fencer, so long as they play fairly according to the rules of the game; and it prevents a person who chooses to pay a debt barred by the Statute of Limitations, or not enforceable by reason of infancy, from getting his money back.[48] The application of the maxim is not dependent upon any valid contract[49] but upon the competence of the decision making capacity of the person at the time the consent was given.[50] So a minor who is capable of making a reasonable assessment of the advantages and disadvantages of a treatment proposed by a physician or a surgeon can give a valid consent. In *Gillick v. West Norfolk and Wisbeck Area Health Authority*,[51] the House of Lords held that a girl under 16 did not, merely by reason of her age, lack legal capacity to consent to contraceptive advice and treatment by a doctor. It was also held that having regard to the reality that a child became increasingly independent as it grew older and parental authority dwindled correspondingly, the law did not recognise any rule of absolute parental authority until a fixed age; parental rights were recognised by the law only as long as they were needed for the protection of the child and such rights yielded to the child's right to make his own decisions when he reached a sufficient understanding and intelligence to be capable of making up his own mind.[51]

To avoid a claim for personal injury against a doctor, it is not necessary that the consent should be informed consent meaning thereby an objective criterion of what is a sufficient disclosure of risk to ensure that the patient is enabled to make an intelligent decision.[52] The English law does not recognise this doctrine of informed consent and the test of liability in respect of a doctor's duty to warn his patient of risks inherent in treatment recommended by him is the Bolam test which is the same as the test recommended for diagnosis and treatment, namely that the doctor is required to act in accordance with a practice accepted at the time as proper by a responsible body of medical opinion.[53] In America it is the 'reasonably prudential patient' test evolved in *Canterbury v. Spence*[54] which is applied. Having regard to

46. *Ilott v. Wilkes*, (1820) 3 B & Ald 304. As a result of this case setting spring guns except by night was made an offence by 7 & 8 Geo. IV, c. 18, which is repealed and re-enacted by 24 & 25 Vic. c. 95.
47. *Bird v. Holbrook*, (1828) 4 Bin 628.
48. *Bize v. Dickason*, (1786) 1 TR 285 (287).
49. *Buckpitt v. Oates*, (1968) 1 All ER 1145.
50. For competence to consent or refuse medical treatment see Cameron Stewart and Paul Beigler, 'A Primer on the law of competence to refuse medical treatment', (2004) 78 ALJ 325.
51. (1985) 3 All ER 402 : (1986) AC 112 : (1985) 3 WLR 830 (HL).
52. *Sidaway v. Bethlem Royal Hospital Governors*, (1985) 1 All ER 543 : (1985) AC 871 (HL).
53. *Sidaway v. Bethlem Royal Hospital Governors*, (1985) 1 All ER 543 : (1985) AC 871 (HL). Not followed in Australia see *Rogers v. Whitaker*, (1992) 175 CLR 475; *Rosenberg v. Percival*, (2001) 75 ALJR 734, pp. 735, 736. In *Roger's* case an eye surgeon's failure to warn the plaintiff of a 1 in 14,000 chance of blindness was held to be negligence. According to this case doctors have a duty to warn or advise a patient of any material risk inherent in the treatment. See further, (2001) 75 ALJ 423-426 (Medico's failure to warn).
54. 464 F 2d 772: 150 US App. DC 263 (1972).

Indian conditions the Supreme Court in *Samira Kohli v. Prabha Manchanda*[55] laid down the law applicable in India on the question of patients' consent as follows:

(i) A doctor has to seek and secure the consent of the patient before commencing a "treatment" (the term "treatment" includes surgery also). The consent so obtained should be real and valid, which means that: the patient should have the capacity and competence to consent; his consent should be voluntary; and his consent should be on the basis of adequate information concerning the nature of the treatment procedure, so that he knows what he is consenting to.

(ii) The "adequate information" to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. But there is no need to explain remote or theoretical risks involved, which may frighten or confuse a patient and result in refusal of consent for the necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusal to take treatment which may persuade a patient to undergo a fanciful or unnecessary treatment. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.

(iii) Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The fact that the unauthorized additional surgery is beneficial to the patient, or that it would save considerable time and expense to the patient, or would relieve the patient from pain and suffering in future, are not grounds of defence in an action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure though unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision.

(iv) There can be a common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.

(v) The nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high degree mentioned in Canterbury but should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of treatment, and the risk and consequences attached to the treatment.

55. (2008) 2 SCC 1 paras 48 to 50 : AIR 2008 SC 1385. Followed in *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka*, (2009) 6 SCC 1 : 2009 CrLj 3012 : (2009) 6 JT 651.

As regards spectators at a game, the law has been stated to be as follows: "A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the cause of and for the purposes of the game or competition notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety."[56] The spectator takes the risk because such an act involves no breach of the duty of care owed by the participant to him and not because of the doctrine expressed by the maxim *volenti non fit injuria*.[57] As regards participants in a sporting event, they may be held to have accepted risks which are inherent in that sport, but this does not eliminate all duty of care of the one participant to the other; the question whether there has been a breach of such duty will depend upon a variety of circumstances and the rules of the sport may be one of those circumstances, but they are neither definitive of the existence of the duty nor does their breach necessarily constitute a breach of any duty.[58] In a football match the defendant's foul play resulted in the plaintiff breaking his leg. In a suit for damages, the defendant was held liable on the finding that he was guilty of "serious and dangerous foul play which showed a reckless disregard of the plaintiff's safety and which fell far below the standards which might be expected in any one pursuing the game."[59] Further, in deciding whether an organizer of a game has been in breach of duty towards a player who suffered injury, industry practice and rules of the game are to be taken into account in assessing what was required by the standard of reasonableness.[60] For example, the organiser of indoor cricket on considering the above factors was held liable to a player who suffered an eye injury from a cricket ball for not providing helmets and failing to warn of the risk of serious eye injury.[60]

The maxim applies, in the second place, to consent to run the risk of harm which would otherwise be actionable. The maxim, be it observed, is not '*scienti non fit injuria*' but '*volenti*'. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defence is complete.[61] It is necessary to prove that the person injured knew of the risk, and voluntarily took it.[62] Thus a person willingly undertaking to do work which is intrinsically dangerous, notwithstanding that care has been taken to make it as little intrinsically dangerous as possible, cannot, if he suffers, complain that a wrong has been done to him.[63] But if there is negligence on the part of the employer and he fails in his duty towards the employed, it cannot be said that the employee is willing and that the employer should thus act towards him simply because he does not straightway refuse to continue in service.[63] If the plaintiff servant is himself in default which leads to his injury, a distinction may have to be drawn whether it is a case of negligence or *volenti*. If the plaintiff's default is the sole cause of the injury he would not be entitled to succeed whether it be a case of negligence or *volenti*, for it does not matter in the result

56. *Wooldridge v. Sumner*, (1962) 2 All ER 978 : (1963) 2 QB 43 : (1963) 3 WLR 616 (CA).
57. *Wooldridge v. Sumner*, (1962) 2 All ER 978 : (1963) 2 QB 43 : (1963) 3 WLR 616 (CA).For injury to a person who is not a spectator see text and footnote 19, p. 487.
58. *Rootes v. Shelton*, (1968) ALR 33; *Condon v. Basi*, (1985) 2 All ER 453, p. 454 : (1985) 1 WLR 668 (CA).
59. *Condon v. Basi, supra*, p. 455.
60. *Woods v. Multi Sports Holdings Pty. Ltd.*, (2002) 76 ALJR 483.
61. PER BOWEN, L.J. in *Thomas v. Quartermaine*, (1887) 18 QBD 685 (696, 697).
62. *Osborne v. London and North Western Ry. Co.*, (1888) 21 QBD 220 (223, 224); *Letang v. Ottawa Electric Ry. Co.*, (1926) AC 725; *South Indian Industrials Ltd., Madras v. Alamelu Ammal*, (1923) MWN 344 (345).
63. *Smith v. Baker & Sons*, (1891) AC 325 : 65 L.T. 467 : 40 WR 392 (HL) referred to in *Imperial Chemical Industries v. Shatwell*, (1964) 2 All ER 999 : (1965) AC 656 (HL).

whether one says 100 per cent contributory negligence or *volenti non fit injuria*.[64] But in cases where the plaintiff's default is partially responsible for the injury, he would succeed to some extent if it is a case of negligence but not at all if it is a case of *volenti*. For example there is a world of difference between two fellow servants collaborating carelessly so that the acts of both contribute to cause injury to one of them; and two fellow servants combining to disobey an order deliberately though they know the risk involved. In the first case only a partial defence of contributory negligence is available but in the second case *volenti non fit injuria* is a complete defence if the employer is not himself at fault and is only liable vicariously for the acts of the fellow servants.[65]

There are certain limitations to the application of this maxim: (1) No consent— no leave or licence—can legalise an unlawful act, *e.g.*, fighting with naked fists, a kicking match or a duel with sharp swords. But the defendent's conduct should be reasonable. So, when the plaintiff, an old man, challenged the defendant to fight and on his coming forward menacingly, the plaintiff gave a punch to the defendant's shoulder who then gave a very severe blow to the plaintiff's eye with his fist, the injury needing nineteen stitches and an operation, it was held that neither *volenti non fit injuria* nor *extur pi causa non oritur actio* applied and the plaintiff was entitled to full compensation for the injury.[66]

(2) The maxim has no validity against an action based on a breach of statutory duty.[67] Thus, it is no answer to a claim made by a workman against his employer for injury caused through a breach by the employer of a duty imposed upon him by a statute.[68] But where the negligence or breach of statutory duty is on the part of an employee of the plaintiff who knowingly accepts the risk flowing from such breach and the employer-defendant is not guilty of negligence or breach of statutory duty, the defence of *volenti non fit injuria* is available to the defendant.[69]

(3) The maxim does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty.[70] The rescuer will not be deprived of his remedy merely because the risk which he runs is not the same as that run by the person whom he rescues.[71] This principle, which has been based upon a weight of authority in America, has now been adopted by the Court of Appeal in England. But where there is no need to take any risk, the person suffering harm in doing so cannot recover.[72]

(4) Generally the maxim does not apply to cases of negligence,[73] to cover a case of negligence the defence on the basis of the maxim must be based on implied

64. *Imperial Chemical Industries v. Shatwell*, (1964) 2 All ER 999 (HL).
65. *Imperial Chemical Industries v. Shatwell*, (1964) 2 All ER 999 (HL).
66. *Lane v. Holloway*, (1967) 3 All ER 129 : (1967) 3 WLR 1003 (CA).
67. *Wheelar v. New Merton Board Mills, Ltd.*, (1933) 2 KB 669 : 149 LT 587 : 49 T.L.R. 567; *Baddeley v. Earl Granville*, (1887) 19 QBD 423. See also, *Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage & Allied Workers & Others* (2011) 8 SCC 568 : (2011) 8 JT 232.
68. *Wheelar v. New Merton Board Mills, Ltd.*, (1933) 2 KB 669 : 149 LT 587 : 49 T.L.R. 567
69. *Imperial Chemical Industries Ltd. v. Shatwell*, (1964) 2 All ER 999, (1965) AC 656.
70. *Haynes v. Harwood*, (1935) 1 KB 146 (157) : 152 LT 121 : 51 T.L.R. 100; *Dicta to the contrary in Cutler v. United Dairies (London) Limited*, (1933) 2 KB 297 : 149 LT 436, questioned.
71. *Chadwick v. British Transport Corporation*, (1967) 2 All ER 945.
72. *Cutler v. United Dairies (London) Limited*, (1933) 2 KB 297 : 149 LT 436.
73. *Dann v. Hamilton*, (1939) 1 KB 509 : 160 LT 433; *Cleghorn v. Oldham*, (1927) WM 147 : 43 TLR 465; *Wooldridge v. Sumner*, (1962) 2 All ER 978 (CA).

agreement whether amounting to contract or not.[74] The defence is available only when the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk impliedly agreed to incur it and to waive any claim for injury.[75] Thus there are several cases where the driver of a vehicle gives a passenger a lift and, at the same time, gives him reasonable notice that he rides at his own risk. The passenger is bound by the notice and he cannot claim.[76] Similarly when dangerous operations are in progress on land and are apparent, and the owner gives a licensee permission to go on it, but at the same time give him reasonable notice that he comes at his own risk, again, he cannot claim.[77] But when the plaintiff has no choice or when the notice is given at a stage when it is beyond the ability of the plaintiff to make a choice there can be no implied agreement and the defence on the basis of the maxim must fail.[78]

(5) The maxim does not also apply where the act of the plaintiff relied upon to establish the defence under the maxim is the very act which the defendant was under a duty to prevent. Thus when a prisoner with known suicidal tendencies committed suicide while in police custody as the police failed to take reasonable precautions for preventing suicide, the defence of *volenti non fit injuria* could not be availed of by the police in an action for negligence brought by administratix of the estate of the deceased.[79]

(6) The maxim will also not apply when the act relied upon is done because of the psychological condition which the defendant's breach of duty had induced. Thus a person who was badly injured in a factory accident caused by the negligence or breach of duty of the defendant and suffered severe depression and committed suicide could not be said to have acted voluntarily and in a claim by widow for damages under the Fatal Accidents Act. The defendant could not plead the defence under the maxim.[80]

Injury in rescuing.—The plaintiff, a police constable, was on duty inside a police station in a street in which were a large number of people including children. Seeing the defendants' runaway horses with a van attached coming down the street he rushed out and eventually stopped them, sustaining injuries in consequence, in respect of which he claimed damages. It was held that as the defendants must or ought to have contemplated that some one might attempt to stop the horses in an endeavour to prevent injury to life and limb, and as the police were under a general duty to intervene to protect life and property, the act of, and injuries to, the plaintiff were the natural and probable consequences of the defendants' negligence; and that the maxim *volenti non fit injuria* did not apply to prevent the plaintiff recovering.[81] A horse belonging to the defendants and attached to one of their vans was seen by the plaintiff running past his house without the driver. It entered a field adjoining the

74. *Burnett v. British Water Ways Board*, (1973) 2 All ER 631 (635) : (1973) 2 Lloyd's Rep. 137 : (1973) 1 WLR 700 (CA).
75. *Burnett v. British Water Ways Board*, (1973) 2 All ER 631 (635) : (1973) 2 Lloyd's Rep. 137 : (1973) 1 WLR 700 (CA).
76. *Buckpitt v. Oates*, (1968) 1 All ER 1145; *Bennet v. Tugwell*, (1971) 2 All ER 248; *Birch v. Thomas*, (1972) 1 All ER 905; *Burnett v. British Water Ways Board*, (1973) 2 All ER 631 (635) : (1973) 2 Lloyd's Rep. 137 : (1973) 1 WLR 700.
77. *Ashdown v. Samuel Williams & Sons Ltd.*, (1957) 1 All ER 35; *White v. Blackmore*, (1972) 3 All ER 158; *Burnett v. British Water Ways Board*, (1973) 2 All ER 631 (635) : (1973) 2 Lloyd's Rep. 137 : (1973) 1 WLR 700.
78. *Burnett v. British Water Ways Board*, (1973) 2 All ER 631, (635) : (1973) 2 Lloyd's Rep. 137 : (1973) 1 WLR 700.
79. *Reeves v. Commissioner of Police of the Metropolis*, (1998) 2 All ER 381 (CA) upheld in (1999) 3 All ER 897 (HL).
80. *Corr v. IBC Vehicles*, (2008) 2 All ER 943 (HL). For this case see further Chapter IX title 1(C) (*iv-a*), p. 193.
81. *Haynes v. Harwood*, (1935) 1 KB 146 : 78 SJ 801.

plaintiff's garden, and the driver, who had followed it, was trying to pacify it, but as it continued to be restive, the driver shouted for help. The plaintiff went and attempted to hold the horse, but it threw him to the ground causing him injuries, in respect of which he sued the defendants. It was held that the plaintiff must have known that his attempt to hold the horse was attended with risk, and that the principle of *volenti non fit injuria* applied and precluded the plaintiff from recovering.[82] This case has been distinguished in the former case on the ground that there was no need to take any risk. While the plaintiffs, husband and wife, were in a shop as customers, a skylight in the roof of the shop was broken, owing to the negligence of contractors engaged in repairing the roof, and a portion of the glass fell and struck the husband causing him a severe shock. His wife, who was standing close to him, was not touched by the falling glass, but, reasonably believing her husband to be in danger, she instinctively clutched his arm, and tried to pull him from the spot. In doing this she strained her leg in such a way as to bring about a recurrence of thrombosis. In an action to recover damages from the contractors, it was held that the wife was also entitled to damages along with the husband, inasmuch as what she did was, in the circumstances, a natural and proper thing to do.[83]

Travelling in motor-car knowing that driver is drunk.—The plaintiff, knowing that the driver of a motor-car was under the influence of drink and that, consequently, the chances of accident were thereby increased, chose to travel by the car. She was injured in an accident caused by the drunkenness of the driver, in which the driver was killed. In an action against the personal representative of the driver, the defendant raised the defence of *volenti non fit injuria*. It was held that, except perhaps in extreme cases, the maxim did not apply to the tort of negligence and that the plaintiff was entitled to recover.[84]

Travelling at own risk.—The plaintiff, an infant 17 years old, agreed to be carried in the car of the defendant, who was also 17 years old, at the plaintiff's own risk. The car struck a wall due to the defendant's negligence and the plaintiff was injured. On the question whether the defence *volenti non fit injuria* was an answer to the plaintiff's claim for damages, it was held that the plaintiff, though an infant in law, could not enforce a right which he had voluntarily waived or abandoned, and, accordingly, the defence of *volenti non fit injuria* succeeded.[85]

11. NECESSITY

There are three classes of cases to which the defence of necessity applies, *viz.* (1) Cases of public necessity; (2) Cases of private necessity; and (3) Cases where assistance is given to a third person without his consent as a matter of necessity.[86]

The defence of public necessity is based on the maxim *salus populi suprema lex* (the welfare of the people is the supreme law), a maxim founded on the implied assent on the part of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community and that his property, liberty and life, shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good. There are many cases in which individuals sustain an injury for which law gives no action; as, where private houses are pulled down, or bulwarks

82. *Cutler v. United Dairies (London) Limred*, (1933) 2 KB 297 : 149 LT 436.
83. *Brandon v. Osborne Garett & Co.*, (1924) 1KB 548.
84. *Dann v. Hamilton*, (1939) 1 KB 509 : (1939) 1 All ER 35.
85. *Buckpitt v. Oates*, (1968) 1 All ER 1145.
86. *F v. West Berkshire Health Authority*, (1989) 2 All ER 545, p. 564 (HL).

raised on private property, for the preservation and defence of the kingdom against the King's enemies,[87] or where houses are pulled down to stop a fire, or goods cast overboard to save a ship or the lives of those on board.[88] It is only in cases of existing, immediate, and overwhelming public necessity that any such right exists.[89] Further the defence of necessity is not available to a defendant whose negligence has created or contributed to the necessity.[90] The doctrine of necessity is confined within very narrow limits *e.g.*, urgent and transient situations of great and imminent danger to life in which the law permits some encroachment on private property.[91] If the Crown takes the subject's land for the defence of the country, the Crown has to pay compensation for its use and occupation.[92] It has been held by the House of Lords that where demolitions were carried out lawfully in exercise of royal prerogative, though without statutory authority, there was no general rule, that the prerogative could be exercised, even in time of war or imminent danger, by taking or destroying property without making payment for it.[93]

Private necessity may also give rise to a defence of necessity. In the context of an argument that pavement dwellers of Bombay had in occupying pavements, though out of sheer helplessness, committed the tort of trespass, the Supreme Court observed: "Under the law of torts necessity is a plausible defence, which enables a person to escape liability on the ground that the acts complained of are necessary to prevent greater damage, *inter alia*, to himself. Here, as elsewhere in the law of torts, a balance has to be struck between competing sets of values."[94] But under the English Law homelessness is not a valid defence. In the words of LORD DENNING, M.R.: "If homelessness were once admitted as a defence to trespass, no one's house could be safe.—So the court must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relieved by the charitable and the good".[95] This view must also prevail in India when the trespass is upon private property. But will different considerations apply when the State complains of trespass for in the context of Articles 21, 39 and 41 of the Constitution it has the duty, in cases of undeserved want, to give public assistance and to provide humane living conditions.[96] The observations of the Supreme Court quoted above from *Olga Tellis*' case raise this question. But in a case relating to removal of a stall built by a pavement squatter on a public street, it was held by the Supreme Court that the municipal corporation Delhi could not be compelled to provide a stall to the squatter before his eviction.[97] And in

87. *Governor, etc. of Cast Plate Manufacturers v. Meredith*, (1792) 4 TR 794 (797).
88. *South Port Corporation v. Esso Petrolium Co.*, (1952) 2 All ER 1204 (QBD) affirmed 1956 AC 218 (HL); "The necessity of saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property". (DEVLIN, J.).
89. *Maleverer v. Spinke*, (1537) Dyer, (Part I), 356.
90. *Rigby v. Chief Constable*, (1985) 2 All ER 985 (995) : (1985) WLR 1242.
91. *London Borough of Southwark v. Williams*, (1971) 2 All ER 175 (1971) 2 WLR 467; *Mc Phail v. Persons Unknown*, (1973) 3 All ER 393 (CA).
92. *De Keyser's Royal Hotel, Ltd. In re. De Keyser's Royal Hotel Ltd. v. The King*, (1919) 2 Ch. 197, (1920) AC 508.
93. *Burmah Oil Co. Ltd. v. Lord Advocate*, (1965) AC 75 : (1964) 2 WLR 1231.
94. *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545, p. 585.
95. *London Borough of Southwark v. Williams*, (1971) Ch 734, p. 744 : (1971) 2 WLR 467 : (1971) 2 All ER 175; *Mc Phail v. Persons Unknown*, (1973) 3 All ER 393 : (1973) Ch 447; WEIR, Casebook on Tort, 5th edition., p. 337.
96. See, text and footnote 94, *supra*. See further, *UPAVAS EVAM VIKAS Parishad v. Friends Co-op. Housing Society*, 1995 (3) SCALE 604 (SC), p. 606 ("Right to Shelter is a fundamental right which springs from the right to residence assured in Article 19(1)e and right to life under Article 21").
97. *Municipal Corporation Delhi v. Gurnam Kaur*, AIR 1989 SC 38 : (1989) 1 SCC 101.

Sodan Singh v. New Delhi Municipal Committee,[1] the Supreme Court, although upholding the fundamental right of hawkers under Article 19(1)(*g*) of the Constitution to trade on street pavements subject to regulation, negatived the right to occupy any particular place on the pavement.[2] The court also held that Article 21 was not attracted in such cases[3] and reaffirmed that "if a person puts up a dwelling on the pavement whatever may be the economic compulsions behind such an act, his user of the pavement would remain unauthorised".[3] However, in a case relating to removal of hutment dwellers from land belonging to the Bombay Port Trust, the Supreme Court did not permit the removal of those who were in occupation for atleast two years prior to a cut off date fixed by the court without providing them alternative sites.[4] In holding so, the court took into account the untold hardship and misery which was bound to result to the occupants on removal of their hutments. Apart from the question of applicability of Article 21 when a trespasser who has built his home on public land is ejected it may also be a question whether in such a case Article 17 of the International Covenant on Civil and Political Rights, 1966 to which India is a party is attracted. Article 17 of the Covenant in so far as relevant provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence". The corresponding Article in the European Convention is Article 8 which has been interpreted differently by the House of Lords[5] and European Court of Human Rights[6] with reference to the ejectment of unauthorized occupation by gypsies, the House of Lords holding that the said Article is not applicable whereas the European Court of Human Rights holding that it may be attracted if there is summary eviction without proper justification and procedural safeguards. Both these cases were discussed by the Court of Appeal in *Leeds City Council v. Price*[7] and the court followed the decision of the House of Lords but granted leave to appeal so that the matter may be reconsidered by the House of Lords.

The plaintiff let the shooting rights over his land to one C. A fire broke out on the land, and while the plaintiff's men were endeavouring to beat it out, the defendant, who was the gamekeeper of C, to prevent spreading of fire and damaging the sporting rights of his master, set fire to strips of heather between the fire and a part of the shooting where there were some nesting pheasants of his master. The fire was

1. AIR 1989 SC 1988 : (1989) 4 SCC 155.
2. AIR 1989 SC 1988, p. 1996.
3. AIR 1989 SC 1988., p. 1997. See second and third *Sodan Singh cases* relating to framing of scheme and allotment of sites to hawkers : (1992) 2 SCC 458 : AIR 1992 SC 1153 and AIR 1998 SC 1174. See in the same context for scheme for Bombay hawkers: *Bombay Hawkers Union v. Bombay Municipal Corporation*, AIR 1985 SC 1204; *Maharashtra Ekta Hawkers Union v. Municipal Corporation Greater Mumbai*, AIR 2004 SC 416 : (2004) 1 SCC 625. *See* further, *Arignar Anna Bus Stand Small SCALE Retail Trader's Association v. Commissioner Madurai Corporation*, AIR 1988 Madras 71, p. 77 (An encroacher of public property cannot claim an alternative site as a precondition to his removal. "To do so would only mean placing a premium on trespasser's encroachment on public property"); *Grahak Sanstha Manch v. State of Maharashtra*, AIR 1994 SC 2319 : JT 1994 (3) SC 474 (State Government cannot be compelled to provide alternative accommodation to allottees of requisitioned premises when the premises are derequisitioned); *N. Jagdisan v. District Collector*, AIR 1997 SC 1197 : (1997) 4 SCC 508 (Removal of bunks and kiosks from medical institutions and from margins of important and busy roads was upheld); *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, (1997) 1 SCALE 770 pp. 776, 784 : AIR 1997 SC 152 : (1997) 11 SCC 121 (It cannot be laid down that in every case the encroacher of public property must be provided with alternative shelter before he is ejected).
4. *Ram Prasad Yadav v. Chairman Bombay Port Trust*, AIR 1989 SC 1306.
5. *Harrow London Be v. Qazi*, (2003) 4 All ER 461.
6. *Connors v. U.K.*, (2004) 16 BHRC 639.
7. (2005) 3 All ER 573 (CA).

extinguished by the plaintiff's men. In an action of trespass against the defendant, it was held that the defendant was not liable.[8]

Third group of cases are concerned with action taken as a matter of necessity to assist another person without his consent. For example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle thereby saving him from injury or even death commits no wrong.[9] Other examples are where medical treatment, which is in his best interests, is administered to a patient who is unable to give his consent[10] or where a person of unsound mind is detained in a mental hospital which is in his best interest.[11]

12. PRIVATE DEFENCE

Every person has a right to defend his own person, property, or possession, against an unlawful harm. This may even be done for a wife or husband, a parent or child, a master or servant.

"When a man strikes at another within a distance capable of the latter being struck, nature prompts the party struck to resist it, and he is justified in using such a degree of force as will prevent a repetition."[12] Normally "no verbal provocation whatever can justify a blow."[13] The force employed must not be out of proportion to the apparent urgency of the occasion.[14] The person acting on the defensive is entitled to use as much force as he reasonably believes to be necessary. The test is whether the party's act was such as he might reasonably, in the circumstances, think necessary for the prevention of harm which he was not bound to suffer. The necessity must be proved.[15] Injuries received by an innocent third person from an act done in self-defence must be dealt with as accidental harm caused from a lawful act.

Every person is entitled to protect his property. But he cannot for this purpose do an act which is injurious to his neighbour. If, for instance, an extraordinary flood is seen to be coming upon land, the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it. Similarly, an owner of agricultural land may protect his land from a visitation of locusts and turn away the pest without being responsible for the consequences to neighbouring owners.[16] The right of a person to protect his land from extraordinary flood extends to the doing of anything which is reasonably necessary to save his property, but he cannot actively adopt such a course as may have the effect of diverting the mischief from his own land to the land of another person which would otherwise have been protected.[17] A landowner, on whose land there is a sudden accumulation of water brought there without any fault

8. *Cope v. Sharpe (No. 2)*, (1912) 1 KB 496 : 81 LJKB 346 : 106 LT 56.
9. *F v. West Berkshire Health Authority*, (1989) 2 All ER 545, p. 564 : (1990) 2 AC 1 : (1989) 2 WLR 1025 (HL).
10. *F v. West Berkshire Health Authority*, (1989) 2 All ER 545, pp. 566, 567.
11. *Bournewood Community and Mental Health Trust*, (1998) 3 All ER 289, pp. 301, 302 (HL).
12. *Anonymous Case*, 168 ER 1075 (PARKE B.) WEIR, Casebook on Tort, 5th edition, p. 329.
13. *Anderson v. Marshall*, (1835) 13 S 1130, WEIR, Casebook on Tort, 5th edition, p. 329.
14. *Reece v. Toylor*, (1835) 4 N & M 469 *Cockeroft v. Smith*, (1705) 11 Mod 43 (HOLT CJ).
15. *Janson v. Brown*, (1807) 1 Camp 41; *Wells v. Head*, (1831) 4 C & P 568. For example, see, *Tounley v. Rushworth*, (1963) 62 LGR 95, WEIR, Casebook on Tort, 5th edition, p. 329; *Collins v. Renison*, 96 ER 830, WEIR, (5th edition), p. 331; *Whatford v. Carty*, The Times, Oct. 29, 1960, WEIR, Casebook on Tort, 5th edition, p. 332. See further, *Debendra Bhoi v. Meghu Bhoi*, AIR 1986 Ori 226.
16. *Greyvensteyn v. Hattingh*, (1911) AC 355 : 80 LJPC 158 : 104 LT 360; *Shanker v. Laxman*, ILR (1938) Nag 289.
17. *Sami Ullah v. Mukund Lal*, (1921) 19 ALJR 736.

or act of his, is not at liberty actively to let it off on to the land of his neighbour without making that neighbour any compensation for damage, because the landowner, by doing so, has been able to save his own property from injury.[18] The means adopted to protect one's property must be reasonable i.e., proportionate to the injuries which they are likely to inflict.[19] Broken glass or spikes on a wall or a fierce dog may be justified on this principle but not deadly implements like spring guns[20] or live electric wire of high voltage[21] to dissuade trespassers.

Shooting dog that has ceased to attack.—Where the defendant was passing by the plaintiff's house, and the plaintiff's dog ran out, and bit the defendant's gaiter, and on the defendant turning round, and raising his gun, the dog ran away, and he shot the dog as it was running away, it was held that the defendant was not justified in so doing. To justify shooting the dog, he must be actually attacking the party at the time.[22] Chasing by dogs which causes any real or present danger of serious harm to the animals chased entitles the owner of the animals to take effective measures of prevention. But he has to show that there was real and imminent danger and that he acted reasonably having regard to the circumstances.[23]

Spearing vicious stallion.—A vicious stallion repeatedly attacked on a road a pair of mares belonging to the carriage in which the defendant was being driven, and finally came into the defendant's compound in spite of attempts made to prevent him, and continued his attacks until the defendant getting hold of a spear inflicted a somewhat severe wound on the left hind quarter of the animal. After this the stallion made off, but subsequently died from the effects of the spear wound. It was held that the defendant's action was justifiable and the owner of the stallion was not entitled to any damages.[24]

13. PLAINTIFF A WRONG-DOER

A plaintiff is not disabled from recovering by reason of being himself a wrongdoer, unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction.[25] A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained.[26] Thus, in *Bird v. Holbrook*,[27] the plaintiff was a trespasser as he climbed over defendant's wall in pursuit of a fowl, but he was held entitled to damages for the injury caused by a spring gun set by the defendant without notice in his garden, although the injury would not have occurred if the plaintiff had not trespassed on the defendant's land.

In *National Coal Board v. England*,[28] LORD ASQUITH gave illustrations as to when a defence of *ex turpi causa* may succeed or may not succeed. He said: "Possibly a party to an illegal prize fight who is injured in the conflict cannot sue for assault. If

18. PER LINDLEY, L.J. in *Whalley v. Lanca & York. Ry. Co.*, (1884) 13 QBD 131 (140, 141); *Moholal v. Baijivkare*, (1904) ILR 28 Bom 472 : 6 Bom LR 529.
19. *Sarch v. Blackburn*, (1830) 4 C & P 297.
20. *Bird v. Holbrook*, (1828) 4 Bing 628.
21. *Cherubin Gregory v. State of Bihar*, AIR 1964 SC 205 : (1964) 4 SCR 199 : (1964) 1 Cr LJ 138; *Ramanuj Madali v. M. Gangan*, AIR 1984 Mad 103.
22. *Morris v. Nugent*, (1836) 7 C & P 572.
23. *Curswell v. Sirl*, (1947) 2 All ER 730 (CA).
24. *Turner v. Jogmohan Singh*, (1905) ILR 27 All 531.
25. FREDERICK POLLOCK, The Law of Torts, 15th edition, p. 126.
26. *Barnes v. Ward*, (1850) 9 CB 392, (420) : 14 Jur 334.
27. *Bird v. Holbrook*, (1828) 4 Bing 628.
28. (1954) 1 All ER 546 : (1954) 1 All ER 546 (HL).

two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A. But if A and B are proceeding to the premises which they intend burglariously to enter and before they enter them B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort. The theft is totally unconnected with burglary."[29]

In *Saunders v. Edwards*,[30] the Court of Appeal laid down that "the conduct and relative moral culpability of the parties may be relevant in determining whether or not the *ex turpi causa* defence falls to be applied."[31] In that case the defendant sold the lease of a flat to the plaintiffs and in so doing fraudulently represented that the flat included a roof terrace. The price paid was £45,000. In order to reduce the stamp duty the purchase price was apportioned on the basis of £40,000 for the flat and £5000 for the chattels although parties knew the chattels to be worth much less. When the plaintiffs discovered that the flat did not include the terrace they sued in tort for damages for the fraudulent misrepresentation. The defendant pleaded that the plaintiffs being party to the illegality of evasion of stamp duty could not sue for damages. The Court of Appeal negatived this defence and disregarded the plaintiffs' illegality because (a) they had an unanswerable claim against the defendant for fraudulent misrepresentation; (b) the defendant's own moral culpability greatly outweighed that of the plaintiffs; and (c) the illegal apportionment in the contract was wholly unconnected with the plaintiffs' cause of action in tort and the loss suffered by them as the result of fraudulent misrepresentation.

When two persons are engaged in a joint illegal enterprise and the hazards necessarily inherent in its execution are such that it is impossible to determine the appropriate standard of care because the joint illegal purpose has displaced the ordinary standard of care, one of them if injured in the course of that enterprise cannot claim compensation from the other.[32] This principle was applied by the Court of Appeal in *Pitts v. Hunt*,[33] where a pillion passenger aged 18 encouraged his friend aged 16 to drive recklessly and dangerously after both had been drinking together and the motor bike met with an accident in which the driver was killed and the pillion passenger suffered serious injuries. The claim for compensation was made by the pillion passenger against the representatives of the deceased in negligence which was negatived.

14. ACTS CAUSING SLIGHT HARM

Nothing is a wrong of which a person of ordinary sense and temper would not complain. Courts of Justice generally do not take trifling and immaterial matters into account, except under peculiar circumstances, such as the trial of a right, or where personal character is involved. This principle is based on the maxim *de minimis non curat lex* (the law does not take account of trifles), and is recognised in the Indian Penal Code (s. 95). The maxim does not apply where there is an injury to a legal right.

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29. (1954) 1 All ER 546, p. 548.
30. (1987) 2 All ER 651 : (1987) 1 WLR 1166 : (1987) 131 S.J. 1039 (CA).
31. (1987) 2 All ER 651p. 660.
32. *Jackson v. Harrison*, (1978) 138 CLR 438 (High Court of Australia), pp. 455-456 (MASON J).
33. (1990) 3 All ER 344 : (1991) 1 QB 24 : (1990) 3 WLR 542 (CA). See, *Gala v. Preston*, (1991) 65 ALJR 366 (High Court of Australia) where a person was injured because of the negligent driving of an associate while engaged in the joint criminal activity of 'joy riding' in a car they had stolen and it was held that there would be no liability.

A walks across B's field without B's leave, doing no damage. A has wronged B, because the act, if repeated, would tend to establish a claim to a right of way over B's land.[34] A casts and draws a net in water where B has the exclusive right of fishing. Whether any fish are caught or not, A has wronged B, because the act, if repeated, would tend to establish a claim or right to fish in that water.[35]

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34. Illustration to section 26 of the Indian Civil Wrongs Bill.
35. *Holford v. Bailey*, (1849) 18 LJ QB 109.

CHAPTER VIII

LIABILITY FOR WRONGS COMMITTED BY OTHERS

SYNOPSIS

A person may be liable in respect of wrongful acts or omissions of another in three ways:—

1. As having ratified or authorised the particular act;
2. As standing towards the other person in a relation entailing responsibility for wrongs done by that person; and
3. As having abetted the tortious acts committed by others.

1. LIABILITY BY RATIFICATION

An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority, whatever, becomes the act of the principal, if subsequently ratified by him. In that case the principal is bound by the act, whether it be to his detriment or advantage, and whether it be founded on a tort or a contract to the same extent as by, and with all the consequences which follow from the same act done by his previous authority.[1] *Omnio ratihabitio retrorahitur et mandato priori oequiparatur* (every ratification of an act relates back and thereupon becomes equivalent to a previous request).

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1. PER TINDAL, C.J. in *Wilson v. Tumman*, (1843) 6 M & G 236 (242), Referred to in *Keighley Maxsted & Co. v. Durant*, (1901) AC 240 (246, 254) : 84 LT 777 (HL).

Three considerations arise before a person can be held liable for a tort by ratification:

(1) It must be shown that the person ratifying the act ratified it with full knowledge of its being tortious, or it must be shown that, in ratifying and taking the benefit of the act, he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and to adopt the transaction right or wrong.[2]

The act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies.[3]

(2) Only such acts bind a principal by subsequent ratification as were done at the time on the principal's behalf.[4] What is done by a person on his own account cannot be effectually adopted by another. If an act be done by a person on behalf of another, it is in general immaterial whether the authority be given prior or subsequent to the act.

(3) An act which is illegal and void is incapable of ratification.[5] A ratification of tort by a principal will not free the agent from his responsibility to third persons.

2. LIABILITY BY RELATION

2(A) Master and Servant

(i) Servant and Independent Contractor

2(A)(i)(a) Traditional View: Test of Control

A servant and independent contractor are both employed to do some work of the employer but there is a difference in the legal relationship which the employer has with them. A servant is engaged under a contract of service whereas an independent contractor is engaged under a contract for services. The liability of the employer for the wrongs committed by his servant is more onerous than his liability in respect of wrongs committed by an independent contractor. It is, therefore, necessary to distinguish between the two. The traditional mode of stating the distinction is that in case of a servant, the employer in addition to directing what work the servant is to do, can also give directions to control the manner of doing the work; but in case of an independent contractor, the employer can only direct what work is to be done but he cannot control the manner of doing the work.[6] In *Short V.J. & W. Henderson Ltd.*,[7] LORD THANKERTON pointed out four indicia of a contract of service: (1) Master's power of selection of his servant; (2) payment of wages or other remuneration;

2. PER LOCH, J., in *Rani Shamasundari Debi v. Dukhu Mandal*, (1869) 2 Beng LR (ACJ) 227 (229); *Girish Chandra Das v. Gillanders Arbutnot & Co.*, (1869) 2 Beng LR (OCJ) 140. See, *Venkatasa Naiker v. T. Srinivasa Chariyar*, (1869) 4 MHC 410; *Eastern Construction Co. v. National Trust Co.*, (1914) AC 197 (213) : 110 LT 321.
3. *Bird v. Brown*, (1850) 4 Ex 786 (799). See *Buron v. Denman*, (1848) 2 Ex 167; *Whitehead v. Taylor*, (1839) 10 A & E 210.
4. *Brook v. Hook*, (1871) LR 6 Ex 89; *Keighley Maxsted & Co. v. Durant*, (1901) AC 240, p. 260 : 84 LT 777 (HL).
5. *Wilson v. Tumman*, (1843) 6 M & G 236; *Lewis v. Read*, (1845) 13 M & W 834.
6. *Performing Right Society Ltd. v. Mitchell*, (1924) 1 KB 762 : 131 LT 243 : 40 TLR 308; *Eggintan v. Reader*, (1936) 52 TLR 212; *Collins v. Herts County Council*, (1947) 2 KB 343 (352).
7. (1946) 62 TLR 427 (HL), p. 420. See further, *State of U.P. v. Audh Narain Singh*, AIR 1965 SC 360: (1964) 7 SCR 89. *State of Assam v. Kanak Chandra Dutta*, AIR 1967 SC 884 (886) : (1967) 1 SCR 679. (A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation).

(3) Master's right to control the method of doing the work, and (4) Master's right of suspension or dismissal. The important characteristic according to this analysis is the master's power of control for other indicia may also be found in a contract for services.

2(A)(i)(b) Modern View: Control Test Not Exclusive

But the test of control as traditionally formulated was based upon the social conditions of an earlier age and "was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanisation), a craftsman and a journeyman, a householder and a domestic servant and even a factory owner and a unskilled hand."[8] The control test breaks down when applied to skilled and particularly professional work and, therefore, it has not been treated as an exclusive test.[9] The Supreme Court in *Dharangadhara Chemical Works Ltd. v. State of Saurashtra*[10] laid down that the existence of the right in the master to supervise and control the execution of the work done by the servant is a *prima facie* test, that the nature of control may vary from business to business and is by its nature incapable of any precise definition, that it is not necessary that the employee should be proved to have exercised control over the work of the employee, that the test of control is not of universal application and that there are many contracts in which the master could not control the manner in which the work was done. The English Courts have also recognised that the control test is no longer decisive.[11] In *Montreal v. Montreal Locomotive Works Ltd.*[12] LORD WRIGHT said that in the more complex conditions of modern industry, more complicated tests have often to be applied. According to him, it would be more appropriate to apply a complex test involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss; and control in itself is not always conclusive.[13] LORD DENNING, as LORD JUSTICE, in *Stevenson Jordan and Harrison Ltd. v. MacDonald and Evens,*[14] referred to the distinction between a contract of service and a contract for services as a "troublesome question" and observed: "It is almost impossible to give a precise definition of the distinction. It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as a part of the business; and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for

8. *Kahn Freund*, (1951) 14 Modern Law Review, p. 505.
9. *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments*, (1974) 3 SCC 498 (507), *M/s P.M. Patel and Sons v. Union of India*, (1986) 1 SCC 32, p. 39 : AIR 1987 SC 447.
10. AIR 1957 SC 264. See further, *Birdhichand Sharma v. First Civil Judge, Nagpur*, AIR 1961 SC 644; *D.C. Dewan Mohideen Sahib and Sons v. The Industrial Tribunal, Madras*, AIR 1966 SC 370; *Shanker Balaji Waje v. State of Maharashtra*, AIR 1962 SC 517; *V.P. Gopala Rao v. Public Prosecutor, A.P.*, (1969) 1 SCC 704; *Employers in Relation to the Management of Reserve Bank of India v. Their Workmen*, (1996) 2 Scale 708, p. 712; *Employees State Insurance Corporation v. Apex Engineering Pvt. Ltd.*, (1997) 9 JT 54, pp. 62, 63 : (1998) 1 SCC 86 (A director appointed managing director on remuneration may be an employee); *Indian Overseas Bank v. IOB Staff Workers Union*, AIR 2000 SC 1508, p. 1517 : (2000) 4 SCC 245 (no test of universal application); *Workmen of Nilgiri Co-op. Mkt. Society v. State of Tamil Nadu*, AIR 2004 SC 1639, pp. 1645, 1646 : (2004) 3 SCC 514, pp. 529, 530.
11. *Cassidy v. Minister of Health*, (1951) 1 All ER 574 (579) : (1951) 1 TLR 539 : (1951) 2 KB 343 (SOMMERVELL, L.J.); *Market Investigations Ltd. v. Minister of Social Security*, (1968) 3 All ER 732.
12. (1947) 1 DLR 161.
13. (1947) 1 DLR 161, p. 169.
14. (1952) 1 TLR 101.

the business, is not integrated into it but is only accessory to it."[15] According to the Supreme Court of United States, the test is not "the power of control whether exercised or not over the manner of performing service to the undertaking", but whether the persons concerned were employees "as a matter of economic reality" and the important factors to be seen are "the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operation".[16] The Supreme Court in *Silver Jubilee Tailoring House v. Chief Inspector of Shops,*[17] after a review of the most of the authorities mentioned above observed: "In recent years the control test as traditionally formulated has not been treated as an exclusive test. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded, which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction."[18] It was also pointed out that control is obviously an important factor and in many cases it may still be the decisive factor, but it is wrong to say that in every case it is decisive.[19] It was further observed that the degree of control and supervision would be different in different types of business and that "if an ultimate authority over the worker in the performance of his work resided in the employer so that he was subject to the latter's direction, that would be sufficient".[20] In *Lee Ting Sang v. Chung Chi-Keung,*[21] the Privy Council held a casual worker on a building site to be an employee of the sub-contractor for whom he was working at the time he suffered an accident although it was found that he worked from time to time for other contractors. In holding so the Privy Council approved the test laid down by COOKE J which is as follows: Control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."[22]

In the context of a courier company which had employed by written 'contract for service' a number of persons as bicycle couriers who owned their own bicycles and bore the expenses of running them but who on their uniforms bore the logo of the company, the High Court of Australia in holding the company vicariously liable for

15. (1952) 1 TLR 101(111).
16. *United State v. Silk*, 331 US 704.
17. (1974) 3 SCC 498 : AIR 1974 SC 37.
18. (1974) 3 SCC 498, pp. 507, 508. *Quoted in M/s. P.M. Patel & Sons. v. Union of India*, (1986) 1 SCC 32 (39).
19. (1974) 3 SCC 498, p. 508.
20. (1974) 3 SCC 498, p. 509. Reference in this context is made to observations of DIXON, J., in *Humberstone v. Northern Timber Mills*, (1949) 79 CLR 389; "The question is not whether in practice the work was in fact done subject to a direction or control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."
21. (1990) 2 AC 374 (PC) 382.
22. *Market Investigations Ltd. v. Minister of Social Security*, (1968) 3 All ER 732, at pp. 737, 738.

an injury caused by the negligence of a bicycle courier observed: "In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise."[23]

2(A)(i)(c) Hospital Authorities

Consistent with the control test which was earlier followed, a hospital authority was not held liable for the negligence of its staff in matters requiring professional skill[24] but with the change in the legal position that the control test is not decisive in all cases and it breaks down when applied to skilled and professional work, a hospital authority has now been held liable for negligence of its professional staff[25] and the distinction earlier drawn between professional duties and ministerial or administrative duties has been disapproved.[26] The State has been held liable for the negligence of the staff of a government hospital.[27] In *Santa Garg v. Director National Heart Institute*[28] the Supreme Court quoted with approval the following proposition from DENNING L.J.'s judgment in *Cassidy's* case[29]: "The hospital authority is liable for the negligence of professional men employed by the authority under contract for service as well as under contract of service. The authority owes a duty to give proper treatment-medical, surgical, nursing and the like—and thought it may delegate the performance of that duty to those who are not its servants, it remains liable if the duty be improperly or inadequately performed by its delegates". In *Santa Garg's* case it was held that a petition for compensation against a hospital could not be dismissed by a consumer forum on this ground that the Doctors responsible for negligence were not joined.

2(A)(i)(d) Lending of Servant

A question very often arises as to whether when a general employer lends his servant with or without any machine under a contract or otherwise to another person there is any change of master for the period the servant is doing the work of that another person. This question becomes material when the servant commits a tort

23. *Hollis v. Vabu Pvt. Ltd.*, (2001) 75 ALJR 1356, p. 1365.
24. *Hillyer v. St. Bartholomew's Hospital*, (1909) 2 KB 820 : 101 LT 368 : 25 TLR 762; Distinction is drawn between professional duties and ministerial and administrative duties.
25. *Gold v. Essex County Council*, (1942) 2 KB 293 : (1942) 2 All ER 237 (case of radiographer); *Collins v. Hertfordshire County Council*, (1947) KB 598; *Cassidy v. Ministry of Health*, (1951) 2 KB 343 (House-Surgeons and whole-time Assistant Medical Officers), *Roe v. Minister of Health*, (1954) 2 QB 66 : (1954) 2 All ER 131 (staff anaesthetists). A hospital authority, it is said, itself owes a duty to the patients which cannot be delegated and the authority is liable both primarily and vicariously for the negligence of its staff. On this principle the hospital authority may be held liable for breach of its primary duty when the negligence is of a person who cannot be called a servant of the authority *e.g.*, Visiting Consultants and Surgeons, See : *Gold v. Essex County Council*, (1942) 2 KB 293 (301, 309) : (1942) 2 All ER 237; *Cassidy v. Ministry of Health*, (1951) 2 KB 343 (362-365) : (1951) 2 All ER 575; *Roe v. Minister of Health*, (1954) 2 QB 66 (82). See, Chapter XIX title 4(D), p. 552; *Joseph Alias Pappachan v. D. George Moonjdy*, AIR 1994 Kerala 289, p. 295 (Surgeon).
26. *Amalgamated Coalfields Ltd. v. Mst. Chhotibhai*, (1973) ACJ 365 (369)(MP); 1973 MPLJ 389. Also, cases in footnote 25, *supra*.
27. *Smt. Kalawati v. State of H.P.*, AIR 1989 HP 5; *Dr. Pinnamanini Narsimha Rao v. Gundavarapu Jayaprakasu*, AIR 1990 AP 207, pp. 217, 218; *R.P. Sharma v. State of Rajasthan*, AIR 2002 Raj 104; *Achutrao Haribhau Khodwa v. State of Maharashtra*, AIR 1996 SC 2377 : (1996) 2 SCC 634; *State of Haryana v. Smt. Santra*, AIR 2000 SC 1888 : (2000) 5 SCC 182.
28. (2004) 8 SCC 56, p. 66 : AIR 2004 SC 5088.
29. *Cassidy v. Ministry of Health*, (1951) 2 KB 341.

during the period his services have been lent, for the person wronged can only make the real master vicariously liable. The principles bearing upon this question that emerge from the leading authorities[30] are: (1) there is a strong presumption that the general employer continues to be the master; (2) the burden is on the general or permanent employer to prove that there is a transfer of service; (3) this burden can be discharged by proving only that entire and absolute control over the servant was transferred to the hirer and that the servant had expressly or impliedly consented to the transfer; and (4) a term in the contract between the general employer and the hirer stipulating as to who shall be the master, though relevant for determining their *inter se* liability, is not conclusive against the person injured by the tort of the servant. In *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.*[31] the appellants let out their crane and driver to the respondent Stevedores under a contract providing that the driver shall be the servant of the respondent. The crane driver by his negligence injured a person giving rise to the question as to who was the master at the time of the accident for purposes of vicarious liability. All the courts held that there was no transfer of the servant and the appellants continued to be the master and were, therefore, liable for the negligence of the servant. LORD PORTER in his speech in the House of Lords pointed out that an arrangement for the transfer of the services of the servant from one master to another can take place only with his express or implied consent and that it is not legitimate to infer that a change of masters has been effected because a contract has been made between the two employers declaring whose servant the man employed shall be at a particular moment in the course of his general employment by one of the two. He then observed: "The most satisfactory test, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required; the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance, since it is his crane and the driver remains responsible to him for its safe keeping. In the present case, if the appellant's contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship. Indeed, he might change it from day to day without any say as to who his master should be and with all the concomitant disadvantages of uncertainty as to who should be responsible for his insurance in respect of health, unemployment and accident."[31] Although this was a case where a machine was let out with a man, the same principle has been followed when man alone is sent for doing another's work. In the words of LORD DENNING, M.R.: "Just as with employers who let out a man with a machine, so also with an employer who sends out a skilled man to do work for another, the general rule is that he remains the servant of the general employer throughout."[32] Indeed the House of Lords decision in *Mersey Docks and Harbour Board's* case was followed by the Privy Council in *Bhoomidas v. Port of Singapore*

30. *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Ltd.*, (1946) 2 All ER 345 (HL); (1947) AC 1 (HL); *Bhoomidas v. Port of Singapore Authority*, (1978) 1 All ER 956 (PC).
31. (1946) 2 All ER 345 (HL) : (1947) AC 1 (HL).
32. *Savory v. Holland and Hannen & Cubitts (Southern) Ltd.*, (1964) 1 WLR 1158 (1163); (1964) 3 All ER 18.

Authority,[33] where a gang of stevedores in the general employment of the port authority of Singapore was hired out to a ship for loading a cargo of planks from the wharfside and a member of the gang was injured by the negligence of another member of the gang. Although this was a case where only men without any machine were sent to work for another, the Privy Council held that the principle was the same and the general employers faced a "formidable" burden which they failed to discharge that there was transfer of services of the gang to the ship. It was pointed out that no reported decision after the case of *Donavan v. Lang and Down Construction Syndicate*[34] a decision which came for a good deal of criticism in *Mersey Docks* case was brought to their notice in which the burden was successfully discharged.[35]

Where a vehicle is let out on hire with the service of a driver, and an accident occurs through the negligent act of the driver causing personal injuries to a third person, one test for determining who is the master for purposes of vicarious liability, is the answer to the question—whether the driver in doing of the negligent act was exercising the discretion given to him by his regular employer, or whether he was obeying a specific order of the hirer for whom, on his employer's direction, he was using the vehicle.[36] Ordinarily, when a vehicle is hired with its driver, the driver continues to exercise his own discretion which has been vested in him by his regular master. But, if the hirer intervenes to give directions as to how to drive for which he possesses no authority and the driver *pro hac vice* (for the occasion) complies with them and an accident occurs resulting in an injury to the third party, the hirer is liable as joint tort-feasor and the general employer is not liable.[37]

In Rajasthan State Road Transport Corporation v. Kailash Nath Kothari[38] the bus which met with an accident was hired along with the driver by the corporation from a private owner. Although the driver continued to be under the pay roll of the owner, his services were transferred along with complete control to the corporation under whose directions, instructions and commands the driver was to ply or not to ply the bus on the road for which permit was held by the corporation. In these circumstances the corporation and not the owner was held vicariously liable for the tort committed by the driver. Laying down the principle applicable to the case ANAND J. observed: "The general proposition of law and presumption arising therefrom that an employer, that is the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the concerned employee during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability and the temporary employer or the hirer as the case may be, must be held vicariously liable for the tort committed by the concerned employee in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the pay roll of the original owner".[39]

33. (1978) 1 All ER 956 (PC).
34. (1893) 1 QB 629.
35. (1978) 1 All ER 956 (958, 959) (PC).
36. *Nicholas v. F.J. Sparkes & Son*, (1945) 1 KB 309; *Niranjanlal v. Ramswarup*, (1950) ALJ 761; *Kundan Kaur v. Shankar*, AIR 1966 Punj 394.
37. *Government of India v. Jeevaraj Alva*, AIR 1970 Mys 13; see further, *Mersey Dock's* case, (1947) AC 1 (12) : 175 LT 270 : 62 TLR 533 (HL) (LORD SIMON).
38. AIR 1997 SC 3444.
39. AIR 1997 SC 3444., p. 3449. See further *National Insurance Co. Ltd. v. Deepa Devi*, (2008) 1 SCC 414 : AIR 2008 SC 735 (vehicle requisitioned by government, the government will be vicariously **(Footnote No. 39 Contd.)**

In Australia on the authority of *Soblusky v. Egan*,[40] a defendant who is the owner or bailee of a motor vehicle is liable for negligence of the driver if he appoints the driver to drive it on his behalf and he is in the vehicle or is otherwise able to assert control over the driver. In *Scott v. Davis*[41] the respondent was the owner of a two-seater aeroplane for private use. The appellant who was a guest of the respondent requested for a joy ride. The respondent's another guest, who was a licensed pilot, was requested by him to fly the plane and take the appellant for a ride. The plane crashed as a result of negligence of the pilot who died and the appellant suffered injuries for which he claimed damages against the owner. On these facts the majority in the High Court held that the owner was not liable and that the ratio of *Soblusky* case should be confined to motor vehicles only.

Though a servant in the general employment of A may, for a particular purpose, be treated as in *pro hac vice* employment of B, there is no principle which permits a servant to be in the *de jure* employment of two separate masters at one and the same time.[42] Thus a compulsory pilot, while navigating a ship, is a servant of the shipowner by virtue of section 15 of the Pilotage Act, 1913 and the general employer, *i.e.*, the harbour authority, is not vicariously liable for negligence of the pilot in navigating the ship.[43]

2(A)(i)(e) Lending of Chattel

Although there is no relationship of master or servant when the owner permits his vehicle to be driven by another, some similar principles have been applied to such cases also. If the owner retains the control of the vehicle by his presence, he is clearly liable.[44] The owner will also be liable if the vehicle was being driven on his request by another for his purpose even though he was not present in the vehicle and had no immediate control.[45] In such a situation, the driver stands in the position of an agent of the owner. In *Rambarran v. Gurrucharran*,[46] it was held by the Privy Council that the ownership of a motor vehicle raises an inference that the person driving at the time of the accident was the agent or servant of the owner but the presumption can be rebutted by showing that the driver had the general permission of the owner to use the vehicle for his own purposes. This was a case of a son driving the car for his own purpose without the knowledge of his father but under an implied general permission and it was held that the father who was the owner was not liable. The House of Lords in *Morgans v. Launchbury*,[47] also negatived any special test applicable to a family car which was owned by one spouse but driven by the other at the time of the accident. In this case the car was owned by the wife. The husband had the permission to use the car for going to work and returning from work. He had also the permission to get it driven by a friend in case he was drunk. At the time when the accident happened the car was being driven back by a friend of the husband who was drunk to

(Footnote No. 39 Contd.)
liable and not the owner); *Godavari Finance Co. v. Degala Satyanarayanamma*, IV (2008) CPJ 30 : AIR 2008 SC 2493 (In case of hire purchase agreement the hirer is liable and not the financier); See also, *Ramu v. Najma Nurkha Shaikh* (2010) 6 Mah LJ 896 : (2011) 1 Bom CR 429; *Delhi Metro Rail Corporation Ltd. v. Samrat Ranga* ILR (2011) 6 Del 595; *Rameshwar Bux Singh v. Kashi Ratneshwar Dayal Tiwari* (2010) 6 All LJ 468 : (2010) 82 ALR 820.

40. (1960) 103 CLR 215.
41. (2000) 74 ALJR 1410.
42. *Esso Petroleum Co. Ltd. v. Hall Russel & Co. Ltd.*, (1989) 1 All ER 37, p. 60 : 1989 AC 643 : 1988 (3) WLR 730 (HL).
43. *Esso Petroleum Co. Ltd. v. Hall Russel & Co. Ltd.*, (1989) 1 All ER 37, p. 64.
44. *Samson v. Aitchison*, (1912) AC 844; *Pratt v. Patrick*, (1924) 1 KB 488.
45. *Ormrod v. Crossville Motor Services Ltd.*, (1953) 2 All ER 753 (CA).
46. (1970) 1 All ER 749 (PC) : (1970) 1 WLR 556.
47. (1972) 2 All ER 606 : 1973 AC 127 (HL).

get the husband and car home. It will be seen that although the safe return of the husband and of the car was an event in which the wife had an interest or concern, yet it was not the wife's purpose so as to constitute the husband and much less the friend an agent of the wife. It was held that in order to fix liability on the owner of the car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant or that, at the material time, the driver was acting on the owner's behalf as his agent. It was further held that to establish the existence of agency relationship, it was necessary to show that the driver was using the car at the owner's request or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner. The fact that the driver was using the car with the owner's permission and that the purpose for which the car was being used was one in which the owner had an interest or concern was not sufficient to establish vicarious liability. The owner would also not be liable if he had given up his right to control the vehicle[48] *e.g.*, when the vehicle had been delivered to a bailee or an independent contractor even if he is present in the vehicle at the time of the accident.[49] But where the owner is not vicariously liable under the general law for the tort committed by an independent contractor or a bailee or their employees, liability may be fastened by statute. Thus it has been held that having regard to the provisions of sections 94 and 95 of the Motor Vehicles Act, 1939, the owner and his insurer are liable to a third party for injuries sustained by him due to the negligent driving of a motor vehicle by an employee of the repairer although the repairer is an independent contractor.[50]

2(A)(ii) Liability of Master

2(A)(ii)(a) Principle of Liability

Why should a master be held liable for the torts committed by his servant in doing his business even when his conduct is not blameworthy and he has used the greatest possible care in choosing the servant? One reason for the rule is historical. "The status of a servant maintains many marks of the time when he was a slave. The liability of the master for his torts is one instance. The notion that his (servant's) personality was merged in that of his family head (master) survived the era of emancipation".[51] Another reason is grounded on public policy that "there ought to be a remedy against someone who can pay the damages,"[52] and the master is expected to be in a better position for paying the damages than the servant.[53] A third reason is expressed in the maxims *Respondeat Superior* and *quifacit per alium facit per se*. In the words of CHELMSFORD, L.C.: "It has long been the established law that a master is liable to third persons for any injury or damage done through the negligence or unskilfulness of a servant acting in his master's employ. The reason of

48. *Municipal Committee, Sonepat v. Khushi Ram*, (1983) 85 Punj LR 313; Government Vehicle used by Municipal Committee for its purpose and driven by its driver.
49. *Chowdhary v. Gillot*, (1947) 2 All ER 541; owner present in the car which had been delivered to a garage for repair and the garage was in possession as bailee at the time of the accident.
50. *Guru Govekar v. Filomena F. Lobo*, AIR 1988 SC 1332 : (1988) 3 SCC 1.
51. HOLMES, Common Law, pp. 179 (180).
52. HOLMES, Common Law, p. 9.
53. The master these days is very often a firm or a corporation with cover of insurance. In *Imperial Chemical Industries Ltd. v. Shatwell*, (1965) AC 656 (685) : (1964) 2 All ER 999 (HL), LORD PEARCE observed: "The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement is answerable to the world at large for all the torts committed by the servant within the scope of it." See further *Rose v. Plenty*, (1976) 1 All ER 97 (CA); 1976 ACJ 387 (392) : 1975 LCR 430.

this is, that every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and, consequently it is the same as if it were the master's own act, according to the maxim, *qui facit per alium facit per se*.[54] In *Stavely Iron & Chemical Co. v. Jones*,[55] where the question was whether a crane driver was negligent or not in operating the crane which resulted in injury to a fellow worker, DENNING, L.J. in the Court of Appeal expressed views to the effect that the master could be held liable even if the crane driver was not negligent. The other two Lords Justices (HODSON and POWEL, L.JJ.) based their judgment on the finding that the crane driver was negligent. The House of Lords dismissed the appeal of the master and upheld the finding of negligence of the crane driver but disapproved the views of DENNING, L.J. After quoting the relevant passage from the judgment of DENNING, L.J., LORD REID observed: "If this means that the appellants could be held liable even if it were held that the crane driver was not himself guilty of negligence, then I cannot accept that view, of course, an employer may be himself in fault by engaging an incompetent servant or not having a proper system of work or in some other way. But there is nothing of that kind in this case. DENNING, L.J. appears to base his reasoning on the maxim *qui facit per alium facit per se*, but, in my view it is rarely profitable and often misleading to use Latin maxims in that way. It is a rule of law that an employer, though guilty of no fault himself, is liable for damage done by the fault or negligence of his servant acting in the course of employment. The maxims *respondeat superior* and *qui facit per alium facit per se* are often used, but I do not think that they add anything or that they lead to any different results. The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it."[55] In yet another case, *Imperial Chemical Industries Ltd. v. Shatwell*,[56] the House of Lords held that if the servant whose wrongful act caused the injury to the plaintiff could not be made liable as he could successfully, on the facts of the case, avail of the defence of *volenti non fit injuria*, the master also could not be made liable. These two cases are said to have finally resolved the controversy between "master's tort", and "servant's tort" theories by ruling in favour of the latter that it is for the servant's tort that the master is vicariously liable.[57] But the master will be primarily liable if there is a non-delegable duty laid on him by common law or statute or when he is negligent in making selection of his servant.[58]

2(A)(ii)(b)(i) Extent of Liability

"The law is settled that a master is vicariously liable for the acts of his servants acting in the course of employment. Unless the act is done in the course of employment, the servant's act does not make the employer liable. In other words, for the master's liability to arise, the act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master. If the servant, at the time of the accident, is not acting within the course of employment but is doing something for himself, the master is not liable."[59] This statement is an echo of the principle stated by Salmond in his work on Torts. Salmond further stated that 'a master is liable even for acts which he has not authorised provided they are *so*

54. *Bartonshill Coal Co. v. McGuire*, (1858) 3 Macq. 300 (306).
55. (1956) 1 All ER 403 : (1956) 2 WLR 479 (HL).
56. (1965) AC 656 : (1964) 2 All ER 999.
57. CLERK & LINDSELL, Torts, 15th edition, pp. 183, 184.
58. (1965) AC 656 : (1964) 2 All ER 999.
59. *Sitaram Motilal Kalal v. Santanu Prasad Jaishankar Bhatt*, AIR 1966 SC 1697; 1966 ACJ 89 (93). See further, *State of Maharashtra v. Kanchanmala Vijaysing Shirke*, AIR 1995 SC 2499 : (1995) 5 Scale 2, p. 5 : (1995) 5 SCC 659.

connected with acts which he has authorised that they may rightly be *regarded* as modes—although improper modes—of doing them.[60] This explanation by Salmond has gained importance and has given rise to 'close connection test' for determining the question whether a wrongful and unauthorised act by the servant can be regarded as a wrongful and unauthorised mode of doing some act authorised by the master or as wholly independent of it.[61] It is the link of the master's business with the servant's wrongful act which makes the master liable. So the plaintiff to obtain a judgment against the master "must establish a relationship between the servant's act and the master's business. The question will be whether the servant was just doing the job badly or not doing the job at all, doing his own thing instead. Considerations of time, place, equipment and purpose will all be relevant to this purely factual determination."[62] In other words, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of the employment but has gone outside of it.[63] Even patently fraudulent and criminal acts done by the servant, which were in no way authorised by the master, may be so connected with the authorised act that they may be regarded as having been done in the course of employment making the master vicariously liable.[64] In reality the connection test propounded by Salmond and applied by courts "is simply a practical test serving as a dividing line between cases where it is or is not just to impose vicarious responsibility."[65] The expressions "course of employment", "sphere of employment" and "scope of employment" mean the same thing and they imply that the matter must be looked at broadly not dissecting the servant's task into its component activities."[66] In speaking about the 'close connection test', LORD NICHOLAS in *Dubai Aluminium Ltd. v. Salaam*[67] observed: "This 'close connection test' focuses attention in the right direction. But it affords no guidance on the type of degree of connection which will be normally regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party.—This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negativing vicarious liability vary widely from one case or type of case to the other. Essentially the court makes an evaluative judgment in each case having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions". If the unauthorised wrongful act bore a 'close connection' with what the employee was authorised to do, "it was no answer to a claim against the employer to say", LORD MILLETT in the same case observed, "that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty."[68] The method of approach in each case, where master's vicarious liability is in issue is to answer two questions: "The first

60. SALMOND on Torts, 1st edition, (1907), pp. 83, 84 referred in *Lister v. Hesley Hall Ltd.*, (2001) 2 All ER 769, p. 775 (HL).
61. *Lister v. Hesley Hall Ltd., supra.* See further, p. 166, *post.*
62. WEIR, Case Book on Tort, 5th edition, p. 222.
63. *Canadian Pacific Ry. Co. v. Leonard Lock-hart*, AIR 1943 PC 63; *State of Maharashtra v. Kanchanmala Vijaysing Shirke*, AIR 1995 SC 2499 : (1995) 5 Scale 2, p. 5 : (1995) 5 SCC 659.
64. *Lister v. Hesley Hall Ltd., supra*, pp. 776, 777. See further title 2A(ii)(b)(vi), pp. 163 to 166.
65. *Lister v. Hesley Hall Ltd., supra* p. 777 (LORD STEYN).
66. *Ilkiw v. Samuels*, (1963) 2 All ER 879 (889) : (1963) 1 WLR 991; *Rose v. Plenty*, 1976 ACJ 387 (392); (1976) 1 WLR 141; (1976) 1 All ER 97 (CA).
67. (2002) 3 WLR 1913, pp. 1920, 1921 (HL).
68. (2002) 3 WLR 1913, p. 1941.

question is to see whether the servant was liable. If the answer is yes, the second question is to see whether the employer must shoulder the servant's liability."[69] The first question rightly assumes that the question of master's liability can arise only when the servant is liable.[70] The second question must be answered on the principles mentioned above[71] by factual determination of the issue whether the servant's wrongful act was done in the course of his employment.

In *Pushpabai Purshottam Udeshi v. M/s. Ranjit Ginning & Pressing Co. Pvt. Ltd.*[72] the Supreme Court referred to the observations of DENNING, L.J. in *Ormrod v. Crossville Motor Services Ltd.*,[73] that the owner is not only liable for the negligence of the driver if that driver is his servant acting in the course of his employment but also when the driver is with the owner's consent driving his car on owner's business or for the owner's purposes. The Supreme Court then said that this extension has also been accepted by the court.[74] The extension refers to cases where the driver is not the servant of the owner. Ormrod's case was such a case. In this class of cases the test is to find whether the driver was acting on behalf of the owner as his agent which means that he was driving the owner's vehicle on his request or instructions in performance of a task or duty delegated to him by the owner.[75]

2(A)(ii)(b)(ii) Course of Employment

The commonest cases these days of vicarious liability are those where a master is held liable for negligence of his servant in driving his vehicle in the course of employment and where otherwise the servant was obviously acting in course of employment. For example, the owner of a car was held liable for the negligence of his son, who was employed in the owner's business, in driving the car which at the time of the accident was being demonstrated to one about to join the business,[76] a Municipal Corporation was held liable for the negligence of its servant in driving a car belonging to the Corporation on the Corporation's business[77] and a Bank was held liable when a security guard on duty by mistake shot a customer believing that he would steal the cash box which had just arrived.[78] But the cases that come to court very often present the problem as to whether the servant's wrongful act was merely a mode of performing the authorised act or whether it was an act of the kind which the servant was not employed to perform. The wide variety of facts in which these questions arise make it difficult to formulate specific rules for guidance and all that can be said is that taking a broad view of the scope of employment, the question generally is one of degree whether the wrongful act falls within the permissible limits of the hypothetical line demarcating the area of authorised acts from the area of unauthorised acts. One of the methods of looking at the problem may be to see whether the servant in doing the wrongful act has so deviated from the normal method of doing the authorised act that the wrongful act cannot be properly described as merely a wrongful or unauthorised method of doing the authorised act[79]

69. *Young v. Edward Box & Co. Ltd.*, (1951) 1 TLR 789 (793); *Pushpabai Purshottam Udeshi v. M/s. Ranjit Ginning & Pressing Co.*, AIR 1977 SC 1735 (1744) : (1977) 2 SCC 745.
70. See, text and footnotes 54 to 57, *supra*.
71. See, text and footnotes 59 to 63, *supra*.
72. AIR 1977 SC 1735 : (1977) 2 SCC 745.
73. (1953) 2 All ER 753 : (1953) 1 WLR 1120.
74. AIR 1977 SC 1735 (1744): (1977) 2 SCC 745.
75. *Morgans v. Launchbury*, (1972) 2 All ER 606 : (1973) AC 127 : (1972) 2 WLR 1217 (HL). See further, text and footnotes 44 to 50, pp. 148, 149.
76. *Subbiah Reddy v. T. Jordan*, AIR 1945 PC 168.
77. *Olga Hall v. Kingston and Andrew Corporation*, AIR 1941 PC 103.
78. *Amita Bhandari v. Union of India*, AIR 2004 Guj 67 : 2004 ACJ 2020.
79. See, text and footnotes 85 and 86 below.

or in other words whether the servant at the relevant time was "on a frolic of his own"[80] or having "a joy ride"[81] instead of doing some act in the course of employment. Another mode of approach may be to apply the close connection test to see whether the wrongful act of the servant was so connected with the master's business that it will be just to impose vicarious liability on the master.[82]

In the case of a joint tort committed by two persons, only one of whom is the employee, what is critical for vicarious responsibility is that the combined conduct of both the tort-feasors which is sufficient to constitute a tort was in the course of the employee's employment and not whether that part of the act which was committed by the employee amounted to a tort and was in the course of employment.[83] The reason is that in the case of joint torts both tort-feasors are responsible for the tortious conduct as a whole and it is not necessary to distinguish between actions of the different tort-feasors.[83] But employer would not be responsible for his employee's tort unless all the features of the wrong necessary to constitute the tort had occurred in the course of employment. Therefore, the master is not liable if the acts of his servant for which he is responsible do not in themselves amount to a tort but only amount to tort when linked to other acts which were not performed in the course of the employee's employment.[83] An act of an employee carried out with the intent of assisting a tort could not by itself amount to a free-standing tort to give rise to vicarious responsibility and it was undesirable to develop new principles of primary tortious liability to extend the vicarious liability of an employer.[84]

The appellants in *General Engineering Services Ltd. v. Kingston and Saint Andrew Corp.*[85] owned certain premises at Kingston, Jamaica. A fire broke out in the said premises on which the appellants promptly informed the local fire brigade. The fire brigade took 17 minutes in reaching the appellants' premises which was at a distance of 1½ miles. The normal time for covering this distance was 3½ minutes. By the time the fire brigade reached, the premises were completely destroyed by fire. The reason why the firemen took 17 minutes instead of 3½ minutes in covering the distance was that they were operating a 'go slow' policy as part of industrial action. They had driven to the premises by moving slowly forward, stopping, then moving slowly forward again, then stopping and so on until they reached the premises. On these facts the question was whether the respondents, as employers of the firemen, were vicariously liable to the appellants or whether, in other words, the firemen acted in the course of employment. In negativing the liability of the respondents the Privy Council observed: "Their (the firemen's) unauthorised and wrongful act was to prolong the time taken by the journey to the scene of the fire, as to ensure that they did not arrive in time to extinguish it, before the building and its contents were destroyed. Their mode and manner of driving, the slow progression of stopping and starting, was not so connected with the authorised act, that is driving to the scene of the fire as expeditiously as reasonably possible, as to be a mode of performing that act."[86] Here the unauthorised and wrongful act was done, not in furtherance of the

80. *Joel v. Morison*, (1834) 6 C & P. 501, p. 503 (PARKE, B).
81. *Morris v. C.W. Martins & Sons Ltd.*, (1965) 2 All ER 725 : (1966) 1 QB 716 (1965) 3 WLR 276 (CA) (LORD DENNING); *Sitaram Motilal Kalal v. Santanu Prasad Jaishankar Bhatt*, 1966 ACJ 89(94)(SC).
82. See, text and footnotes 60, 61, 64 and 65, p. 151.
83. *Credit Lyonnais Bank Nederland N.V. v. Export Credit Guarantee Department*, (1999) 1 All ER 929, p. 935 : (2000) 1 AC 486 : (1999) 2 WLR 540 (HL).
84. *Credit Lyonnais Bank Nederland N.V. v. Export Credit Guarantee Department*, (1999) 1 All ER 929, p. 939.
85. (1988) 3 All ER 867 : (1989) 1 WLR 69 : (1989) 1 RLR 35 (PC).
86. (1988) 3 All ER 867, p. 869.

employers' business, but in furtherance of the employees' industrial dispute to bring pressure on the employers to satisfy their demands. Such a conduct was held to be a very negation of carrying out some act authorised by the master, albeit in a wrongful and unauthorised mode.

In *Beard v. London General Omnibus Co.*,[87] the plaintiff was injured by the negligent driving of the conductor of an omnibus, who, at the end of a journey, on his own initiative, and in the absence of the driver, took charge of the omnibus and drove it round through some neighbouring bye-streets apparently with the intention of turning it round, to be ready for the next journey. It was held that the masters were not liable for the negligence of the conductor in driving the omnibus as he was not authorised to drive the vehicle. In this case the driver also did not authorise or permit the conductor to drive the vehicle and apparently he was not negligent in leaving the vehicle in charge of the conductor. It could not, therefore, be said that the driver was negligent in driving the vehicle. As regards the conductor, the act of driving the vehicle was outside his scope of employment for it was clearly an act which he was not authorised to perform and so his negligence could not make the master liable. In contrast in *Ricketts v. Thomas Tilling Ltd.*,[88] where the master was held liable, the facts were that the conductor of an omnibus drove the omnibus with permission of the driver who was sitting beside him for the purpose of turning it in the right direction for the next journey and in that process by his negligence the vehicle mounted a foot pavement and injured a person. It will be noticed that in this case the master's liability was for the negligence of the driver whose wrongful act in permitting the conductor to drive the vehicle was an unauthorised mode of performing the authorised act of driving the vehicle for the master's business. Both these cases were referred to by the Supreme Court in *Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt*,[89] where the facts were that the owner had entrusted his car to a driver for plying it as a taxi. The driver lent the taxi to the cleaner for taking it to the R.T.O.'s office for driving test. The accident happened when the cleaner was driving while giving the driving test. The driver was then not in the vehicle. It is clear from the facts that at the time the accident happened, the car was not being used as a taxi for the owner's business. The car was then engaged in the work of the cleaner which had no connection whatsoever with the owner's business. The driver in lending the car to the cleaner for taking a driving test did an act which he was not employed to perform and thus clearly acted beyond the scope of his employment which was to drive the car as a taxi. The owner was, therefore, held not liable. The result would have been the same had the driver gone for a picnic or taken the car for giving a joy ride to his friends,[90] or had the owner himself lent the car to the driver or cleaner for the latter's private work.[91] In all these cases, use of

87. (1900) 2 QB 530. For a similar Indian case, see, *Nalini Ranjan Sen Gupta v. Corporation of Calcutta*, (1925) ILR 52 Cal 983.
88. (1915) 1 KB 644. For similar Indian cases, see, *Beharilal v. Surinder Singh*, AIR 1965 Punj 376; *U.P. Govt. v. Ram Milan*, AIR 1967 All 287; *The Ad hoc Committee, The Indian Association Pool, Bombay v. Radhabai Babulal*, 1976 ACJ 362 (MP); *Subhash Chandra Meena v. Madan Mohan Sood*, AIR 1988 Raj 186; *K.G. Bhaskaran v. K.A. Thankamma*, 1973 ACJ 539 (Kerala); *Prabhavati v. Anton Francis Nazarath*, AIR 1981 Kant 74; *Inderjeet Singh v. Kamal Prakash Pawar*, A 1989 Bom 325; *Smt. Sitabai Mangesh Koli v. Jonvel Abraham Soloman*, AIR 1991 Bom 287. See further, text and footnotes 1 and 2 below.
89. (1966) ACJ 89 (SC) : AIR 1966 SC 1697.
90. (1966) ACJ 89 (SC), p. 94 : AIR 1966 SC 1697. For example, see, *Storey v. Ashton*, (1869) LR 4 QB 476, where the cartman after business hours instead of taking the cart to the stables drove it in a different direction on the business of the clerk of the master.
91. (1966) ACJ 89 (SC), p. 94, approving *Britt v. Golmaye and Neviel*, (1927-28) 44 TLR 294 : 72 SJ 122.

the vehicle would be outside the course and scope of employment. The principle that mere unauthorised mode of doing an authorised act does not go outside the course and scope of employment and the master remains vicariously responsible is illustrated by the case of *State of Maharashtra v. Kanchanmala Vijaysing Shirke*.[1] In this case, the accident happened when a government jeep while being used on official duty, for bringing the employees of a government office, was driven by a clerk with the permission of the driver who was in charge of the vehicle and who had consumed liquor. On these facts, the Supreme Court held that this was a case where an authorised act was done in an unauthorised manner and the State Government was vicariously liable.[2] Similarly, when the driver of a truck while on master's business left the truck in charge of the cleaner and with its engine running, went to a nearby shop for bringing snacks. Accident happened while the cleaner was on the wheels. The master and the insurance company, both, were held liable.[3] Here the negligence was of the driver, while he was in the course of employment, in that he left the truck in control of the cleaner. Indeed, it may be said that the owner of the vehicle has been generally held liable when the driver is negligent in leaving the vehicle in such circumstances that an unauthorised person is able to drive it which leads to the accident; the negligence which makes the owner liable in such cases is that of the driver.[4] The courts also raise a presumption, which can be rebutted, that a vehicle is driven on the master's business and by his authorised agent or servant.[5] The Supreme Court has, however, cautioned that in cases of employers, like the Central and State Government, who are exempted from having their vehicles compulsorily insured against liabilities arising from accidents, the courts should be more careful in inferring vicarious responsibility.[6]

In the absence of any prohibition, it may be possible from the circumstances to infer authority in the servant to do certain acts not covered by any positive direction. Acts done within the implied authority will obviously be in the course of employment. "The course of the employment is not limited to the obligations which lie on an employee in virtue of his contract of service. It extends to acts done on the implied authority of the master."[7] In *Pushpabai Purshottam Udeshi v. Ranjit Ginning & Pressing Co. Pvt. Ltd.*,[8] the facts were that the manager of the defendant company was driving a car of the company on its journey from Nagpur to Pandhurna on the Company's business. The manager took one Purshottam as a passenger in the car. The car met with an accident because of the negligence of the manager in driving the car and Purshottam died. The High Court negatived the claim of the dependants of the deceased against the Company on the reasoning that the manager in taking the deceased as a passenger was not acting in the course of

1. (1995) 5 Scale 2 : AIR 1995 SC 2499 : (1995) 5 SCC 659.
2. (1995) 5 Scale 2, pp. 9, 10 : AIR 1995 SC 2499, p. 2504. **N.B.** This case is similar to the cases in footnote 88, *supra*.
3. *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan*, (1987) 2 SCC 654 : AIR 1987 SC 1184. See further, a similar case *Sohanlal Passi v. P. Sesh Reddy*, 1996(5) Scale 388 : (1996) 5 SCC 21 (cleaner and conductor, who was not licensed, driving the vehicle on owners business with the permission of the driver. Owner and Insurance Company were both held liable).
4. *Orissa State Commercial Transport Corporation v. Dhumali Bewa*, AIR 1982 Orissa 70; *Smt. Lalwanti v. Haryana State*, AIR 1985 Punj & Har 71; *Sampat Reddi v. Gudda Meddi*, AIR 1989 AP 337.
5. *Sitaram Motilal Kalal v. Santanu Prasad Jaishankar Bhatt*, (1966) ACJ 89 (SC), p. 93 : AIR 1966 SC 1697.
6. *State of Maharashtra v. Kanchanmala Vijay Singh*, AIR 1995 SC 2499, P. 2504 : (1995) 5 Scale 2, pp. 8, 9 : (1995) 5 SCC 659.
7. *Keppel Bus Co. Ltd. v. Sa'ad bin Ahmad*, (1974) 2 All ER 700 (702) : (1974) 1 WLR 1082 : 1974 RTR 504 (PC).
8. AIR 1977 SC 1735 : (1977) 2 SCC 745.

employment. The Supreme Court in reversing the decision of the High Court observed: "In the present case a responsible officer of the Company, the manager, had permitted Purshottam to have a ride in the car. Taking into account the high position of the driver who was the manager of the Company, it is reasonable to presume, in the absence of any evidence to the contrary, that the manager had authority to carry Purshottam and was acting in the course of employment."[9]

Questions have very often been raised as to whether a servant while going to the place of work or returning therefrom acts in the course of his employment. Some general principles relevant to these questions were formulated by the House of Lords in *Smith v. Stages*.[10] They are: "(1) An employee travelling from his ordinary residence to his regular place of work, whatever the means of transport and even if it is provided by the employer, is not on duty and is not acting in the course of his employment, but if he is obliged by his contract of service to use the employer's transport, he will normally, in the absence of an express condition to the contrary, be regarded as acting in the course of his employment while doing so. (2) Travelling in the employer's time between workplaces (one of which may be the regular workplace) or in the course of a peripatetic occupation, whether accompanied by goods or tools or simply in order to reach a succession of workplaces (as an inspector of gas meters might do), will be in the course of employment. (3) Receipt of wages (though not receipt of a travelling allowance) will indicate that the employee is travelling in the employer's time and for his benefit and is acting in the course of his employment and in such a case the fact that the employee may have discretion as to the mode and time of travelling will not take the journey out of the course of his employment. (4) An employee travelling in the employer's time from his ordinary residence to a workplace other than his regular workplace or in the course of a peripatetic occupation or to the scene of an emergency (such as fire, an accident or mechanical breakdown of plant) will be acting in the course of employment. (5) A deviation from or interruption of a journey undertaken in the course of employment (unless the deviation or interruption is merely incidental to the journey) will for the time being (which may include an overnight interruption) take the employee out of the course of employment. (6) Return journeys are to be treated on the same footing as outward journeys".[11] The above general propositions are subject to any express arrangements between the employer and the employee or those representing his interests.[11] Further they are not intended to define the position of salaried employees, with regard to whom the touchstone of payment made in the employer's time is not generally significant.[11] In the case[12] in which the above propositions were laid down two employees M and S were employed as peripatetic laggers to install insulation at power stations by *Darlington Insulation Co. Ltd.*, the employer. M and S were working on a power station in the Midlands when they were taken off and sent to carry out an urgent job on a power station in Wales. They were paid eight hour's pay for the travelling time to Wales and eight hour's pay for the journey back as well as the equivalent of the rail fare for the journey, but no stipulation was made as to the mode of travel. M and S travelled to Wales in S's car. After doing the work they decided to drive back to Midlands in the same car. On the way back the car met with an accident because of the negligence of S in driving it and M suffered injuries. In an action by M for personal injuries, which on his death

9. AIR 1977 SC 1735 (1741, 1743), the expression used is "ostensible authority", but the finding, at p. 1743 makes it a case of implied authority.
10. *Smith v. Stages*, (1989) 1 All ER 833 (HL) : (1989) AC 828 : (1988) 2 WLR 529. See further, *Rajanna v. Union of India*, AIR 1995 SC 1966 : (1995) 2 Scale 853 : 1995 Supp (2) SCC 601.
11. *Smith v. Stages*, (1989) 1 All ER 833, p. 851.
12. *Smith v. Stages*, (1989) 1 All ER 833 (HL) : (1989) AC 828 : (1988) 2 WLR 529.

was continued by his widow, the question was whether the employers were vicariously liable for the negligence of S. It was held that as the employees had been paid while driving back to the Midlands they had been travelling in the employer's time and so the journey back was in the course of employment and the employers were vicariously liable for the negligence of S.

An employee met with an accident while he was on his way to the place of employment to join his duty. The accident occurred about one kilometre away from the factory when the employee riding a cycle was hit by a lorry of the employers. In a claim for disablement benefit under the Employee's State Insurance Act, 1948, it was held that the accident did not arise in the course of employment of the claimant and he was not entitled to disablement benefit under the Act.[13] It will be noticed that the claim was not under the general law or under the Motor Vehicles Act against the lorry driver and the employer where the question would have been whether the lorry driver was negligent and whether the accident arose in the course of employment of the lorry driver.

2(A)(ii)(b)(iii) Implied Authority

In general, a servant in an emergency has an implied authority to protect his master's property.[14] In *Poland v. John Parr & Sons*[15] a carter who had handed over his wagon and was going home to his dinner, struck a boy whom he suspected, wrongly but on reasonable grounds, of stealing his master's property. The master was held liable for the consequences on the principle that a servant has implied authority at least in emergency to protect his master's property. In holding the master liable, SCRUTOON, L.J., observed: "May be his action was mistaken and may be the force he used was excessive, he might have pushed the boy instead of striking him. But that was merely acting in excess of what was necessary in doing an act which he was authorised to do. The excess was not sufficient to take the act out of the class of authorised acts."[16] But the excess may be so great or the act so outrageous as to take it out of the class for which the master could be made liable. For example, if in the above case, the servant, instead of striking the boy had shot at him, the master could not have been made liable.[17]

In the case of *Riddell v. Glasgow Corporation*[18] it was alleged that one Gilmour, a rate Collector, employed by the Corporation, had defamed the appellant by charging her with forging a receipt and the Corporation was vicariously liable. The question was whether the pleadings disclosed a triable case. In holding in favour of the Corporation, LORD ATKINSON observed: "There is nothing, in my opinion, on the face of the pleading, to show expressly or by implication that Gilmour was clothed with authority to express on behalf of the Corporation to ratepayers any opinion he might form on the genuineness of any receipts which might be produced to him for payment of rates. It was not shown by the pursuer's pleadings, as I think it should be, that the expression of such an opinion was within the scope of Gilmour's employment; from which it follows, on the authorities, that the Corporation are not responsible for a slander uttered by him in the expression of that opinion."[19]

13. *Regional Director E.S.I. Corporation v. Francis De Costa*, (1996) 6 Scale 473 : AIR 1997 SC 432 : (1996) 6 SCC 1.
14. *Keppel Bus Co. Ltd. v. Sa'ad bin Ahmad*, (1974) 2 All ER 700, p. 702 : (1974) 1 WLR 1082 (PC).
15. (1927) 1 KB 236 : 136 LT 271.
16. (1927) 1 KB 236, p. 244. Referred in *Keppel Bus Co. Ltd. v. Sa'ad bin Ahmad*, *supra* p. 702.
17. (1927) 1 KB 236 , p. 245 (ATKIN L.J.).
18. 1911 SC (HL) 35.
19. 1911 SC (HL) 35, pp. 36, 37. Referred in *Keppel Bus Co. Ltd. v. Sa'ad bin Ahmad*, *supra* p. 702.

A master, as stated above, is liable for acts done by a servant in performance of implied authority derived from the exigency of the occasion, but to fasten the liability on the master, a state of facts must be proved to show that such exigency was present or from which it might be reasonably be presumed that it was present.[20] In *Keppel Bus Co. Ltd. v. Sa'ad bin Ahmad*[21] the conductor employed in one of buses of the appellant struck a passenger in the eye with his ticket punch breaking his glasses and causing the loss of the sight of the eye. In a suit by the passenger for damages, the facts found were that the conductor was rude to an elderly Malay lady in the bus on which the plaintiff-respondent remonstrated. An altercation broke out between them, but other passengers prevented them in coming to blows. Thereafter the bus stopped and the lady got off and other passengers got in. The Collector began collecting fares and at that stage again started abusing the respondent who stood up and asked the conductor not to use abusive language. The respondent then sat down and after he had done so the conductor struck him. The Privy Council accepted that the keeping of order amongst the passengers is part of the duties of a conductor but they did not find any evidence of disorder among the passengers to justify assault and the master was held not liable. In the words of LORD KILBRANDON: "The only sign of disorder was that the conductor had gratuitously insulted the respondent and the respondent had asked him in an orderly manner not to do it again…. She (the Malay lady) had by now left the bus, normalcy had been restored, except, apparently, for some simmering resentment in the conductor which caused him to misbehave himself…. On the story as a whole, if any one was keeping order in the bus, it was the passengers. The evidence falls far short of establishing an implied authority to take violent action where none was called for."[22]

2(A)(ii)(b)(iv) Totality of Circumstances to be Seen

The course of employment is not broken simply because the wrongful act is one which is done by the servant for his own comfort and convenience. The act must be seen not in isolation but in the context of all other facts and circumstances to find out whether it did not form part of the method, though negligent or wrong, of conducting the work entrusted to the servant. In *Century Insurance Co. v. Northern Ireland Road Transport Board*[23] the driver of a petrol tanker lighted a cigarette and threw the match while the petrol was being transferred from the tanker to a storage tank by means of a delivery pipe. The match ignited some material on the ground and the fire spread to the manhole of the storage tank. The owner of the storage tank attacked the manhole with a fire extinguisher. The driver of the tanker without turning off the stop-cock, drove the tanker into the street. The fire followed the trail of petrol from the delivery pipe and when it reached the tanker, the tanker exploded causing damage to the storage tank, owner's car and the neighbouring houses. In holding that the driver's act of starting smoking and throwing away a lighted match was negligence in the course of employment, VISCOUNT SIMON, L.C. observed: "Denison's (Driver's) duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow, and to turn off the tap when the proper quantity had passed from the tanker. In circumstances like these, 'they also serve who only stand and wait'. He was presumably close to the apparatus, and his negligence in starting smoking and in throwing away a lighted match at that moment is plainly negligence in the

20. *Bank of New South Wales v. Owston*, (1879) 4 AC 270, p. 290. Referred in *Keppel Bus Co. Ltd. v. Sa'ad bin Ahmad*, *supra*, p. 703.
21. (1974) 2 All ER 700 : (1974) 1 WLR 1082 : 1974 RTR 504 (PC).
22. (1974) 2 All ER 700 (703) : (1974) 1 WLR 1082 : 1974 RTR 504 (PC).
23. (1942) 1 All ER 491 (HL).

discharge of the duties on which he was employed."[24] In contrast, even a permitted act may be so remote from the duties assigned to the servant that it may fall outside the course of employment. In *Hilton v. Thomas Burton (Rhodes) Ltd.*[25] four workmen were permitted to use their master's van for going to work on a demolition site in the country. After half a day's work, the workmen decided to go to a cafe seven miles away for tea. When they had almost reached the cafe, they changed their minds and started to return to the site of work. On the return journey an accident happened because of the negligence in driving the van and one of them was killed. The master was not held vicariously liable as the men were on 'a frolic of their own' and the accident did not happen in the course of employment.

2(A)(ii)(b)(v) Effect of Prohibition

It is not the law that whenever a servant does an act which his employer has prohibited him from doing, the act so done falls outside the course of employment. Prohibitions fall under two categories: (1) those which limit the scope or sphere of employment; and (2) those which merely affect or restrict the mode of doing the act for which the servant is employed. If a servant violates a prohibition of the first category, his act will be outside the course of employment and the master will not be vicariously liable; but if the violation by the servant is only of a prohibition of the second category, the servant's act will still be in the course of employment making the master liable. This distinction was admirably brought out by LORD DUNEDIN in *Plumb v. Cobden Flour Mill Co. Ltd.*[26] when he observed: "There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of the prohibition of the latter class leaves sphere of employment where it was and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."[27]

In *Canadian Pacific Railway Co. v. Leonard Lockhart*,[28] the servant was employed as a carpenter and general handy-man by the defendant Railway Company. In the course of his employment, the servant was required to make repairs of various kinds to employer's property. He had to make a key for use in a lock in a station far away from his headquarters. The Company had kept vehicles to be used by its servants and had issued notices to them warning them against using their own cars for Company's business unless they had got the car to be used insured against third party risk. The servant concerned had a car of his own which was not insured. Instead of using the Company's vehicle, he used his car for going to the station where he had to make the key. On the way, an accident happened. The Company was held liable for negligence of the servant in driving his car on the reasoning that though the servant was not employed to drive a car, he was entitled to use that means of transport as incidental to execution of that which he was employed to do, provided the car was insured; that the prohibition did not relate to the servant acting as driver but to the non-insurance of the car and thus "the prohibition merely limited the way in which, or by means of which, the servant was to execute the work and that the breach of the prohibition did not exclude the liability of the master to third parties."[29] And in *Limpus v. London*

24. (1942) 1 All ER 491 (HL).
25. (1961) 1 All ER 74 : (1961) 1 WLR 705. *Compare Storey v. Ashton*, (1869) LR 4 QB 476; *Roberts v. Shanks*, (1924) ILR 27 Bom LR 548; *Stanes Motors Ltd. v. Peter*, (1935) ILR 59 Mad 402.
26. (1914) AC 62 (HL).
27. (1914) AC 62, p. 67; *Ilkiw v. Samuels*, (1963) 2 All ER 879 (889) : (1963) 1 WLR 991; *Rose v. Plenty*, 1976 ACJ 387, p. 394.
28. AIR 1943 PC 63; (1942) 2 All ER 464 (PC).
29. (1942) 2 All ER 464 (601).

General Omnibus Co.[30] the drivers of omnibuses were furnished with printed instructions saying that "they must not on any account race with or obstruct another omnibus", nevertheless the driver of one of the defendant's omnibuses did obstruct a rival omnibus and caused an accident in which the plaintiff's horses were injured. The defendants were held liable because what his driver did was merely an unauthorised mode of doing what he was authorised to do, namely, to promote the defendant's business. Again in *Ilkiw v. Samuels*,[31] the facts were that a lorry driver was employed by a transport company to drive their lorry to a sugar warehouse, pick up a load of sugar and transport it to its destination. The driver took the lorry to the warehouse and backed it into position by a conveyor belt from which the sugar was to be loaded into the lorry. The driver stood on the back of the lorry to take the sacks from the conveyor belt and stack them on the lorry. When loaded, the lorry had to be moved a short distance to enable the driver to sheet the load and to make room for other lorries. A person employed at the warehouse offered to move the lorry. The driver accepted the offer. That person while moving the lorry, was unable to stop it and due to his negligence in driving, a labourer was injured. The driver throughout remained at the back of the lorry. The driver had strict instructions from his employer not to allow anyone else to drive the lorry. The employers were held liable not for the negligence of the stranger, but for the negligence of the driver in the course of his employment in permitting the stranger to drive the lorry. It will be seen that the stranger was permitted to drive the lorry for the employer's business and, therefore, the violation of the instructions by the driver in that context was only an unauthorised mode of doing what he was employed to do and hence it fell within the course of employment.

The question of prohibition has also been considered in some cases in the context of injury to a person who has been given a lift in the master's vehicle by his driver contrary to his instructions. The leading authority now on this question is *Rose v. Plenty*.[32] The majority decision[33] in this case settles two points: (1) the question of master's liability is not to be considered from the view point that a passenger taken contrary to instructions is a trespasser *qua* the master; and (2) the master is liable only if the passenger is taken in the course of employment, although contrary to master's instructions, which means that there is a link between the lift given to the passenger by the driver and the master's business. Before discussing the facts of *Rose v. Plenty*,[34] it is convenient to notice two earlier cases, *viz., Twine v. Bean's Express Ltd.*[35] and *Conway v. George Wimpey & Co. Ltd.*[36] In *Twine's* case,[37] the defendants provided for the use of a bank a commercial van and a driver on the terms that the driver remained the servant of the defendants and that the defendants accepted no responsibility for injury suffered by persons riding in the van who were not employed by them. There were two notices in the van, one stating that no unauthorised person was allowed on the vehicle, and the other, that the driver had instructions not to allow unauthorised travellers on the van, and that in no event would the defendants be responsible for damage happening to them. One person who was not authorised to ride in the van got a lift in the van with the consent of the

30. (1862) 1 H & C 526 : 130 RR 641.
31. (1963) 2 All ER 879 followed in the *Ad Hoc Committee, The Indian Insurance Companies Association Pool v. Radhabai Babulal*, 1976 ACJ 362 (MP), pp. 365, 366.
32. (1976) 1 All ER 97 (CA), 1976 ACJ 387 : (1976) 1 WLR 119.
33. LORD DENNING M.R. and SCARMAN L.J.
34. 1976 ACJ 387 : (1976) 1 WLR 119.
35. (1946) 62 TLR 458 : (1946) 1 All ER 202.
36. (1951) 1 All ER 363 : (1951) 2 KB 266.
37. (1946) 62 TLR 458 : (1946) 1 All ER 202.

driver. Owing to the negligence of the driver, there was an accident and that person was killed. In negativing the defendants' liability for negligence of the driver, LORD GREEN, M.R. observed that his act of driving was no doubt in the course of employment but "the other thing he was doing simultaneously was something totally outside the scope of his employment, namely, giving a lift to a person who had no right whatsoever to be there."[38] *Conway v. George Wimpey & Co. Ltd.*[39] was also a similar case. In this case the defendants, a firm of contractors, were engaged in building work at an aerodrome, and they provided lorries to convey their employees to the various places of their work on the site. In the cab of each lorry there was a notice indicating that the driver was under strict orders not to carry passengers other than the employees of the defendants during the course of, and in connection with, their employment, and that any person travelling on the vehicle did so at his own risk. Further, the driver of the lorry had received clear oral instructions prohibiting him from taking other passengers. The plaintiff who was employed as a labourer by another firm of contractors at the aerodrome, while on his way to work, was permitted by the driver to ride on one of the defendants' lorries for some distance across the aerodrome and while dismounting the plaintiff was injured owing to driver's negligence. In holding that the defendants were not vicariously liable, ASQUITH, L.J., observed: "Taking men other than the defendants' employees on the vehicle was not merely a wrongful mode of performing an act of the class which the driver was employed to perform, but was the performance of an act of a class which he was not employed to perform at all."[39] In both, *Twine's* case and *Conway's* case, the giving of lift to unauthorised person by the driver had no connection whatsoever with the master's business making it fall outside the course of employment. And this is the main distinction between these cases and *Rose v. Plenty*[40] where the facts were that the first defendant Plenty was employed as a milk-rounds-man by the second defendants, a Dairy company. There were notices at the Depot making it quite clear that the rounds-men were not allowed to take children and young persons on the vehicles or to employ them in the performance of their duties. The job of a rounds-man was to drive his float around his round and to deliver milk, to collect empties and to obtain payment. The plaintiff *Rose*, a boy of 13, was given a lift by the first defendant *Plenty* to help him. Whilst plaintiff was going round some houses, the first defendant would go to others. The plaintiff suffered a fracture of the leg because of the negligence of the second defendant in driving the float. The Court of Appeal by a majority decision held the Dairy company vicariously liable. LORD DENNING, M.R. observed: "In considering whether a prohibited act was within the course of the employment, it depends very much on the purpose for which it is done. If it is done for his employer's business, it is usually done in the course of his employment, even though it is a prohibited act. But if it is done for some purpose other than his master's business, as for instance, giving a lift to hitchhiker, such an act, if prohibited, may not be within the course of his employment. Both *Twine v. Bean's Express Ltd.*[41] and *Conway v. George Wimpey & Co. Ltd.*[42] are to be explained on their own facts as where a driver had given a lift to someone else contrary to a prohibition and not for the purposes of the employers. In the present case, it seems to me that the course of *Mr. Plenty's* employment was to distribute the milk, collect the money and to bring back the bottles to the van. He got or allowed this young boy, *Leslie Rose*, to do part of that business. It seems to me that although prohibited, it was conduct which was

38. (1946) 62 TLR 458 : (1946) 1 All ER 202.
39. (1951) 1 All ER 363 : (1951) 2 KB 266.
40. 1976 ACJ 387 : (1976) 1 All ER 97 : (1976) 1 WLR 119.
41. (1946) 62 TLR 458 : (1946) 1 All ER 202.
42. (1951) 1 All ER 363 : (1951) 2 KB 266.

within the course of the employment."[43] In the same case, after referring to Conway's case, SCARMAN, L.J., said: "That was also a case of lift; the person lifted was not in any way engaged, in the course of the lift or otherwise, in doing the master's business. In the present case, the first defendant, the servant, was employed to deliver milk, to collect empties, to obtain payment from the customers. The plaintiff was there on the float in order to assist the first defendant to do those jobs. I would have thought, therefore, that whereas *Conway v. George Wimpey & Co. Ltd.*[44] was absolutely correctly decided on facts, the facts of the present case lead to a very different conclusion."[45]

A Full Bench case of the Madhya Pradesh High Court[46] seems to have been decided without noticing the distinction between cases where the giving of lift to an unauthorised person has no nexus with the master's business and cases where such a nexus is present. In this case, the facts were that the owner of the goods that were being transported in a motor-truck was given a lift by the driver of the truck without the permission of the owner of the truck. This act of the driver was in contravention of Rule 105 of the Motor Vehicles Rules providing that no person should be carried in a goods vehicle other than a *bona fide* employee of the owner or hirer of the vehicle. A reading of the judgment shows that the view of the Full Bench was that in no case a contravention of the rule will affect the sphere of employment which was "to drive the vehicle in execution of the master's business from Udaigarh to Indore."[47] It is submitted that the question whether the contravention of such a statutory rule or a similar direction of the master affects merely the mode of doing what the servant is employed to do or pertains to the sphere or scope of employment cannot be decided in the abstract without appreciating the facts constituting the contravention. If the driver gives a lift to a person who has nothing to do with the master's business, *e.g.* a hitchhiker, as explained by LORD DENNING in *Young v. Edward Box & Co. Ltd.*[48] and *Rose v. Plenty*[49] (both cases were referred to by the Full Bench), the giving of lift will not be in the course of employment but if the lift is given to a person for facilitating the work of the master, as was the case in *Rose v. Plenty*,[49] the giving of lift, though unauthorised, will still be in the course of employment. The Full Bench decision, however, can be supported on the reasoning that the owner of the goods, that were being transported, travelled in the truck to facilitate safe transportation of the goods, which was the business in which the truck was engaged, and, therefore, the giving of lift by the driver to the owner of the goods was for the master's business and fell within the course of his employment. The Punjab & Haryana High Court[50] had also to consider the effect of contravention of a similar Motor Vehicles Rule. In this case, the person given a lift by the driver of the motor-truck had absolutely no connection with the business in which the truck was engaged and the master was rightly held to be not liable. Another case that may be mentioned in this context is a decision of the Madras High Court.[51] In this case, a tourist taxi authorised by the Motor Vehicles Rules to carry only 5 passengers, carried 7 passengers and met with an accident. The owner was held liable on the ground that the restriction as to the number of passengers imposed by the Rules

43. 1976 ACJ 387 (389) : (1976) 1 All ER 97 : (1976) 1 WLR 119.
44. (1951) 1 All ER 363 : (1951) 2 KB 266.
45. 1976 ACJ 387 (394) : (1976) 1 All ER 97 : (1976) 1 WLR 119.
46. *Narayanlal Lunaji Padiyar v. Rukhminibai*, 1979 MPLJ 405 (FB). See also *State of Orissa v. Rebati Tiwari*, AIR 1988 Orissa 242; *Bhagwandas v. National Insurance Co. Ltd.*, AIR 1991 MP 238.
47. *Narayanlal Lunaji Padiyar v. Rukhminibai*, 1979 MPLJ 405, p. 408 (para 6).
48. (1951) 1 TLR 789.
49. 1976 ACJ 387 : (1976) 1 All ER 97 : (1976) 1 WLR 119.
50. *Jiwan Dass Roshanlal v. Karnail Singh*, 1980 ACJ 445.
51. *K.R. Sivagami, Proprietor Rajendra Tourist v. Mahaboob Nisa Bi*, AIR 1981 Mad 138.

related only to the manner of performance of the driver's duty and did not restrict the scope of employment. It will be seen that the extra passengers were carried by the driver to promote the master's business and the decision against the owner is fully justified. These cases[52] also show that the principle applicable to violations of statutory prohibitions is the same as applicable to violations of prohibitions proceeding from the master. The only difference that may possibly be drawn is that in the case of a prohibition imposed by a statute or a statutory rule, it may be difficult for a third party to presume the existence of any implied authority in the servant contrary to the prohibition for everyone is presumed to know the law, but in case of a prohibition imposed solely by the instructions of the master which are not notified for general information, it is possible that in certain circumstances a third party dealing with the servant may reasonably assume an implied authority contrary to the prohibition. But even in cases of statutory prohibitions, which are not absolute but require the obtaining of a licence or permission from an authority, a third party may proceed on the assumption that the owner or the servant must have obtained the required licence or permission.[53]

2(A)(ii)(b)(vi) Dishonest and Criminal Acts

A master is not liable for a dishonest or criminal act of his servant where the servant merely takes the opportunity afforded by his service to commit the wrongful act.[54] For example, if a window cleaner steals an article from the room where he is doing the window cleaning work, his employer is not liable.[55] Similarly, when a servant assaults another, whom he meets in the course of his work, out of personal vendetta, and the assault has no relation to the master's work, the master is not liable.[56] But if the wrongful act is committed for the benefit of the master and while doing his business, the master is liable. "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master is proved."[57] The master will also be liable if the servant while doing the wrongful act was acting within the apparent scope of his authority even though the act was done for his own benefit or for the benefit of some person other than the master. This extension of the course of employment was made by the House of Lords in *Lloyd v. Grace, Smith & Co.*[58] where the managing clerk of a firm of solicitors induced a client of the firm to transfer a mortgage to him by fraudulently representing the nature of the deed and, thereupon, obtained and misappropriated the mortgage money. The solicitors were held liable as their managing clerk in accepting the deed was acting within the apparent scope of his authority although fraudulently for his own benefit. Similar were the facts in *Uxbridge Permanent Benefit Building Society v. Pickard*[59] where a Solicitor's managing clerk obtained an advance of a sum of £ 500 upon a mortgage

52. Cases mentioned in footnotes 46, 50 and 51, *supra*.
53. *Stone v. Taffe*, (1974) 3 All ER 1016 (1020, 1021) : (1974) 1 WLR 1575 (CA).
54. *Morris v. C.W. Martin & Sons Ltd.*, (1965) 2 All ER 725 (CA) (LORD DENNING M.R.). See further *State Bank of India v. Shyama Devi*, AIR 1978 SC 1263, 1979 ACJ 22 : (1978) 3 SCC 399.
55. *Morris v. C.W. Martin & Sons Ltd.*, (1965) 2 All ER 725 (CA) (LORD DENNING M.R.); *De Parrell v. Walker*, (1932) 49 TLR 37.
56. *Warren v. Henlys Ltd.*, (1948) 2 All ER 935 : (1948) W.N. 449.
57. *Barwick v. English Joint Stock Bank*, (1867) 2 Exch 259 (265) (WILLIS, J.).
58. (1912) AC 716 (HL). Followed by the Privy Council in a case of theft: *United Africa Co. Ltd. v. Saka Owade*, (1955) AC 130 (PC). Also followed by the Delhi High Court in a case of fraud by P.A. of a managing director : *Smt. Niranjan Kaur v. M/s. New Delhi Hotels Ltd.*, AIR 1988 Delhi 332, p. 341.
59. (1939) 2 KB 248.

of property by producing to a building society's solicitors a fictitious deed. It was not proved that the solicitor's clerk actually forged the deed, but he must have known that it was a forged document. The clerk had apparent authority for all that he did in the matter. It was held that so long the clerk was acting within his apparent authority, the master was liable despite the fact the fraud involved forgery. After referring to these cases, LORD DENNING, M.R., observed: "In consequence of this apparent authority, the firm of solicitors were clearly under a duty to deal honestly and faithfully and they could not escape that duty by delegating it to their agent. They were responsible for the way he conducted himself therein, even though he did it dishonestly for his own benefit."[60] The master's liability in tort for frauds of his servant resembles the principal's liability on contracts entered by his agents. Therefore, if the servant had no actual authority nor was he acting for the master's benefit and the person injured by the fraudulent or dishonest act of the servant could not have reasonably regarded the servant as possessing any apparent authority in dealing with him, the master cannot be made liable simply because the acts done by the servant were of a class which he was authorised to do on the master's behalf.[61] When an employee has neither ostensible nor express authority to enter into contract and when the fact that the employee needs express authority is known to the third party, the employer is not vicariously liable for deceit if the employee fraudulently stating that he has obtained the requisite authority induces the third party to enter into a contract.[62] In other words the employer is liable where he has by words or conduct induced the injured party to believe that the servant was acting in the lawful course of the employer's business; but the employer is not liable where such belief although it is present, has been brought about through misguided reliance on the servant himself when the servant is not authorised to do what he is purporting to do when what he is purporting to do is not within the class of acts that the employee in his position is usually authorised to do and when the employer has done nothing to represent that he is authorised to do it.[63]

In *State Bank of India v. Shyama Devi*[64] the plaintiff who had a Savings Bank account with the Bank, handed over a cheque and cash to an employee of the Bank who was a neighbour and friend of the plaintiff's husband with a letter of instructions and pass-book for being credited to her account. The employee misappropriated the amount and made false entries in the pass-book. The employee was not in charge of the Savings Bank counter and the cheque and cash were not handed over to the counter-clerk concerned. On these facts the Supreme Court held that the Bank was not liable for the fraud of the employee. The employee concerned here had no actual or apparent authority to accept on behalf of the Bank cheque or cash for being deposited in Savings Bank Accounts and the money was not received by him in the normal course of business of the Bank. Indeed, the employee was constituted agent of the plaintiff when she sent the cheque and cash with letter of instructions through him for being credited to her Savings Bank Account. The employee's fraud was, therefore, not in the course of his employment

60. *Morris v. C.W. Martin & Sons Ltd.*, (1965) 2 All ER 725 : (1966) 1 QB 716 (CA). See further *United Bank of Kuwait v. Hammond*, (1988) 3 All ER 418 : (1988) 1 WLR 1051 (CA) where a solicitor gave false undertaking as security for loan on behalf of a firm of solicitors; as ostensible authority was established the firm was held liable.
61. See for example *Koorangong Investments P. Ltd. v. Richardson & Wrench Ltd.*, (1981) 3 All ER 65 : (1982) AC 462 (PC).
62. *Armagas Ltd. v. Mundogas S.A.*, (1985) 3 All ER 795 (CA). Affirmed (1986) 2 All ER 385 (HL).
63. *Armagas Ltd. v. Mundogas S.A.*, (1985) 3 All ER 795 (CA);. (1986) 2 All ER 385 (HL) p. 394.
64. AIR 1978 SC 1263 : 1979 ACJ 22.

and all that could be said was that "the fact of his being an employee of the Bank" gave him an opportunity to commit the fraud.

As regards theft or similar acts in relation to goods, the general proposition has been stated to be "that when a principal has in his charge the goods or belongings of another, in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredations, then if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them."[65] Negligence in the discharge of duty or theft by a servant who is entrusted with the custody of goods by his master is in the course of his employment and so the master is liable to the owner of the goods. But if the conduct of the servant entrusted with the custody of goods is not blameworthy, and some other servant, who has nothing to do with the goods, taking the opportunity of being in service steals them, the master is not liable for the theft by such a servant is not in the course of employment.[66] In *United Africa Company Ltd. v. Saka Owoade*,[67] the appellant company had expressly entrusted to servants of the respondent, a transport contractor, at his request, goods for carriage by road, and the servants stole the goods. The respondent was held liable by the Privy Council as the conversion took place in the course of employment. It was observed that there is no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of employment, and it is a question of fact in each case whether it was committed in the course of employment.[68] Similarly in *Morris v. C.W. Martin & Sons Ltd.*[69] the plaintiff delivered her mink stole to one Bedser for getting it cleaned who with the permission of the plaintiff delivered it to the defendants for that purpose. The defendants' servant who was entrusted with the job instead of cleaning it stole it. The defendants were held liable for the theft of the article as it was in the course of employment. In contrast in *Leesh River Tea Co. Ltd. v. British India Steam Navigation Co. Ltd.*[70] the shipowners were not held liable for theft of a brass plate by a stevedore which made the ship unseaworthy and resulted in damages to the cargo. The stevedore was engaged by the shipowners for loading and unloading of cargo and he was in no other way connected with the ship or parts of the ship and so the theft of the brass plate by him was entirely outside the course of his employment although his employment did give him an opportunity to steal the plate.

The 'close connection test' to which reference has already been made[71] has been applied in cases of sexual abuse by employees also. In the Canadian case of *Bazley v. Curry*,[72] sexual abuse was committed by an employee of a children's foundation who had been engaged as a parent-figure caring for emotionally troubled children in a children's home. The Canadian Supreme Court held that there was sufficient connection between the acts of the employee and the employment and, therefore, vicarious liability of the employer was established. On the other hand in another

65. *Morris v. C.W. Martin & Sons Ltd.*, (1965) 2 All ER 725 : (1966) 1 QB 716 (CA) (LORD DENNING, M.R.).
66. *Morris v. C.W. Martin & Sons Ltd.*, (1965) 2 All ER 725 : (1966) 1 QB 716 (CA), (SALMON, L.J.).
67. 1955 AC 130 (PC).
68. 1955 AC 130, p. 144; Referred in *State Bank of India v. Shyama Devi*, 1979 ACJ 22 (28) (SC).
69. (1965) 2 All ER 725 : (1966) 1 QB 716.
70. (1966) 3 All ER 593 : (1966) 3 WLR 642. Referred with approval in *State Bank of India v. Shyama Devi*, AIR 1978 SC 1263; 1979 ACJ 22 (27) : (1978) 3 SCC 399 (SC).
71. See p. 151.
72. (1999) 174 DLR (4th) 45.

similar case, *Jacobi v. Griffiths*[73] where sexual abuse took place in the employee's home outside working hours and away from the club which was the principal place of employment, the Supreme Court did not find sufficient connection between the employee's acts and the employment from the fact that the club had provided an opportunity to the employee to establish friendship with the children and vicarious liability was held to be not established. Both these decisions and the close connection test applied in them were referred with approval by the House of Lords in *Lister v. Hesley Hall Ltd.*[74] In this case the plaintiffs were resident for a few years at a school for boys with emotional and behavioural difficulties, owned by the defendants who employed a person to take care of the boys as warden of the school's boarding house. The warden systematically sexually abused the plaintiffs while they were resident at the school. In holding the defendants vicariously liable the court held that the defendant had undertaken to care for the boys through the services of the warden and there was a very close connection between his employment and his torts which were committed in the premises of the defendants while he was busy caring for the children in performance of his duties.

The close connection test was also applied in *Dubai Aluminium Co. Ltd. v. Salaam*[75] for holding a firm liable for the fraudulent act of one of its partners which were not authorised by other partners. It was further applied to hold a nightclub vicariously liable for the act of a bouncer employed by the club in causing injury by a knife to a patron outside the club premises for which he was not authorised. The owner of the club encouraged the bouncer to be aggressive in ejecting his patrons. This furnished the link for holding the owner liable.[76]

2(A)(ii)(b)(vii) Doctrine of Common Employment

The doctrine of common employment has its origin in *Priestley v. Fowler*[77] which laid down that a master was not liable to a servant who was injured by the wrongful act of a fellow servant who was at the time in common employment with him. The enactment of the Employers' Liability Act, 1880 introduced in English law a number of exceptions to the doctrine. The English Courts also did not favour it and restricted its application.[78] In *Secretary of State v. Rukhminibai*,[79] the Nagpur High Court refused to apply the doctrine in India in so far as it was abolished in England by the Employers' Liability Act. After this case, the Indian Legislature enacted the Employers' Liability Act, 1938. The Privy Council in *Brocklebank Ltd. v. Noor Ahmode*[80] left the question open whether the doctrine of common employment so unsatisfactory both as to its policy and as to its practical results ought to be followed at all by the Indian Courts as a part of the law in India. The doctrine was abolished in England by the Law Reform (Personal Injuries) Act 1948. The Privy Council had again to consider the question of the application of the doctrine to India in *Governor General in Council v. Constance Zena Wells*[81] and it was held that it applied in so far as it was not abrogated by the Employers' Liability Act, 1938. By a restrictive construction of section 3(d) of the Act, it was held that where a personal injury is

73. (1999) 174 DLR (4th) 71.
74. (2001) 2 All ER 769 (HL).
75. (2003) 3 WLR 1913 (HL). See further, p. 151.
76. *Mattis v. Pollock*, (2003) 1 WLR 2158. See for comments 63 (2004) Cambridge Law Journal, Part I, p. 53.
77. (1837) 3 M. & W. 1.
78. *Radcliffe v. Ribble Motor Services Ltd.*, (1939) AC 215.
79. AIR 1937 Nag 354 (367, 368).
80. AIR 1940 PC 225.
81. AIR 1950 PC 22.

caused to a workman in the normal performance of his fellow servant's duties, section 3(d) did not apply and did not operate to take away the defence of common employment in a suit for damages. But the lacuna pointed out by the Privy Council was promptly remedied by the Employers' Liability (Amendment) Act, 1951. Section 3(d) as amended now expressly negatives the defence of common employment when injury is caused by a fellow servant in the normal performance of his duties. The Act also introduces a new section 3A making void any collateral agreement excluding or limiting any liability of the employer under the Act. The definition of workman in the Act is very wide so as to include all employees. After the aforesaid statutory amendments, it can be safely asserted that the doctrine of common employment cannot be applied in India and a master is liable to a servant of his in the way he is liable to any other person for injuries caused by his employees acting in the course of employment. In addition an employer directly owes certain common law duties and statutory duties in his employees' favour but these are not cases of vicarious liability and are dealt with elsewhere.[82]

2(A)(ii)(b)(viii) Compulsory Employment

A master is not liable for the torts committed by a servant whose appointment is compulsory under the law and when he has practically no power of selection.[83] But the employer is not absolved from liability merely because the appointment of a servant or agent for doing certain work is compulsory under the law if he is allowed power of control and the class from which appointment is to be made is sufficiently large to give the employer a practical power of selection.[84] The difference lies between virtually directing that a person be appointed and in limiting and regulating the choice of the master by prescribing qualifications of the servant and/or the mode of selection.

2(A)(ii)(b)(ix) Vicarious Liability of State

The State is liable vicariously for the torts committed by its servants in the course of employment. But there are certain areas where the State is not liable and the subject has been discussed elsewhere.[85]

2(A)(iii) Master's Right to Recover Damages from Servant

The law implies a term in contract between employer and employee that the employee will exercise reasonable care in performance of his work and, therefore, if the master is obliged to pay damages to a third party for wrongs committed by the servant, he can recover that amount from the servant in a suit for damages for breach of the implied term. It was so held by the House of Lords in *Lister v. Romford Ice and Cold Storage Co. Ltd.*[86] In this case, the facts were that a lorry driver employed

82. Chapter XIX, title 9, p. 583.
83. The master of a ship was generally not liable for this reason under the common law for the negligence of a pilot in a compulsory pilotage district; *The Halley*, (1808) LR 2 PC 193 (201); *Muhammad Yusuf v. P. & O.S.N. Co.*, (1869) 6 BHC (OCJ) 98 (106). Section 15 of the Pilotage Act, 1913 makes the shipowner and master liable for the negligent acts of compulsory pilots in the same way as they are liable for negligence of voluntary pilots under the common law. S. 15 has been held to create the relationship of master and servant between the shipowner and the compulsory pilot : *Workington Harbour and Dock Board v. Towerfield (Owners)*, (1951) AC 112 ; (1950) 2 All ER 414 (HL); *Esso Petroleum Co. Ltd. v. Hall Russel & Co. Ltd.*, (1989) All ER 37 (HL), pp. 58-60 : (1989) AC 643.
84. *Martin v. Temperley*, (1843) 4 QB 298.
85. For vicarious liability of the State see Chapter III, title 8, *'The State and its Officers'*, p. 44.
86. (1957) AC 555 (1957) 2 WLR (HL).

by a company took his father, a fellow servant, with him as a mate. In backing the lorry, he injured his father by negligent driving. The father recovered damages in an action against the company for the negligence of the driver. The Company then brought an action against the driver claiming that, as joint tort-feasor, it was entitled (1) to contribution from him under section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, and (2) to damages for breach of an implied term in his contract of service that he would use reasonable care and skill in driving. The House of Lords held that the driver was under a contractual obligation of care to his employer in the performance of his duty as a driver and that the Company was entitled to recover from the driver damages for breach of that contractual obligation even if the employer had insurance cover against his liability to the party injured by the negligence of the servant. In England the decision was not well received and a Committee was constituted to study its implications.[87] The Committee did not recommend nullification of the decision by legislation for it thought that the employers and their insurers who would be the real plaintiffs by subrogation, in the interests of good industrial relations were not likely to unreasonably exploit their rights under the said decision. In consequence of the Committee's report, the members of the British Insurance Association agreed not to institute a claim against the employee of an insured employer in respect of death or injury to a fellow employee unless the weight of evidence indicated collusion or wilful misconduct of the employee against whom the claim was made.[87] This "gentleman's agreement" did not cover a case where the person injured by the employee of the insured was not a fellow servant. Such a situation arose in *Morris v. Ford Motor Co.*[87] where the court by a majority held that though a contract of indemnity including a contract of insurance by its very nature implied a right of subrogation as a necessary incident of that contract, yet the contract might, by implication, exclude this right and that such an implication arose when the contract was operative in an industrial setting where recovery of damages from the employee by exercise of right of subrogation would lead to industrial strife or where it would be unjust to make the employee personally liable. No employer normally brings a suit against his servant to enforce his right under the *Lister* case for the reasons that very often he is covered by insurance, the servant is not in a position to pay and a suit against the servant in case of industrial employment is likely to prejudicially affect the industrial relations with the workers. The Insurance Companies also normally do not enforce their right of subrogation against the employee of the insured for generally it is not possible to recover the amount from the employee. So the principle of the *Lister* case is a dead letter in England[88].

In India it has been held that when an officer of the government or a public authority acts maliciously and oppressively causing harassment and agony to the plaintiff, the government and authority made liable for damages must recover the amount from the officers who are responsible.[89] The reason is that when the government or a public authority is made to pay damages the burden really falls on

87. *Morris v. Ford Motor Co. Ltd.*, (1973) 2 All ER 1084 (1088) : (1973) 1 QB 792 : (1973) 2 WLR 843 (CA).
88. CLERK & LINDSELL, Tort, 15th edition, p. 154.
89. *Lucknow Development Authority v. M.K. Gupta*, AIR 1994 SC 787, pp. 799, 800 : (1994) 1 SCC 243 : (1994) 13 CLA 20. Followed in *Gaziabad Development Authority v. Balbir Singh*, AIR 2004 SC 2141 : (2004) 5 SCC 65; See also, *T.Subramani v. State of Tamil Nadu* (2012) 3 LW 849, (followed on the point of what is misfeasance in public office); *Ganesh Prasad v. Lucknow Development Authority*, (2012) 90 ALR (SUM 9) 5 : (2011) 89 ALR (SUM 64) 31; *Vijay Mallappa Muchandikar v. Belgaum Urban Development Authority*, ILR 2011 KAR 5476 : (2012) 2 AIR Kant R 513: (2012) 2 KCCR 1065..

the citizens as taxpayers and there is no justification for burdening them for malicious and oppressive conduct of the officers.

2(B) Employer and Independent Contractor

An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result. In the actual execution of the work he is not under the order or control of the person for whom he does it, but uses his own discretion in things not specified beforehand. A servant is an agent who works under the supervision, control and direction of his employer.[90] This is the traditional distinction between an independent contractor and a servant and is now subject to many qualifications which have been discussed earlier.[91]

If an independent contractor as distinguished from a servant is employed to do some work and in the course of the work he or his servants commit any tort, the employer is not answerable.[92] Employer's right to inspect works, to decide as to the quality of materials and workmanship, to stop the works or any part thereof at any stage, to modify and alter them, and to dismiss disobedient or incompetent workmen employed by the contractor, does not render him liable to third persons for the negligence of the contractor in carrying out the work.[93] One employing another is not liable for his collateral negligence unless the relationship of master and servant existed between them.[94] An employer who commissions work to be done near a highway which if done with ordinary care by a skilled workman presents no hazard to anyone and does not constitute a nuisance but which if done negligently may endanger users of the highway, and who employs an apparently competent independent contractor to do the work is not liable for the negligence of that contractor in doing it.[95] The plaintiff who was visiting a block of flats on the business of one of the tenants sustained injury through the breaking of the cylinder band of a hydraulic lift. The landlord was in occupation of those parts of the building which were not occupied by tenants. The lift was looked after by a firm of engineers. The cause of the accident was the faulty repacking of the cylinder band by a mechanic of the firm of engineers. It was held that the landlord was not liable to the plaintiff but the firm of engineers was.[96]

Exceptions.—It has been said that there are exceptions to the general rule that an employer is not liable for the torts of his independent contractor. Properly analysed, the cases which are referred to as exceptions are those in which either the employer is in some way party or privy to the tort or is in breach of some duty primarily laid on him. For example if the employer is negligent in selecting a proper person as a contractor or a servant, he is in breach of his duty and if the contractor or the servant commits a tort, he would be liable for breach of this duty. Similarly, if the duty laid on the employer by common law or statute is to produce a given result or to see that care is taken as distinguished from duty to take reasonable care, he is not absolved

90. *Performing Right Society Ltd. v. Mitchell & Booker Ltd.*, (1924) 1 KB 762 : 131 LT 243 : 40 TLR 308.
91. Titles 2(A)(i)(a) and (b), pp. 142 to 145, *supra*.
92. *Pickard v. Smith*, (1861) 10 CBNS 470, 480 : 4 LT 70; *Morgan v. Girls' Friendly Society*, (1936) 1 All ER 404; *Guru Govekar v. Filomena F. Lobo*, AIR 1988 SC 1332, p. 1334 (para 26) : (1988) 3 SCC 1 : (1988) 2 ACJ 585.
93. *Reedie v. L. & N.W. Ry.*, (1849) 4 Ex. 244; *Hardaker v. Idle District Council*, (1896) 1 QB 335.
94. *Dalton v. Angus*, (1881) 6 App Cas 740 (829) : 44 LT 884; *Padbury v. Holliday & Greenwood*, (1912) 28 TLR 494.
95. *Salsbury v. Woodland*, (1969) 3 All ER 863 : (1970) 1 QB 324.
96. *Haseldine v. Daw*, (1941) 2 KN 343.

from his duty by employing with reasonable care a contractor or a servant to do the job. These are instances of non-delegable duties or duties primarily laid on the employer and he would be liable if there is a breach of these duties whether he appoints a servant or an independent contractor.[1] Apart from statute, the non-delegable duty, which may be termed as special duty, "arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety in circumstances where the person affected might reasonably expect that due care will be exercised".[2] In these situations the duty is not merely to use reasonable care but to ensure that reasonable care is used even by an independent contractor whom he employs.[3] Further "if the task which an independent contractor is employed to perform carries an inherent risk of damage to the person or property of another and the risk eventuates and causes such damage, the employer may be liable even though the independent contractor exercised reasonable care in doing what he was employed to do, because the employer authorised the running of the risk and the employer may be in breach of his own duty for failing to take the necessary steps to avoid the risk which he authorised.[4] The so-called exceptions to the rule that the employer is not liable for the tort of the independent contractor are not, therefore, technically exceptions but are cases where the employer is made liable for his own fault or breach of duty and not vicariously for the fault or breach of duty of the contractor. They are called exceptions only as a matter of convenience and are as follows:—

(1) Where the employer retains his control over the contractor and personally interferes and makes himself a party to the act which occasions the damage;[5]

(2) Where the thing contracted to be done is itself wrongful. In such a case the employer is responsible for the wrong done by the contractor or his servants, and is liable to third persons who sustain damage from the wrong doing.[6] For instance, if a man employs a contractor to build a house, who builds it so as to darken another person's windows, the remedy is not against the builder, but the owner of the house.

A gas company, not authorised to interfere with the streets of Sheffield, directed their contractor to open trenches therein. The contractor's servant, in doing so, left a heap of stones, over which the plaintiff fell and was injured. It was held that the defendant company was liable, as the interference with the streets was in itself a wrongful act.[6] Similarly, when the trustees of a temple employed a contractor to get electric connection for use of lighting and mike arrangements in the temple from the well of an agriculturist without informing and obtaining the permission of the Electricity Board and a person was injured as the wires used by the contractor snapped, the trustees were held liable as the act of diverting electricity without permission of the Board was in itself an illegal act;[7]

1. *Cassidy v. Ministry of Health*, (1951) 2 KB 343, p. 363 : (1951) 1 All ER 575.
2. *Kondis v. State Transport Authority*, (1984) 154 CLR 672, p. 687; *Northern Sandblasting Pvt. Ltd. v. Harris*, (1997) 71 ALJR 1428, p. 1435 (BRENNAN C.J.)
3. *Northern Sandblasting Pvt. Ltd. v. Harris, supra.*
4. *Northern Sandblasting Pvt. Ltd. v. Harris*, (1997) 71 ALJR 1428
5. *Burgess v. Gray*, (1845) 1 CB 578.
6. *Ellis v. Sheffield Gas Consumers Co.*, (1853) 2 E & B 767.
7. *Patel Maganbhai Bapujibhai v. Patel Ishwarbhai Motibhai*, AIR 1984 Guj 69.

(3) Where legal or statutory duty is imposed on the employer, he is liable for any injury that arises to others in consequence of its having been negligently performed by the contractor.[8]

No one can get rid of such a duty by imposing it upon an independent contractor. The employer remains liable to those who are injured by the non-performance of the duty, even though the contractor has agreed to indemnify him.[9]

If a man does work on or near another's property, which involves danger to that property unless proper care is taken, he is liable to the owners of the property for damage resulting to it from failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another to do it for him.[10]

Where a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor.[11] It is the duty of a person who is causing such work to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway.[12]

Two houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This continued for twenty years and afterwards some alterations were made in one of the buildings openly and without deception. More than twenty years after the alterations the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it the plaintiffs' house. It was held that the plaintiffs were entitled to damages from the owners of the adjoining house and the contractor for the injury.[13] A district council employed a contractor to construct a sewer for them. In consequence of his negligence in carrying out the work a gas-main was broken, and the gas escaped from it into the house in which the plaintiffs (a husband and wife) resided, and an explosion took place, by which the wife was injured, and the husband's furniture was damaged. In an action by the plaintiffs against the district council and the contractor, it was held that the district council owed a duty to the public (including the plaintiffs), so to construct the sewer as not to injure the gas-main; that they had been guilty or a breach of this duty; that, notwithstanding that they had delegated the performance of the duty to the contractor, they were responsible to the plaintiffs for the breach.[14] A was empowered under an Act to make

8. *Hole v. Sittingbourne and Sheerness Ry.*, (1861) 6 H & N 488; *Gray v. Pullen*, (1864) 10 CB NS 470; *Tarry v. Ashton*, (1876) 1 QBD 314; *Dalton v. Angus*, (1881) 6 App Cas 740, 831; *Hardaker v. Idle District Council*, (1896) 1 QB 335; *The Snark*, (1900) p. 105; *Matania v. National Provincial Bank*, (1936) 2 All ER 633 : (1937) 106 LJKB 113 : 80 SJ 532. *Murphy v. Brentwood District Council*, (1990) 2 All ER 269, pp. 279, 280 : (1990) 2 WLR 944.
9. *Bower v. Peate*, (1876) 1 QBD 321, 326; *Gray v. Pullen*, (1864) 5 QB & S 970.
10. *Honeywill and Stein Ltd. v. Larkin Brothers Ltd.*, (1934) 1 KB 191, 199 : 150 LT 771 : 50 TLR 56.
11. *Penny v. Wimbledon Urban Council*, (1899) 2 QB 72, 76 : 15 TLR 483.
12. PER SMITH, L.J., in *Holliday v. National Telephone Co.*, (1899) 2 QB 392, 400 : 15 TLR 483; *Pickard v. Smith*, (1861) 10 CBNS 470 : 142 ER 535.
13. *Dalton v. Angus*, (1881) 6 App. Cas 740 : 44 LT 884.
14. *Hardaker v. Idle District Council*, (1896) 1 QB 335; *Holliday v. National Telephone Co.*, (1899) 2 QB 392 : 15 TLR 483. See *The Snark*, (1900) p. 105, and *The Utopia*, (1893) AC 492.

a drain from his premises to a sewer, by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B. It was held that A was responsible in an action by B.[15] Where the defendants, a railway company, were authorized, by an Act of Parliament, to construct a railway bridge, across a navigable river, and they employed a contractor to construct a bridge but before the works were completed the bridge, from some defect in its construction, could not be opened, and the plaintiffs' vessel was prevented from navigating the river, it was held that the defendants were liable.[16] Defendant was the occupier of a house, from the front of which a heavy lamp projected several feet over the public foot-pavement. As plaintiff was walking along, in November, the lamp fell on her and injured her. In the previous August the defendant had employed an experienced gas-fitter to put the lamp in repair. The fastening by which the lamp was attached to the post was in a decayed state. It was held that the plaintiff was entitled to recover damages for the injury caused. A person maintaining a lamp projecting over a highway for his own purposes was bound to maintain it so as not to be dangerous to the public, and if it caused injury owing to want of repair, it was no answer on his part that he employed a competent person to put it in a state of repair.[17] A contractor was employed to make up a road, and in carrying out the work, he negligently left on the road a heap of soil unlighted and unprotected. A person walking along the road after dark fell over the heap and was injured. It was held that his employers were liable, because, from the nature of the work, danger was likely to arise to the public using the road unless precautions were taken.[18]

The plaintiff was driving a buggy along a street in Calcutta by night and fell into a hole opened in the road, which was left unfenced and insufficiently lighted, and was badly injured. It appeared that the road had been opened by an engineer in the employment of the Government, who had applied to, and obtained permission from, the Corporation to open the road subject to the condition that he employed one of the contractors licensed by the Municipality to do such work, and such a contractor had been employed. The plaintiff sued for damages, making the Secretary of State, the Corporation and the contractor, defendants. It was held that the Secretary of State was not liable, because he came within the established rule that one who employs another to do what is perfectly legal must be presumed to employ that other to do this in a legal way; that the Corporation who had a statutory obligation imposed upon them to repair and maintain the roads were liable to the plaintiff for a breach of their statutory duty; and that the contractor was also liable.[19]

(4) Where the work contracted to be done is from its nature likely to cause danger to others, in such cases there is a duty on the part of the employer to take all reasonable precautions against such danger, and if the contractor does not take these precautions,[20] *e.g.* interference with a neighbour's right of support, the employer is

15. *Gray v. Pullen*, (1864) 5 B & S 970.
16. *Hole v. Sittingborne and Sheerness Rly.*, (1861) 6 H & N 488.
17. *Tarry v. Ashton*, (1876) 1 QBD 314.
18. *Penny v. Wimbledon Urban Council*, (1899) 2 QB 72.
19. *Corporation of the Town of Calcutta v. Anderson*, (1884) ILR 10 Cal 445; *Keough v. Municipal Committee of Lahore*, (1883) PR No. 108 of 1883. See *Municipal Committee of Lahore v. Nand Lal*, (1913) PR No. 88 of 1913, where a Municipality was held liable for the bursting of a main. See *Municipal Council of Vizagapatnam v. Foster*, (1917) ILR 41 Mad 538.
20. *Hughes v. Percival*, (1883) 8 App Cas 443 : 49 LT 189; *Bower v. Peate*, (1876) 1 QBD 321; *Dalton v. Angus*, (1881) 6 App Cas 740 : 142 ER 535; *Penny v. Wimbledon Urban Council*, (1899) 2 QB 72, 78; *Patel Maganbhai Bapuji Bhai v. Patel Ishwarbhai Motibhai*, AIR 1984 Guj 69.

liable. It is his duty to use every reasonable precaution that care and skill may suggest in the execution of his works, so as to protect his neighbours from injury, and he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury, no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution.[21] But the employer will not be liable if the contractor was not acting within the scope of his contract, but was a trespasser when he did the act complained of.[22]

Defendant liable.—Where the defendant employed a contractor to pull down an old house and erect a new one, and the contractor expressly undertook to support the plaintiff's house, and to be liable for all damage, it was held that the defendant was liable for the damage.[23] The defendant employed a contractor to pull down his house and rebuild it. The contractor in fixing a staircase negligently cut into the party-wall between the defendant's house and the adjoining house of B, and this caused the defendant's house to fall and to damage the plaintiff's house. It was held that the defendant was liable upon the ground that the work ordered by him was necessarily attended with risk to the plaintiff's house, and that it was, therefore, the defendant's duty to see that proper precautions were taken to prevent injury to that house, and that he could not get rid of the responsibility by delegating the performance to a third person.[24]

Where the plaintiffs had procured the defendants, as independent contractors, to take photographs of the interior of a cinematograph theatre, and owing to the defendants' negligence the premises were damaged by fire, it was held that the plaintiffs were liable to the owners of the theatre for the damage, and were entitled to recover what they paid from the defendants.[25]

Sub-contractor.—Where the defendant employed two sub-contractors to carry out certain work on the roof of a building and the plaintiff, who was employed by one of the sub-contractors, was injured due to the negligence of the employees of the other sub-contractor, and it was found that there was no safety arrangement made either between the defendant and his sub-contractors or between sub-contractors *inter se*, it was held that the defendant as well as both the sub-contractors owed a duty of care to the plaintiff and were liable to him for negligence, each having left to others the taking of necessary safety precautions.[26]

(5) Where liability is imposed by statute for example under the provisions of the Workmen's Compensation Act, 1923, if the principal employs a contractor, such contractor's servants are able to recover compensation from the principal without prejudice to the principal's right to be indemnified by the contractor, if the contractor is himself liable under the Act.[27] Having regard to sections 94 and 95 of the Motor Vehicles Act, 1939 the owner of the motor vehicle and his insurer have been held

21. *Hughes v. Percival*, (1983) 8 App Cos 443 : 52 LJQB 719, *supra* p. 455.
22. *Black v. Christchurch Finance Co.*, (1894) AC 48.
23. *Bower v. Peate*, (1876) 1 QBD 321; *Lemaitre v. Davis*, (1881) 19 Ch D 281.
24. *Hughes v. Percival*, (1883) 8 App Cas 443, at p. 455 : 49 LT 189 overruling *Butler v. Hunter*, (1862) 7 H & N 826. See to the same effect, *Dhondiba Krishnaji v. Mun. Commr. of Bombay*, (1892) ILR 17 Bom 307. See also *Ullman v. The Justices of the Peace for the Town of Calcutta*, (1871) 8 Beng LR 265, where the contractor was held not negligent.
25. *Honeywill and Stein Ltd. v. Larkin Brothers, Ltd.*, (1934) 1 KB 191 : 50 TLR 56.
26. *Mc Ardle v. Andmac Roofing Co.*, (1967) 1 All ER 583 : (1967) 1 WLR 356.
27. Workmen's Compensation Act, 1923, VIII of 1923, ss. 12(2) and 13.

liable to a third party for injuries sustained by the negligent driving of the vehicle by an employee of the repairer although he is an independent contractor.[28]

2(C) Principal and Agent

There are no special rules dealing with the liability of the principal for the torts committed by the agent and the rules discussed earlier in the context of master's liability for the torts of his servant apply here also. "Just as the tort must be committed by a servant either under the actual control of his master or while acting in the course of his employment, the act of the agent will only make the principal liable if it is done within the scope of his authority."[29] The law on this point has been stated to be that "an agent will make the principal responsible so long as the agent does the act within the scope of his authority or does so under the actual control of the principal."[29] The word "agent" is commonly used in dealing with cases of owner's liability when he lends his vehicle to a friend and also in the context of cases relating to vicarious liability for fraud.[30] In the former class of cases the use of the word "servant" will be inappropriate, and therefore, the word "agent" is used as a matter of usage. In the latter class of cases the master is liable when the fraud is committed by the servant within the scope of his actual or ostensible authority and this test of liability is more in line with the liability of agent under the law of contract. These cases have already been discussed.[31] It need hardly be stated that the principal will be liable for a wrongful act of his agent which is authorised by him or is subsequently ratified by him. This is in addition to his liability for torts committed by the agent within the scope of his agency even though they are not authorised or ratified by him.[32]

2(D) Company and Director

Liability of Company.—The ordinary principles of agency apply to companies which are consequently liable for the negligence of their servants, and for torts committed by them in the course of their employment.[33]

Personal liability of Director.—Directors are personally responsible for any torts which they themselves may commit or direct others to commit, although it may be for the benefit of their company.[34]

2(E) Firm and Partner

Both under the English[35] and the Indian[36] law, a firm is liable for torts committed by a partner in the ordinary course of the business of the firm. Thus, where a partner, acting on behalf of the firm, induced by bribery a clerk of the plaintiff, a competitor in trade, dishonestly and improperly, and in breach of his duty to the plaintiff, to communicate secret and confidential information in regard to the plaintiff's business, whereby the plaintiff suffered loss, it was held that the firm was liable for the injury.[37] Whether the act of the partner is one done in the course of the business of

28. *Guru Govekar v. Filomena F. Lobo*, AIR 1988 SC 1332 : (1988) 3 SCC 1.
29. *Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt*, AIR 1966 SC 1697 : (1966) 3 SCR 527.
30. See title 2(A)(i)(e). Lending of Chattel, p. 148.
31. See title 2(A)(ii)(b)(vi); 'Dishonest and Criminal Acts', p. 163.
32. See titles 2(A)(ii)(b), (ii), (iii), (iv), pp. 152 to 158.
33. LINDLEY on Companies, 6th edition., Vol. I, p. 257.
34. *Vide* LINDLEY on Companies, Vol. I, p. 348.
35. Partnership Act (English), 1890, (53 & 54 Vic. c. 39) ss. 10 & 12.
36. The Indian Partnership Act (IX of 1932), s. 26.
37. *Hamlyn v. Houston & Co.*, (1903) 1 KB 81.

the firm is a question to be determined on the same considerations as those which determine the responsibility of a master for the acts of his servants.

The relation of partners *inter se* is that of principal and agent, and therefore, each partner is liable for the act of his fellows. Every partner is liable to make compensation to third person in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.[38]

2(F) Guardian and Ward

Guardians are not personally liable for torts committed by minors under their charge.[39] But guardians can sue for personal injuries to minors under their charge on their behalf.[40]

3. LIABILITY BY ABETMENT

In actions of wrong, those who abet the tortious acts are equally liable with those who commit the wrong.[41] A person who procures the act of another is legally responsible for its consequences (1) if he knowingly and for his own ends induces that other person to commit an actionable wrong, or (2) when the act induced is within the right of the immediate actor and, therefore, not wrongful so far as the actor is concerned, but is detrimental to a third party and the inducer procures his object by the use of illegal means directed against that third party.[42]

38. The Partnership Act, 53 & 54 Vic. c. 39, ss. 10, 11 and 12; The Indian Partnership Act (IX of 1932), s. 26.
39. *Luchmun Das v. Narayan*, (1871) 3 NWP 191.
40. *Madhoo Soodan v. Kaemollah*, (1868) 9 WR 327.
41. *Kashee Nath v. Deb Kristo*, (1871) 16 WR 240; *Golab Chand v. Jeebun*, (1875) 24 WR 437; *Wharton v. Moona Lall*, (1866) 1 Agra HC 96.
42. *Allen v. Flood*, (1898) AC 1 96 : 77 LT 717 : 14 TLR 125; *Nam Kee v. Ah Fong*, (1934) ILR 13 Ran 175.

CHAPTER IX

REMEDIES

SYNOPSIS

THERE are two kinds of remedies for torts, namely, judicial and extra-judicial. Judicial remedies are remedies which are afforded by the courts of law; while extra-judicial remedies are those which are available to a party, in certain cases of torts, by his own acts alone. Extra-judicial remedies are (i) expulsion of trespasser, (ii) re-entry on land, (iii) recaption of goods, (iv) distress damage feasant and (v) abatement of nuisance. These remedies are discussed at appropriate places in subsequent Chapters. But these remedies, which are in the nature of self-help, should not be normally resorted to, for the person resorting to them may frequently exceed his rights and may be faced with a case civil or criminal alleging that he took the law in his own hands. It may also create problems of law and order. Judicial remedies are: (1) awarding of damages; (2) granting of injunction; and (3) specific restitution of property. Damages and injunctions are merely two different forms of remedies against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second. The third remedy is the specific restitution of property.

1. DAMAGES

1(A) Introduction

In a suit for damages in a tort case, the court awards pecuniary compensation to the plaintiff for the injury or damage caused to him by the wrongful act of the defendant. After it is proved that the defendant committed a wrongful act, the plaintiff would be entitled to compensation[1], may be nominal, though he does not prove any specific damage or injury resulting to him, in cases where the tort is actionable *per se*. But even in these cases when specific damage is alleged and in all other cases, where tort is not actionable *per se*, and it becomes the duty of the plaintiff to allege the damage resulting from the wrongful act for which he claims damages, the court's enquiry resolves in deciding three questions: (1) Was the damage alleged caused by the defendant's wrongful act? (2) Was it remote? and (3) What is the monetary compensation for the damage?

1(B) Causation

If the damage alleged was not caused by the defendant's wrongful act the question of its remoteness will not arise. In deciding the question whether the damage was caused by the wrongful act, the generally accepted test is known as 'but for' test. This means that if the damage would not have resulted but for the defendant's wrongful act, it would be taken to have been caused by the wrongful act. Conversely it means that the defendant's wrongful act is not a cause of the damage if the same would have happened just the same, wrongful act or no wrongful act. Thus when a doctor is negligent in failing to see and examine a patient and give him the proper treatment, the claim will still fail if it is shown on evidence that the patient would have died of poisoning even if he had been treated with all due care. The doctor's negligence in such cases is not the cause of the patient's death.[2] In *Robinson v. Post Office*[3] the plaintiff, who was employed by the *Post Office*, slipped as he was descending a ladder. The ladder had become slippery due to negligence of the employer. The plaintiff sustained a wound on his left shin. Some eight hours later, he visited his doctor and was administered antitetanusserum (A.T.S.). The recognised test procedure then was to wait for half an hour after injecting a small quantity to see whether the patient showed any reaction before administering a full dose. The doctor did not follow this procedure but waited only a minute after the test dose before administering the balance of the full dose. The plaintiff did not suffer any reaction for about three days but thereafter he suffered from encephalitis which is a possible though rare consequence of A.T.S. injection. In a suit for damages against the doctor, it was found that the doctor was not negligent in deciding to inject A.T.S. His negligence lay in not waiting for half an hour after the test dose. But the negligence did not cause the onset of encephalitis for it was almost certain that when

1. In *Yadava Kumar v. Divisional Manager, National Insurance Company Limited*, (2010) 10 SCC 341, the Supreme Court has distinguished between "compensation" and "damages" to mean that "the expression compensation may include a claim for damages but compensation is more comprehensive. Normally damages are given for an injury which is suffered, whereas compensation stands on a slightly higher footing. It is given for the atonement of injury caused and the intention behind grant of compensation is to put back the injured party as far as possible in the same position, as if the injury has not taken place, by way of grant of pecuniary relief. Thus, in the matter of computation of compensation, the approach will be slightly more broad based than what is done in the matter of assessment of damages."
2. *Bernett v. Chelsea and Kensington Hospital Management Committee*, (1968) 1 All ER 1068 : (1968) 2 WLR 422: 111 SJ 912.
3. (1974) 2 All ER 737 : (1974) 1 WLR 1176 : 117 SJ 915(CA).

the plaintiff did not show any reaction for three days after administration of full dose he would not have shown any sign of reaction even if the doctor had waited for half an hour after the test dose. The plaintiff's suit, therefore, failed against the doctor. The plaintiff had also sued the Post Office and that part of the case is considered later in this Chapter. Negligence in not telling the patient of the risk involved in a surgical operation or treatment would not justify award of damages on materialisation of the risk after the operation or treatment if it can be shown that the patient would have proceeded with the surgery or treatment even if he had been told of the risk involved for the claim for damages would then fail on the ground of causation.[4]

The same principle applies where the defendant/employer's negligence lies in not taking prescribed safety precautions. In *Mc Williams v. Sir William Arrol & Co.*,[5] the claim was by the widow of a workman of the defendants, who fell from a steel tower which was being erected and died. The defendants were at fault in not providing safety belts, the use of which would have prevented the accident. Evidence was, however, given that throughout for a long period when belts had been provided the deceased never used them and a finding was reached that the deceased would not have worn a belt on the date of the accident even if it had been available. On this finding it was held that the defendant's breach of duty in not providing safety belts did not cause the accident and the defendants were not liable. Refuting the argument that if a person is under a duty to provide safety belts and fails to do so, he cannot be heard to say 'even if I had done so they would not have been worn', LORD REID observed: "If I prove that my breach of duty in no way caused or contributed to the accident, I cannot be liable in damages. And if the accident would have happened in just the same way, whether or not I fulfilled my duty, it is obvious that my failure to fulfil my duty cannot have caused or contributed to it. No reason has ever been suggested why a defender should be barred from proving that his fault, whether common law negligence or breach of statutory duty, had nothing to do with the accident." *Mc Williams* case, though technically correct on principles, is an extreme case in so far as it found against the plaintiff on the hypothetical question whether the deceased workman would have used the safety belt which the defendants ought to have provided. In actual practice and speaking generally, such a "causal uncertainty is apt to be resolved by the strong sympathetic bias for the victim of a proven wrongdoer".[6]

It must here be mentioned that the wrongful act of the defendant need not have been the sole or principal cause of the damage. The defendant would be liable for the damage if his wrongful act caused or materially contributed to it notwithstanding that there were other factors for which he was not responsible which had contributed to the damage.[7]

The 'but for' test is, however, not of universal application and a lesser degree of causal test may be applied in special circumstances to prevent injustice. In *Mc Ghee v. National Coal Board*[8] the workman contracted dermatitis after some days spent in cleaning brick kilns. The employer was not at fault for the hot and dusty condition of the brick kilns. The employer's fault lay in not providing washing facilities as a

4. *Rosenberg v. Percival*, (2001) 75 ALJR 734.
5. (1962) 1 All ER 623 : (1962) 1 WLR 295 : 106 SJ 218.
6. FLEMING, Torts, 6th edition, p. 173.
7. *Bonnington Castings v. Wardlaw*, (1956) AC 613 (HL) : (1956) 2 WLR 707 : (1956) 1 All ER 615; *Mc Ghee v. National Coal Board*, (1972) 3 All ER 1008 : (1973) 1 WLR 1 (HL); *Wilsher v. Essex Area Health Authority*, (1988) 1 All ER 871 : (1988) AC 1074 (HL); *Page v. Smith*, (No. 2) (1996) 3 All ER 272 (CA).
8. *Mc Ghee v. National Coal Board*, (1972) 3 All ER 1008 : (1973) 1 WLR 1 (HL).

consequence of which the employee had to cycle home unwashed. It was not proved and could not have been proved with the knowledge relating to onset of dermatitis then available that the washing would have been effective to prevent onset of dermatitis. But it was found that the absence of washing materially increased the risk of the disease and on this finding the defendant was held liable. Thus in the special circumstances of this case the 'but for' test was not insisted upon and no distinction was drawn between making a material contribution to causing the disease and materially increasing the risk of contracting it. This is how *Mc Ghee's* case was understood in *Fairchild v. Glenhaven Funeral Services.*[9] In this case the claims were by or on behalf of the estates of former employees. In each case the employee had worked at different times and for differing periods under more than one employer. Both employers were in breach of duty towards the employee to take reasonable care to take all practicable measures to prevent him from inhaling asbestos dust because of the known risk that the dust if inhaled may cause mesothelioma. The employee was found to be suffering from a mesothelioma because of inhalation of excessive asbestos dust during his employment but he was unable to prove on the balance of probabilities due to current limits of scientific knowledge that his mesothelioma was the result of inhaling asbestos dust during his employment by one or other or both of his employers. The House of Lords held that in the circumstances the 'but for' test would have led to unfair result by denying redress to the employee and could be departed from and a lesser degree of causal connection applied namely that by materially increasing the risk of the disease each employer had materially contributed to causing the employee's disease. Both the employers were, therefore, jointly held liable. *Chester v. Afsher*[10] is yet another case where in the special circumstances 'but for' test was not followed. In this case the claimant, a patient suffered from severe back pain. An eminent neurosurgeon whom she consulted advised for surgery but negligently failed to inform her of the one to two per cent risk of paralysis inherent in such an operation. The operation was conducted without any negligence but unfortunately the very risk which the surgeon had failed to inform materialised and the patient suffered partial paralysis. In the claim for damages the claimant did not prove that she would never have had the operation had she been told about the risk and all that she proved was that she would then not have consented to the operation which was performed resulting in the injury. Although the risk, of which the patient was not warned, was not created or increased by the failure to warn yet it was held that the patient was entitled to succeed. In this case there was a breach of duty on the part of the doctor towards the patient in not informing her of the risk and the patient would have remained remedy less had the 'but for' test of causation been applied and, therefore, in the special circumstances that test was not applied.[11]

9. (2002) 3 All ER 305 (HL). This case was followed in *Barker v. Saint Gobbain Pipelines plc*, (2005) 3 All ER 661 (CA) where the claimant was the widow of a man who had died from mesothalioma contracted as a result of exposure to asbestos dust while working as an employee under two employers and while self-employed. No apportionment was allowed to reduce damages in respect of the period of self employment and the injury was held to be indivisible. But in appeal this decision of the Court of Appeal in *Barker's* case was reversed: (2006) 3 All ER 785 (H.L.). It was held that the extent of liability of each defendant would be commensurate with the degree of risk for which that defendant was responsible. Ascertainment of the degree of risk would be an issue of fact to be decided by the trial judge. Accordingly the defendant's liabilities were several and were for a share of the damage consequent on the contracting of Mesothalioma by the victim according to the share of the risk created by their breaches of duty.
10. (2004) 4 All ER 587 (HL).
11. (2004) 4 All ER 587 , pp. 596, 604-612, 616.

In *Gregg v. Scot*,[12] the House of Lords was faced with a new problem whether in the law of clinical negligence a patient who has suffered an adverse event is entitled to recover damages for loss of a chance of more favourable outcome. By majority that question was answered in the negative. The facts in this case were that the patient had a lump under his arm which he showed to Dr. Scott who thought it was a collection of fatty tissue. That was the most likely explanation but unfortunately it was wrong. The patient had cancer of a lymph gland which was discovered a year later. He was treated by chemotherapy and was still alive after nine years when the appeal was heard. Dr. Scott was found negligent in excluding the possibility that the growth might be cancerous. He should have referred the patient to a routine check up in a hospital which would have settled the matter. The patient however failed to prove on a balance of probabilities that Dr. Scott's negligence had affected the course of his illness or prospects of survival. The patient's alternative submission that loss of a chance of a favourable outcome should itself be a recoverable head of damage in cases of clinical negligence was negatived.

It need hardly be stated that if out of the two competing factors (of which one is tortious) the evidence fails to establish that the tortious factor has caused or aggravated the damage it will have to be held that the damage was caused solely by the other factor. In *Kay v. Ayrshire and Arram Health Board*,[13] the plaintiff's son a child aged two years was treated for pneumococcal meningitis in a hospital managed by the defendant. In the course of the treatment the child was administered negligently an overdose of penicillin. The child suffered deafness and the suit was for damages on that account. The evidence failed to establish that an overdose of penicillin could have caused or aggravated deafness whereas it was established that deafness was a common sequela of pneumococcal meningitis. The House of Lords upheld the dismissal of the suit observing that since according to the expert evidence, an overdose of penicillin had never caused deafness, and the child's deafness had to be regarded as resulting solely from the meningitis. The question whether a particular factor has caused or materially contributed to the damage has to be answered on a balance of probabilities.[14] In *Hotson v. East Buck Shire Area Health Authority*,[14] the plaintiff when aged about 13 years had injured his hip by a fall. The plaintiff was taken to a hospital run by the defendant. The injury was not correctly diagnosed and the plaintiff was sent home. After five days of severe pain the plaintiff was taken back to the hospital. The nature of the hip injury was such that it caused deformity of the hip joint restricting mobility and a major permanent disability developed by the age of 20. The plaintiff claimed damages for negligence of the medical staff. The defendant admitted that delay in diagnosis amounted to negligence but denied that the delay had adversely affected the plaintiff's long term condition. At the trial it was found that even if the medical staff had correctly diagnosed when the plaintiff first came there was still a 75% risk of the plaintiff's disability developing and so on the balance of probabilities even correct diagnosis and treatment would not have prevented the disability from occurring. The trial judge and the Court of Appeal however, awarded the plaintiff 25% of the full value of the damages awardable for the disability on the ground that the negligence in the diagnosis denied the plaintiff a 25% chance of full recovery. The House of Lords reversed this award holding that when on a balance of probabilities, which was the correct test on a question of causation, the plaintiff failed to prove that the negligence in diagnosis caused the permanent disability he was not entitled to any damages on that account. It was also

12. (2005) 2 WLR 268 (HL).
13. (1987) 2 All ER 417 (HL).
14. *Hotson v. East Buckshire Area Health Authority*, (1987) 2 All ER 909 : (1987) AC 750 : (1987) 3 WLR 232 (HL).

held that had the plaintiff succeeded in proving that the negligence in diagnosis had caused the damage he would have been entitled to full damages. In the words of LORD ACKNER: "Where causation is in issue, the judge decides that issue on the balance of the probabilities. There is no point or purpose in expressing in percentage terms the certainty or the near certainty which the plaintiff has achieved in establishing his cause of action. Once liability is established on the balance of probabilities, the loss which the plaintiff has sustained is payable in full. It is not discounted by reducing his claim by the extent to which he has failed to prove his case with 100% certainty."[15] Further, when the plaintiff's injury is attributable to a number of causes including the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury does not give rise to any presumption that the defendant's negligence caused or materially contributed to the injury and the burden of proving the causative link between the defendant's negligence and the plaintiff's injury remains on the plaintiff.[16] The link can be inferred from evidence on balance of probabilities but cannot be held to be proved on the basis of any presumption.[16] In *Wilsher's*[16] case, the plaintiff a child who was prematurely born suffered from various illnesses including oxygen deficiency. While in a special baby unit of the hospital where he was born, the plaintiff was negligently given excess oxygen. The plaintiff was later on discovered to be suffering from an incurable condition of the retina resulting in near blindness. The plaintiff's retinal condition could have been caused by excess oxygen as also by five other conditions which had afflicted the plaintiff. In an action for damages against the Health Authority, the House of Lords held that there was no presumption that the retinal condition was caused or materially contributed by the excess oxygen and the burden lay on the plaintiff to prove the causation link. In the case of *Page v. Smith (No. 2)*,[17] the plaintiff who was involved in a motor accident due to negligence of the defendant did not suffer any physical injury. He had, however, earlier suffered from chronic fatigue syndrome (CFS) which was exacerbated by the accident. The balance of medical opinion was to the effect that the accident could have materially contributed to the recrudescence of plaintiff's CFS and the plaintiff was awarded damages on that basis.

Different problem arises when the events causing damage to the plaintiff are not simultaneous but successive. Such a problem is illustrated by the case of *Baker v. Willoughby*.[18] In that case the plaintiff's leg was injured in 1964 when he was knocked down by a car which was negligently driven by the defendant. In 1967, before the action came for trial, the plaintiff was shot in the same leg during an armed robbery and the limb had to be amputated well above the knee. It was submitted by the defendant that no loss or injury suffered thereafter by the plaintiff could be attributed to his tort since its effect was obliterated by the gunshot injury followed by amputation. The trial judge rejected this submission and allowed full damages taking both past and future losses into account on the basis of continued weakness and pain in the left ankle and the possibility of later development of arthritis in the leg. The defendant's submission, however, succeeded in the Court of Appeal but on further appeal, the House of Lords restored the decision of the trial Judge. LORD REID (with whom LORD GUEST, VISCOUNT DILHORNE and LORD DONOVAN agreed) made the following observations: "If the later injury suffered before the date of the trial either reduces the disabilities from the injury for which the defendant is liable, or shortens the period during which they will be

15. *Hotson v. East Buckshire Area Health Authority*, (1987) 2 All ER 909, p. 922.
16. *Wilsher v. Essex Area Health Authority*, (1988) 1 All ER 871 : (1988) AC 1074 (HL).
17. (1996) 3 All ER 272 (CA) : (1996) 1 WLR 855.
18. (1969) 3 All ER 1528 : (1970) AC 467 : (1970) 2 WLR 50 (HL).

suffered by the plaintiff, then the defendants will have to pay less damages. But if the later injury merely becomes a concurrent cause of the disabilities caused by the injury inflicted by the defendant, then in my view they cannot diminish the damages."[19] LORD PEARSON in the same case said: "The supervening event has not made the plaintiff less lame or less disabled nor less deprived of amenities. It has not shortened the period over which he will be suffering. It has made him more lame, more disabled, more deprived of amenities. He should not have less damages though being worse off than might have been expected."[20] The policy consideration leading to the decision was that otherwise the second tort-feasor could (on the principle that a tort-feasor is entitled to take his victim as he finds him) reduce the damages against him on the ground that he was only responsible for the removal of an already damaged leg, and not for removal of a sound leg; thus if the first tort-feasor escaped liability, the plaintiff could not get full compensation for the injuries done to him. Further in this case the second tort-feasor *i.e.* the robbers, even if traceable, were in all probability men of straw and a suit against them for damages would have been a fruitless exercise. *Baker's* case, though not overruled, came up for strong criticism in *Joblin v. Associated Dairies Ltd.*[21] which was a case where the plaintiff received a back injury arising due to the defendant's breach of statutory duty and the injury impaired the plaintiff's capacity to work by 50%. During the pendency of the plaintiff's action for trial, he was found suffering from a spinal disease which was unconnected with the back injury but which rendered him wholly unfit to work. The House of Lords held that the defendants were not liable for any loss of earnings suffered by the plaintiff after the onset of the spinal disease rendering him wholly unfit to work. The principle that was applied was that in assessing damages, the vicissitudes of life are to be taken into account so that the plaintiff is not overcompensated and that a supervening illness known at the time of the trial is a known vicissitude about which the court ought not to speculate when it in fact knew. The criticism of *Baker's* case in *Joblin's* case is that it failed to apply the vicissitude principle, and failed to notice the compensation payable under the Criminal Injuries Compensation Scheme. The distinction between the two cases on facts is that in *Baker's* case the first and the second injuries were both from tortious acts whereas in *Joblin's* case the second injury was from a supervening illness. *Baker's* case, though shaken by *Joblin's* case, is still an authority in case of disabling injuries arising from successive and independent tortious acts[22] and it may find additional support in India where there is no scheme statutory or otherwise corresponding to Criminal Injuries Compensation Scheme as applied in England.

In a case where the claimant was exposed to asbestos dust while working for several years with different employees and developed asbestosis but had claimed damages for personal injury against only one of the employers on the ground of negligence and breach of statutory duty, it was held by the court of appeal that the defendant would be liable only to the extent that he had contributed to the disability.[23]

There is much to be said for the view expressed by LAWS L.J. that there is no decisive test of causation and the law is that every tortfeasor should compensate the

19. (1969) 3 All ER 1528, p. 1534.
20. (1969) 3 All ER 1528, p. 1535.
21. (1981) 2 All ER 742 : (1982) AC 794 : (1981) 3 WLR 155 (HL).
22. (1981) 2 All ER 742, p. 760, (LORD RUSSEL); p. 764 (LORD KEITH).
23. *Holtby v. Brigham & Cowan (Hull) Ltd.*, (2000) 3 All ER 421 (2000) 1 CR 1086 (CA). See further *Murrell v. Healy*, (2001) 4 All ER 345 (C.A.) (when an injured person suffers subsequent further injury by the tort of another person, in assessing damages against him, the court has to ask what damage had been suffered as a result of that tort by the already injured victim).

injured claimant in respect of that loss or damage which he should be *justly* held responsible and that the elusive conception of causation should not be frozen into constricting rules.[24]

1(C) Remoteness

1(C)(i) Foreseeability

There would be manifest injustice if a person were held responsible for all consequences of his act which in theory may be endless. A person is, therefore, held responsible in law only for consequences which are not remote. A damage or injury though caused by a tortious act of the defendant will not qualify for award of damages if it is too remote. Towards the middle of the 19th Century, two competing views were advanced as laying down the test of remoteness. According to one view foreseeability is the test of remoteness. In other words, on this view consequences are too remote if a reasonable man would not have foreseen them.[25] According to the other view, directness is the correct test, that is to say, the defendant is liable for all direct consequences of the tortious acts suffered by the plaintiff whether or not a reasonable man would have foreseen them.[26] It is the test of foreseeability that now holds the field but to properly understand the difference between the two views, it is more convenient to first notice the implication of the test of directness.

The leading authority of the test of directness is the decision of the Court of Appeal in *In Re an Arbitration between Polemis and Furness, Withy & Co.*[27] In this case, the defendants chartered the plaintiff's ship, the Polemis, to carry a cargo which contained a quantity of Benzine or petrol. Some of the petrol cases leaked on the voyage and there was petrol vapour in the hold. While shifting some cargo at a port, the stevedores employed by the charterers negligently knocked a plank out of a temporary staging erected in the hold, so that the plank fell into the hold and in its fall by striking something caused a spark which ignited the petrol vapour and the vessel was completely destroyed. It was held that as the fall of the board was due to the negligence of the charterers' servant, the charterers were liable for all the direct consequences of the negligent act including destruction of the ship even though those consequences could not have been reasonably anticipated. According to this case, once the tortious act is established, the defendant is to be held liable for all the damage which "is in fact directly traceable to the negligent act, and not due to independent causes having no connection with the negligent act".[28] On this view, if the tort concerned is negligence, foreseeability of some damage is relevant to decide whether the act complained of was negligent or not but the liability for damages is not restricted to foreseeable damage but extends to all the damage directly traceable to the negligent act.

The test of foreseeability in preference to the test of directness came to be established by the decision of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.* popularly known as *Wagon Mound No 1*.[29] In this case, during bunkering operations in Sydney harbour, a large quantity of oil was negligently allowed to spill from the Wagon Mound, a ship under the defendant's control as charterers. The oil spread to the plaintiff's wharf where another ship was being repaired. During welding operations in the course of repairs, a drop of molten metal fell on a floating

24. *Mc Manus v. Beckham*, (2002) 4 All ER 497, pp. 512, 513.
25. *Rigby v. Hewitt*, (1850) 5 Ex. 240, p. 243 : 19 LJ Ex 291 (POLLOCK, CB); *Greenland v. Chaplin*, (1850) 5 Ex. 243, p. 248 : 82 RR 655 (POLLOCK, CB).
26. *Smith v. S.W. Ry.*, (1870) LR 6 CP 14.
27. (1921) 3 KB 560.
28. (1921) 3 KB 560 (SCRUTTON LJ).
29. (1961) 1 All ER 404 : (1961) 2 WLR 126 : 105 SJ 85 (PC).

waste setting it on fire and this ignited the floating oil resulting in the destruction of the wharf by fire as also the vessel that was being repaired.

In this suit, which was restricted to damage to the wharf (there was another suit by the owner of the ship that was being repaired which is discussed later), the trial Judge's finding was that the defendant did not know and could not reasonably be expected to have known that the oil was capable of being set a fire when spread on water. He, however, found that the destruction of the wharf by fire was a direct though unforseeable consequence of the negligence of the defendant and gave judgment for the plaintiff.

The Supreme Court of New South Wales affirmed the decision of the trial Judge. In further appeal by the defendant the Privy Council allowed the appeal. In holding foreseeability to be the correct test, the Judicial Committee observed that the Polemis case should not be regarded as good law "for it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be direct".[30] After pointing out that the test of directness looked at the happenings, after the event, it was further observed: "After the event even a fool is wise. But it is not hind sight of a fool; it is the foresight of a reasonable man which alone can determine responsibility."[30]

In *Wagon Mound No. 2*[31] which was a suit against the same defendant by the owner of the vessel which was being repaired and which was damaged by fire, the evidence was different and the finding reached by the Privy Council was that the risk of the oil on the water catching fire was foreseeable; so the defendant was held liable. The Privy Council refuted the argument that if a real risk can properly be described as remote it must be held to be not reasonably foreseeable and observed: "If a real risk is one which would occur to the mind of a reasonable man—and which he would not brush aside as far fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense."[31] The finding that the damage by fire was foreseeable was reached on the following considerations: (1) There was a real risk of fire although remote; (2) The risk was great in the sense that if the oil caught fire serious damage to ships and property was very likely; (3) A qualified Chief Engineer of the defendant would have known the gravity of the risk; (4) Action to eliminate the risk presented no difficulty, disadvantage or risk; (5) From the very beginning the discharge of oil was an offence and was causing loss to the defendant financially; and (6) A reasonable man in the position of a Chief Engineer would have realised and foreseen and prevented the risk.

The effect of the decision in *Wagon Mound No. 2*[31] is to affirm and explain the test of foreseeability. A tort-feasor is liable according to the explanation given of foreseeability in this case, "for any damage which he can reasonably foresee may happen as a result of the breach (of duty) however unlikely it may be, unless it can be brushed aside as far fetched."[32] This case (*Wagon Mound No. 2*) also establishes that the test of foreseeability is not limited to the tort of negligence but applies also to the tort of nuisance. In *Wagon Mound No. 1*.[33] the Privy Council reserved its opinion on the question whether the *test of foreseeability* could be applied to a tort of strict liability.

30. (1961) 1 All ER 404 : (1961) 2 WLR 126 : 105 SJ 85 (PC).
31. (1966) 2 All ER 709 : (1967) 1 AC 617 (PC).
32. *The Heson II*, (1969) 1 AC 350, (442) (LORD UPJOHN); WEIR, Case Book, 5th edition, p. 184.
33. (1961) 1 All ER 404 : (1961) AC 388 (PC).

It has now been authoritatively decided by the House of Lords in *Cambridge Water Co. Ltd. v. Eastern Countries Leather Plc.*[34] that even in cases of strict liability governed by the rule in *Rylands v. Fletcher,*[35] foreseeability of damage of the relevant type, if there be escape from the land of things likely to do mischief, was a prerequisite of liability. However, it has been said that in action for deceit, damages are not restricted to foreseeable damage.[36]

The House of Lords in *Hughes v. Lord Advocate*[37]; *Jolly v. Sutton London Borough Council,*[38] and the Court of Appeal in *Doughty v. Turner Manufacturing Co.*[39] accepted the Privy Council decision in *Wagon Mound No. 1.* These cases also lay down and illustrate that the test of foreseeability is satisfied if the damage suffered is similar in kind though different in degree and that the precise sequence of events or extent of the damage need not have been foreseeable; but if the damage suffered is altogether different in kind, the test of foreseeability is not satisfied, and the plaintiff cannot recover. "What must have been foreseen is not the precise injury which occurred but injury of a given description. The foreseeability is not as to particulars but the genus."[40] In *Hughes*' case[41] the Post Office maintenance gang before going for a tea-break, left an open manhole unattended after covering it with a canvas shelter surrounded by four kerosene lamps. A boy, aged eight, brought one of the lamps in the shelter and started playing with it when he stumbled and it fell into the manhole. There was a violent explosion and the boy himself fell into the manhole and sustained severe burn injuries. It was foreseeable that boys might enter the shelter and play with the lamps and that spilled kerosene might catch alight and cause burn injuries. What actually happened was that kerosene vapours were formed by the heat of the lamp and set off by its flame resulting in the explosion which was not foreseeable. The House of Lords held the defendants liable rejecting the distinction between burning of kerosene and exploding of kerosene vapours. It will be seen that the foreseeable and actual injuries were of the same kind that is to say burn injuries resulting from kerosene coming in contact with naked flame and the difference only lay in the manner in which the events were predictable and the way they happened for instead of the oil coming in contact it was its vapour which came in contact with the flame of the lamp causing the explosion. This distinction was too fine to make the accident different in kind from that which was foreseeable. In *Doughty's* case[42], the foreseeable risk was injury to workmen from splash of extremely hot molten liquid if a thing fell into it. What happened actually was that an asbestos cover fell into the liquid and the extreme heat caused the asbestos cement to undergo a chemical change creating or releasing water which turned to steam and which in one or two minutes later caused an eruption of the molten liquid from the cauldron injuring the plaintiff workman. The workman was not injured by the splash, if any, from falling of the cover into the liquid. Until the accident had been investigated, no one knew or suspected that heat can cause such a chemical change in asbestos cement. The Court of Appeal held the defendant not liable on the reasoning that the accident that happened was not merely a variant of but of entirely different kind to that which was

34. (1994) 1 All ER 53 (HL).
35. (1868) LR 3 HL 330.
36. *Doyle v. Olby (Iron mongers),* (1969) 2 QB 158, (167) : (1969) 2 All ER 119.
37. (1963) 1 All ER 705 : (1963) AC 837 (HL).
38. (2000) 3 All ER 409 (HL).
39. (1964) 1 All ER 98 : (1964) 1 QB 518 (CA).
40. *Jolly v. Sutton London Borough Council,* (2000) 3 All ER 409, p. 418 (HL).
41. (1963) 1 All ER 705 : (1963) AC 837 (HL).
42. (1964) 1 All ER 98 : (1964) 1 QB 518 (CA).

foreseeable. *Hughe's* case,[43] also shows that if the damage is of the same kind as was foreseeable, the defendant will be liable even if the magnitude of the accident and the extent of damage greatly varied from what was foreseeable.[44]

1(C)(ii) Intended Consequences

Intended consequences of the tort-feasor are evidently foreseeable. But an intentional wrongdoer's liability will cover all consequences, whether foreseeable or not, which result from his wrongful act. This is not affected by the *Wagon Mound* cases. The striking illustration of the extent of intentional wrongdoer's liability is furnished by the case of *Scott v. Shepherd*[45] where the defendant threw a lighted squib into the market house when it was crowded. The fiery missile came down on the shed of a vendor of ginger bread who to protect himself caught it dexterously and threw it away from him. It then fell on the shed of another ginger bread seller, who passed it on in precisely the same way, till at last it burst in the plaintiff's face and put his eye out. The defendant was held liable to the plaintiff. It is an application of the same or similar principle that in an action for deceit which is an intentional tort, the tort-feasor is liable for all actual damage, whether foreseeable or not, which directly flows from the fraudulent act.[46] This principle was approved by the House of Lords and it was held that in an action for deceit the plaintiff is not restricted to the difference between real value of the subject matter on the date of sale and the price paid by him for the asset acquired but to all consequential loss from the misrepresentation which induced the plaintiff to retain the asset or in other words the plaintiff was by reason of the fraud locked into the property.[47]

1(C)(iii) "Eggshell Skull" Cases

Wagon Mound also leaves the "*eggshell skull*" cases unaffected. A tort-feasor takes his victim as he finds him. If the plaintiff suffers personal injury from the wrongful act of the defendant, it is no answer to the claim that the plaintiff would have suffered less injury "if he had not unusually thin skull or an usually weak heart".[48] The principle is illustrated by *Smith v. Leech Brain & Co. Ltd.*[49] where a workman of the defendants because of their negligence suffered a burn injury on his lower lip which promoted cancer at the site of the burn resulting in his death. But for the burn, the cancer might never have developed, though there was a premalignant condition and there was a likelihood that it would have done so at some stage in his life. In an action by the widow of the deceased workman, the defendants were held liable for his death on the principle that a tort-feasor must take his victim as he finds him. *Smith's* case was followed in *Robinson v. The Post Office*[50] the facts of which have been stated earlier[51] in decreeing the claim against the Post Office. It was foreseeable that if a workman slipped from a ladder made slippery because of the negligence of the employer, the workman was likely to suffer injury needing

43. (1963) 1 All ER 705 : (1963) AC 837 (HL).
44. For another example, see *VacWell Engineering Co. Ltd. v. BDH Chemicals Ltd.*, (1971) 1 QB 88 (110) (Supply of chemical in ampoules liable to explode on contact with water; minor explosion foreseeable; huge explosion took place as plaintiff put a number of ampoules in the same sink).
45. (1773) 2 WBI 892.
46. *Doyle v. Olby Ltd.*, (1969) 2 QB 158 : (1969) 2 All ER 119.
47. *Smith New Court securities Ltd. v. Scrimgeour Vickers,* (1996) 4 All ER 769, p. 778 : (1996) 3 WLR 1051 (HL). See further p. 630.
48. *Dulieu v. White*, (1901) 2 KB 669, p. 679 : 85 LT 186 : 17 TLR 555.
49. (1962) 2 QB 405 : (1961) 3 All ER 1159.
50. (1974) 2 All ER 737 : (1974) 1 All ER 1176 (CA).
51. P. 178, *supra.*

medical treatment in the form of injection of ATS. Although it was not foreseeable that the injection given even without any negligence on the part of the doctor would cause encephalitis to the workman because he was ellergic to the second dose of ATS yet the Post Office were held liable on the principle that they were bound to take the plaintiff as they found him.[52] The case also holds that foreseeable medical treatment given without any negligence on the part of the doctor does not constitute *Novus actus interveniens*.[52]

1(C)(iv) Intervening Acts or Events: Novus Actus Interveniens

Damage resulting to the plaintiff after the chain of causation set in motion by the defendant's wrongful act is snapped is too remote and does not qualify for award of damages against the defendant.[53] The proposition so stated is simple but the difficulty lies in formulating the principles as to when an act or event breaks the chain of causation. The snapping of the chain of causation may be caused either by a human action or a natural event.

As regards human action, two principles are settled; one that human action does not *per se* severe the connected sequence of acts; in other words, the mere fact that human action intervenes does not prevent the sufferer from saying that injury which is due to that human action as one of the elements in the sequence is recoverable from the original wrongdoer; and secondly that to break the chain of causation it must be shown that there is something ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic.[54] If there is a duty to avoid risk to children, their unexpected behaviour does not break the chain of causation "for their ingenuity in finding unexpected ways of doing mischief to themselves and others should never be underestimated."[55]

As an application of the above principles, a reasonable act done by a person in consequence of the wrongful act of the defendant which results in further damage does not break the chain of causation.[56] In *The City of Lincoln*,[57] a collision took place between a steamer and a barge in which the steamer alone was to be blamed. The steering compass, charts and other instruments of the barge were lost in the collision. The Captain of the barge made for a port of safety, navigating his ship by a compass which he found on the board. The barge without any negligence on the part of the Captain or the crew, and owing to the loss of the requisites for navigation, grounded and was abandoned. The Court of Appeal held that the *Captain's* action of navigating the barge to a port of safety, in which he did not succeed, was a

52. (1974) 2 All ER 737 : (1974) 1 All ER 1176 (CA).
53. *Weld Blundell v. Stephens*, (1920) AC 956 : 123 LT 593 : 36 TLR 640 (HL) p. 986 (LORD SUMNER).
"One may find that, as a matter of history several people have been at fault and that if any of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as too remote and those which must not." *Stapley v. Gypsum Mines Ltd.*, (1953) 2 All ER 478 (H.L.) pp. 485, 486 : (1953) AC 663 (LORD REID).
54. *Lord v. Pacific Steam Navigation Co. Ltd.; The Oropesa*, (1943) 1 All ER 211 (CA); (PER LORD WRIGHT).
55. *Jolley v. Sutton London Borough Council*, (2000) 3 All ER 409, p. 420 (HL). For this case see p. 509.
56. *City of Lincoln*, (1889) P.D. 15; *The Oropesa supra; M/s. Chaurasia & Co. v. Smt. Pramila Rao*, (1974) ACJ 481 (485) (MP). See further Chap. XIX, title 7(c), p. 574.
57. (1889) PD 15.

reasonable act and did not break the chain of causation. It will be seen that as a consequence of the collision, the Captain of the barge was placed in the difficulty of taking a decision for the safety of the barge. He may have decided to remain where the barge was in the hope that the vessel would be picked up. The other alternative was to make for a port of safety. Both the alternatives were not free from risk; but neither could be called unreasonable. So the *Captain's* action in deciding to take one of them did not constitute an act breaking the chain of causation. In *Lord and another v. Pacific Steam Navigation Co. Ltd., the Oropesa*,[58] the facts were that a collision occurred between the *Oropesa and the Manchester Regiment*. The latter vessel was seriously damaged and the Captain ordered the majority of the crew to take to lifeboats who safely reached Oropesa. The Captain, after sometime, boarded another lifeboat with the rest of the crew. He hoped to persuade the Captain of Oropesa to take the Manchester Regiment in tow or to arrange for salvage assistance, and in any event, to arrange for messages to be sent out and to obtain valuable advice. The lifeboat capsized and nine of the crew died. The Oropesa returned safely with survivors and the Manchester Regiment sank. In a claim for damages by the dependants of one of the deceased crew, the contention was that the chain of causation had been broken by the act of the Captain in attempting to go to Oropesa with the crew in a lifeboat. In rejecting this contention, it was held that the action taken by the Captain was a natural consequence of the emergency in which he was placed by the negligent act of the Oropesa and there was no break in the chain of causation and that the death of the seamen was a direct consequence of the negligent act of the Oropesa. These cases were followed by the Madhya Pradesh High Court in *Chaurasiya & Co. v. Smt. Pramila Rao*.[59] The facts in this case were that the driver negligently drove a passenger bus over a causeway submerged in floodwaters. The bus skidded and stopped after crossing one-third of the causeway when one of the wheels got stuck up in stones embedded on the sides of the causeway. One of the passengers crossed the causeway safely on foot. Others remained in the bus. The water was then up to waist level. When the water level rose further, the passengers climbed to the top. The water went on rising and the bus was swept away by the flood and the passengers died. In a claim by the dependants of one of the deceased passengers, it was argued that the deceased should have crossed the causeway on foot and should not have remained in the bus. There were two courses before the marooned passengers in the bus; one was to cross the river by walking the submerged causeway and the other was of remaining in the bus in the hope that the water will recede. Both the courses involved a great risk, but neither could be called unreasonable looking to the circumstances in which the passengers were placed. The court, therefore, negatived the contention that the death of the passengers was caused by their own act of remaining in the bus and not by the negligent act of the driver in driving the bus over a flooded causeway. The court also observed: "If the persons affected by the negligent act of the defendant are exposed to risk of misjudgment of accident which would not have otherwise arisen, further damage from the materialisation of the risk may be recoverable. A reasonable act by the persons affected by the negligence in a dilemma created by the negligent act cannot be held to be *novus actus inter veniens* which breaks the chain of causation."[60] These cases have to be contrasted with those where the plaintiff acts unreasonably. In such cases further injury caused by the second accident following the plaintiff's unreasonable conduct cannot be attributed to the defendant's wrongful act causing the first accident for the chain of causation is broken by the plaintiff's unreasonable

58. (1943) 1 All ER 211 (CA).
59. (1974) ACJ 481 (MP).
60. (1974) ACJ 481(MP), p. 485. (G.P. SINGH, J.)

conduct. In *Mckew v. Holland & Hannen & Cubbits (Scotland) Ltd.*,[61] the plaintiff suffered trivial injuries in the course of his employment which were caused by the fault of the defendants. His back and hips were strained and sometimes his left leg became numb, *i.e.* he lost control of himself. But these injuries would have got cured in a week or two. In the meantime, the plaintiff went to inspect a tenement flat in the company of his family members. The stair was steep with wall on either side but without handrails. The plaintiff left the apartment with his daughter to go down the stairs. His leg became numb. To avoid a fall, he jumped and landed heavily on his right foot breaking the right ankle and a bone in his left leg. The plaintiff's conduct was unreasonable in the sense that if he had given the matter a moment's thought he must have realised that he could only safely descend the stair if either he went extremely slowly and carefully so that he could sit down if his leg gave way or waited for the assistance of his family, instead the plaintiff chose to descend in such a way that when his leg gave way he could not stop himself from jumping. The House of Lords rejected the argument that the second accident was foreseeable and hence the defendants were liable. After holding that the plaintiff's unreasonable conduct was *novus actus inter veniens*, LORD REID observed: "It is often easy to foresee unreasonable conduct or some other *novus actus inter veniens* as being quite likely. But that does not mean that the defender must pay for damage caused by the *novus actus*."[62] LORD REID also pointed out that if there is no break in causation, the plaintiff is not non-suited "by acting wrongly in the emergency unless his action was so utterly unreasonable that even on the spur of the moment no ordinary man could have been so foolish as to do what he did".[63] Another case where this passage was applied is *Emeh v. Kensington and Chelsea and Westminster Area Health Authority*.[64] In this case the plaintiff had sterilisation operation which was negligently performed by two doctors employed by the defendants and some months later, the plaintiff became pregnant. She decided not to have abortion and later gave birth to a child which was congenitally abnormal. It was held that the negligent operation had confronted the plaintiff with the dilemma of whether to have the child or an abortion and the fact that she decided against the abortion was not a *novus actus inter veniens*.[64] This view is also in line with the opinion of the House of Lords in a later case.[65] Another case[66] leads to the inference that if the plaintiff's unreasonable action resulting in further damage is caused by a personality change from a brain injury suffered in an accident for which the defendant was responsible, there is no *novus actus* and the defendant is liable for the further damages. In this case[66] the plaintiff suffered brain injury in a car accident for which the defendant was responsible. Brain injury resulted in severe personality change which led the plaintiff to sexually assault and wound with knife three women for which he was sentenced to life imprisonment. It was held that since but for injuries received in the accident and the resulting personality change, the plaintiff would not have committed the criminal acts for which he was sentenced to life imprisonment, he was entitled to damages to compensate him for being imprisoned.

Rescue cases also illustrate the principle that a reasonable act done by a person in consequence of the wrongful act of the defendant does not constitute *novus actus* breaking the chain of causation. It is reasonably foreseeable that if the defendant's wrongful act has put a person in danger of death or personal injury some other person

61. (1969) 3 All ER 1621 : 5 KIR 921 (HL).
62. (1969) 3 All ER 1621, p. 1624.
63. (1969) 3 All ER 1621
64. (1984) 3 All ER 1044 (CA).
65. *McFarlane v. Tayside Health Board*, (1999) 4 All ER 961, pp. 970, 990 (HL).
66. *Meah v. McCreamer*, (1985) 1 All ER 367 : (1985) 135 NLJ 80.

may come forward to effect a rescue even by exposing himself to the same risk whether or not the person endangered is one to whom he owes a duty to protect or is a mere stranger.[67] The rescuer can, therefore, claim damages from the defendant for injury suffered by him in effecting a rescue[68] unless his act was a foolhardy act or wholly unreasonable.[69]

When the defendant's breach of duty lies in not doing something which he was required to do to prevent loss to the plaintiff from foreseeable wrongful acts of third persons, such wrongful acts of third persons do not constitute *novus actus interveniens* and damage resulting to the plaintiff from them is recoverable from the defendant. Thus, if the defendant's duty was to take certain precautions for the safety of the plaintiff's goods and if the goods are stolen because those precautions were not taken, the defendant is liable for the loss of goods to the plaintiff.[70] Indeed, there is a broader principle involved in such cases which is stated to be that when the law imposes a duty to guard against loss caused by the free, deliberate and informed act of a human being, the occurrence of the very act which ought to have been prevented does not negative causal connection between the breach of duty and the loss. The above principle is not restricted to cases where the deliberate act is of third parties but applies also to a case where the act is of plaintiff himself irrespective of whether he is of sound or unsound mind. A duty to protect a person of full understanding from causing harm to himself is very rare but once it is found that in a particular case such a duty is owed it would be self contradictory to say that the breach could not have been a cause of the harm as the victim caused it to himself.[71] Thus when a prisoner of sound mind who was in police custody committed suicide as proper precautions to prevent him from doing so were not taken, though there was previous history of suicide attempts by him, the act of the prisoner of self destruction was held not to amount to *novus actus interveniens*.[72] Similarly when a person suffered serious injuries leading to severe depression as a result of breach of duty of the defendant and committed suicide, it could not amount to *novas actus interventions* absolving the defendant.[73]

Where the *novus actus* is caused by an irresponsible actor, it does not break the chain of causation.[74] Anyone who invites or gives opportunity to mischievous children to do a dangerous thing cannot escape liability on the ground that he did not do the wrong.[75]

Subject to what has been stated above, where damage is caused by an intervening act of an independent third party, something more than reasonable foreseeability as expressed in *Wagon Mound* cases is necessary. According to LORD REID, where such human action "forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something *very likely to happen* if it is not to be regarded as *novus actus interveniens*

67. *Haynes v. Harwood*, (1935) 1 KB 146 : 152 LT 121 : 78 SJ 801 (CA); *Chadwick v. British Railway Board*, (1967) 1 WLR 91 : (1967) 2 All ER 945.
68. *Haynes v. Harwood*, (1935) 1 KB 146 : 152 LT 121 : 78 SJ 801 (CA).
69. *Haynes v. Harwood*, (1935) 1 KB 146 (163) : 152 LT 121 : 78 SJ 801.
70. *Stansbie v. Troman*, (1948) 2 KB 48 : (1948) 1 All ER 599. Approved in *Empress Car Co. (Abertillery) Ltd. v. National Rivers Authority*, (1998) 1 All ER 481, p. 488 (HL).
71. *Reeves v. Commissioner of Police of the Metropolis*, (1999) 3 All ER 897, pp. 902, 903, 914 : (2000) 1 AC 360 : (1999) 3 WLR 363 (HL).
72. *Reeves v. Commissioner of Police of the Metropolis*, (1999) 3 All ER 897 : (2000) 1 AC 360 : (1999) 3 WLR 363 (HL).
73. *Corr. v. IBC Vehicles Ltd.*, (2008) 2 ALL ER 943. For this case see further title 1(C)(IV)A, p. 193.
74. *Weld-Blundell v. Stephens*, (1920) AC 956 (985) : 89 LJKB 705 : 36 TLR 640.
75. *Haynes v. Harwood*,.

breaking the chain of causation".[76] Thus as already seen, foreseeable medical treatment given without any negligence does not break the chain of causation.[77] OLIVER L.J. explained these observations in *Lamb v. Camden London Borough*[78] in these words: "All that LORD REID seems to me to be saying is that the hypothetical reasonable man in the position of the tort-feasor cannot be said to foresee the behaviour of another person unless that behaviour is such as would, viewed objectively, be very likely to occur. Thus, for instance, if by my negligent driving, I damage another motorist's car, I suppose that theoretically I could foresee that, whilst he leaves it by the roadside to go and telephone his garage, some ill-intentioned passer-by may jack it up and remove the wheels. But I cannot think that it could be said that, merely because I have created the circumstances in which such a theft might become possible, I ought reasonably to foresee that it would happen."[79] WATKINS L.J. in the same case observed that in addition to foreseeability one should see whether on a practical view, the intervening act did not seem sufficiently connected with the original wrongful act of the defendant.[80] In most cases, this difference in approach would make no difference to the result. It was so observed by SCOTT, J. in *Ward v. Cannock Chase District Council*.[81] The cases of *Lamb* and *Ward* both related to claim of compensation for damage caused by vandals and thieves to plaintiff's house property which became unoccupied because of the negligent act of the defendant. In *Lamb's* case, the damage was held to be too remote but in *Ward's* case, it was held to be very likely to happen for which the defendant was liable. The differing results were reached having regard to the location of the houses and the chain of events intervening the defendant's negligence and damage caused by vandals and thieves. A mini-bus belonging to the defendants' bus company was left at the end of a shift at one of the regular change over points with ignition keys in it. An unknown third party stole the bus and knocked down the plaintiff's wife who died. It was held that the act of the thief constituted *novus actus interveniens* which broke the chain of causation and the bus company was not liable in negligence for the death of the plaintiff's wife.[82]

Recklessness of a third party as distinguished from his mere negligence may break the chain of causation and constitute *novus actus interveniens*. A car broke down at night in fog on dual carriageway. The driver of the car was negligent in leaving the car on the carriageway instead of moving the car onto the verge. A lorry driven not merely negligently but recklessly collided with the stationary car and then went out of control. The lorry ended up overturned on the opposite carriageway. This would not have happened but for the reckless driving. Two other cars collided with the overturned lorry. It was held that the lorry driver's reckless driving broke the chain of causation and it was the sole cause of the accident on opposite carriageway.[83]

Just as human action which is wholly unconnected with the wrongful act of the defendant may break the chain of causation, so also a natural event although that action or event would not have affected the plaintiff had not the defendant committed the wrongful act complained of. If A's car is damaged because of the negligence of B and it is taken to a garage for repairs wherefrom it is stolen, B would not be liable to A for theft of the car from the garage. Similarly, if the car is further damaged or

76. *Home Office v. Dorset Yacht Club*, (1970) 2 All ER 294 (300) : (1970) 2 WLR 1140 (HL).
77. See text and footnotes 56 to 58, pp. 187-188.
78. (1981) 2 All ER 408 : (1981) 2 WLR 1038 : (1981) QB 625 (CA).
79. (1981) 2 All ER 408, p. 418.
80. (1981) 2 All ER 408, p. 421.
81. (1985) 3 All ER 537 (552) : (1986) 2 WLR 660 : (1986) Ch 546.
82. *Topp v. Country Bus (South West) Ltd.*, (1993) 3 All ER 448 (CA) p. 465 : (1993) 1 WLR 976.
83. *Wright v. Lodge*, (1993) 4 All ER 299 (CA)

destroyed by lightning and storm while it is in the garage B would not be liable. In the above examples, the theft and so also the lightning and storm are wholly unconnected with the original wrongful act of B and break the chain of causation although neither of them would have affected A, had not B committed the wrongful act for there would have been then no occasion to take the car to the garage for repairs.[84] Damage by such an act or event is not reasonably foreseeable in the context of the original wrongful act of the defendant.

1(C)(iv-a) A Summary of Principles in Considering Remoteness

In *Simmons v. British Steel Plc*,[85] Lord Rodger summarized the principles involved in considering the question of remoteness of damage. The summary reads:

> "These authorities suggest that, once liability is established, any question of the remoteness of damage is to be approached along the following lines which may, of course, be open to refinement and development.
>
> (1) The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable.[86]
>
> (2) While a defender is not liable for damage that was not reasonably foreseeable, it does not follow that he is liable for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a *novus actus interveniens* or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable.[87]
>
> (3) Subject to the qualification in (2), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or it was caused in a way that could not have been forseen.[88]
>
> (4) The defender must take his victim as he finds him.[89]
>
> (5) Subject again to the qualification in (2), where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of his wrongdoing".[90]

In *Corr v. IBC Vehicle*[91] where the above summary was quoted and applied, Corr was employed as a maintenance engineer by IBC vehicles, the defendant. In an accident which took place in June 1996 because of breach of duty or negligence of the defendant, Corr suffered severe injuries on the right side of his head. He underwent long and painful reconstructive surgery. He remained disfigured, persistently suffered from unsteadiness, mild tinnitus and severe headaches and difficulty in sleeping. He also suffered from post traumatic stress disorder. Also as a result of the accident Corr became depressed, a condition which worsened with

84. For a case of natural breaking of causation see *Carslogie Steamship Co. Ltd. v. Royal Norwegian Government*, (1952) AC 292 : (1952) 1 All ER 20 (HL).
85. (2004) UKHL 20.
86. *McKnew v. Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All ER 1621 at 1623 per LORD REID; *Hay or Bourhill v. Young* [1942] 2 All ER 396 at 401, [1943] AC 92 at 101 per LORD RUSSELL of Kilowen; *Allan v. Barclay*, (1863) 2 M 873 at 874 per LORD KINLOCH.
87. *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All ER 1621 at 1623 per LORD REID; *Lamb v. Camden London BC* [1981] 2 All ER 408, [1981] QB 625; but see *Ward v. Cannock Chase DC* [1985] 3 All ER 537, [1986] Ch 546.
88. *Hughes v. Lord Advocate* [1963] 1 All ER 705 at 708, [1963] AC 837 at 847 per LORD REID.
89. *Hay or Bourhill v. Young* [1942] 2 All ER 396 at 405, [1943] AC 92 at 109-110 per LORD RIGHT; *McKillen v. Barclay Curle & Co Ltd* 1967 SLT 41 at 421, per LORD PRESIDENT CLYDE.
90. *Page v. Smith* [1995] 2 All ER 736 at 768, [1996] AC 155 at 197 per LORD LLOYD.
91. (2008) 2 All ER 943 (H.L.) para 8.

passage of time, and developed suicidal tendency. A psychologist diagnosed his condition as one of 'severe anxiety and depression'. In May 2002, while suffering from severe depression Corr committed suicide. In June 1999 Corr had instituted proceedings claiming damages for the physical and psychological injuries suffered by him. After his death his widow was substituted as claimant and claimed damages for benefit of the estate. She also claimed damages as a dependant for herself under the Fatal Accidents Act, 1976. It was only the latter claim as a dependant that was contested and came up before the House of Lords in appeal by the defendant. In dismissing the appeal the House of Lords held:

(1) At the time of his death the deceased had acted in a way he would not have done but for the injury which he had suffered because of defendant's breach of duty. His conduct in taking his own life could not be said to fall outside the scope of the duty which the defendant had owed him.

(2) A reasonable employer would have recognized the possibility not only of acute depression but of such depression culminating in suicide as foreseeable.

(3) The rationale of the principle that a *novus actus interveniens* broke the chain of causation was fairness. It was not fair to hold a tortfeasor liable for damage caused not by his breach of duty but by some independent, supervening cause for which the tortfeasor was not responsible. That was not the less so where the independent supervening cause was a voluntary informed decision taken by the victim as an adult about his own future. But it was not so in this case where the suicide was the response of a man suffering from a severely depressive illness which impaired his capacity to make reasoned and informed judgment about his future, such illness being a consequence of the defendants' tort.

(4) The deceased's conduct in taking his own life could not be said to be unreasonable once it was accepted that this conduct was induced by the defendant's breach of duty.

(5) As the deceased's conduct in taking his own life was an act performed because of psychological condition which the defendant's breach of duty had induced, it was not a voluntary act giving rise to the defence of *volenti non fit injuria*.

1(C)(v) Mitigation of Damage

A plaintiff who sues in a tort action cannot claim damages for that loss which he may have avoided by taking a reasonable step. Principle is similar to the one applied in actions for breaches of contract.[92] The question of reasonableness is a question of fact.[92] In *Selvanayagam v. University of West Indies*,[93] the Privy Council laid down that a plaintiff in an action for damages for personal injuries who rejects a medical advice in favour of surgery must, in order to discharge the burden on him of proving that he acted reasonably in regard to his duty to mitigate his damage prove that in all the circumstances including in particular the medical advice, he acted reasonably in refusing surgery. It has been accepted by the Privy Council[94] that the decision in *Selvanayagam* is not an accurate statement of the law and had given rise to a lot of criticism. LORD BINGHAM in that context quoted with approval the following

92. WINFIELD & JOLOWICZ, Tort, 12th edition, p. 623.
93. *Selvanayagam v. University of the West Indies*, (1983) 1 All ER 824 (827) : (1983) 1 WLR 585 (PC).
94. *Geest plc v. Lansiquot*, (2003) 1 All ER 383, p. 384 (PC).

observation of Donaldson M.R. in *Sotiros Shipping Inc. v. Sameiet Solholt, The Solholt* [(1983) 1 Lloyd's Rep. 605, at p. 608]: "A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly, to be regarded as caused by the defendant's breach of duty."[1]

1(C)(vi) Further Examples

Where the defendant took up a pick-axe and chased the plaintiff's servant boy, who rushed for shelter into his master's shop and in so doing knocked out the faucet from a cask of wine whereby the wine ran out and was lost, it was held that the defendant was responsible in damages for the loss of wine.[2]

The defendant's truck had, contrary to local regulations, been left on the street for the night, the shafts being shored up and projecting into the road; a second truck was similarly placed on the opposite side of the road; the driver of a third truck endeavouring to drive past the narrowed way thus left, struck the shafts of the defendant's truck which whirled round, struck and injured the plaintiff who was on the side walk; it was held that the defendant was liable.[3]

Where the defendant knowing the plaintiff to be a farmer sold him a cow which he warranted free from disease and she was placed with other cows some of which became infected and died; the defendant was held liable for the entire loss as being a natural damage.[4]

The defendant left a loaded gun at full cock, beside a gap from which a private path led over defendant's lands from the public road to his house. The defandant's son (aged fifteen), coming towards his father's house along the path, found the gun, and returning with it to the public road, not knowing it was loaded, pointed it in play at the plaintiff who was injured by the gun going off. It was held that the defendant was liable as the damage caused was not too remote.[5]

At a railway station some water had frozen upon the platform. The cause of this was unexplained, but from the ice being nearly an inch thick, and extending nearly half-way across the platform, it had the appearance of having been there some time. A passenger, while waiting for a train, not observing the ice, stepped upon it and fell, sustaining serious injury. It was held that the defendants were guilty of actionable negligence in allowing the ice to remain on the platform.[6]

A water company left unfenced a stream of water which they had caused to spout up in a public highway. The horses of the plaintiff were frightened and swerving from it fell into an unfenced excavation in the highway made by contractors who were constructing a sewer, and were thereby injured. It was held that the water company, and not the contractors, was liable, "as the proximate cause of the injury is the first negligent act which drove the carriage and horses into the excavation.

1. *Geest plc v. Lansiquot*, (2003) 1 All ER 383, p. 384 (PC).
2. *Vendenburgh v. Truax*, (1847) 4 Denio 464, NY.
3. *Powell v. Deveney*, (1849) 3 Cush 300.
4. *Smith v. Green*, (1875) 1 CPD 92; *Mullett v. Mason*, (1866) LR 1 CP 559, (563); *Mowbray v. Merryweather*, (1895) 2 QB 640.
5. *Sullivan v. Creed*, (1904) 2 IR 317.
6. *Shepherd v. Midland Ry. Co.*, (1872) 25 LT 879.

That act was the spouting up of the water, by which the horses were frightened. That was the *causa causans* of the mischief".[7]

The plaintiff delivered to the defendant a mare to be agisted on his field, which was separated by a wire fencing from his neighbour's field in the occupation of a cricket club. Owing to the negligence of the defendant's servant in leaving open a gate between the two fields the mare strayed into the field occupied by the cricket club, whereupon some of the members of the club endeavoured in a careful and proper manner to drive her back through the gate. The mare refused to go through the gate and having run against the wire fence fell over it and was injured. It was held that the injury to the mare was the natural consequence of the gate having been left open and that the defendant was liable.[8]

The plaintiff, who had lent money to a certain company being asked for a further advance, employed the defendant, a chartered accountant, to look into the affairs of the company. In a letter of instructions to the defendant the plaintiff inserted libellous statements concerning the former manager and an auditor of the company. The defendant handed the letter to his partner, who negligently left it at the company's office. The manager found it, read it and communicated its contents to the two persons defamed, who sued the plaintiff for libel and recovered damages against him, the jury in each case finding that the writer of the letter was actuated by malice. The plaintiff then sued the defendant for breach of an implied duty to keep secret the letter of instructions. It was held that it was the duty of the defendant to keep secret the contents of the letter; that as he had neglected that duty, the plaintiff could recover nominal damages only and no more; that any further damages being in the nature of an indemnity for the consequences of the plaintiff's own wilful wrong could not be recovered.[9]

A herdsman on the defendant's farm contracted what is known as Weil's disease, a disease carried by rats but very rarely contracted by human beings by reason of their very slight susceptibility to the disease. The knowledge of this disease was as rare as the disease itself. On the question whether the defendants were liable on account of negligent breach of their duty towards the plaintiff, it was held that the master's duty was to avoid exposing the servant to a resonably foreseeable risk of injury and on the facts the plaintiff's illness was not attributable to any breach of this duty, and that Weil's disease was at best a remote possibility which the defendants could not reasonably foresee, and hence the damage suffered by the plaintiff was unforeseeable and too remote to be recoverable.[10]

The plaintiff suffered an injury caused by the admitted negligence of the defendants. After attending the hospital she felt shaken and the movement of her head was constricted by a collor which had been fitted to her neck. In consequence she was unable to use her bifocal spectacles with her usual skill and she fell while descending stairs, sustaining further injuries. It was held that the injury and damage suffered because of the second fall were attributable to the original negligence of the defendants so as to attract compensation from them.[11]

Loss of articles—Race-glasses.—The plaintiff was travelling with other passengers in a railway carriage, and on the tickets being collected there was found to be a ticket short. The plaintiff was charged by the ticket collector for being the defaulter, and on

7. *Hill v. New River Company*, (1868) 9 B & S 303, (305).
8. *Halestrap v. Gregory*, (1895) 1 QB 561.
9. *Weld-Blundell v. Stephens*, (1920) AC 956 : 36 TLR 640 : 123 LT 593.
10. *Tremain v. Pike*, (1969) 3 All ER 1303 : (1969) 1 WLR 1556.
11. *Wieland v. Cyril Lord Carpets Ltd.*, (1969) 3 All ER 1006.

his refusing to pay the fare or leave the carriage, he was removed from the carriage by the company's officers without any unnecessary violence. It turned out that the plaintiff had a ticket and he had left a pair of race-glasses when removed. It was held that he could not recover for their loss as it was not the necessary consequence of the defendants' acts.[12]

Currency notes.—A person died in a collision between the train in which he was travelling and another train of the same railway administration. In an action for the pecuniary loss which resulted to members of the deceased's family from his death a claim was included for Rs. 1,300 being the value of lost currency notes which the deceased was carrying with him on the night in question. It was held that the defendant railway would not be liable for loss resulting from the wrongful act (*e.g.* theft) of a third party, such as could not naturally be contemplated as likely to spring from the defendant's conduct.[13]

Putting up barrier in street.—The defendant was in occupation of certain premises, abutting on a private road, which he used for athletic sports. He erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises and overlooking the sports. In the middle of this barrier was a gap which was usually open for vehicles, but which was closed when sports were going on. The defendant had no legal right to erect this barrier. Some person removed a part of the barrier armed with spikes from the carriage way and put it in an upright position across the footpath. The plaintiff, on a dark night, was proceeding along the way when his eye came in contact with one of the spikes and was injured. It was held that the defendant was liable for having unlawfully placed a dangerous instrument in the road notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriage way to the footpath.[14]

Damage caused by derelict vessel.—A vessel met with certain risks and injuries which compelled her crew to leave her and she became a derelict. She was driven ashore by a violent storm and after having been abandoned was forced by wind and waves against a pier, whereby serious damage was occasioned. It was held that the owners of the ship were not liable. The court said: "The ship should be dealt with as if it had been abandoned at the antipodes, and had been ploughing the ocean, without a crew, for years before it was driven against the pier."[15]

Illness due to travelling in wrong train.—The plaintiff took tickets at W for himself, wife and children, to go to H by the last train at night. By the negligence of the porters they were put into the wrong train and carried to E. Being unable to obtain accommodation for the night at E, or a conveyance, they walked home, a distance of four miles, and the night being wet the wife caught cold and medical expenses were incurred. It was held that the husband was entitled to recover damages in respect of inconvenience suffered by being compelled to walk home, but that the illness of the wife was a consequence too remote from the breach of contract for damages to be recoverable for it.[16]

12. *Glover v. L. & S. W. Ry. Co.*, (1867) LR 3 QB 25. The negligence of a railway company caused such an injury to a passenger that he became insane, and by reason of the insanity he committed suicide; the injury was not regarded as the proximate cause of the death and the company was held not liable for his death; *Scheffer v. W. & C. Ry.*, LT Aug. 1882.
13. *Secretary of State v. Gokul Chand*, (1925) ILR 6 Lah 451.
14. *Clark v. Chambers*, (1878) 3 QBD 327.
15. *River Wear Commissioners v. Adamson*, (1877) 2 App Cas 743 : 47 LJKB 193 : 26 WR 217.
16. *Hobbs v. L & S Ry Co.*, (1875) LR 10 QB 111, 116.

Damage resulting from robbery in train.—The plaintiff alleged that he had suffered damage through being robbed while a passenger on the defendants' railway, and that through the refusal of the defendants' servants to stop the train and afford him facilities for arresting the persons who had robbed him, he was prevented from recovering the property stolen. He also claimed to recover the amount of the money stolen from him as damages for the negligent over-crowding of the carriages. It was held that the damages claimed were too remote.[17]

Fowl running foul of cycle.—The plaintiff was riding a bicycle on a highway upon the footpath of which were some fowls belonging to the defendant. As the plaintiff got abreast of the fowls a dog belonging to a third person frightened the fowls one of which flew into the spokes of the machine, causing it to upset, whereby the plaintiff suffered personal injury and the bicycle was damaged. It was held that even if the fowl was not lawfully on the highway, the circumstances under which the accident happened prevented the damage from being the natural consequence of its presence there, and that the plaintiff could not recover.[18]

Death caused by horse kick.—A workman was killed, in the course of his employment, by the kick of a horse belonging to a third party, by whose servant it was brought upon the employer's premises and left there unattended. It was held that in the ordinary course of things a horse, not known to be vicious, would not kick a man and that the injury to the deceased was not sufficiently connected with the trespass or negligence to be the natural or probable consequence of it.[19]

Suicide due to anxiety neurosis.—One P was injured in an accident which occurred when he was employed by the defendants and in circumstances in which they were liable to P for negligence. Thereafter, P suffered from acute anxiety neurosis with depressive features which so sapped his powers of resistance that, about a year and a half later, he took his own life. It was held that the defendants were liable to P's widow in damages as she had sustained damage by P's death and that was directly traceable to P's injury in the accident for which the defendants were responsible and that P's act in taking his own life did not break the chain of causation.[20]

Loss of profits due to plaintiffs absence through injury.—The plaintiff, while driving his car, received injuries in a collision with another car of which the driver was killed. The plaintiff was one of the two directors of a private company, and held nearly half the share capital. The company carried on the business of textile merchants, and the plaintiff acted as buyer and seller. Owing to the plaintiff's absence on account of his injuries there was a substantial diminution of the turnover and profits of the company, so that there was a heavy reduction in the proceeds of the business available for the plaintiff and his co-director. In an action for negligence against the personal representatives of the deceased driver, the plaintiff claimed, as one of the heads of damage, damages in respect of the diminution of the distributions received by him from the company. The lower court found that the deceased had been wholly to blame, and awarded the plaintiff £1,500 in respect of this particular claim. On an appeal, it was held that the plaintiff had suffered a real loss flowing from a tortious act, and that the damages were not too remote.[21]

17. *Cobb v. G.W. Ry Co.*, (1893) 1 QB 459 : (1894) AC 419 : 62 LJQB 335. See also *P.A. Narayanan v. Union of India*, (1998) 3 SCC 67 : AIR 1998 SC 1659; *Sumatidevi M. Dhanwatay v. Union of India*, (2004) 6 SCC 113 : (2004) 2 CPJ 27 (SC).
18. *Hadwell v. Righton*, (1907) 2 KB 345. See *Heath's Garage Ltd. v. Hodges*, (1916) 1 KB 206.
19. *Bradley v. Wallaces Ltd.*, (1913) 3 KB 629 : 82 LJQB 1074.
20. *Pigney v. Pointers Transport Services Ltd.*, (1957) 2 All ER 807, (1957) 1 WLR 1121, 101 SJ 851.
21. *Lee v. Sheard*, (1956) 1 QB 192 : (1955) 3 WLR 951 : 99 SJ 888.

Uncertain voluntary payment.—Where the plaintiffs sued for possession of certain idols and prayed for damages on the ground that they had been prevented from receiving certain sums, which they might have received if they had custody of the idols, it was held that no suit would lie as the damages were based upon uncertain and merely voluntary payments.[22]

Loss of crops.—Where loss of rents resulted to a landlord from his ryots' crops being injured and destroyed owing to a neighbouring landlord's stopping the outlets by which surface drainage water had from time immemorial flowed from the plaintiff's land, it was held that this was not too remote a damage.[23] The plaintiff's and the defendant's plots of land were adjacent to each other. In the midst of monsoon the defendant dug a tank in the side of his plot without any embankment and put the earth on the sides. The earth spread over the plaintiff's adjoining plot on account of heavy rains and thereby caused damage to the plaintiffs' paddy crop. In a suit by the plaintiffs for damages, it was held that on the facts and circumstances of the case the defendant having not foreseen the consequences of his act, which was in the course of the normal use of his land, he was not liable.[24]

Death of animal during lawful detention.—The defendants seized the plaintiff's cow on the ground that it had trespassed the previous day into their cotton plantation and refused to give it up. The cow while it was in their custody suddenly died. The plaintiff sued for the value of the cow. It was held that the death of the cow was not a natural or probable result of the seizure and detention and that the defendants therefore were not liable.[25]

Damage resulting from judicial act.—A dispute having arisen regarding the possession of certain land, an order was passed, under section 131 of the Criminal Procedure Code, 1872, forbidding both the plaintiff and the defendant to interfere with the land until either established his title in a civil court. The land in consequence of this order was not cultivated in the following year. The plaintiff sued for damages for the loss of profits resulting from non-cultivation of the land. It was held that the damages were not the probable result of the defendant's act but were the consequences of a judicial act proceeding from the Magistrate alone.[26]

Threat to prosecute.—The plaintiff applied to a Municipal Board for permission to construct a building. One month after his application he was entitled to proceed with

22. *Ramessur Mookerjee v. Ishan Chunder Mookerjee*, (1868) 10 WR 457. A suit for WASILAT, in respect of profits derived from a turn of worship, which are in their nature uncertain and voluntary, is not maintainable: *Kashi Chandra Chukerbutty v. Kailash Chandra Bandhopadhya*, (1899) ILR 26 Cal 356; *Dino Nath Chukerbutty v. Pratap Chandra Goswami*, (1899) ILR 27 Cal 30. See also *Venkatasa v. T. Srinivassa*, (1869) 4 MHC 410; *Ram Gobind Singh v. Magistrate of Ghazeepoor*, (1872) 4 NWP 146.
23. *Mussamut Anundmoyee Dossee v. Mussamut Hameedoonissa*, (1862) 1 Marsh 85; *Punnun Sing v. Meher Ali*, (1864) WR (Gap No.) 365; *Ram Chandra Jana v. Jiban Chandra Jana*, (1868) 1 Beng LR (ACJ) 203. The plaintiff cannot recover the value of the crops he is prevented from raising on his land by reason of the defendant obstructing his right of way to his land: *Karibasavana Gowd v. Veerabhadrappa*, (1912) ILR 36 Mad 580. It is submitted that the case is of doubtful authority.
24. *Lokenath v. Guru Prosad*, AIR 1963 Orissa 21.
25. *Mi Taw v. Nga Ket*, (1904) UBR (1904-1906), Tort, p. 1.
26. *Ammani v. Sellayi*, (1883) ILR 6 Mad 426. Where, as a result of a proceeding under section 144, Criminal Procedure Code, taken by the defendants, the police stopped the plaintiff's brick making and owing to rainfall the bricks and the fuel which was to be used in burning them were damaged, and the plaintiff sued the defendants for damages, it was held that the damage was too remote. Neither could the defendants have contemplated damage by rain as the result of their action, nor could it be said that the damage by rain necessarily flowed from the action of the defendants : *Maksood Alvam v. Bandhu Sahu*, [1938] PWN 621. See *Ross v. Secretary of State*, (1913) ILR 37 Mad 55, where action was brought for loss of commission for supplying labour. See *Robert and Charriol v. Isaac*, (1870) 6 Beng LR (Appx) 20, where interest on bills was claimed.

his construction after giving a requisite notice to the board. In reply to such notice the Board threatened to prosecute him if he started building operations. Plaintiff sued the Board for damages for obstructing him to proceed with the work. It was held that no action lay as the plaintiff was entitled to proceed with his work and that the damage contemplated by the plaintiff was too remote.[27]

Damage due to granting of licence.—A Municipal Board granted a licence to erect a flour mill adjacent to the house of the plaintiff although the bye-laws of the Board prohibited the grant of such licence near residential premises. A flour-mill was erected and due to the vibrations produced by the working of the flour-mill, the plaintiff's house was damaged. In a suit against the Board for damages, it was held that the damage to the house was not the direct result of the unlawful act of the Board in granting the licence and, therefore, the Board was not liable for the damage.[28]

I(D) Measure of Damages

I(D)(i) General Principle

The expression "measure of damages" means the Scale or rule by reference to which the amount of damages to be recovered is, in any given case, to be assessed. Damages may rise to almost any amount, or they may dwindle down to being merely nominal. The law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts and circumstances. In case of criminal conversion, battery, imprisonment, slander, malicious prosecution, etc., the state, degree, quality, trade, or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by a jury in giving damages.[29] "The common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act. If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved."[30] This is the principle of *restitutio in integram* which was described by LORD WRIGHT as "the dominant rule of law."[31] For example, if the plaintiff's car is damaged in collision with the defendant's car which was being negligently driven, the plaintiff in addition to cost of repair may be entitled to recover reasonable charges for hiring a car for his use during the period his car was not available for use as it was undergoing repair.[32] But restitution is seldom, if at all, really possible and the law provides only for notional restitution, *i.e.* restitution as nearly as may be by award of compensation. This is specially so when the plaintiff is compensated for non-pecuniary damage such as pain and suffering. At common law damages are purely compensatory, except where the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the executive or the servants of the Government and when the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. In latter two classes of cases exemplary damages may be awarded.[33] In accident cases, it has been held that grant of compensation comes under the realm of torts which is

27. *Banwarilal v. The Municipal Board, Lucknow*, (1941) ILR 17 Luck 98.
28. *Municipal Board, Kheri v. Ram Bharosey*, AIR 1961 All 430.
29. *Huckle v. Money*, (1763) 2 Wilson 205, 206.
30. PER VISCOUNT DUNEDIN in *Admiralty Commissioners v. S. S. Susquehanna*, (1926) AC 655 (661, 662).
31. *Liesbosch Dredger v. Edison S.S.*, (1933) AC 449 : 149 LT 49 : 102 LJP 73.
32. *Dimond v. Lovell*, (2000) 2 All ER 897 : (2000) 9 WLR 1121 (HL); *Lagden v. Oconnar*, (2004) 1 All ER 277 (HL).
33. *Rookes v. Barnard*, (1964) AC 1129 : (1964) 2 WLR 269 (HL). *Rustom K. Karanjia v. Thackersay*, (1969) 72 Bom LR 94.

based upon the principle of *restitutio in integrum* i.e. *a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong'*.[34]

It has been seen that in determining liability when causation is in issue, it has to be established, like any issue relating to past event, on the balance of probabilities and not on the basis of percentage of probability.[35] But when liability is once established, and the court comes to assessment of damages, "which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will happen or would have happened and reflect those chances, whether they are more or less even, in the amount of damages which it awards."[36] The High Court of Australia has applied the same test for hypothetical situations of the past (as distinguished from events alleged to have happened) treating them as analogous to future possibilities.[37] In that case the plaintiff was employed as a labourer by the defendant in its meatworks. In consequence of the negligence of the defendant the plaintiff contracted brucellosis leading to a degenerative spinal condition and neurosis rendering him unemployable for rest of his life. It was also found that independently of the negligence it was 'likely' that the plaintiff would have been suffering from a similar neurotic condition making him unemployable by 1982. The Supreme Court of Queensland allowed damages to the plaintiff for economic loss and pain and suffering only upto 1982. The High Court of Australia reversed the judgment of the Supreme Court holding that the plaintiff was entitled to get damages for economic loss, pain and suffering and cost of care for the rest of his life, subject to this, that those damages had to be reduced to take account of the chance that factors, unconnected with the defendant's negligence, might have brought on a similar neurotic condition.[38]

Where a wrong has been committed the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of damages.[39] But the plaintiff must give the best evidence to prove damages.[40]

If damage has resulted from two or three causes, as from an *act of God* as well as a negligent act of a party, then the award of damages should be apportioned to compensate only the injury caused by the negligent act.[41]

In consequence of a railway embankment the flood waters of a river were sent back and flowed over the land of the plaintiff, doing some injury; had the embankment not been constructed the waters would have flowed a different way, but would have reached the plaintiff's land, and would have done damage to a lesser amount. It was held that the measure of damages recoverable by the plaintiff against the railway company was the difference only between the two amounts.[42]

34. *Reshma Kumari v. Madan Mohan*, (2009) 13 SCC 422; followed by Rajasthan High Court in *Sangeeta Parihar v. Suraj Parihar*, 2011 AIR CC 1592 : (2011) 103 AIC (Sum 26) 14.
35. See text and footnotes 13 to 15, pp. 181, 182, *supra*.
36. *Mallet v. Mc Monagle*, (1970) AC 166 (HL), p. 176 (LORD DIPLOCK).
37. *Malee v. J.C. Hutton Pty Ltd.*, (1990) 64 ALJR 316 (High Court of Australia).
38. *Malee v. J.C. Hutton Pty Ltd.*, (1990) 64 ALJR 316 (High Court of Australia).
39. *Duke of Leeds v. Earl of Amherst*, (1850) 20 Beav 239.
40. *Joseph v. Shew Bux*, (1918) 21 Bom LR 615, PC.
41. *Nitro-Phosphate etc., Co. v. London and St. Katharine Docks Co.*, (1878) 9 ChD 503 : 39 LT 433 : 27 WR 267.
42. *Workman v. G. N. Ry. Co.*, (1863) 32 LJQB 279.

1(D)(ii) Contemptuous, Nominal, Ordinary and Exemplary Damages

There are four kinds of damages :(1) contemptuous; (2) nominal; (3) ordinary; and (4) exemplary.

CONTEMPTUOUS DAMAGES are awarded when it is considered that an action should never have been brought. When the plaintiff has technically a legal claim but there is no moral justification for it or he morally deserved what the defendant did to him, the court may award a half penny or a paisa showing its disapproval of the conduct of the plaintiff.

NOMINAL DAMAGES are awarded where the purpose of the action is merely to establish a right, no substantial harm or loss having been suffered, for example, in cases of infringement of absolute rights of personal security (*e.g.* assault) and property (*e.g.* bare trespass, invasion of a right of easement, etc.). Nominal damages are so called because they bear no relation even to the cost and trouble of suing, and the sum awarded is so small that it may be said to have "no existence in point of quantity," *e.g.* one anna, one shilling. But small damages are not necessarily nominal damages.[43] An award of nominal damages implies no censure of the plaintiff's conduct in bringing the suit.

ORDINARY DAMAGES are awarded where it is necessary to compensate the plaintiff fairly for the injury he has in fact sustained. These are also called compensatory damages. Whatever sum is awarded, whether large or small, must afford a fair measure of compensation to the plaintiff with reference to the actual harm sustained by him. The law does not aim at restitution but compensation, and the true test is, what sum would afford, under the circumstances of the particular case, a fair and reasonable compensation to the party wronged for the injury done to him, the plaintiff's own estimate being regarded as the maximum limit. The measure of reparation or damages for any injury should be assessed as nearly as possible at a sum of money which would put the injured party in the same position as he would have been in if he would not have sustained the injury.[44] For example, where a surveyor negligently surveyed a property which the plaintiff purchased the proper measure of damages is the amount of money which will put the plaintiff into as good a position as if the surveying contract had been properly fulfilled.[45] In other words the proper amount of damages would be the difference between the market value of the property without the defects and its value with the defects at the date of purchase.[46] When the plaintiff's injury is aggravated by the conduct and motives of the defendant, *e.g.* when he has acted in a highhanded manner, wilfully or maliciously, the damages may be correspondingly increased. But the damages so increased or aggravated are really compensatory and fall in the class of ordinary damages.[47]

EXEMPLARY DAMAGES are awarded not to compensate the plaintiff but to punish the defendant and to deter him from similar conduct in future. The House of

43. *Mediana v. Comet*, (1900) AC 113 (116) : 82 LT 95 : 16 TLR 194; *Bishun Singh v. AWN Wyatt*, (1911) 14 CLJ 515; *Lala Punnalal v. Kasturichand Ramaji*, (1945) 2 MLJ 461.
44. *Jeet Kumari Poddar v. Chittagong Engineering and Electric Supply Co. Ltd.*, ILR (1946) Cal 433.
45. *Phillips v. Ward*, (1956) 1 All ER 874 (CA); *Perry v. Sidney Phillips & son (a firm)*, (1982) 3 All ER 705 : (1982) 1 WLR 1297 (CA); *Wats v. Morrow*, (1991) 4 All ER 937 (CA); *Gardner v. Marsh & Parsons (a firm)*, (1997) 3 All ER 871 (CA).
46. *Phillips v. Ward*, (1956) 1 All ER 874 (CA)
47. *Rookes v. Barnard*, (1964) AC 1129 : (1964) 2 WLR 269 (HL); *Jodhpur Development Authority v. State Consumer Dispute Redressal Forum & Others*, 2012 AIR CC 362.

Lords[48] has ruled that exemplary damages can be allowed in three categories of cases. The first category is oppressive, arbitrary or unconstitutional action of the Government or its servants. Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. Third category consists of cases in which exemplary damages are expressly authorised by statute. It was earlier held that the House of Lords in 1964[49] restricted the grant of exemplary damages to torts which were recognised at that time as grounding a claim for exemplary damages and therefore exemplary damages could not be allowed in an action for public nuisance which is not such a tort.[50] But this view now does not hold the field. The House of Lords itself has held that the power to award exemplary damages was not limited to cases where it could be shown that the cause of action had been recognised before 1964 as justifying an award of such damages.[51] Unconstitutional action *e.g.* of wrongful arrest by a servant of the Crown by itself authorises grant of exemplary damages and it is not necessary to show any other aggravating circumstance.[52] The Supreme Court has accepted the principle that oppressive, arbitrary or unconstitutional action of the Government or its servants calls for exemplary damages and this principle has been extended to a government statutory authority like the Lucknow Development Authority.[53] In this case damages for harassment of the plaintiff by the officers of the authority were allowed.[54] But it is not in every case against the government or its officers that exemplary damages should be allowed for if public servants were constantly under the fear of threat of being proceeded against in court of law for even slightest of lapse or under constant fear of exemplary damages being awarded against them, they will develop a defensive attitude which would not be in the interest of administration.[55] If the power has been exercised *bona fide* and honestly there cannot be any occasion for exemplary damages being awarded notwithstanding that unintended injury was caused to some one.[56] Award of exemplary damages can also be moderate. The conduct of the parties throughout the proceedings would also be a relevant consideration in assessing exemplary damages.[58] According to the Supreme Court[57] exemplary damages are also recoverable when harm results from the hazardous or inherently dangerous nature of the activity in which the defendant is engaged. In such cases, compensation "must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise the greater must be the amount of compensation payable by it."[57] But a

48. *Rookes v. Barnard, supra; Cassel & Co. Ltd. v. Broome*, (1972) AC 1027 : (1977) 2 WLR 645 : (1977) 1 All ER 801 (HL).
49. See cases in footnotes 47, 48, *supra*.
50. *AB v. South West Water Services Ltd.*, (1993) 1 All ER 609 (CA).
51. *Kuddus v. Chief Constable of Leicestershire*, (2001) 3 All ER 193 : (2001) 2 WLR 1789 : (2001) UKHL 29 (HL).
52. *Holden v. Chief Constable of Lancashire*, (1986) 3 All ER 836 : (1986) 3 WLR 1107 (CA). Tort by a public authority like a Metropolitan Council in discharge of its public functions will also attract exemplary damages; *Bradford City Metropolitan Council v. Arora*, (1991) 3 WLR 1377 (CA). But a tort by a statutory water undertaker carrying on a commercial operation of supplying water will not attract exemplary damages; *A.B. v. South West Water Services Ltd.*, (1993) 1 All ER 609 (CA).
53. *Lucknow Development Authority v. M.K. Gupta*, AIR 1994 SC 787 p. 798 : (1994) 1 SCC 243 : (1994) 13 CLA 20.
54. *Lucknow Development Authority v. M.K. Gupta*, AIR 1994 SC 787 p. 798 : (1994) 1 SCC 243 : (1994) 13 CLA 20.
55. *Common Cause a Registered Society v. Union of India*, AIR 1999 SC 2979, p. 3019 : (1999) 6 SCC 667. See further, *Rabindra Nath Ghosal v. University of Calcutta*, AIR 2002 SC 3560 : (2002) 7 SCC 478.
56. *Common Cause a Registered Society v. Union of India*, AIR 1999 SC 2979, p. 3020.
57. *M.C. Mehta v. Union of India*, (1987) 1 SCC 395, p. 421 : AIR 1987 SC 965 : 1987 SCC (L&S) 37.

later decision,[58] without deciding the point finally, expressed doubts as to the correctness of the view that the damages recoverable must be correlated to the magnitude and capacity of the delinquent industry, called it "an uncertain province of the law" and observed that it was difficult to foresee any reasonable possibility of acceptance of this yardstick and, at any rate, there were numerous difficulties in its being accepted internationally. Exemplary damages in a libel action can also be allowed when the court is satisfied that the publisher had no genuine belief in the truth of what he published, but suspected that the words were untrue and deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into certainty.[59]

In *Thompson v. Commissioner of Police,*[60] the Court of Appeal laid down certain guidelines for injuries for assessing damages awardable to members of the public for unlawful conduct against them by the police. Certain points that emerge from these guidelines are instructive even for subordinate courts in India where assessment is directly made by the court without the assistance of a jury. These points are: (1) Save in exceptional cases such damages are only awarded as compensation and are intended to compensate the plaintiff for any injury or damage which he has suffered. They are not intended to punish the defendant. (2) Compensatory damages (which have been described above as ordinary damages) are of two kinds: (a) basic, and (b) aggravated. (3) Aggravated damages can be awarded when there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a highhanded, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. (4) In a case fit for grant of damages other than basic damages, sums awarded for each category should be separately shown to ensure a greater transparency in assessing damages. (5) Aggravated damages, though compensatory, do in fact contain a penal element. (6) When a case is made out for award of exemplary damages *e.g.,* when there has been oppressive or arbitrary behaviour by police officers, it should be kept in mind that these factors have already been taken into account while awarding aggravated damages, and exemplary damages should be awarded if, and only if, it is considered that the compensation awarded by way of basic damages and aggravated damages is in the circumstances an inadequate punishment for the defendants. (7) Any improper conduct on the part of the plaintiff, if proved can be taken into account in reducing or even eliminating any award of aggrevated or exemplary damages if the conduct caused or contributed to the behaviour complained of. The policy of the English Law is, however, not to encourage award of exemplary damages and exemplary damages will not be allowed where compensatory award cannot be made e.g. where the claimant has not suffered any material damage.[61]

The High Court of Australia is of the view that when the wrongdoer has been substantially punished under the criminal law and virtually the same conduct is the basis of the civil action, exemplary damages may not be awarded as its purpose is wholly met by the substantial punishment.[62] It may also be mentioned that in

58. *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480, pp. 1545, 1557 : (1990) 1 SCC 613 . See further, p. 503.
59. *John v. MGN Ltd.*, (1996) 2 All ER 35 : (1997) 3 WLR 403 (CA).
60. (1997) 2 All ER 762 (CA), pp. 774 to 776 (The case also contains guidance regarding the amount to be generally awarded).
61. *Watkins v. Secretary of State for the Home Department*, (2006) 2 ALL ER 353 (HL) pp. 365, 366.
62. *Gray v. Motor Accidents Commission*, (1999) 73 ALJR 45.

Australia the limitation laid down in *Rookes v. Barnard* for grant of exemplary damages have not been accepted and exemplary damages are available in Australia in cases of conscious wrong doing in contumelious disregard of another's right."[63] It is interesting to notice that the Law Commission of U.K. in its report on Aggravated, Restitutionary and Exemplary Damages (no. 247, 1997) has also recommended that exemplary damages may be allowed where the defendant deliberately and outrageously disregarded the plaintiff's rights.[64]

1(D)(iii) General and Special Damages

General damages are those which the law will imply in every violation of a legal right. They need not be proved by evidence for they arise by inference of law, even though no actual pecuniary loss has been, or can be, shown. General damages "are such as the jury may give when the Judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man."[65] Whenever the defendant violates any absolute legal right of the plaintiff general damages to at least a nominal amount will be implied.[66]

The expression 'special damage' has three different meanings:—

(1) It is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be super-added to the general damage which the law implies in every infringement of an absolute right.

(2) Where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denotes the actual and temporal loss which has, in fact, occurred. Such damage is called variously "express loss," "particular damage," "damage in fact," "special or particular cause of loss."

(3) In actions brought for a public nuisance, such as the obstruction of a river or a highway, "special damage" denotes that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action.[67]

Where special damage is the gist of the plaintiff's case and he fails to prove such damage, he is precluded from recovering ordinary damages.[68] But where special damage is not the gist of the case he is not precluded from recovering ordinary damages by reason of his failure to prove the special damage.[69]

The aforesaid distinction between General Damages and Special Damages is based on the substantive law distinction between torts actionable *per se* and torts not actionable without actual or special damage to the plaintiff. The expression special damage in the context of pleadings, however, signifies "some special or material item of plaintiff's loss which is not an obvious consequence of the tort committed by the

63. *Gray v. Motor Accidents Commission*, (1999) 73 ALJR 45, p. 48
64. (1999) ALJ 402.
65. *Prehn v. Royal Bank of Liverpool*, (1870) LR 5 Ex 92, 99.
66. *Ashby v. White*, (1704) 2 Ld Raym 938.
67. *Ratcliffe v. Evans*, (1892) 2 QB 524, 528 : 61 LJQB 535 : 66 LT 794 followed in *Manjappa Chettiar v. Ganapathi Gounden*, (1911) 21 MLJ 1052.
68. *Wilson v. Kanhya*, (1869) 11 WR 143.
69. *Mudhun Mohun Dass v. Gokul Dass*, (1866) 10 MIA 563.

plaintiff and of which, therefore, the defendant should be given notice in the pleadings."[70]

1(D)(iv) Prospective and Continuing Damages

Damages resulting from the same cause of action must be recovered at one and the same time as more than one action will not lie on the same cause of action. If a person is beaten or wounded and if he sues, he must sue for all his damage, past, present and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action.[71]

Damages when given are taken to embrace all the injurious consequences of the wrongful act, unknown as well as known, which may arise hereafter, as well as those which have arisen, so that the right of action is satisfied by one recovery. "The cause of action is complete, for the whole thing has but one neck, and that neck was cut off by one act of the defendant... It would be most mischievous to say—it would be increasing litigation to say—you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action" for the recovery of your damages.[72] Thus recovery of damages in an action of assault and battery is a bar to an action for a subsequent loss in consequence of a part of the skull coming off subsequently owing to the same injury.[73] A fresh action cannot be brought unless there is both a new unlawful act and fresh damage.[74]

If the same wrongful act violates two distinct rights, successive actions may be brought in respect of each of them. If a person sustains two injuries from a blow, one to his person, another to his property, as for instance, damage to a watch, there is no doubt that he can maintain two actions in respect of the one blow.[75] For damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes for action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person.

An action for malicious prosecution could be brought notwithstanding the recovery of damages in a previous action for false imprisonment arising out of the same transaction because the causes of action were perfectly distinct and different.[76]

It is necessary to distinguish between a complete cause of action which may yet produce fresh damage in the future, and a continuous cause of action from which continuous damage steadily flows. Speaking accurately, there is no such thing as a continuing cause of action; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.[77] If once a cause of action arises, and the acts

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70. WINFIELD & JOLOWICZ, Tort, 12th edition, p. 621; *Ratcliffe v. Evans*, (1892) 2 QB 524 (528); *Stroms Bruks Aktie Bolag v. John and Peter Hutchinson*, (1905) AC 515, (525, 526).
71. PER LORD BRAMWELL in *Darley Main Colliery Co. v. Mitchel*, (1886) 11 App Cases 127 (144); *Raghubir Singh v. Secretary of State for India*, ILR (1938) All 658.
72. PER BEST, C.J. in *Richardson v. Mellish*, (1824) 2 Bing 229, 240.
73. *Fetter v. Beale*, (1701) 1 Ld Raym 339 : 12 Mod 42.
74. *Hodsoll v. Stallebrass*, (1840) 11 A & E 301; *Allan Mathewson v. Chairman of the District Board of Manbhum*, (1920) 5 PLJ 359.
75. *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App Cas 127, 144 : 54 LT 882 : 2 TLR 301; *Brunsden v. Humphrey*, (1884) 14 QBD 141 : 51 LT 529.
76. *Guest v. Warren*, (1854) 9 Ex 379.
77. PER LINDLEY, LJ, in *Hole v. Chard-Union*, (1894) 1 Ch 293, 295.

complained of are continuously repeated, the cause of action continues and goes on *de die in diem*. If a person is injured in a railway accident, and recovers substantial damages from the company and subsequently disease of the brain or of the spine develops, which is solely due to the accident, he cannot bring a second action, or claim further damages in the first action. But where the cause of action is a continuing one (as an action for a continuing trespass), a fresh cause of action arises every day that such breach or injury continues; and it is open to the plaintiff to bring fresh action. Where the cause of action is not a continuing one the damage should be assessed once for all. No fresh action can be brought for any subsequent damage that may arise from that act. Not only the damage that has accrued, but also such damage, if any, as it is reasonably certain will occur in the future, should be taken into consideration.[78] The plaintiff should be compensated for every prospective loss which would naturally result from the defendant's conduct, but not for merely problematical damages that may possibly happen, but probably will not.

Where a wrong is not actionable in itself unless it causes damage, it will seem that as the action is only maintainable in respect of the damage, or not maintainable till the damage is caused, an action will lie every time any damage accrues from the wrongful act. For example, an action cannot be maintained for mere excavation, but a cause of action arises when damage to a person's property results therefrom by subsidence. Where there are, in such a case, successive damages, a fresh cause of action arises in respect of each successive damage.[79] Similarly, if A says to B that C is a swindler, and B refuses to enter into a contract with C, C has a cause of action against A; if D, who was present and heard it, also refuses to make such a contract, surely another action will lie.

1(D)(v) Damages for Mental Suffering and Psychiatric Injury or Nervous Shock

The common law regarding recovery of compensation for pure psychiatric illness also described by the expression nervous shock was reviewed by the House of Lords in *White v. Chief Constable of South Yorkshire*,[80] where all relevant earlier authorities were considered. The court noticed that this law "is a patchwork quilt of distinctions which are difficult to justify."[81] The court, however, declined to reform the law leaving this task to Parliament.[82]

For understanding the law as it now stands after *White's* case mental suffering has to be divided into different categories. Mental suffering which follows from foreseeable physical injury is routinely compensated under the head 'pain and suffering' while awarding compensation for personal injury.[83] Mental suffering which is not a concomitant of physical injury is further subdivided into two groups.

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78. *Lambkin v. S.E. Ry. Co.*, (1880) 5 App Cas 352. See *Koomaree Dossee v. Bama Soonduree*, (1868) 10 WR 202, in which damages for prospective loss were awarded because the defendant not only kept the plaintiff out of possession of her land but cut down all the fruit-bearing and timber trees, and carried away or destroyed by brick making all the fertile soil.
79. *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App Cas 127 : 55 LJQB 127 : 54 LT 882; *Crumbie v. Wallsend Local Board*, (1891) 1 QB 503. Depreciation due to risk of future subsidence not taken into account in awarding damages : *West Leigh Colliery Co. Ltd. v. Tunnicliffe and Hampson, Ltd.*, (1908) AC 27 : 24 TLR 146 : 77 LJ Ch 202.
80. (1999) 1 All ER 1 (HL).
81. (1999) 1 All ER 1, p. 38 (Lord Steyn).
82. (1999) 1 All ER 1, p. 39.
83. (1999) 1 All ER 1, pp. 30, 31, 40. (See further pp. 215, 216, *post*).

The first group embraces that mental suffering which does not amount to a recognisable psychiatric illness even if it consists of extreme grief and the sufferer is debilitating. The second group consists of that mental suffering which amounts to a recognisable psychiatric illness. The difference between the two groups is often difficult to draw and is a matter for expert psychiatric evidence. Mental suffering not following physical injury which does not amount to a recognisable psychiatric illness, irrespective of its severity or debilitating effect on the sufferer, is not redressable under the common law.[84] Mental suffering amounting to a recognisable psychiatric illness, when not consequent to personal injury, is redressable in a limited class of cases for which purpose the sufferers are divided into two categories *viz.* primary victims and secondary victims. Primary victims are those who are participants in the event or in other words are in the actual area of danger of receiving foreseeable personal injury but suffer only a recognisable psychiatric illness and escape personal injury by chance or good fortune. Primary victims are entitled to receive compensation for mental suffering which amounts to a recognisable psychiatric illness even if psychiatric illness was not foreseeable.[85] Secondary victims are those who are not participants in the event or in other words are not in the area of danger of receiving foreseeable personal injury but yet suffer recognisable psychiatric illness. A plaintiff falling in the category of secondary victim can be allowed damages if the following conditions known as 'control mechanism' are satisfied: (1) The plaintiff must have close ties of love and affection with the main victim. Such ties may be presumed in some cases (*e.g.*, spouses, parent and child) but must otherwise be established by evidence. (2) The plaintiff must have been present at the accident or its immediate aftermath. (3) The psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not upon hearing about it from some one else.[86] A plaintiff who was an employee of the tort-feasor and suffered psychiatric injury in the course of his employment but who was not within the range of foreseeable physical injury has to prove the conditions mentioned above like other secondary victims, for claiming damages and the mere fact of employer and employee relationship with the tort-feasor cannot enable him to claim as a primary victim.[87] Similar is the position of a plaintiff who was a rescuer and suffered psychiatric injury by witnessing or participating in the aftermath but who was not within the range of foreseeable physical injury. Such a plaintiff also cannot be given special treatment simply because he was a rescuer and has to prove the conditions mentioned above, like any other secondary victim.[87] The effect of the decision in *White's* case is to finally replace the test of foreseeability of psychiatric injury to a person of normal fortitude which started from *Hay or (Bourhill) v. Young,*[88] by the test of foreseeability of personal injury in case of primary victims and by the control mechanisms mentioned above in case of secondary victims. These tests which are reaffirmed in *White's* case[89] have their origin in *Alcock v. Chief Constable of South Yorkshire Police,*[90] and *Page v. Smith.*[91]

84. (1999) 1 All ER 1, p. 31 See further pp. 111-113, *ante.*
85. (1999) 1 All ER 1, pp. 35, 36, 43.
86. (1999) 1 All ER 1, pp. 36, 41.
87. (1999) 1 All ER 1
88. (1942) 2 All ER 396 : (1943) AC 92 : 167 LT 261 (HL).
89. *White v. Chief Constable of the South Yorkshire Police,* (1999) 1 All ER 1 pp. 40, 41 : (1999) 2 AC 455 : (1998) 3 WLR 1509 (HL).
90. (1991) 4 All ER 907 : (1992) 1 AC 310 : (1991) 3 WLR 1057 (HL).
91. (1995) 2 All ER 736 : (1995) 2 WLR 644 : (1996) AC 155 (HL).

Policy considerations have played an important role in treating pure psychiatric injury different from personal injury and in limiting the area within which compensation can be claimed for the former.[92]

Page v. Smith,[93] is a case where the plaintiff though in a position of a primary victim, being directly involved in the accident, remained unhurt. The plaintiff, however, suffered 'myalgic encephalomyelitis' a psychiatric illness with which he had earlier suffered but which was then in remission. This illness which the plaintiff suffered as a result of a motor accident was not foreseeable in a person of ordinary fortitude but as personal injury of physical harm which the plaintiff did not suffer was foreseeable, the plaintiff succeeded in recovering damages for psychiatric illness suffered by him.

In *Mclovghlin v. O'Brian,*[94] the plaintiff's husband and three children were involved in a road accident caused by the negligence of the defendants. One child was killed and the husband and the two other children were severely injured. The plaintiff at the time of the accident was two miles away. After being told of the accident, the plaintiff was taken to the hospital where she saw the injured husband and children and heard about the death of her daughter. The plaintiff suffered severe and persisting psychiatric illness and was allowed damages for nervous shock. This case relates to a secondary victim in which the 'control mechanisms' noticed above were satisfied. The plaintiff though not present at the accident was present at the aftermath in the hospital and suffered nervous shock on seeing her severely injured husband and children in the hospital. Close ties of love and affection were presumed as the plaintiff was wife and mother of the injured.

Two cases which will be noticed hereinafter and which settle the present law relating to damages for nervous shock arose out of a disaster in a Football stadium in Sheffield resulting in the death of 96 spectators and physical injuries to more than 400. It also scarred many others for life by emotional harm. The disaster occurred by the negligence of the police in allowing the over crowding of two spectators' pen. Scenes from the ground were broadcast live on television from time to time during the course of disaster and later on television as news. News of the disaster was also broadcast over the radio. In accordance with the guidelines, none of the television broadcasts depicted the suffering or dying of recognisable individuals. The chief constable admitted liability in respect of those who died or were injured but denied liability in respect of those who did not receive any physical injury. In *Alcock v. The Chief Constable of the South Yorkshire Police,*[95] sixteen persons who did not receive any physical injury but suffered psychiatric injury claimed damages against the chief constable. The plaintiffs were relatives or friends of the persons killed or injured in the disaster. Some of the plaintiffs were in the stadium at the time of disaster but not in the area where disaster occurred. They alleged to have suffered nervous shock caused by seeing or hearing news of the disaster. One of the plaintiffs, Mr. H, who was present elsewhere in the stadium and whose two brothers died failed to satisfy condition no (1) of the control mechanism because the court refused to presume existence of close ties of love and affection between brothers and no evidence was led to prove that they existed in this case. Two of the plaintiffs Mr. & Mrs. C, whose son died failed to satisfy condition no. 2 because they were not present in the stadium and saw the scenes on television. One of the plaintiffs Mr. A, who identified his brother-in-law in the mortuary at mid-night failed to satisfy condition no. 3 because

92. *White v. Chief Constable of the South Yorkshire Police, Supra,* pp. 32, 33.
93. (1995) 2 All ER 736 (HL).
94. (1982) 2 All ER 298 : (1983) AC 410 : (1982) 2 WLR 982 (HL).
95. (1991) 4 All ER 907 : (1992) 1 AC 310 : (1991) 3 WLR 1057 (HL).

he was not in time for the immediate aftermath of the tragedy. The claims of others were also dismissed on similar grounds.[1] *White v. Chief Constable of the South Yorkshire,*[2] is the second relevant case that arose out of the same football stadium disaster. In this case the claimants were a number of police officers who were on duty at that time at the stadium and who suffered post traumatic stress disorder, a recognised psychiatric illness, while engaged in the rescue work in the aftermath of the disaster. The plaintiffs were not within the range of foreseeable physical injury but they claimed that they should be treated as primary victims merely because they were employees of the tort-feasor and the nervous shock was suffered in the course of employment. They also claimed special treatment as a primary victim on the ground that they were rescuers. The plaintiffs' claims were rejected on the ground that they did not satisfy the test of being a primary victim as they were not in the range of foreseeable personal injury and the fact that they were employees of the tort-feasor or the fact that they were rescuers did not enable them to claim as primary victim.

A third case which also arose out of the same football stadium disaster is *Hicks v. Chief Constable of the South Yorkshire Police.*[3] In this case the plaintiff made a symbolic claim on behalf of his daughters who died in the disaster for the distress suffered by them before they died. The claim was negatived holding that fear of impending death felt by the victim of a fatal injury before that injury is inflicted did not furnish any cause of action.

But the common law relating to recovery of compensation for pure psychiatric injury can not be taken to have been finally settled by the decision in *White v. Chief Constable of South Yorkshire* to cover all situations. This follows from the decision of the House of Lords in *W v. Essex County Council.*[4] In this case the plaintiffs, parents of four young children, were approved as foster carers by the defendant local authority. They had however told the authority that they were not willing to accept any child who was a known or suspected child abuser. Despite this the authority placed with them a 15 year old boy who was a child abuser, a fact recorded on the authority's file but which was not disclosed to the plaintiffs. The boy so put in the care sexually abused the four children of the plaintiffs. The plaintiffs who claimed to have suffered psychiatric illness after learning of the sexual abuse of their children sued for damages against the local authority. Their claim was struckout as not maintainable, but the House of Lords reversed that decision and remitted the case for trial without giving any indication either way as to out-come of the case holding that the existing case law did not conclusively show that the parents could not be primary or secondary victims and their claim could not be said to be so certainly or clearly bad that they should be barred from persuing it to trial.

A claim on account of nervous shock which was caused to a man who came up on a scene of serious accident for acting as a rescuer was allowed though the persons involved in the accident did not include any near relative.[5] This case has been explained in *White's* case[6] to be a case where the rescuer was in the zone of foreseeable personal injury. A mere bystander not in the danger zone cannot

1. In *White v. Chief Constable of Yorkshire Police,* (1999) 1 All ER 1, p. 41 : (1999) 2 AC 455 : (1998) 3 WLR 1509 (HL), LORD HOFFMAN summarises the decision in Alcock.
2. (1999) 1 All ER 1 (HL).
3. (1992) 2 All ER 65 (HL). For this case see pp. 112 (footnote 61), 131 (footnote 9).
4. (2000) 2 All ER 237 (HL).
5. *Chadwick v. British Transport Commission,* (1967) 1 WLR 912 : (1967) 2 All ER 945.
6. (1999) 1 All ER 1 p. 47(e)(HL).

recover.[7] *Wainwright v. Home Office*[8] is another case of the House of Lords relating to nervous shock. A mother and son who were claimants in this case went to see another son who was in prison on a charge of dealing in drugs. Claimants were strip searched by the prison authorities before being allowed to see the prisoner. The prison authorities acted in good faith in strip searching the claimants without any intention to cause any distress to them but in certain respects the prescribed procedure was not followed therefore, the searches were not protected by statutory authority. When searching the son, one of the prison officers touched his penis. There was no other physical contact with any of the claimants. The son had been so affected by the experience that he suffered post-traumatic stress disorder a recognised psychiatric illness. The mother suffered emotional distress but not any recognised psychiatric illness. The claim of the son for damages succeeded on the ground that touching his penis by a prison officer amounted to battery and he was entitled to damages for recognised psychiatric illness which he suffered. The mother's claim for emotional distress was negatived.

In *Yearworth v. North Bristol NHS*[9] the plaintiffs were cancer patients. They were treated in a hospital for which the defendant trust was responsible. The plaintiffs were advised Chemotherapy which was likely to affect their fertility. Samples of their semen were taken on the assurance that the same would be preserved with due care so that the sperms may be used in future when needed. But because of negligence in taking reasonable care to preserve the sperm there was loss of plaintiff's sperm and knowing this they suffered a psychiatric injury namely a mild or moderate depressive disorder. The court of appeal held that the above facts gave rise to liabilities in negligence and bailment and the case was recommended for trial.

The courts in India have been more generous in awarding damages for mental suffering. Damages for mental agony in a case of harassment of the plaintiff by the officers of a public authority were allowed under the Consumer Protection Act, 1986 by the Supreme Court.[10] In another case, compensation was awarded to a person for undergoing unwarranted mental torture at the hands of police officers, while in custody. This award of compensation was by way of public law remedy which did not prejudice the remedies available to the aggrieved person under private law.[11] Damages for mental agony were also allowed to parents when their child because of negligence of the hospital, where he was taken for treatment suffered severe damage due to negligence of the hospital staff and was left in a vegetative state.[12] The child was separately allowed damages for the injury suffered in the same case. Damages for loss of consortium are allowed in fatal accident cases.[13] Damages for mental gony were also allowed under the Consumer Protection Act when a defective car was

7. *Mc Farlane v. E E Caledonia Ltd.*, (1994) 2 All ER 1 (CA).
8. (2003) 4 All ER 969 (HL).
9. (2009) 2 All ER 829 (C.A.).
10. *Lucknow Development Authority v. M.K. Gupta,* AIR 1994 SC 787, pp. 799, 800 : (1994) 1 SCC 243 : (1994) 80 Com Cases 714. Followed in *Gaziabad Development Authority v. Balbir Singh,* AIR 2004 SC 2141; *Haryana Development Authority v. Vijay Agarwala,* AIR 2004 SC 3952. Distinguished in *Gaziabad Development Authority v. Union of India,* (2000) 7 JT 256, p. 261 : (2000) 6 SCC 113 : AIR 2000 SC 2003 (compensation for mental agony cannot be allowed in cases of breach of contract). See further *Farley v. Skinner,* (2001) 4 All ER 801 (H.L.) (An exceptional case where non-pecuniary damages were allowed for breach of contract)
11. *Mehmood Nayyar Azam v. State of Chhattisgarh,* (2012) 8 SCC 1; See also *Hardeep Singh v. State of M.P.*, (2012) 1 SCC 748 : (2012) 1 SCC (Cri) 684; *Raghuvansh Dewanchand Bhasin v. State of Maharashtra,* (2012) 9 SCC 791
12. *Spring Meadows Hospital v. Harjot Ahluwalia,* (1998) 2 JT 620 : (1998) 4 SCC 39 : AIR 1998 SC 1801.
13. Text and footnote 62, p. 112, *ante.*

delivered to the purchaser who was held entitled to Rs. 40,000 as damages for mental agony in addition to cost of repair of the ear.[14]

The Madras High Court has held that the theory that damages at law could not be proved in respect of personal injuries unless there was some injury which was variously called "bodily" or "physical," but which necessarily excluded an injury which was only "mental" is wrong at the present day. The body is controlled by its nervous system and if by reason of an acute shock to the nervous system the activities of the body are impaired and it is incapacitated from functioning normally, there is clear "bodily injury" and an insurance company cannot seek to evade liability for damages for such nervous shock on the strength of a clause in the policy which makes the company legally liable to pay in respect of death or "bodily injury" to any person. But it is only shock of such description which can be measured by direct consequences on bodily activity which can form the basis for an action in damages.[15]

The defendant, by way of practical joke, falsely represented to the plaintiff that her husband had met with a serious accident whereby both his legs were broken. By reason of this misrepresentation the plaintiff suffered a violent nervous shock, and was made seriously ill, and her hair was turned white, and her life was for some time in great danger; and her husband had to incur expenses for medical treatment for her. It was held that the defendant was liable.[16]

The defendants were two private detectives. One of them was designing to inspect certain letters, to which he believed the plaintiff, a maid-servant, had means of access. He instructed the other defendant, who was his assistant, to induce the plaintiff to show him the letters, telling him that the plaintiff would be remunerated for this service. The assistant endeavoured to persuade the plaintiff by false statements and threats, as the result of which the plaintiff fell ill from a nervous shock. In an action by the plaintiff against the defendants for damages, it was held that the assistant was acting within the scope of his employment and that both the defendants were liable.[17]

The cases of *Wilkinson* (n. 25) and Janvier (n. 26) noticed above were discussed by the House of Lords in *Wainwright*.[18] As these cases related to *nervousshock thatis psychiatric* illness and not merely of distress, the court observed that they were not any authority for the view that damages for distress falling short of psychiatric injury can be recovered if there was intention to cause it.[19] The court of Appeal in *Wong v. Parkside Health NHS Trust*[20] was of opinion that there was no tort of intentional harassment which gave a remedy for anything less than physical or psychiatric injury. In England the Protection of Harassment Act, 1997 enacted by the British Parliament now provides for damages for anxiety as a result of 'harassment', which is defined in section 1(2) as a 'course of conduct' amounting to harassment. The Act provides by section 7(3) that 'a course of conduct' must involve conduct on at least

14. *Jose Philip Mampillil v. Premier Automobiles Ltd.*, (2004) 2 SCC 278, p. 281 : AIR 2004 SC 1529; *Bangalore Development Authority v. Syndicate Bank*, (2007) 6 SCC 711 : AIR 2007 SC 2198 (Damage for mental agony can be allowed where the seller a statutory authority acts negligently, arbitrarily or capriciously in delivering possession. Case under Consumer Protection Act).
15. *Halligua v. Mohansundaram*, (1951) 2 MLJ 471.
16. *Wilkinson v. Downston*, (1897) 2 QB 57 : 66 LJQB 493.
17. *Janvier v. Sweeney*, (1919) 2 KB 316 : 121 LT 179.
18. (2003) 4 All ER 969, pp. 980, 981.
19. (2003) 4 All ER 969, p. 981.
20. (2003) 3 All ER 932 (CA).

two occasions. If these requirements are satisfied the claimant can pursue a civil remedy for damages for anxiety.[21]

In the United States a right to recover for negligent infliction of emotional distress (which is mental or emotional harm such as fright or anxiety) that is caused by the negligence of another and is not directly brought about by a physical injury has been recognized but has been limited to those plaintiffs who sustain a physical impact as a result of defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.[22] In Australia save in exceptional circumstances "a person is not liable in negligence for a course of distress, alarm, fear, annoyance, despondency without any recognised psychiatric illness."[23]

1(D)(vi) Damages in an Action for Personal Injuries

Personal injury may cause (a) non-pecuniary as well as (b) pecuniary loss to the plaintiff. Non-pecuniary loss may cover the following heads of damage: (i) Pain and suffering; (ii) loss of amenities, and (iii) loss of expectation of life. Pecuniary loss may cover the following heads: (i) Consequential expenses; (ii) cost of care; and (iii) loss of earnings.[24] Another case in which all the above heads of damage except loss of expectation of life figured is *Lim Poh Choo v. Camden and Islington Area Health Authority*.[25] The earlier practice was to make a global award without indicating the sums under different heads.[26] But the current practice is to itemise the award at least broadly.[27] "But at the end, the Judge should look at the total figure in the round, so as to be able to cure any overlapping or other source of error."[28] For, "the separate items, which together constitute a total award of damages, are inter-related. They are the parts of the whole, which must be fair and reasonable."[29] The determination of the quantum may require a test as to what contemporary society would deem to be a fair sum such as would allow the wrong-doer to hold up his head among his neighbours and say with their approval that he has done the fair thing;[30] or in other words what a Lok Adalat would award in a similar case.[31] The amount awarded must be liberal and not niggardly since the law values life and limb in a free society in

21. (2003) 4 All ER 969, p. 982 (para 46).
22. *Consolidated Rail Corporation v. Gottshall*, (1994) 512 US 532, 544, 547, 548.
23. *Tame v. New South Wales*, (2002) 211 CLR 317, p. 319.
24. See further *Klans Mitterbachart v. The East India Hotels Ltd.*, AIR 1997 Delhi 201, p. 217 (22nd edition p. 177 of this book is referred).
25. (1979) 2 All ER 910 : (1980) AC 174 : (1979) 3 WLR 44 (HL). See further, *Sushila Pandey v. New India Assurance Co. Ltd.*, AIR 1983 All 69; *M/s Pest Control India Pvt. Ltd. v. Ramanand Devrao Hattangadi*, AIR 1990 Bombay 4, pp. 11, 12; *Shruti Shekhar Singh Samanta v. Managing Director, Orissa Road Transport, Berhampur*, AIR 1991 Orissa 225, p. 228; *Narbada v. Suresh Chandra Mittal*, AIR 1993 MP 26; *Ghanshyam Patel v. Vijay Kumar Dubey*, AIR 1998 MP 216 p. 219. Victims in a motor accident were, it is submitted, wrongly allowed Rs. 10,000 for the mental shock and injury to family members in *U.P. State Road Transport Corporation v. Jagjit Singh*, AIR 1991 All 84, p. 88; such a claim ought to be made by the family members themselves if tests laid down in title 1(D)(v) are satisfied.
26. *Watson v. Powles*, (1968) 1 QB 596.
27. *Jefford v. Gee*, (1970) 2 QB 130; *Taylor v. Bristol Omnibus Co.*, (1975) 2 All ER 1107 (CA); *Klans Mitterbachert v. The East India Hotels Ltd., Supra* p. 217.
28. *Taylor v. Bristol Omnibus Co.*, (1975) 2 All ER 1107 p. 1111 (CA).
29. *Lim Poh Choo v. Camden and Islington Area Health Authority*, (1979) 2 All ER 910 (921) : (1980) AC 174 : (1979) 3 WLR 44 (HL). See further *Fizabai v. Nemichand*, AIR 1993 MP 79, pp. 87, 88.
30. *Basavraj v. Shekhar*, AIR 1988 Kant 105, p. 108 (quoting LORD DEVLIN); *Shruti Shekhar Singh Samanta v. Managing Director, Orissa Road Transport, Berhampur, supra*, p. 229.
31. *Lado v. Uttar Pradesh Electricity Board*, Hindustan Times 17/12/87 (SC).

generous scales.[32] All this only means that the sum awarded must be fair and reasonable[33] by accepted legal standards[34] and all elements requiring consideration must be viewed with objective standards.[35]

In *R.D. Hattangadi v. Pest Control (India) Pvt. Ltd.*[36] the heads of damage mentioned above were elaborated. Damages for pecuniary loss were illustrated to cover: (*i*) medical expenses, (*ii*) loss of earning of profit upto the date of trial, (*iii*) other material loss. Damages for non-pecuniary loss were said to cover: (*i*) mental and physical shock, pain already suffered or likely to be suffered in future, (*ii*) loss of amenities of life which may include a variety of matters such as inability to walk, run or sit, (*iii*) loss of expectation of life if on account of injury normal longevity of the person concerned is shortened; (*iv*) inconvenience hardship, discomfort, disappointment, frustration and mental stress in life.[37] It is submitted that item (*iv*) may already be covered in items (*i*) and (*ii*) and care must be taken to avoid duplication.

In *Sapna v. United India Insurance Company Ltd.*[38] the court said in a case of motor accident that the principles governing a claim petition for assessing the damages in case of bodily injury suffered is that "the Tribunal should consider all relevant circumstances so as to enable the insured to be put in the same position as if he had not sustained any injury. The principle of *restitution-in-integrum* may be applied in a case of this nature."[39] It is submitted that the principle of restitution in integram can be applied only to pecuniary loss not for non-pecuniary loss for the simple reason that the court cannot restore a person to the state of health which he enjoyed before he suffered a serious injury to his body or brain and the court can award only reasonable compensation the assessment of which is essentially a guess work and assistance in this respect is taken from comparable awards.[39]

Damage to semen of the plaintiff stored by the defendant for future use of the plaintiff does not constitute personal or bodily injury even though the defendant was negligent in taking care of the semen.[40]

I(D)(vi)(a) Non-pecuniary Loss

Pain and suffering consequential to injury inflicted on the plaintiff is a proper head of damage for which the defendant must compensate the plaintiff. It will include pain attributable to medical treatment for the injury. The amount of compensation will vary with the intensity of pain and suffering of the plaintiff. So, if the plaintiff after receiving the injury becomes wholly unconscious or is otherwise unable to experience the pain, he gets no compensation under this head, however serious the injury may be. Loss of amenities is a separate head of damage and covers deprivation

32. *Concord of India Insurance Co. Ltd. v. Nirmala Devi*, AIR 1979 SC 1666; (1980) ACJ 55 : (1979) 4 SCC 365 (SC), p. 56 (Fatal accident case); *Hardeo Kaur v. Rajasthan State Road Transport Corporation*, AIR 1992 SC 1261, p. 1263 : (1992) 2 SCC 567 (Fatal Accident case).
33. See text and footnote 32, *supra*.
34. *General Manager, Kerala State Road Transport Corporation v. Mrs. Susamma Thomas*, AIR 1994 SC 1631, p. 1632 : (1994) 2 SCC 176 : 1994 ACJ 1.
35. *R.D. Hattangadi v. M/s. Pest Control India Pvt. Ltd.*, AIR 1995 SC 755, p. 759; *Divisional Controller KSRTC v. Mahadeo Shetty*, (2003) 7 SCC 197, pp. 204, 205.
36. AIR 1995 SC 755.
37. *R.D. Hattangadi v. M/s. Pest Control India Pvt. Ltd.*, AIR 1995 SC 755, p. 759. See further *Aswini Kumar Misra v. P. Muniam Babu*, AIR 1999 SC 2260 p. 2261 : (1999) 4 SCC 22. For these cases see text and footnotes 18, 19, p. 222, 223; *Divisional Controller KSRTC v. Mahadeo Shetty, supra*.
38. (2008) 7 SCC 613 : AIR 2008 SC 2281.
39. (2008) 7 SCC 613, para 8 see pp.223-224, *infra*.
40. *Yearworth v. North Bristol NHS*, (2009) 2 All ER 986 (C.A.).

of ordinary experiences and enjoyment of life. For example, if the plaintiff is deprived of his ability to play games which he used to play before the injury, he would be entitled to damages under this head. The important distinction between the heads of pain and suffering and loss of amenities is this that the fact of unconsciousness deprives the plaintiff of any damages under the former head but not so under the latter. So, a plaintiff who is totally unconscious due to the injury will not receive any damages under the head pain and suffering but may yet receive substantial damages under the head loss of amenities.[41] Speaking generally, the court awards a lump sum as damages covering both the heads.

Loss of expectation of life is a separate head of damage when a normal expectation of life is shortened as a result of the injury.[42] Medical evidence is generally required to prove this though caution is necessary before accepting the evidence of medical men as such evidence is necessarily speculative. Damages under this head are assessed by putting a money value on the prospective balance of happiness in the years that the injured might have otherwise lived and having regard to the uncertainties of life and difficulties in assessment very moderate sums are awarded.[43] This head of damage has been abolished in England by the Administration of Justice Act, 1982. It may be mentioned here that suffering experienced by the plaintiff from the awareness that his life expectancy has been shortened will fall under the head "pain and suffering' and not under the head 'loss of expectation of life'.[44]

Quantification of damages for non-pecuniary damage such as pain and suffering and loss of amenities presents great difficulties. The court cannot restore a person to the state of health which he enjoyed before he suffered a serious injury to his body or brain. The court can award only reasonable compensation to the plaintiff for his suffering the assessment of which is essentially a guess work. To bring about a degree of uniformity and predictability, the courts have evolved certain rules. After referring in this context to the speech of LORD MORRIS in *West (H) & Sons Ltd. v. Shephard*[45] and to the decision of a unanimous five member Court of Appeal in *Ward v. James*,[46] a Division Bench of the Madhya Pradesh High Court observed: "The task of assessment of damages for non-pecuniary damage in personal injury actions is a difficult one, for human suffering resulting from any serious bodily injury cannot from its very nature be valued in terms of money. But as the injured can be awarded only monetary compensation, the courts make an endeavour as best as they can to quantify non-pecuniary damage in terms of money having regard to the injury and the damage resulting from it. In the process of application, the wide discretion that the courts exercise in making awards of compensation, like any other judicial discretion, has canalised itself into a set of rules. These rules are: (1) The amount of compensation awarded must be reasonable and must be assessed with moderation; (2) Regard must be had to awards made in comparable cases; and (3) The sums awarded must to a considerable extent be conventional. It is only by adherence to

41. *Wise v. Kay*, (1962) 1 All ER 257 : (1962) 1 QB 638; *West (H) & Son Ltd v. Shephard*, (1963) 2 All ER 625 (HL); *Lim Poh Choo v. Camden and Islington Area Health Authority*, (1979) 2 All ER 910 : (1980) AC 174 (HL). See further *Valiyakathodi Mohammad Koya v. Ayyappankadu Ramamoorthi Mohan*, AIR 1991 Ker 47.
42. *Flint v. Lovell*, (1934) All ER 200 : (1935) 1 KB 354 : 50 TLR 127; *Rose v. Ford*, (1937) 3 All ER 359 (HL); *Benham v. Gambling*, (1941) 1 All ER 7 : (1941) AC 157 (HL); *West (H) & Son Ltd v. Shephard*, (1963) 2 All ER 625 : (1994) AC 324 (HL); *Vinod Kumar Shrivastava v. Ved Mitra Vohra*, (1970) ACJ 189 (MP) : AIR 1970 MP 172; *Klaus Mittelbachert v. The East India Holds Ltd.*, AIR 1997 Delhi 201 p. 218.
43. *Flint v. Lovell*, (1934) All ER 200 : (1935) 1 KB 354 : 50 TLR 127
44. WINFIELD & JOLOWICZ, Tort, 12th edition, p. 625.
45. (1963) 2 All ER 625 (631) : (1994) AC 324 (HL).
46. (1965) 1 All ER 563 : (1966) 1 QB 273 (CA).

these self imposed rules that the courts can decide like cases in like manner and bring about a measure of predictability of their awards. These considerations are of great importance if administration of justice in this field is to command the respect of the community."[47] Referring to non-economic loss in personal injury actions, the House of Lords in the same context observed: "Such loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be basically a conventional figure derived from experience and from awards in *comparable cases*."[48] Similar views have been expressed by the Supreme Court[49] after referring to the speech of Lord Morris in *West (H) and Sons v. Shephard*.[50] Before cases can be used as comparable cases, they must bear a reasonable measure of similarity; "it is necessary to ensure that in main essentials, the facts of one case must bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made".[51] Further, in taking assistance from earlier awards, the courts should remain conscious of the fall in the value of currency; indeed, the conventional sums awarded for pain, suffering and loss of amenities should be periodically reassessed to keep pace with inflation so that they do not lose contact with reality and may serve as guide in other cases for similar injuries.[52] Guidance on the question of comparable awards has been elaborately furnished in *Nagappa v. Gurudayal Singh*.[53] The Court of Appeal in England issues guidelines and revises them from time to time for award of damages for non-pecuniary loss.[54] The House of Lords, however, in *Lim Poh Choo v. Camden and Islington Area Health Authority*[55] observed that an award for pain, suffering and loss of amenities was dependant on a most general way on the movement of money values and though in times of inflation there will be tendency for conventional awards to increase, the requirement of law will be met if the sum awarded is a substantial sum in the context of current money values. As regards an award for loss of expectation of life, there is comparatively much less scope for increase with the decrease in money value; an increase, if at all, will be justified "only to prevent the conventional becoming the contemptible".[56] It has also been held that award of general damages for pain and suffering is not related to the status of the plaintiff and suffering of a rich man is not more acute than the pain and suffering of a poor riff-raff.[57]

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47. *Vinod Kumar Shrivastava v. Ved Mitra Vohra*, (1970) ACJ 189 (194) (MP) : AIR 1970 MP 172 p. 176 (G.P. SINGH J). These observation were reproduced by another D.B. of M.P. without referring to the earlier case *Shafiq v. Promod Kumar Bhatia*, AIR 1997 MP 142, p. 144. See further, *Sushila Pandey v. New India Assurance Co. Ltd.*, AIR 1983 All 69; *M/s. Pest Control India Pvt. Ltd. v. Ramanand Devrao Hattangadi*, AIR 1990 Bombay 4, pp. 11, 12; *Klaus Mitterbachert v. The East India Hotels Ltd.*, AIR 1997 Del 201, p. 218.
48. *Wright v. British Railways Board*, (1983) 2 All ER 698 (HL), p. 699 : (1983) 2 AC 773.
49. *Jai Bhagwan v. Laxman*, (1994) 5 SCC 5. See further *Divisional Controller KSRTC v. Mahadeo Shetty*, (2003) 7 SCC 197 pp. 203, 204 : AIR 2003 SC 4172.
50. Footnote 48, *supra*.
51. *Singh v. Toong Fang Omnibus Co.*, (1964) 2 All ER 925 (927) (PC); *Vinod Kumar Shrivastava v. Ved Mitra Vohra*, *supra*, p. 195 (ACJ). See further *Delhi Transport Corporation v. Kumari Lalita*, AIR 1982 Del 558.
52. *Babu Mansa v. The Ahmedabad Municipal Corporation*, 1978 ACJ 485 (494, 495); (Gujarat); *Narbada v. Sureshchandra*, AIR 1993 MP 26; *Walker v. John McLean & Sons Ltd.*, (1979) 2 All ER 965 (CA); *Croke (a minor) v. Wiseman*, (1981) 3 All ER 852 (859) : (1982) 1 WLR 71 (CA).
53. (2003) 2 SCC 274, pp. 284, 285 : AIR 2003 SC 674, pp. 681, 682.
54. *Heil v. Rankin*, (2000) 3 All ER 138 : (2000) 2 WLR 1173 : (2001) QB 272 (CA).
55. (1979) 2 All ER 910 (920) : (1980) AC 174 (HL).
56. (1979) 2 All ER 910 (920) : (1980) AC 174 (HL).
57. *Ramu Tolaram v. Amichand Hansraj Gupta*, AIR 1988 Bombay 304, p. 311 : (1980) AC 174 : (1979) 3 WLR 44.

1(D)(vi)(b) Pecuniary Loss

The plaintiff is obviously entitled to the expenses consequential to the injury. This item will include expenses incurred for taking the plaintiff to a hospital, purchase of medicines or equipment needed for his treatment, fees of private doctors if consulted and similar other expenses. If the plaintiff will require medical aid in future also, compensation for that too has to be allowed.

If the plaintiff's injuries are such that he needed nursing and attendance, the expenses required for this are to be allowed under the head cost of care. Serious injuries sometimes make a person invalid for years and even for life. The plaintiff in such cases has to be compensated for cost of future care.[58] Compensation for future medical expenses has to be allowed on the basis of fair guest work aftertaking into account increase in the cost of medical treatment.[59] It is now settled that the plaintiff can recover the value of nursing and other services gratuitously rendered to him by wife, parents and other relatives.[60] Damages are awarded in such cases on the principle that the plaintiff's loss is the existence of the need for those services. As expressed by a Division Bench of the Gujarat High Court: "The value of such loss for purposes of damages or to put it differently for the purpose of the ascertainment of his (plaintiff's) loss, is the fair and reasonable cost of supplying those needs. If the provider of such services gave up paid work or otherwise incurred loss of earnings and also underwent incidental expenses to look after him, the plaintiff can recover as special damages a specified amount up to the date of the trial which is equivalent to the loss of such third party. For future attendance and nursing, if need for the same is proved and the person providing voluntary service agrees to render the same as long as he can continue to do so, the plaintiff can recover general damages at a certain years' purchase on the basis of a datum figure which will be arrived at taking into account the financial disadvantage of the third party. Even if the provider of services had not been doing paid work, but only domestic duties in the house, the plaintiff can still recover compensation for all the extra attendance on him on the basis of proper and reasonable cost of supplying those needs. The compensation in such a case would also be referable to the past and future financial value of the voluntary services rendered by such devoted provider and the measure of damages will require to be worked out in the like manner as in the other case."[61] The English law on this point as clarified by the House of Lords[62] is that an injured plaintiff can recover the reasonable value of gratuitous services rendered to him by way of voluntary care by a member of his family or other person but damages recovered under this head are to be held by the injured plaintiff on trust for the voluntary carer. But when the voluntary carer is the tortfeasor himself, who later married the plaintiff, there can be no ground in public policy or otherwise for requiring the tortfeasor to pay to the plaintiff, in respect of

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58. *Lim Poh Choo v. Camden & Islington Area Authority*, (1979) 2 All ER 910 (HL).
59. *Nagappa v. Gurudayal Singh*, (2003) 2 SCC 274, pp. 282, 283 : AIR 2003 SC 674, p. 682.
60. *Wattson v. Port of London Authority*, (1969) 1 Lloyd's Rep 95; *Cunningham v. Harrison*, (1973) QB 942; *Donnelly v. Joyce*, (1974) QB 454; *Hay v. Hughes*, (1975) 1 All ER 257; *Taylor v. Bristol Omnibus Co.*, (1975) 2 All ER 1107 (CA); *Bharat Premji Bhai v. Municipal Corporation, Ahmedabad*, (1979) ACJ 264 (Gujarat); *Tejinder Singh v. Inderjit Singh*, AIR 1988 P&H 164 p. 172. But when a plaintiff is looked after under the national health service a nil award should be made in respect of nursing care because no expense will be incurred in supplying the plaintiff's needs; *Housecroft v. Burnefit*, (1986) 1 All ER 332 : (1985) 135 NLJ 728 (CA).
61. *Bharat Premji Bhai v. Municipal Corporation, Ahmedabad*, 1979 ACJ 264 (Gujarat), pp. 270, 271.
62. *Hunt v. Severs*, (1994) 2 All ER 385 (HL) p. 394 : (1994) AC 350 : (1994) 2 WLR 602 . *Giambrone v. JMC Holiday Ltd.*, (2004) 2 All ER 891 (CA). (The gratuitous care rendered by a family member for which damages can be allowed must be one which went distinctly beyond that which was a part of the ordinary regime of family life.)

the services which he himself has rendered, a sum of money as damages which the plaintiff must then repay to him.[63] Further, the Court of Appeal[64] has held that when the gratuitous service was rendered by the wife for helping in running the business after injury to husband, the financial value thereof cannot be recovered as damages. The case thus restricts the House of Lord's direction to cases where voluntary services are rendered as gratuitous carer. A gratuitous carer, providing his services to a relative, when injured which prevents him to provide the services can also in a personal injury action claim damages in respect of the loss of his ability to look after his relative.[65]

Loss of earnings constitutes an important pecuniary loss for which damages are allowed. There are two fundamental principles in assessing damages for loss of earnings.[66] The first principle is that damages are compensatory and intended, so far as money can, to put the plaintiff in the same financial position as if the accident had never happened.[67] The second principle is that it is no concern of the tortfeasor how the injured plaintiff chooses to dispose of his earnings.[67] As an application of the first principle, damages for loss of earnings are to be assessed at the net sum that would be available to the plaintiff after discharging his liability for tax, rather than his gross earnings before deduction of tax.[68] As a further application of the same principle, any unpaid contributions to a pension scheme (whether made by the employee or the employer) during the period the plaintiff was not receiving his pay being off duty would not be recoverable as part of his lost earnings provided the non-payment of these contributions did not affect his pension.[69] He would certainly be entitled to compensation if his pension was affected because of non-payment of contributions but he would not be entitled to recover both the contributions and the pension that those contributions would have purchased since that would allow double recovery.[67] The second principle is illustrated by the rule that it does not lie in the mouth of the tort feasor to argue that because he has put the plaintiff in a hospital bed for six months he must be given credit for the money that the plaintiff would have spent on his own amusement during that time if he had been able to do so.[70] There is not much difficulty in quantifying the loss of earnings up to the date of judgment. Damages for future loss of earnings, if it is likely to continue for a number of years or for the entire working life of the plaintiff, are assessed by the multiplicand multiplier method.[71] The multiplicand is selected by estimating yearly loss of income after making allowance for expenses, if any, including taxes, required for earning the same.[72] The selection of multiplier takes into account the accelerated receipt of the entire amount in a lump sum and vicissitudes of life.[73] The multiplier is, therefore, much

63. *Hunt v. Severs* is not the law in Australia where the plaintiff is not to be regarded holding the relevant damages in trust for the voluntary carer and it matters not the carer is the actual tortfeasor : *Kars v. Kars*, (1997) 71 ALJR 107. But the decision has been criticised see (1997) 71 ALJ 882.
64. *Worwick v. Hudson*, (1999) 3 All ER 426 (CA).
65. *Lowe v. Guise*, (2002) 3 All ER 454 (CA).
66. *Dews v. National Coal Board*, (1987) 2 All ER 545 (HL), p. 547.
67. *Dews v. National Coal Board*, (1987) 2 All ER 545 (HL)
68. *Dews v. National Coal Board*, (1987) 2 All ER 545 (HL) See further text and footnote 72, *infra*.
69. *Dews v. National Coal Board*, (1987) 2 All ER 545 (HL), p. 549.
70. *Dews v. National Coal Board*, (1987) 2 All ER 545 (HL). But 'domestic element' in the cost of hospital and nursing care is deductible to avoid duplication (p. 548). See text and footnote 76, *infra*.
71. *Lim Poh Choo v. Camden and Islington Area Health Authority*, (1979) 2 All ER 910 (HL) p. 925 : (1980) AC 174 : (1979) 3 WLR 44.
72. *Lim Poh Choo v. Camden and Islington Area Health Authority*, (1979) 2 All ER 910 (HL) p. 925 : (1980) AC 174 : (1979) 3 WLR 44, *British Transport Commission v. Gourley*, (1956) AC 185 (HL) and text and footnote 57, *supra*.
73. *Lim Poh Choo v. Camden and Islington Area Health Authority*, (1979) 2 All ER 910 : (1956) 2 WLR 41 : (1955) 3 All ER 796 (HL), p. 925 : (1980) AC 174 : (1979) 3 WLR 44.

less than the estimated period of future loss of earnings. When life expectancy of the plaintiff stands reduced as a consequence of the injury, he is entitled to claim compensation for loss of earnings of the lost years, *i.e.* for the years he would have lived had he not suffered the injury.[74] But as the plaintiff is not expected to live during the lost years, in selecting the multiplicand for this period, allowance must be made for the living expenses of the plaintiff by deducting the same from the estimated yearly income.[75] This allowance or deduction will be in addition to the allowance or deduction made for the expenses, if any, required for making yearly income. When a plaintiff is incapacitated but without affecting his life expectancy and is allowed, both, cost of care and loss of earnings, his living expenses would be deducted from cost of care to avoid duplication.[76] Cost of care is not allowed for lost years and hence there is no question of duplication when damages for loss of earnings are allowed for lost years, but as already seen, in assessing these damages, living expenses are deducted as the plaintiff is not expected to live during these years.[77] Damages are assessed with reference to the value of the currency on the date of judgment and no notice is taken of future inflation.[78] But the selection of the number of years' purchase that is the multiplier is on the basis that the amount allowed as damages will be invested at the interest rate of 4 to 5 per cent and yearly interest supplemented by drawing on capital will yield the annual loss of income for the entire period for which loss of earnings are allowed and after the end of that period will stand exhausted. If it were assumed that the amount allowed as damages will be invested at the current rate of interest, the multiplier would be much less than what is usually allowed and so will consequently be the damages. The selection of multiplier with reference to interest rate of 4 to 5 per cent thus covers the contingency of future inflation or fall in money value.[79] The date of trial is the appropriate date on which to determine (a) the actual loss of earnings upto that date and (b) the future loss of earnings based on a multiplicand and multiplier and ascertained from the facts as they are at that date.[80] Normally the courts adopt a multiplier of 15 or 16 treating 18 as the maximum.[81] A conventional multiplier selected with reference to interest rate of 4 to 5 percent is not to be further increased to allow for higher tax payable on income from large award and it should be assumed that the multiplier so selected will take care of not only future inflation but future incidence of taxation.[82] Further, a convential multiplier selected by the trial court should not be lightly interfered with by the appellate court by reference to actuarial calculations.[83] Damages for loss of earnings are also allowed to

74. *Picket v. British Rail Engineering Ltd.*, (1979) 1 All ER 774 : (1980) AC 136 : (1978) 3 WLR 955 (HL). *Bhagwandas v. Mhd. Arif*, AIR 1988 AP 99, p. 103. But in case of children of tender years, the assessment being highly speculative, damages for loss of earnings of lost years will not be allowed.
75. *Picket v. British Rail Engineering Ltd.*, (1979) 1 All ER 774 : (1980) AC 136 : (1978) 3 WLR 955 (HL)
76. *Lim Poh Choo v. Camden and Islington Area Health Authority*, (1979) 2 All ER 910 (HL), p. 921 : (1980) AC 174 : (1979) 3 WLK 44.
77. *Lim Poh Choo v. Camden and Islington Area Health Authority*, (1979) 2 All ER 910 (HL) : (1980) AC 174 : (1979) 3 WLK 44; *Picket v. British Rail Engineering Ltd., supra*.
78. *Lim Poh Choo v. Camden & Islington Area Health Authority*, (1979) 2 All ER 910 (HL), p. 923 : (1980) AC 174 : (1979) 3 WLR 44.
79. *Lim Poh Choo v. Camden and Islington Area Health Authority*, (1979) 2 All ER 910 (HL) : (1980) AC 174 : (1979) 3 WLK 44; *Cookson v. Knowles*, (1978) 2 All ER 604 : (1979) AC 556 (HL). (A case of fatal accident).
80. *Pritchard v. J.H. Cobben Ltd.*, (1987) 1 All ER 360 : (1987) 2 WLR 627 (C.A.). In fatal accident cases multiplier is selected with reference to the date of death. See text and footnotes 92, 93, p. 116.
81. WINFIELD & JOLOWICZ, Tort, 12th edition, p. 633.
82. *Hodgson v. Trapp*, (1988) 3 All ER 870 (HL).
83. *Hunt v. Severs*, (1994) 2 All ER 385 (HL) p. 396.

incapacitated children who at the time of the accident had not yet started to earn.[84] Further, damages under this head are not confined to loss of wages but also cover loss resulting from reduction[85] or deprivation of pension.[86]

The statement in the preceding paragraph that multiplier is selected on the hypothesis that damages awarded would be invested to yield return at the rate of 4 to 5 per cent now does not hold the field in England. The change in this respect has been brought about because of the advent of Index-Linked Government Stock (ILGS). The return of income and capital on ILGS is fully protected against inflation. Thus the purchaser of £100 of ILGS with a maturity date of 2020 knows that his investment will then be worth £100 plus x% where x represents the percentage increase in the retail price index between the date of issue and the date of maturity. Investment in ILGS for this reason yields comparatively low rate of return which was about 3.5% in 1995. Fixation of multiplier on the basis of ILGS would thus be higher than that fixed on the basis of interest rate of 4 to 5 per cent and would yield higher damages. The Law Commission (U.K.) in 1994 recommended fixation of damages by reference to return on ILGS in preference to interest rate of 4 to 5 per cent. The recommendation was accepted by the House of Lords in *Wells v. Wells*[87] where it was held that investment in ILGS is most accurate way of calculating the present value of the loss to which the plaintiff will actually suffer in real terms. In that case taking the gross return on such investment at 3.5% and after making allowance for tax on income, the House of Lords regarded 3% as the appropriate return and damages for anticipated future losses and expenses were calculated on that basis. This case also holds that actuarial tables should now be regarded as the starting point for selecting multiplier.[88] In the absence of availability of ILGS and actuarial tables this decision of the House of Lords is not likely to affect any change in India.

In assessing damages for loss of earning capacity, that is to say, damages which are intended to compensate the plaintiff for his handicap in the labour market resulting from his injury, the award is necessarily speculative but there is no such thing as a conventional approach.[89] In each case the court has to do its best to assess the plaintiff's handicap as an existing disability, by reference to what may happen in the future.[90]

As the principle behind the award of damages for loss of earnings is *restitutio in integram*, the court has to make deductions in respect of monetary benefits coming

84. *Taylor v. Bristol Omnibus Co.*, (1975) 2 All ER 1107 (CA); *Croke (a minor) v. Wiseman*, (1981) 3 All ER 852 (CA).
85. *Parry v. Cleaver*, (1969) 1 All ER 555 (HL); (1970) AC 1 (HL).
86. *Lim Pooh Choo v. Camden & Islington Area Health Authority*, (1979) 2 All ER 910 (HL), p. 925 : (1980) AC 174 (1979) 3 WLR 44.
87. (1998) 3 All ER 481 (HL).
88. (1998) 3 All ER 481 (HL), p. 498. In England section 1 of the Damages Act, 1996 enables the Lord Chancellor to prescribe from time to time the rate of return expected from the investment of a sum awarded as damages for future pecuniary loss in action for personal injury which the court shall take into account unless it finds that a different rate is more appropriate. By the Damages (Personal Injury) order 2001 the Lord Chancellor prescribed 2.5% as the rate of return. This is the rate which is now used for calculating damages for future pecuniary loss : See *Warriner v. Warriner*, (2000) 3 All ER 447 (CA).
89. *Foster v. Tyne and Wear Country Council*, (1986) 1 All 567 (CA). For calculating loss of earning capacity from loss of a *chance* of career see *Herring v. Ministry of Defence*, (2004) 2 All ER 44 (CA). This case also refers to Actuarial Tables (Ogden Tables edition 2000) at p. 47 used in personal injury and fatal accident cases.
90. *Foster v. Tyne and Wear Country Council*, (1986) 1 All 567 (CA) (In this case the plaintiff suffered a fracture of the ankle joint. The employer of his gave him the old job of driving heavy vehicles. The medical opinion was that the plaintiff will have to give up the job after 5-10 years. The plaintiff was awarded 5 years' salary as damages for loss of earning capacity.)

to the deceased because of the injury suffered by him. Thus, social security benefits such as unemployment benefit or attendance and mobility allowances payable under a statute to an invalid plaintiff will be taken into account in mitigation of damages.[1] But fruits of private insurance and private benevolence are not to be deducted.[2] Exgratia payments to victims by tortfeasors are deductible and private benevolence in this context is limited to payments received from third parties.[3] Similarly proceeds of personal accident insurance policy taken out by employers for benefit of employees, employee making no contribution to policy or premium, are also deductible.[3] It is also settled that invalid pension received from the employer under a contributory pension scheme will not be taken into account for assessing loss of wages and will be considered only in assessing loss of pension.[4] Thus if the injured person receives a recurring annual sum as incapacity pension, the recurring annual payments receivable till the age when he would have retired are not taken into account either for calculating loss of wages or retirement pension.[5] The annual sum payable as incapacity pension after the age of retirement will be taken into account in reducing the loss of retirement pension.[5] If in addition to recurring annual sum, the person receives a lump sum as part of incapacity pension, this lump sum is also not taken into account in calculating loss of wages upto the date of retirement but an appropriate portion of this lump sum, appropriate for the post retirement period, will be taken into account for calculating loss of retirement pension.[5] The reasoning why incapacity pension is not taken into account for calculating loss of wages is that pension and wages constitute "two quite different equation" and comparison has to be made of "like with like".[6] But sickness benefits contractually payable to the plaintiff by the employer are deductible even though the employer had insured himself against this liability for such payments are designed to compensate the plaintiff for loss or dimunition of wages, and are of the same nature as wages and are not fruits of private insurance.[7] *Ex gratia* payments made by the employer should also be taken into account for reducing damages when the claim is against the employer.[8] Redundancy payment made by the employer, when the employee is made redundant, is also deductible.[9] *Ex gratia* employment given to the victim by his employer, which can be terminated at any time, cannot be taken into account in assessing compensation against the tortfeasor when he is not the employer of the plaintiff.[10]

1. *Westwood v. Secretary of State for Employment*, (1984) 1 All ER 874 (HL), p. 879; *Hodgson v. Trapp*, (1988) 3 All ER 870 (HL). But under section 2(1) of the Law Reform (Personal Injuries) Act, 1948 (U.K.) only one half of the value of benefits accruing for five years after accrual of cause of action are alone to be deducted from damages and no deduction is to be made for any period thereafter : *Jackman v. Corbett*, (1987) 2 All ER 699 : (1988) QB 154 (CA). See further, *Smoker v. London Fire and Civil Defence Authority*, (1991) 2 WLR 1052 : (1991) 2 SC 502 : (1991) 2 All ER 449 (HL); *Hassal v. Secretary of State for Social Security*, (1995) 3 All ER 909 (CA).
2. *Bradburn v. Great Western Railway Co.*, (1874) LR 10 Ex 1; *Parry v. Cleaver*, (1970) AC 1 (HL); *Westwood v. Secretary of State for Employment, supra*, p. 879; *Kandimallan Bharati Devi v. The General Insurance Corporation of India*, AIR 1988 AP 361, pp. 369, 370; *Smoker v. London Fire and Civil Defence Authority, supra*.
3. *Gaca v. Pirelli General plc* (2004) 3 All ER 348 (CA).
4. *Parry v. Cleaver*, (1970) AC 1 : (1969) 2 WLR 821 : 113 SJ 147 (HL); *Smoker v. London Fire and Defence Authority*, (1991) 2 All ER 499 (HL).
5. *Longden v. British Coal Corp.*, (1998) 1 All ER 289 (HL).
6. *Longden v. British Coal Corp.*, (1998) 1 All ER 289 (HL), p. 296 (where relevant passages from speeches of Lord Reed and Lord Wilberforce in *Parry v. Cleaner* are quoted.
7. *Hussain v. New Taplow Paper Mills*, (1987) 1 All ER 417 (C.A.) : affd. (1988) 1 All ER 541 (HL); *Parry v. Cleaver*, 1970 AC 1, p. 16 : (1969) 2 WLR 821.
8. *Hussain v. New Taplow Paper Mills, supra*.
9. *Colledge v. Bass Mitchells and Butlers Ltd.*, (1988) 1 All ER 536 (CA).
10. *Pallavan Transport Corporation v. P. Murthy*, AIR 1989 Mad 14.

1(D)(vi)(c) Interest

In England as also in India, interest is allowed on damages awarded. In England interest on non-pecuniary loss is allowed at the conventional rate of 2% from the date of writ to the date of judgment.[11] Interest is also allowed on pretrial pecuniary loss but no interest is allowed on future pecuniary loss.[12] In India, the practice is to allow interest from the date of suit or claim application.[13] In *Chameli Wati v. Delhi Municipal Corporation*[14] which was a fatal accident case, interest was allowed on the total award, as finally increased in appeal, from the date of the claim application at the rate of 12%. The current practice in India seems to be to allow interest at the rate of 9 to 12% from the date of application on the amount of compensation finally awarded.[15] But the Karnataka High Court prefers a rate of 6% on the amount awarded from the date of the claim application.[16]

1(D)(vi)(d) Illustrations

In *Lim Poh Choo v. Camden and Islington Area Health Authority*[17] the plaintiff who at the relevant time was aged 36, was a senior psychiatric Registrar. In 1973, she was admitted to a hospital controlled by the defendant for a minor operation. Due to the negligence of one of the hospital staff, the plaintiff suffered cardiac arrest and irreparable brain damage. She went to Penang where her mother was but eventually returned to England as there was in Penang no proper institution where she could be taken care of. The plaintiff was reduced to a helpless invalid for her life. She was so intellectually impaired that she did not appreciate what had happened to her. But her expectation of life which was estimated to be 37 years had not been reduced. Her condition was such that there was a total loss of her earning capacity and she needed total care for the rest of her life. The award of damages as modified by the House of Lords was as under: Pain and suffering, loss of amenities £ 20,000; Out of pocket expenses-£ 3,596; Cost of care to the date of judgment of the House (21st June, 1979)-£ 22,689.64; Loss of earning to the date of judgment at trial (7th December, 1977)-£ 14,213; Cost of future care, *i.e.* from the date of judgment of the House by applying a multiplier of 12-£ 76,800; loss of future earnings from the date of judgment at the trial by applying a multiplier of 14-£ 84,000; loss of pension-£ 8,000; total £ 2,29,298.64.

In *R.D. Hattangadi v. M/s. Pest Control (India) Pvt. Ltd.*,[18] the plaintiff an advocate aged 50 suffered 100% disability and parplegia below the waist. He could move only in a wheel chair. He was allowed for pecuniary loss damages for cost of medical treatment present and future, cost of care present and future and loss of earnings present and future. In addition to damages for pecuniary loss, the plaintiff

11. *Wright v. British Railways Board*, (1983) 2 All ER 698 : (1983) 2 AC 773 (HL).
12. *Cooksan v. Knowles*, (1978) 2 All ER 604 : (1979) AC 556 : (1978) 2 WLR 978 (HL). (A fatal accident case).
13. Section 34, Code of Civil Procedure; Section 110 CC, Motor Vehicles Act, 1939; & see further *Vinod Kumar Shrivastava v. Ved Mitra*, 1974 ACJ 189.
14. 1985 ACJ 645 : AIR 1986 SC 1191 followed in *Jagbir Singh v. General Manager, Punjab Roadways*, (1986) 4 SCC 431 : AIR 1987 SC 70; *Hardeo Kaur v. Rajasthan State Transport Corporation*, AIR 1992 SC 1261, p. 1263 : (1992) 2 SCC 567.
15. See 1985 ACJ Index, under the title 'Interest'. *Maharashtra State Road Transport Corporation v. Pushpaben Rajaram Bhai Patel*, AIR 1990 Bom 214; *Sardar Ishwar Singh v. Himachal Puri*, AIR 1990 MP 282.
16. *Managing Director, Karnataka Power Corporation v. Geetha*, AIR 1989 Karnt 104.
17. (1979) 2 All ER 910 : (1980) AC 174 : (1979) 3 WLR 44 (HL). See further *Dr. M.K. Gourikutty v. M.K. Raghvan*, AIR 2001 Ker 398.
18. AIR 1995 SC 755, p. 759 : (1995) 1 SCC 551.

was allowed Rs. 1,50,000 for pain and suffering and the same amount for loss of amenities, *i.e.*, in all Rs. 3,00,000 for non-pecuniary loss.

In *Ashwinikumar Misra v. P. Muniram Babu*,[19] the appellant who was 23 years of age and was earning about Rs. 2,000 per month was rendered permanently disabled and paraplegic on account of injury received in a Motor accident. He was allowed as damages Rs. 94,037 for expenses incurred on medical care, Rs. 20,000/- for special diet and expenses for attendant during treatment. In addition he was allowed Rs. 3,84,000 (calculated by applying a multiplier of 16 to his yearly income of 24,000) "on account of loss of expectation of life besides disappointment frustration and mental stress particularly when he has to keep a permanent attendant to look after him in his rest of life." Putting it in convential terms Rs. 94,037 + Rs. 20,000 *i.e.* in all Rs. 1,14,037 were allowed for expenses consequential to injury and Rs. 3,84,000 were allowed for loss of earning and cost of care as also for non pecuniary damage *i.e.* pain and suffering, and loss of expectation of life.

Divisional Controller KSRTC v. Mahadeva Shetty[20] is another case of paraplegia. The claimant was a mason. The total compensation allowed was Rs. 4.50 lakhs. Out of this Rs. 2,04,000 was allowed for loss of income. The rest was allowed for pain and suffering, loss of prospect of marriage, medical expenses etc.

Croke (a minor) v. Wiseman[21] was a case where the plaintiff, a boy aged 21 months, was admitted in 1973 in a hospital for treatment. Due to negligence in the treatment, the plaintiff suffered cardio-respiratory arrest, resulting in irreparable brain damage. His brain ceased to function; he became blind, and was unable to speak and was paralysed in all four limbs. The plaintiff's mother gave up full time career as a teacher to care for him. His life expectancy was reduced to 40 years. The award as modified by the Court of Appeal was as follows: Pain, suffering and loss of amenities-£ 35,000; future cost of nursing care-£ 1,19,000 (annual cost of parental nursing was valued at £ 2,500 and annual cost of extra nursing was valued at £ 6,000, *i.e.* total annual cost of nursing was assessed at £8,500 per annum to which a multiplier of 14 was applied); and loss of further earnings £ 25,000 (annual loss of earnings was assessed at £ 5,000, and a multiplier of 5 was applied on the reasoning that the plaintiff was not expected to start earning before 18, and his maximum working life, taking 40 as his reduced life expectancy, would have lasted only for 22 years, and he was receiving a lump sum more than 11 years before earnings would commence). Plaintiff was not allowed damages for loss of earnings of lost years on the reasoning as held in *Picket v. British Rail Engineering Ltd.*,[22] that in a case of child of tender years, the amount of earnings that he might have lost in lost years was so speculative and unpredictable that its assessment was not possible.

Joyce v. Yeomans[23] was also a case of a boy aged 10, who was injured in a car accident. He sustained severe injuries including a head injury. Not long afterwards, he began having epileptic fits. The Court of Appeal allowed him £ 6,000 with interest for pain and suffering and loss of amenities and £ 7,500 without interest for future loss of earning capacity. The amount allowed for loss of earning capacity

19. AIR 1999 SC 2260 : (1999) 4 SCC 22.
20. (2003) 7 SCC 197 : AIR 2003 SC 4172.
21. *Croke (a minor) v. Wiseman*, (1981) 3 All ER 852 : (1982) 1 WLR 71 (CA).
22. (1979) 1 All ER 774 : (1980) AC 136 (HL); According to a guideline in April, 1985 an award of £ 75,000 for pain and suffering and loss of amenity is appropriate for a typical case of tetraplegia; *Housecroft v. Burnett*, (1986) 1 All ER 332 (CA); (A typical case of tetraplegia is one where the injured is fully aware of his disability, has a life expectancy of 25 years or more, has powers of speech, sight and hearing and needs help with bodily functions).
23. (1981) 2 All ER 21 : (1981) 1 WLR 549 (CA).

was not assessed on multiplicand/multiplier basis as in the circumstances there were many imponderables.

Liffen v. Watson[24] illustrates the principle that private benevolence in any form not coming from the tort-feasor is not to be taken into account in mitigation of damages. In this case, as a result of personal injuries a domestic servant who was receiving weekly wages and free board and lodging could not continue in service and went to live with her father to whom she made no payment for board and lodging. In a suit for damages she was held entitled to claim damages, not only for loss of wages, but also for loss of board and lodging.

In *Pushpa Thakur v. Union of India*[25] which was decided by the Supreme Court by a brief order, the appellant, an unmarried girl of 23, suffered fracture of both legs, resulting in amputation of right leg in a road accident. The Supreme Court made a global award of Rs. 1,00,000 with 12% interest from the date of its order. The principle of assessment in such cases was laid down in *Hughes v. Mckeown.*[26] In a claim by a female plaintiff who sustained a diminution of both her prospects of marriage and her future earnings, the correct approach is to consider the matter on the basis of the plaintiff's economic loss, disregarding the intervention of marriage, since during the period when a woman is married and child bearing, she is still working, albeit in a different capacity, and is being supported by her husband, which is an economic gain. The simplest way of assessing the plaintiff's loss of future earnings is for the court to fix the multiplier without regard to the possibility that as a result of marriage and child bearing, the plaintiff would have ceased to work for a time. Similarly, damages for pain and suffering and loss of amenities will include an amount for loss of the comfort and companionship of marriage and will disregard the economic aspect of loss of marriage prospects.[27]

In *Shashendra Lahiri v. Unicef,*[28] a 17 year old boy a student of B.Com, met with an accident while driving a motor cycle in which he suffered multiple injuries resulting in shortening of his leg by three inches. The boy continued his studies after the accident and was found to be a good student. He was awarded Rs. 4 lakhs as compensation by the Supreme Court in addition to Rs. 58,000 awarded by the High Court. In another case[29] a student of M.L. course aged 25 suffered dislocation of right hip, loss of 60% vision and 50% hearing in the left ear and had to go to New York for treatment. The Supreme Court awarded him Rs. 3 lakhs as compensation in addition to Rs, 1,76,000 allowed by the High Court. In yet another case[30] a boy of 15 years suffered permanent injury to his urethra requiring repeated dilatations throughout his life. His sexual life was also to be affected. He was awarded Rs. 1 lakh for pain shock and suffering and on other heads Rs. 50,000.

24. (1940) 1 KB 556 : 162 LT 398 : 56 TLR 442.
25. (1984) ACJ 559 : AIR 1986 SC 1199. For injuries resulting in amputation of either right leg, left leg or right hand damages ranging from Rs. 23,000 to Rs. 70,000 have been awarded by different High Courts; see *Akhaya Kumar Sahoo v. Chhabirani Seth*, AIR 1991 Orissa 218 and other cases referred to in para 13 at p. 220 of the report.
26. (1985) 3 All ER 284 : (1985) 1 WLR 963 : (1985) 135 NLJ 383.
27. (1985) 3 All ER 284 : (1985) 1 WLR 963 : (1985) 135 NLJ 383.
28. (1997) 11 SCC 446. In the same accident the pillion rider, who was earning Rs. 500 p.m. in photography had to undergo prolonged treatment and suffered permanent partial disability was allowed Rs. 1 lac. compensation in addition to that allowed by the High Court : *Swatantra Kumar v. Omar Ali*, AIR 1999 SC 1500 : (1998) 5 SCC 308.
29. *Muthaiah Shekhar v. Nesamony Tpt. Corporation*, AIR 1998 SC 3064 : (1998) 7 SCC 39.
30. *A Robert v. United Insurance Co.*, AIR 1999 SC 2977 : (1999) 8 SCC 226.

In the case of *Lado v. Uttar Pradesh Electricity Board*[31] the petitioner Lado, a village woman who was 30 years of age and was earning Rs. 600 p.m. from two places lost her right arm due to electrocution from the high voltage cable left hanging by the Electricity Board's officials. In a petition directly to the Supreme Court under Article 32 of the Constitution, she was allowed Rs. 75,000 as compensation. The court observed that she would have got this sum from a Lok Adalat.

Minu B. Mehta v. Balkrishna Ramchandra Nayan[32] was a case in which the respondent, a Surgeon, aged 63, at the time of the award, was injured in a car accident. The respondent had a nursing home and consulting rooms. As a result of the injuries suffered in the accident, the movement of the right elbow of the respondent got restricted affecting his operative work. The Tribunal assessed loss of earnings of Rs. 73,779 for 4 years before the award on a comparison of income-tax returns of four years prior to and four years after the accident. The Tribunal estimated future longevity of 7 years and assessed future loss of income for 7 years at Rs. 1,26,000 and deducted 50% for lump sum payment and thus allowed Rs. 63,000 for future loss of earnings. The Tribunal also allowed Rs. 5,000 for discomfort and inconvenience *i.e.* pain and suffering and loss of amenities. The award made by the Tribunal was upheld in appeal by the High Court and the Supreme Court.

Oriental Insurance Company v. Ram Prasad Verma[33] was a case in which the claimant met with a motor accident as a result of which both his legs had to be amputated and he suffered 100% disability. The claimant was aged 55 years and his annual income was Rs. 2,27,471/- and tax deducted at source was Rs. 30,748/-. A multiplier of eight was adopted. Having regard to items such as pain and suffering loss of amenities of life and cost of care and need for an attendant the tribunal allowed Rs. 19,63,000/- as total damages with interest at 12% from the date of filing of the petition. The High Court upheld the awards but reduced the interest from 12% to 9%. The Supreme Court in appeal declined to interfere.

1(D)(via) Damages for Unwanted Pregnancy Resulting from Medical Negligence

The question as to what damages are recoverable in case of unwanted pregnancy resulting from medical negligence in sterilisation operation has been considered in different countries. It is generally accepted that the mother in such cases would be entitled to recover general and special damages for personal injury in suffering unwanted pregnancy. But there appears to be a sharp divergence of opinion on the question whether the parents would be entitled to recover damages for economic loss in rearing up the child.[34]

Cases on this point from different jurisdictions were considered by the House of Lords in *McFarlane v. Tayside Health Board.*[35] In this case one Mr. McFarlane underwent a vasectomy operation. Six months later he was told by the consulting surgeon that his sperm count were negative and he could dispense with contraceptive precautions during intercourse. Mr. and Mrs. McFarlane who had four children relied

31. Hindustan Times, 17/12/87. See further *Ishwardas Paulsrao Ingle v. General Manager Maharashtra Road Transport Corporation*, AIR 1992 Bombay 396 (Loss of right forearm of boy aged 18 or 19 years, Rs. 50,000 allowed); *Kumari Alka v. Union of India*, AIR 1993 Del 267 (A female child aged 6 years lost two fingers of her right hand, awarded Rs.1,50,000).
32. (1977) ACJ 118 : (1977) 2 SCC 441.
33. (2009) 2 SCC 712 : AIR 2009 SC 1831.
34. *Mcfarlane v. Tayside Health Board*, (1999) 4 All ER 961 (HL), p. 970; *State of Haryana v. Smt. Santra*, AIR 2000 SC 1888, p. 1895 : (2000) 5 SCC 182.
35. (1999) 4 All ER 961 (HL).

upon this advice but subsequently Mrs. McFarlane became pregnant and gave birth to a healthy daughter. In proceedings brought by Mr. and Mrs. McFarlane seeking damages against the Health Board, the House of Lords held that if there was negligence the mother would be entitled by way of general damages to be compensated for the pain, discomfort and inconvenience of the unwanted pregnancy and birth and she would also be entitled to special damages associated with both—extra medical expenses, clothes for herself and equipment on the birth of the baby, as also compensation for loss of earnings due to pregnancy and birth.[36] It was however held that on principle it was not fair, just or reasonable to impose on the doctor or his employer the liability for damages for the economic loss of bringing up a healthy child which must be held to fall outside the duty of care which was owed to the parents.[37] In holding so the House of Lords took into account that in return for the love and expenses in caring, a healthy child also gives pleasure and affection to the parents and the value attached to these benefits is incalculable. *McFarlane* was reconsidered by the House of Lords in *Rees v. Darlington Health Authority*[38] and was reaffirmed by a majority of 4 against 3. It was also held that it will not make any difference that the mother was disabled and this fact was known to the doctor who performed the sterilisation operation for the reason that the disability was unconnected with the doctor's negligence and disabilities are generally taken care of by public provisions made by the State in U.K. It was further held in a little variation of *Mc Farlane* that parent of a child born following a negligently performed vasectomy or sterilisation or negligent advice on the effect of such a procedure was the victim of a legal wrong and should in all cases be awarded a conventional sum of £ 15,000 to mark the injury and loss. This would be in addition to the award for general and special damages for pregnancy and birth allowed in *Mc Farlane*. Even after *Mc Farlane* it was held by the court of Appeal[39] that where a child's significant disabilities flowed foreseeably from the unwanted conception resulting from a negligently performed sterilisation operation, damages were recoverable for the cost of providing for the child's special needs and care attributable to those disabilities but not for the ordinary costs of upbringing. This case was distinguished in *Rees* and not overruled.

The same question came up before the Supreme Court in *State of Haryana v. Santra*.[40] In this case the plaintiff a poor labourer woman had undergone a sterilisation operation in a Government hospital under the 'sterilisation scheme' launched by the Government of Haryana. At that time she had seven children. She was issued a certificate of total sterilisation operation and was assured that she would not conceive a child in future. But due to negligence of the doctor conducting the operation the sterilisation was not complete as only the right fallopian tube was operated upon and the left fallopian tube was left untouched. As a result the plaintiff conceived and gave birth to a female child inspite of the operation. In the suit she claimed as damages the expenses needed for bringing up the unwanted child. The Supreme Court noticed that there was no unanimity on this point in different countries but upheld the plaintiff's claim both against the doctor and the Government for damages for rearing up the child upto the age of puberty. In holding so the court observed :

> "Ours is a developing country where majority of the people live below the poverty line. On account of the ever-increasing population, the country

36. (1999) 4 All ER 961, pp. 970. 979, 983.
37. (1999) 4 All ER 961, pp. 972, 991, 998.
38. (2003) 4 All ER 987 (HL).
39. *Parkinson v. St. James Hospital*, (2001) 3 All ER 97 (CA).
40. AIR 2000 SC 1888 : (2000) 5 SCC 182.

> is almost at the saturation point so far as its resources are concerned. The principles on the basis of which damages have not been allowed on account of failed sterilisation operation in other countries either on account of public policy or on account of pleasure in having a child being offset against the claim for damages cannot be strictly applied to the Indian conditions so far as poor families are concerned. The public policy here professed by the Government is to control the population and that is why various programmes have been launched to implement the State-sponsored family planning programmes and policies. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class who earn their livelihood on daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence."[41]

The Allahabad and Madhya Pradesh High Courts in cases where the wife gave birth to a child after the vasectomy operation of the husband in a Governmental hospital which failed because of negligence of the surgeon have in writ petitions also allowed damages to the wife for loss of dignity (as she may be accused of being unfaithful) and violation of her fundamental right under Article 21 to enjoy life with dignity.[42]

State of Haryana v. Santra[43] has been distinguished in *State of Punjab v. Shivram*[44] on the ground that in *Santra* the woman was assured that she would not conceive a child in future. The case holds that damages for unwanted pregnancy can be allowed (para 25) only when there is negligence in performing the surgery by applying *Bolam* test[45] or when there is 100% assurance by the doctor of exclusion of pregnancy after surgery (para 17). It is pointed out that no prevalent method of sterilization assures 100% success. The failure rate is 3% to 7% (para 30). The case further holds that cause of action is not birth of children but negligence. If having known that there is failure of sterilization and there is pregnancy which can be terminated under the Medical Termination of Pregnancy Act 1971, the couple opts for bearing the child it ceases to be unwanted pregnancy and they cannot claim compensation for upbringing and maintaining the child.

1(D)(vii) Injury to Property

If a chattel be lost or destroyed by a wrongful act of the defendant, the measure of damages is the value of the chattel, but if the chattel be only injured, then the depreciation in its value is the measure, with an extra allowance for the loss of the use of the chattel while it is being repaired or replaced. The measure of damages where goods shipped are lost by fire would be the market value of the goods when and where the goods were damaged less the proceeds of the sale of the damaged goods, and in addition any freight, insurance, premia, and other incidental expenditure which may have been lost.[46] A person to whom a wrong is done is entitled to full compensation for restoring the thing damaged to its original condition. This applies equally to a private person as to a Corporation or trustee. If this is called

41. AIR 2000 SC 1888, p. 1895.
42. *Shakuntala Sharma v. State of U.P.*, AIR 2000 All 219; *Smt. Jyoti Kewat v. State of M.P., Writ petition 627/2001 D/8-7-2002.*
43. See footnote 41, *supra.*
44. (2005) 7 SCC 1 (para 27) : AIR 2005 SC 3280.
45. See, p. 535, *infra.*
46. See *Rogers Pyatt Shellac Co. v. John King & Co. Ltd.*, (1925) ILR 53 Cal 239.

restitution, a Corporation as well as a private person would be entitled to it, but if by restitution is meant complete reconstruction irrespective of the damage done, then neither a private person nor a Corporation or a trustee is entitled to complete reconstruction irrespective of the damage done.[47]

Where one person, A, who is entitled to possession of goods, is deprived of such possession by tortious conduct of another person B, whether such conduct consists in conversion or negligence, the proper measure in law of the damages recoverable by A from B is the full market value of the goods at the time when and the place where possession of them should have been given.[48] For this purpose it is irrelevent whether A has the general property in the goods as the outright owner of them, or only a special property in them as pledgee, or only possession or a right to possession of them as bailee.[49] Further, the circumstance that if A recovers the full market value of the goods from B, he may be liable to account for the whole or part of what he has recovered to a third party C is also irrelevant as being *res inter alios acta*.[49] It has further been held that when a plaintiff is permanently deprived of his goods by deceit of the defendant, the measure of damages is the same as in conversion *viz*. the full market value of the goods and not the cost of replacing or producing them which may be less than the market value.[50]

In action for injury to a horse which is sent to a farrier to be cured, the proper measure of damages is the keep of the horse at the farrier's, the farrier's bill, and the loss in value of the horse, but the plaintiff ought not to be allowed also for the hire of another horse during the period of inability of the first horse.[51] The weight of authority, however, now seems to be that the plaintiff is entitled to damages also for loss of use of his chattel[52] even though he uses the chattel such as a motor-car for pleasure only and not for profit.[53] So now if the plaintiff's car is damaged by the defendant's negligence or other wrongful act, the plaintiff in addition to cost of repair will be entitled to recover reasonable charges for hiring a car for his use during the period his car was not available.[54]

The plaintiff, relying on a valuation of freehold property by the defendants, advanced money on mortgage to the owner of the property. The valuation was excessive, it having been made without the skill and care which the defendants owed to the plaintiff, and the plaintiff suffered loss owing to the default of the mortgagor. It was held that the plaintiff's damages were not limited to the difference between the amount of the valuation and the true value of the property at the time of the valuation, but that he was entitled to recover the actual loss suffered by him as a result of his lending the money, including the difference between the sum advanced by him and that received by him when, having entered into possession of the

47. *Lotus Line P. Ltd. v. State*, (1965) 67 Bom LR 429 : AIR 1965 SC 1314.
48. *Chabbra Corp. Ptc. v. Jag Shakti*, (1986) 1 All ER 480, 484 : (1986) AC 337 : (1986) 2 WLR 87 (PC). See further *Caxton Publishing Co. Ltd. v. Sutherland Publishing Co. Ltd.*, (1938) 4 All ER 389 : (1939) AC 178 (HL).
49. *Chabbra Corp. Ptc. v. Jag Shakti*, (1986) 1 All ER 480, 484 : (1986) AC 337 : (1986) 2 WLR 87 (PC)
50. *Smith Kline & French Laboratories Ltd. v. Long*, (1988) 3 All ER 887 : (1989) 1 WLR 1 : (1988) 132 SJ 553 (CA).
51. *Hughes v. Quentin*, (1838) 8 C & P 703. The measure of damages for the loss of use of a horse when it had become permanently useless would be the market price of a comparable horse; *Jung Bahadur v. Sunder Lal*, AIR 1962 Pat 258.
52. *Owners of the Steamship Medina v. Owners of Lightship Comet (The Medina)*, (1900) AC 113 (HL); WEIR, Case book on Tort, 5th edition, pp. 544, 545.
53. WINFIELD & JOLOWICZ, Tort, 12th edition, p. 647.
54. *Dimond v. Lovell*, (2002) 2 All ER 897 (HL); *Lagdon v. O'connor*, (2004) 1 All ER 277 (HL). See further text and footnote 32, p. 200.

property, he sold it; the amount of interest which the mortgagor had failed to pay; the cost of insuring the property and of maintaining it in repair; while it was in the plaintiff's possession; legal charges during that period; the expenses of abortive attempts to sell the property; estate agents' commission and the eventual sale of the property and legal charges in connection with the sale.[55] But the House of Lords has held that a person who lent money by relying on a negligent valuation and suffered loss of interest at the default rate of 45% mentioned in the contract was not entitled to recover from the valuer as damages interest at the above rate but only interest at the normal rate of 12%.[56]

The basic principle governing the measure of damages for damage to property in tort as well as in contract is *restitutio in integrum*. But the application of this principle works differently in different circumstances. Whether the assessment of damages should be on the basis of diminution in value or the cost of reinstatement or some other basis depends on the facts of each case. The question to be considered is: what is reasonable and fair under the circumstances to put the plaintiff, so far as money can, in the same position as he would have held had the tort not occurred.[57] So when income earning premises such as a factory are seriously damaged or destroyed beyond repair, the plaintiff may be awarded the cost of reconstruction or acquisition of new premises, including cost of replacing the destroyed machinery by new machinery, if that is the only reasonable way for the plaintiff to carry on the business and to mitigate the loss of profit.[58] It would then not be open for the defendant to complain that the plaintiff is being given new for old.[59]

1(E) Interim Damages

The court has no inherent jurisdiction to order interim payment of damages pending the final disposal of a suit for it is not a matter of procedure but of substantive right.[60] Absence of such a power in a court resulted in hardship in many cases. In England on the recommendation of the Winn Committee on personal injuries litigation, provision was made in section 20 of the Administration of Justice Act, 1969 for making of rules to enable a court to make an order of interim payment. Rules 9 to 18 of Order 29 of the Supreme Court Rules made in that behalf regulate the grant of interim payment. Briefly stated, the rules provide that a court may order the defendant to make an interim payment of such an amount as it thinks just, not exceeding a reasonable proportion of the damages which are likely to be recovered finally by the plaintiff. Interim payment can only be ordered when (i) the defendant has admitted liability, or (ii) the plaintiff has obtained judgment against the defendant for damages to be assessed, or (iii) if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages. Further, no order for interim payment can be made if it appears to the court that the defendant is not (i) a person who is insured in respect of plaintiff's claim, (ii) a public authority, or (iii) a person whose means

55. *Baxter v. Gapp (F.W.) & Co.*, (1939) 2 KB 271.
56. *Swing Castle Ltd. v. Alastair Gibson, (a firm)*, (1991) 2 All ER 353 : (1991) 2 AC 223 : (1991) 2 WLR 1091 (HL).
57. *C.R. Taylor (Wholesale) Ltd. v. Hepworths Ltd.*, (1977) 2 All ER 784 (C.A.); *Dominion Mosaics & Tile Co. Ltd. v. Trafalgar Trucking Co. Ltd.*, (1990) 2 All ER 246 (C.A.), pp. 249, 251 : (1989) 139 NLJ 364.
58. *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.*, (1970) 1 All ER 225 (C.A.); *Dominion Mosaics & Tile Co. Ltd. v. Trafalgar Trucking Co. Ltd.*, (1990) 2 All ER 246 : (1989) 139 NLJ 364 (CA).
59. *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.*, (1970) 1 All ER 225 (C.A.); *Shearson Lehman Bros. v. Maclaine Watson & Co.*, (1977) 2 All ER 842 : (1977) 1 WLR 638 (C.A.); *Moore v. Assignment Courier Ltd.*, (1987) 2 All ER 181 : (1987) 1 WLR 480 (C.A.); *Union Carbide Corporation v. Union of India*, (1988) MPLJ 540.

and resources are such as to enable him to make interim payment. In India, there are no corresponding statutes or statutory rules. The High Court of Madhya Pradesh has, however, held that interim payment can be ordered in a suit on the analogy of the English Rules which can be applied as principles of justice, equity and good conscience.[61] It was on this basis that the High Court allowed interim payment of Rs. 250 crores in a suit on behalf of Bhopal gas victims and their dependants against the Union Carbide Corporation.[61]

1(F) Compensation Under Section 357, Code of Criminal Procedure

Section 357(1) of the Code of Criminal Procedure permits a court, while sentencing an accused to fine, to award compensation out of the fine to any person for loss or injury caused by the offence when compensation is, in the opinion of the court, recoverable by such person in a civil suit. Section 357(3) allows a court while sentencing an accused, when fine does not form part of the sentence, to order the accused person to pay by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced. The Supreme Court adverted to section 357(3) in *Harikrishan and State of Haryana v. Sukhbir Singh*[62] and said that all courts should liberally exercise the power to award reasonable compensation. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of the accused to pay. As provided in section 357(5), at the time of awarding compensation in a subsequent civil suit, the court shall take into account any sum paid or recovered as compensation under the section. In *Sukhbir Singh's* case[62] the victim Joginder lost his power of speech permanently due to the injury suffered by him and he was awarded Rs. 50,000 as compensation. In *Venkatesh v. Tamil Nadu*[63] where the accused was convicted for homicide under section 304 Part II of the Penal Code and sentenced to rigorous imprisonment for five years and to pay a fine of Rs. 3,000 the Supreme Court reduced the sentence of imprisonment to the period already undergone and enhanced the fine by Rs. 100,000 and directed that the amount of fine so enhanced be paid as compensation to the widow and minor daughter of the deceased. Again in *Dr. Jacob George v. State of Kerala*[64] a homeopath conducted abortion and caused the death of the woman. He was convicted under section 304 of the Penal Code and sentenced to four years rigorous imprisonment and to a fine of Rs. 5,000. The Supreme Court in appeal reduced the sentence of imprisonment to two months, the period already undergone, and enhanced the fine to Rs. one lac. The amount of fine was directed under section 314 Cr.P.C. to be deposited in a bank as compensation for benefit of a minor son of the woman. It has also been held by the Supreme Court that if the fine, which a magistrate can impose, is inadequate to compensate the complainant, he can instead of imposing a sentence of fine directly proceed to award compensation under section 357(3), which fixes no limit as to the amount which can be awarded. Thus a first-class magistrate, who could impose only a fine of Rs. 5000 under section 29 of the CrPC, was held entitled to award Rs. 83,000 as compensation to the complainant for an offence under section 138 of the Negotiable Instruments Act.[65] The power of the court to award compensation to victims under section 357 is not ancillary to other sentences but is in addition thereto

61. *Union Carbide Corporation v. Union of India*, 1988 MPLJ 540.
62. AIR 1988 SC 2127, p. 2131 : (1988) 4 SCC 551 : 1988 SCC (Cri) 984.
63. AIR 1993 SC 1230 : (1993) 4 SCC 77.
64. (1994) 3 SCC 430 : (1994) 3 JT 225.
65. *Pankajbhai Nagjibhai Patel v. The State of Gujarat*, AIR 2001 SC 567, p. 571 : (2001) 2 SCC 595.

and is a recompensatory measure to rehabilitate to some extent the beleagured victims of the crime, a step forward in our criminal justice system.[66] The accused has to be heard before directing payment of compensation under section 357(3) although such a requirement is not mentioned in the section.[67] In *Manish Jalan v. State of Karnataka*[68] the appellant was convicted under section 304-A of the Indian Penal Code and section 279 and sentenced to one year imprisonment and a fine of Rs. 10,000 in all for rashly and negligently driving a tanker and causing death of a person who was driving a scooter. In appeal the Supreme Court affirmed the conviction and sentence of fine but reduced the sentence of imprisonment to period already undergone and directed payment of Rs. 1,00,000 as compensation to the mother of the victim under section 357 of the Code of Criminal Procedure. The court reiterated that the provision for compensation under section 357 is aimed at serving the social purpose and the power under it should be liberally exercised. But the amount of compensation awarded must be reasonable and not arbitrary and should be lesser than the amount which a civil court would grant in the circumstances.[69] A civil court while deciding a suit for damages for an injury in respect of which compensation has been awarded under section 357 of the Code of Criminal Procedure is bound to take into account any sum paid or recovered as compensation under this section.[70]

1 (F1) Compensation to Rape Victims

In *Delhi Domestic Working Women's Forum v. Union of India*[71] the Supreme Court directed the setting up of Criminal Inquiries Compensation Board to award compensation to a rape victim whether or not a conviction has taken place. In awarding compensation the Board has to take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of the child if this occurred as a resuslt of the rape. The court trying an accused in a rape case has jurisdiction to award compensation to the victim of the rape under section 357 Cr.P.C. after conviction. In one case,[72] however, the Supreme Court allowed interim compensation of Rs.1,000 per month to the rape victim from the accused during the pendency of the criminal case. This order was passed under the court's inherent power under Article 142 of the Constitution to do complete justice between the parties.

1(G) Provisional Award

The lacuna in the powers of the court to award proper damages in actions for personal injuries, when there was a known risk of a further development either by way of a new disease or a serious deterioration of a presently existing and detected condition, was cured in England by empowering the court (a) to make provisional award by assessing damages on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition, and (b) to award further damages at a future date if he develops the disease or suffers the deterioration. This reform was brought about by section 32A of the Supreme Court Act, 1981 and the rules of the Supreme Court (Order 37) made under that section.[73]

66. *Mangilal v. State of Madhya Pradesh*, AIR 2004 SC 1280, p. 1283 : (2004) 2 SCC 447, p. 453.
67. *Mangilal v. State of Madhya Pradesh*, AIR 2004 SC 1280 : (2004) 2 SCC 447
68. (2008) 8 SCC 225 : AIR 2008 SC 3074.
69. *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd.* (2007) 6 SCC 528 paras 38, 39 : (2007) 6 JT 204.
70. *D. Purushotama Reddy v. K. Sateesh* (2008) 8 SCC 505 : AIR 2008 SC 3202.
71. 1995 (1) SCC 14 : 1995 SCC (Cri) 7.
72. *Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty*, AIR 1996 SC 922 : (1996) 7 SCALE 228, p. 236 : (1996) 1 SCC 490.
73. See Practice Note (1985) 2 All ER 895; *Hurditch v. Sheffield Health Authority*, (1989) 2 All ER 869 (CA), pp. 872, 873, 874, 875 : (1989) QB 562 : (1989) 2 WLR 827.

There is no corresponding statutory alteration of law in India and it is yet to be seen whether the principles of the aforesaid statutory reform in England can be applied in India as principles of equity, justice and good conscience.[74] In *Nagappa v. Gurudayal Singh*[75] the court did not advert to this aspect of the matter and held that final award cannot be reviewed and no further award can be passed to compensate for medical expenses incurred after the final award and such expenses can only be taken into account on the basis of guess work at the time of final award.

In England the court has also the discretion under section 33 of the Limitation Act,1980 to extend period of limitation in personal injury cases and this discretion appears to have been quite liberally applied. For example if when the injury such as sexual abuse was caused the defendant was a pauper and the claimant did not sue him as she would have recovered nothing but if later say after a few years the defendant received a lottery or gained enough property and the claimant brought the suit for damages the court may be willing to extend the period of limitation.[76]

1(H) Damages in Actions of Contract and of Tort

The measure of damages, or test by which the amount of damages is to be ascertained is, in general, the same both in contract and in tort, with these distinctions:—

(1) The intention with which a contract is broken is perfectly immaterial: whereas the intention with which a tort is committed may fairly be considered by the court in assessing the amount of damages. In actions of contract, evidence of malicious motive is not admissible, in those of tort, it is. Thus, in an action for throwing poisoned barley upon the plaintiff's premises in order to poison his poultry, the court took into account the malicious intention of the defendant in awarding damages.[77]

(2) In cases of contract, damages are only a compensation. In cases of tort to the property, they are generally the same. Injuries to property are only visited with damages proportioned in the actual pecuniary loss sustained, where damage, pecuniary or estimable in money, is the gist of action. But where absolute rights are infringed, a plaintiff is awarded nominal damages not because he has lost anything but because his rights are absolute. Where the injury is to the person, or feelings, and the facts disclose fraud, malice, violence, cruelty, or insult, the injury is aggravated and the plaintiff gets aggravated damages[78] but they bear no proportion to the actual loss sustained by the plaintiff. Exemplary damages are also allowed in a tort action against the State or its officers when the action complained of is oppressive, arbitrary or unconstitutional and also against a defendant who by committing the tort makes profit which may exceed the normal compensation payable by him.[79] But exemplary damages cannot be recovered for a breach of contract, except in an action for breach of promise of marriage.

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74. In *Union Carbide Corporation v. Union of India*, AIR 1992 SC 248, p. 266, the question of provisional award was discussed but it was left undecided whether courts in India can make such an award.
75. (2003) 2 SCC 274, pp. 282, 283 : AIR 2003 SC 674, p. 682. Followed in *Sapna v. United India Insurance Co. Ltd.*, (2008) 7 SCC 613 para 12 : AIR 2008 SC 2281.
76. *A v. Hoare*, (2008) 2 All ER 1 (H.L.).
77. *Sears v. Lyons*, (1818) 2 Stark 317.
78. See title 1(D)(ii), pp. 202 to 205, *ante*.
79. See title 1(D)(ii), pp. 202 to 205, *ante*.

2. INJUNCTION

An injunction is an order of a court restraining the commission, repetition, or continuance, of a wrongful act of the defendant. To entitle a party to an injunction he must prove either damage or apprehended damage. The apprehended damage must involve imminent danger of a substantial kind or injury that will be irreparable.[80] Preventive injunction can be granted only when the defendant has violated or is going to violate some legal or equitable right of the plaintiff and not merely on the ground that what the defendant is threatening to do is unconscionable for him to do.[81] In certain cases the court may have to do a balancing between two rights, e.g. a right to privacy and a right to freedom of expression, before deciding to issue the injunction.[82]

An injunction may be granted to prevent waste, trespass, or the continuance of nuisance to dwelling or business houses, to right of support, to right of way, to highways, to ferries, to markets, etc.; or the infringement of patent rights, copy-rights and trademarks; or the publication of trade secrets; or the wrongful sale or detention of a chattel, or the publication of a libel or the uttering of a slander; or the disclosure of confidential communications, papers, secrets, etc.; or the publication of manuscripts, letters, and other unpublished matter.

The right to an injunction is governed in India by the Specific Relief Act.[83] Grant of temporary injunction is governed by the Code of Civil Procedure.[84]

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80. *Mahadev v. Narayan*, (1904) 6 Bom LR 123.
81. *Australian Broadcasting Corporation v. Lenah Game Meats Pty. Ltd.*, (2001) 76 ALJR 1.
82. *A.v. B. (a company)*, (2002) 2 All ER 545 (CA). See also, p. 424.
83. See ss. 36 to 42 of the Specific Relief Act (XLVII of 1963) as regards the granting or withholding of injunction. For injunction against Press in respect of a matter pending in Court see : *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd.*, AIR 1989 SC 190 : (1988) 4 SCC 592 (Balance between two competing public interests viz. freedom of press and administration of justice. Test of present and imminent danger applied). For injunction against agent after termination of agency to prevent interference with plaintiff's possession and business see : *Southern Roadways Ltd., Madurai v. S.M. Krishnan*, AIR 1990 SC 673 : (1989) 4 SCC 603. For injunction in favour of the government or a local authority to prevent repeated violations of criminal law see: *Kirkless Metropoliton Boraugh Council v. Wickes Building Supplies Ltd.*, (1992) 3 All ER 717 (HL) pp. 723-728 : (1993) AC 227 : (1992) 3 WLR 170 ; For injunctions against enforcing bank guarantees, irrevocable letters of credit see: *Svenska Handelsbanken v. Indian Charge Chrome*, AIR 1994 SC 626 : (1994) 1 SCC 502. For principles governing Anti-suit injunction see *Modi Entertainment Network v. W.S.G. Cricket Pty Ltd.*, AIR 2003 SC 1177 : (2003) 4 SCC 341.
84. Order 39, Code of Civil Procedure. For principles applicable see : *American Cyanmid v. Ethicon*, (1975) 1 All ER 504 : (1975) 2 WLR 316 (H.L.); *Hadmor Productions Ltd. v. Hamilton*, (1982) 1 All ER 1042 : (1983) 1 AC 191 : (1982) 2 WLR 322 (HL); *Attorney General v. Guardian*, (1987) 3 All ER 316 (HL); *Shankerlal Debiprasad Rathore v. State of MP*, 1978 MPLJ 419; *Morgan Stanley Mutual Fund v. Kartickdas*, (1994) 4 SCC 225 : JT 1994 (3) SC 654 (Principles for grant of *ex parte* injunction), *Municipal Corporation of Delhi v. C.L. Batra*, JT 1994 (5) SC 241 (Principles for grant of interim injunction against a municipal corporation restraining it to recover tax); *S.M. Dyechem Ltd. v. Cadbury (India) Ltd.*, AIR 2000 SC 2114 : (2000) 5 SCC 573 (Principles for grant of interim injunction in a Trade Mark case); *Mahendra and Mahendra paper Mills v. Mahindra and Mahindra Ltd.*, AIR 2002 SC 117 : (2002) 2 SCC 147 (Injunction in a Trade Mark case). *Dharwal Industries Ltd. v. M/s. MSS Food Products*, AIR 2005 SC 1999 : (2005) 3 SCC 63 (interim injunction in an unregistered mark case); *Midas Hygine Industries (P.) Ltd. v. Sudhir Bhatia*, (2004) 3 SCC 90 (Interim injunction should normally be granted when there is *prima facie* an infringement of trade mark or copyright). *Ajay Mohan v. H.N. Rai*, (2008) 2 SCC 507 : AIR 2008 SC 804 (*Prima facie* case, balance of convenience and irreparable injury to be shown for interim injunction). For interim mandatory injunction see : *Dorale Cawasji Warden v. Coomi Sorab Warden*, AIR 1990 SC 867 : (1990) 2 SCC 117, *Redland Bricks Ltd. v. Morris*, (1969) 2 All ER 576 (HL); *Francis v.Kensington and Chelsia London Borough Council*, (2003) 2 All ER 1052, p. 1058 (CA).

3. SPECIFIC RESTITUTION

The third kind of remedy is the specific restitution of property. Thus a person who is wrongfully dispossessed of immovable property,[85] or of specific movable property[86] is entitled to recover the immovable or movable property, as the case may be. The concept of 'Restitution' revolves around conferment or receiving of benefit which is unjust. Supreme Court in the case of *State of Gujarat v. Essar Oil Limited*[87] while relying on the 'Restatement of the Law of Restitution by American Law Institute (1937 American Law Institute Publishers, St Paul)' has expounded upon the phrase 'benefit' and has held that 'A person confers benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other or in a way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. Thus the word "benefit" therefore denotes any form of advantage'. Thus, a case for restitution can be made out if it is proved that a benefit has been either conferred or received and the same is unjust, constituting unjust enrichment.

4. JOINT AND SEVERAL TORT-FEASORS

All persons who aid, or counsel, or direct or join in the committal of a wrongful act, are joint tort-feasors.[88] Persons are not joint tort-feasors merely because their independent wrongful acts have resulted in one *damnum*.[89] To constitute a joint liability the act complained of must be joint and not separate.[90] The joint liability arises under three circumstances:—

(1) Agency, when one person employs another to do an act which turns out to be a tort.

(2) Vicarious liability, *i.e.* the liability arising from relations, such as master and servant, principal and agent, guardian and ward etc., which is discussed in Chapter VIII.

(3) Joint action—where two or more persons combine together to commit an act which amounts to a tort.[91]

When persons, not acting in concert, by their wrongful acts, committed substantially contemporaneously, cause damage to another person, they are not joint tort-feasors but several or concurrent tort-feasors. The damage caused by several tort-feasors may be the same or indivisible or it may be distinct referable to each tort-feasor. In case where the damage caused by each of the several tort-feasors is distinct, each of them is liable only for the damage attributable to his

85. Specific Relief Act, 1963, section 6. See Chapter XV, title 4(B), p. 390, *infra*.
86. Specific Relief Act, 1963 , section 7.
87. (2012) 3 SCC 522; See also, Nagpur Golden Transport Compnay (Registered) v. Nath Traders, (2012) 1 SCC 555; Jay Vee Rice and General Mills v. State of Haryana, (2010) 10 SCC 687.
88. *Petrie v. Lamont*, (1841) Car & Mar 93, 96. A lessor does not become jointly liable with his lessee for the latter's tort simply by reason of his being the lessor or by any encouragement of the lessee in the absence of evidence that he had made himself a party to the tort : *Pugh v. Ashutosh Sen*, (1928) 56 IA 93; 31 Bom LR 702.
89. *The Koursk*, (1924) P. 140; *Chainatamano v. Surendranath*, ILR (1956) Cut 587.
90. *Thompson v. London County Council*, (1899) 1 QB 840; *Sadler v. G.W. Ry. Co.*, (1896) AC 450 : 53 JP 694 : 37 WR 582; *Nilmadhub Mookerjee v. Dookeeram Khottah*, (1874) 15 Beng LR 161.
91. The mere coincidence of a number of persons doing a series of acts whereby the plaintiff is injured will not make them joint tort-feasors. It must be shown that they acted concurrently : *Subbayya v. Verayya*, (1935) MWN 1043, 42 LW 17.

own act. The legal position in respect of several tort-feasors causing the same or indivisible damage is now nearly the same as in respect of joint tort-feasors. The following principles are to be kept in view in respect of the liability of joint tort-feasors and several tort-feasors causing the same or indivisible damage:

1. Joint tort-feasors are jointly and severally liable for the whole damage resulting from the tort. They may be sued jointly or severally. If sued jointly, the damages may be levied from all or either.[92] Each is responsible for the injury sustained.[93]

In a suit for "composite negligence"[94] the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, he is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more than his whole damage.[95] He has a right to recover the full amount of damages from any of the defendants.

A case of 'composite negligence' is sometimes confused with 'contributory negligence'. The distinction between the two was well brought out by Balakrishnan C.J.I. in *T.O. Anthony v. Karvarnan*[96] as follows:

> "'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence."

92. *Hume v. Oldacre*, (1816) 1 Stark 351; *Blair and Sumner v. Deakin*, (1887) 57 LT 522; *Sutton v. Clarke*, (1815) 6 Taunt 29. See *Kamala Prosad Sukul v. Kishori Mohan Pramanik*, (1927) ILR 55 Cal 666; *Calico Printers Association v. Mitsubishi Shoji Kaisha, Limited*, (1938) 40 Bom LR 661; *Kanhaiyalal v. Chimanbhai*, (1954) 3 MLR 379.
93. *De Bodreugnam v. Le Arcedekin*, (1302) YB 30, Edw I fo 106; *Ajoodhya v. Laljee*, (1873) 19 WR 218; *Shama Sunkur v. Sreenath*, (1869) 12 WR 354; *Harihar Pershad v. Bholi Pershad*, (1907) 6 CLJ 383; Coercion is no defence : *Ganesh Singh v. Ram Raja*, (1869) 3 Beng LR (PC) 44; *Biresshur Dutt Chowdhury v. Baroda Prosad Ray Chowdhury*, (1906) 15 CWN 825; *Gajo Singh v. Amrit Narain*, (1921) 2 PLT 234; *Ahsanali v. Kazi Syed Hifazat Ali*, ILR (1956) Nag 378.
94. It means negligence of two or more persons other than the victim of the negligence, when victim of the negligence is also partly responsible, it is a case of contributory negligence : *Pujamma v. G. Rajendra Naidu*, AIR 1985 Mad 109, p. 112.
95. *Palghat Coimbatore Transport Co. Ltd. v. Narayanan*, ILR (1939) Mad 306. *Prasani Devi v. State of Haryana*, 1973 ACJ 531 (P&H); *Sushma Mitra v. M.P. State Road Transport Corporation*, (1974) ACJ (MP), pp. 91, 92; *Hira Devi v. Bhaba Kanti Das*, AIR 1977 Gau 31 (F.B.); *Pujamma v. G. Rajendra Naidu*, AIR 1988 Mad 109, p. 112.
96. (2008) 3 SCC 748 para 6 : (2008) 3 SCC 748. See further *Pujamma v. G. Rajendra Naidu*, AIR 1988 Mad 109 p.112; *Vinesh Kumari v. Rajendra Kumar* (2010) 1 TN MAC 663 : (2010) 80 ALR 1 : (2010) 4 All LJ (NOC 422) 97 (on the issue of 'composite negligence').

In assessing damages against joint tort-feasors or several tort-feasors causing same or indivisible damage one set of damages will be fixed, and they must be assessed according to the aggregate amount of the injury resulting from the common act or acts.[1] The damages cannot be apportioned so as to award one sum against one defendant and another against the other defendant, though they may have been guilty in unequal degree.[2] If two omnibuses are racing, and one of them runs over a man who is crossing the road and has no time to get out of the way, the injured person has a remedy against the proprietors of both or either of the omnibuses.[3]

Those who are sued cannot insist on having the others joined as defendants. The mere omission to sue some of them will not disentitle the plaintiff from claiming full relief against those who are sued.[4] The fact that the claim is barred by limitation as against one will not in itself free the others from liability.[5]

Two dogs, belonging to different owners, acting in concert, attacked a flock of sheep and injured several. In an action for damages brought against the owners of the dogs, one of them put in a defence claiming that he was liable for one-half only of the damage. It was held that in law each of the dogs occasioned the whole of the damage as the result of the two dogs acting together, and that consequently each owner was responsible for the whole.[6]

As a result of a collision between two buses a passenger in one of the buses died. The accident was the result of negligence of the drivers of both the buses. In a suit under the Fatal Accidents Act by the representatives of the deceased, it was held that the owners of both the buses were liable as the injury arose from the composite negligence of the two drivers.[7]

2. Under the common law a judgment recovered against one joint tort-feasor, even though it remained unsatisfied was a good defence to an action against any other joint tort-feasor in respect of the same tort.[8] In contrast to this when same or indivisible damage was caused by several tort-feasors, as frequently happens in running down actions, a judgment recovered against one of the tort-feasors did not put an end to the cause of action against any other of the tort-feasors until it had been satisfied. It did so then because on satisfaction of the judgment the plaintiff had recovered full compensation for his loss which he could not recover twice. But so long as the earlier judgment remained unsatisfied it was not a bar at common law to a subsequent action against any other of the tort-feasors nor did it affect the measure of damages that might be awarded in subsequent action.[9]

The Common Law stated above was altered by section 6 of the Law Reform (Married Women and Tort-feasors) Act, 1935 which was later replaced with

1. *Chapman v. Ellesmere (Lord)*, (1932) 2 KB 431 : 146 LT 538.
2. *Clark v. Newsam*, (1847) 1 Ex. 131, *London Association for Protection of Trade v. Green Lands Ltd.*, (1916) 2 AC 15 : 114 LT 434; *Greenlands Ltd. v. Wilmshurst etc.*, (1913) 3 K.B. 507 : 109 LT 487; *M.P. State Road Transport Corporation v. Abdul Rahman*, AIR 1997 MP 248, p. 253 (also see cases referred to therein). See further cases in foonote 95, *supra*. The Punjab and Haryana High Court holds that Motor Accidents Claims Tribunal can apportion compensation amongst tort-feasors : *Narinder Pal Singh v. Punjab State*, AIR 1989 P&H 82.
3. PER CRESWELL, J., in *Thorogood v. Bryan*, (1849) 8 CB 115, 121; *Clark v. Newsam*, (1847) 1 Ex 131.
4. *Subbayya v. Verayya*, (1935) MWN 1043, 42 Mad LW 17.
5. *Harihar Pershad v. Bholi Pershad*, (1907) 6 CLJ 383.
6. *Arneil v. Paterson*, (1931) AC 560.
7. *Palghat Coimbatore Transport Co. Ltd v. Narayanan*, ILR (1939) Mad 306. See further other cases in footnote 95, *supra*.
8. *Bryanstan Finance Ltd. v. de vires*, (1975) 2 All ER 609 (CA), pp. 624, 625 : (1975) 2 WLR 718 : 119 SJ 287 (LORD DIPLOCK).
9. *Bryanstan Finance Ltd. v. de vires*, (1975) 2 All ER 609 (CA) : (1975) 2 WLR 718 : 119 SJ 287

modification by section 6 of the Civil Liability (Contribution) Act, 1978. The law now is that a judgment recovered against one tort-feasor, if unsatisfied does not bar a subsequent action against any other tort-feasor irrespective of whether he was a joint tort-feasor or one of the several tort-feasors causing the same or indivisible damage. Nor is the second action limited to the sum for which the judgment was given in the first action. But the plaintiff is not entitled to costs in any later action unless the court thinks that there were reasonable grounds for not bringing one action against all the tort-feasors.[10] Of course the plaintiff remains barred from going on with a separate action against another tort-feasor if the judgment which he has obtained in the first action has been satisfied.[11]

3. Under the common law as developed after *Brown v. Wooton*,[12] a release granted to one or more of the joint tort-feasors operates as a discharge of the others. The reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable therefor are consequently released.[13] But as in case of several tort-feasors causing the same or indivisible damage the cause of action is not one and indivisible release granted to one of several tort-feasors does not release the others. This is now, if at all, the only substantial distinction between joint tort-feasors and several tort-feasors causing indivisible damage.[14] A mere agreement not to sue one of them is no bar to an action against others.[15] Because such an agreement merely prevents the cause of action from being enforced against the particular wrong-doer with whom it is entered into. The acceptance of a sum of money from one of the joint tort-feasors in full discharge of his own personal liability does not operate as a release as far as the other joint tort-feasors are concerned.[16] Where the plaintiff sued several persons for damages for letting loose their cattle and grazing his crop but compromised with some of the joint tort-feasors according to their liability and not in full satisfaction of the entire cause of action, the compromise did not exonerate the other tort-feasors from liability.[17]

According to the High Court of Australia the common law rule that there was only one indivisible cause of action against joint tort-feasors stood abolished in Australia by the Law Reform (Miscellaneous Provisions) Act, 1955 (which is exactly the same as the corresponding English Act of 1935) and that there remained no legal basis for the rule that release of one joint tort-feasor releases the others.[18]

The Supreme Court of India[19] has not accepted the common law as developed after *Brown v. Wooton*[20] and has held that in order to release all the joint tort-feasors the plaintiff must have received full satisfaction or which the law must consider as such

10. CLERK & LINDSELL, Torts, 15th edition, pp. 357, 358.
11. *Jameson v. Central Electricity Generating Board*, (1999) 1 All ER 193 (HL), p. 203 : (2000) 1 AC 455.
12. 1605 Yelv 67 : 80 ER 47.
13. *Duck v. Mayeu*, (1892) 2 QB 511, 513 : 62 LJQB 92; *Thurman v. Wild*, (1840) 11 A & F 453 : 3 P&D 489.
14. CLERK & LINDSELL on Torts, 15th edition, p. 142 (2.54).
15. *Duck v. Mayeu, supra; Rice v. Reed*, (1900) 1 QB 54 : 81 LT 410; *Hutton v. Eyre*, (1815) 6 Taunt 289. See, to the same effect, *Ram Kumar Singh v. Ali Hussain*, (1909) ILR 31 All 173; *Kamala Prasad Sukul v. Kishori Mohan Pramanik*, (1927) ILR 55 Cal 666; *Pollachi Town Bank Ltd. v. Subramania Ayyar*, (1933) 39 LW 114.
16. *Cocke v. Jennor*, (1615) Hob 66 See, to the same effect, *Kamala Prosad Sukul v. Kishori Mohan Pramanik, sup.*; *Basharat Beg v. Hiralal*, (1932) ALJR 497; *Devendrakumar Patni v. Nirmalabai*, (1945) NLJ 158.
17. *Har Krishna Lal v. Qurban Ali*, (1941) ILR 17 Luck 284.
18. *Thompson v. Australian Television Pty. Ltd.*, (1997) 71 ALJR 131 (Australia).
19. *Khushro S. Gandhi v . N.A. Guzdar*, AIR 1970 SC 1468, p. 1474 : (1969) 1 SCC 358 : (1969) 2 SCR 959. For somewhat similar Australion case see *Baxter v. O Bacelo Pty Ltd.*, (2001) 76 ALJR 114.
20. 1605 Yelv 67 : 80 ER 47.

from a tort-feasor before the other joint tort-feasors can rely on accord and satisfaction and that what is full satisfaction will depend on the facts of each case. In this case[21] a suit was filed against several defendants as joint tort-feasors for defamation. One of the defendants apologised to the plaintiff who accepted the apology. A compromise petition was filed for disposing of the suit against that defendant on that basis and a decree was passed in terms of the compromise. The remaining defendants then raised the plea that the release of the defendant who had apologised extinguished the cause of action against all as they were joint tort-feasors. The Supreme Court negatived this defence holding that the decree following the apology of one of the defendants could not be said to be full satisfaction of the claim for the tort committed by the remaining defendants.[22] The Supreme Court has in effect put joint tort-feasors in the same category as several or concurrent tort-feasors causing the same or indivisible damage. In case of several or concurrent tort-feasors, as the causes of action are different the common law rule applying to joint tort-feasors that the release of one operates as a discharge of all has no application. Therefore, acceptance of a sum less than the full amount of damages from one tort-feasor will not preclude a suit for the balance against the remaining tort-feasors. But the position will be different if the sum accepted from one tort-feasor is in full and final settlement of the entire claim arising out of the tort in which case any subsequent suit against other tort-feasors will be barred.[23]

4. If, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong-doers.[24] Thus, when the Commissioners of Customs and Excise were, in the exercise of their official duties, handling goods which infringed the plaintiffs' patent and which were being illicitly imported, they were required to make full disclosure of the documents in their possesison to enable the plaintiffs to identify the importers.[25] Similarly, a journalist, who receives information damaging to the interests of the plaintiff for publication from a person who has tortiously obtained them, can be directed to disclose the source in the interests of justice so that the plaintiff may sue the wrong-doer and take preventive action to protect himself in future.[26]

5. CONTRIBUTION BETWEEN WRONG-DOERS

At common law no action for contribution was maintainable by one wrong-doer against another, although the one who sought contribution might have been compelled to satisfy the full damages. This is known as the rule in *Merryweather v. Nixan*.[27] The reason alleged for this rule was that any such claim to contribution must be based on an implied contract between the tort-feasors, and that such a contract was illegal as being made with a view to commit an illegal act.

21. *Khushro S. Gandhi v. N.A. Guzdar, supra.*
22. *Khushro S. Gandhi v . N.A. Guzdar*, AIR 1970 SC 1468, p. 1475.
23. *Jamesan v. Central Electricity Generating Board*, (1999) 1 All ER 193 ; (2000) 1 AC 455 : (1999) 2 WLR 141 (HL).
24. *Norwich Pharmacal Co. v. Customs and Excise Comrs.*, (1973) 2 All ER 943 (HL), p. 948.
25. *Norwich Pharmacal Co. v. Customs and Excise Comrs.*, (1973) 2 All ER 943 (HL)
26. *X Ltd. v. Morgan Grampian (Publishers) Ltd.*, (1990) 2 All ER 1 (HL), p. 6 : (1991) 1 AC 1 : (1990) 2 WLR 1000.
27. (1799) 8 TR 186; *Sreeputty Roy v. Loharam Roy*, (1867) 7 WR 384, FB; *Parbhu Dayal v. Dwarka Prasad*, (1931) ILR 54 All 371.

The rule in *Merryweather v. Nixan* survived with several exceptions until it was abolished by the Law Reform (Married Women and Tort-feasors) Act, 1935 now replaced by the Civil Liability (Contribution) Act, 1978. A tort-feasor may now recover contribution from any other tort-feasor who is, or who if sued, would have been, liable in *respect of the same damage*, whether as a joint tort-feasor or otherwise. No person shall be entitled to recover contribution from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.[28] The words 'the same damage' did not mean 'substantially or materially similar damage'. The words 'the same damage' have not to be given an expansive interpretation. It had been a constant theme of the law of contribution that B's claim to share with others the liability to A rested upon the fact that they, whether equally with B or not, were subject to a common liability to A. The words 'in respect of the same damage' emphasised the need for one loss to be apportioned among those liable.[29]

The amount of the contribution recoverable from any person shall be just and equitable having regard to the extent of his responsibility for the damage. The court can exempt any person from liability to make contribution or direct that the contribution from any person shall amount to a complete indemnity.[30]

The plaintiff fell down a hole which had been left uncovered by the negligence of a contractor employed by the defendant to carry out certain works on the premises on which the plaintiff had come. It was held that the contractor who was added as a third party to the suit was liable to contribute one-half of the damages.[31]

The principle of *Merryweather v. Nixan* has been followed in several cases in India,[32] though its applicability is doubted in various cases.[33] It is held to apply in cases where the parties were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act.[34] The Nagpur and the

28. 25 & 26 Geo V. c. 30, section 6 (1) (c). See now section (1) of the Civil Liability (Contribution) Act, 1978.
29. *Royal Brompton Hospital NHS Trust v. Hammond*, (2002) 2 All ER 801 (HL).
30. 25 & 26 Geo V. c. 30, section 6 (2). See now section (1) of the Civil Liability (Contribution) Act, 1978.
31. *Burnham v. Boyer and Brown*, (1936) 2 All ER 1165.
32. *Harnath v. Haree Singh*, (1872) 4 NWP 116; *Manja v. Kadugochen*, (1883) ILR 7 Mad 89; *Gobind Chunder Nundy v. Srigobind Chowdhry*, (1896) ILR 24 Cal 330; *Ramratan Kapali v. Aswini Kumar Dutt*, (1910) ILR 37 Cal 559, 569. See, to the same effect, *Golam Hossein v. Imam Bux*, (1866) PR No. 32 of 1866, in which contribution for damages paid for libel was sought for. There is a right of contribution between joint defendants in respect to the costs awarded against them and paid by one of them in such cases: *Mahabir Prasad v. Darbhangi Thakur*, (1919) 4 PLJ 486; *Bhagwan Das v. Rajpal Singh*, (1920) 24 OC 148; *Karya Singh v. Shiva Ratan Singh*, (1925) 29 OC 7. See *Ram Prasad v. Arja Nand*, (1889) 10 AWN 161, which decides that whatever the rights and liabilities of joint tort-feasors *inter se* might be before a decree was passed, there was a right of contribution afterwards, the matter having passed *in rem judicatum*. In the case of decree for mesne profits, a person who had to satisfy the entire decree can recover his share from his co-defendants: *Sheo Ratan Singh v. Karan Singh*, (1924) ILR 46 All 860. See *Parbhu Dayal v. Dwarka Prasad*, (1931) ILR 54 All 371. Where as a result of wilful wrongdoing on the part of two persons, they become jointly and severally liable to pay a penalty to the State, and such penalty is recovered only from one person, he cannot maintain a suit against the other for contribution: *Vedachala v. Rangaraju*, AIR 1960 Mad 457, 73 MLW 315, (1960) 1 MLJ 445, ILR (1960) Mad 455.
33. *Siva Panda v. Jujusti Panda*, (1901) ILR 25 Mad 599; *Nihal Singh v. The Collector of Bulandshahr*, (1916) ILR 38 All 237; *Sheo Ratan Singh v. Karan Singh*, (1924) ILR 46 All 860; *Bhagwan Das v. Rajpal Singh*, (1920) 24 OC 148; *Karya Singh v. Shiva Ratan Singh*, (1925) 29 OC 7; *Rajagopala Iyer v. Arunachala Iyer*, (1924) MWN 676; *Kamala Prasad Sukul v. Kishori Mohan Pramanik*, (1927) ILR 55 Cal 666, 675; *Basantakumar Basu v. Ramshanker Ray*, (1931) ILR 59 Cal 859; *Yegnanarayana v. Yagannadha Rao*, (1931) MWN 667, 34 Mad LW 618.
34. *Kishna Ram v. Rakmini Sewak Singh*, (1887) ILR 9 All 221; *Hari Saran Maitra v. Jotindra Mohan Lahiri*, (1900) 5 CWN 393; *Suput Singh v. Imrit Tewari*, (1880) ILR 5 Cal 720; *Shakul Kameed* **(Footnote No. 34 Contd.)**

Calcutta High Courts have definitely held that it does not apply in India. Where, therefore, a joint decree is passed against several persons in a suit in tort and one of them satisfies the decree, he can obtain contribution from his co-judgment-debtors.[35] A Full Bench of the Allahabad High Court has also held that the doctrine does not apply in India. A tort-feasor may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise. The apportionment of liability between the tort-feasors is to be made in such proportions as the court thinks just and equitable having regard to the extent of the moral responsibility of the parties concerned for the damage caused.[36] The correct view, it is submitted, is that while the right of contribution is based on the principle of justice, that a burden which the law imposes on two men should not be borne wholly by one of them, the rule in *Merryweather v. Nixan* is not in conformity with "justice, equity and good conscience," which after all is the guiding principle to be followed by the courts in India. But it has been held that in cases, where the doer of the act knew or is presumed to have known that the act he committed was unlawful as constituting either a civil wrong or a criminal offence, there is neither equity nor reason nor justice that he should be entitled to claim contribution from the other tort-feasors.[37]

6. REMEDIES UNDER THE CONSTITUTION

Articles 32 and 226 of the Constitution respectively confer jurisdiction on the Supreme Court and the High Courts for the enforcement of fundamental rights. The High Courts have in addition jurisdiction to enforce other legal rights. It has been held that the power conferred by these provisions is not merely injunctive *i.e.* preventive but also remedial and includes a power to award compensation, interim or final, in appropriate cases.[38] Ordinarily, these provisions are not to be used as a substitute for a suit for compensation but their recourse can be taken in exceptional cases.[39] Such cases are where the infringement of the fundamental right is gross and patent that is, incontrovertible and *ex facie* glaring; and either such infringement is on large scale affecting the fundamental rights of a large number of persons; or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantageous position to require the person or persons affected by such infringement to initiate or pursue action in Civil Courts.[40]

Infringement of a fundamental right or any other right conferred by the Constitution is a wrong under public law which is *sue generis i.e.* a class in itself.[41]

(Footnote No. 34 Contd.)
Alim Sahib v. Syed Ebrahim Sahib, (1902) ILR 26 Mad 373; *Jhibu v. Balaji*, (1923) 19 NLR 75; *Parbhu Dayal v. Dwarka Prasad*, (1931) ILR 54 All 371; *M/s. Dedha & Co. v. M/s. Paulson Medical Stores*, AIR 1988 Kerala 233, p. 235. Express promise of indemnity is void in such cases: *Yegnanarayana v. Yagannadha Rao*, (1931) MWN 667, 34 Mad LW 618.

35. *Khushalrao v. Bapurao*, ILR (1942) Nag 1; *Nani Lal De v. Tirthlal De*, ILR 1953 1 Cal 249. See also *Krishnrao v. Deorao*, AIR 1963 MP 49, where ILR (1942) Nag 1 is relied upon.
36. *Dharni Dhar v. Chandra Shekhar*, ILR (1952) 1 All 759, FB.
37. *M/s. Dedha & Co. v. M/s. Paulson Medical Stores*, AIR 1988 Kerala 233, p. 235. See also text and footnote 36, *supra*.
38. *M.C. Mehta v. Union of India*, (1987) 1 SCC 395, p. 408 : AIR 1987 SC 965. For a case under Article 226, see *Smt. Kalavati v. State of Himachal Pradesh*, AIR 1989 SC 5.
39. *M.C. Mehta v. Union of India*, (1987) 1 SCC 395: AIR 1987 SC 965.
40. *M.C. Mehta v. Union of India*, (1987) 1 SCC 395: AIR 1987 SC 965; For example, see *Rudul Shah v. State of Bihar*, AIR 1983 SC 1036 : 1086 : (1983) 4 SCC 141; *Bhim Singh v. State of J&K*, (1985) 4 SCC 677 : AIR 1986 SC 494. For a discussion of these and other cases see Chapter III, title 8(B), p. 43. See also, *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers*, (2011) 8 SCC 568.
41. See Chapter (III), title 8(B), p. 43.

Damages can be claimed for right to life and personal liberty (Article 21) under Articles 32 or 226 of the Constitution in exceptional cases of the nature indicated above.

It may further be mentioned that the Supreme Court has enlarged the doctrine of *locus standi* by laying down that where legal injury is caused or legal wrong is done to a person or class of persons who, by reason of poverty or disability or socially or economically disadvantaged position cannot approach a court of law for justice, any member of the public or social action group acting *bona fide* can file a petition under Article 32 or 226 seeking judicial redress and this can be done even by addressing a letter to the court.[42]

42. *M.C. Mehta v. Union of India, supra*, p. 406; *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 : AIR 1984 SC 802 : *S.P. Gupta v. Union of India*, (1981) Supp SCC 87 : AIR 1982 SC 149; *PUDR v. Union of India*, (1982) 3 SCC 235 : AIR 1982 SC 1473.

CHAPTER X

CLASSIFICATION OF TORTS

TORTS are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief.[1] All writers on the law of torts unanimously agree that it is difficult to classify torts with scientific accuracy. Some writers subdivide one portion of the whole class of wrongful acts on one principle, and another portion on another principle. To frame a scheme of classification which shall be at once comprehensive, accurate and easily intelligible, is, it seems, a problem not yet solved; and scarcely two writers have agreed to one and the same or a uniform scheme.[2] The classification adopted in this work is based on the lines of

1. PER, PRATT C. J. in *Chapman v. Pickersgill*, (1762) 2 Wils 145.
2. In POLLOCK'S Law of Torts, 15th edition, p. 6, torts are classified as follows:—

GROUP A

Personal Wrongs

1. Wrongs affecting safety and freedom of the person: Assault; battery; false imprisonment.
2. Wrongs affecting personal relations in the family: Seduction; enticing away of servants.
3. Wrongs affecting reputation: Slander and libel.
4. Wrongs affecting estate generally: Deceit; slander of title; fraudulent competition by colourable imitation, etc.; malicious prosecution; conspiracy.

GROUP B

Wrongs to Property

1. Trespass:—(a) to land.
   (b) to goods.
   Conversion and unnamed wrongs *ejusdem generis*.
   Disturbance of easements, etc.
2. Interference with right analogous to property, such as private franchises, patents, copyrights, trademarks.

GROUP C

Wrongs to Person, Estate and Property Generally

1. Nuisance.
2. Negligence.
3. Breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings.

I. Person: and may relate to	Body	Assault Battery Mayhem False Imprisonment
	Reputation	Libel Slander. Malicious Prosecution Malicious Civil Action Abuse of Legal Process.
	Freedom and Reputation Domestic and other Miscellaneous rights	Marital Rights Parental Rights Rights to Service. Contractual rights Intimidation Conspiracy Trespass Trespass *ab initio*

(Footnote No. 2 Contd.)

SIR HENRY FINCHE'S view of the English law. "Our Law," he says, "regards the person above his possession—life and liberty most—freehold and inheritance above chattels, and chattels real above personal." Accordingly torts relating to person come first; those affecting property—real and then personal—second; and those concerning person and property in common, third. [*Vide* Discourse of Law]

(Footnote No. 2 Contd.)

TORTS may affect	II. Property: and may relate to	Immovable property	Dispossession Reversionary Rights Waste Rights of Easement and Natural Rights.
		Movable property	Trespass Trespass *ab initio* Conversion Detention.
		Immovable or movable property	Slander of title Slander of goods
		Incorporeal Personal property	Maintenance Patent Copyright Trademark Tradename.
	III. Person and property		Negligence Nuisance Fraud. Negligent mis-statement

CHAPTER XI

TRESPASS TO PERSON

SYNOPSIS

1. INTRODUCTION[1]

The tort of negligence[2] though of recent origin, it was recognised nearly fifty years ago, is growing so fast that it is eclipsing other torts under a general principle towards which it is moving that it is actionable unreasonably to cause foreseeable harm to another. Trespass is one of the torts which has partly survived. Its principle was that any direct invasion of a protected interest from a positive act was actionable subject to justification. If the invasion was indirect though foreseeable or if the invasion was from an omission as distinguished from a positive act, there could be no liability in trespass though the wrong-doer might have been liable in some other form of action. Subsequent development has led to further limitation. If the invasion is unintended, though direct and resulting from a positive act, there will still be no liability if the conduct of the defendant was reasonable, or even if it was unreasonable, if the invasion was an unforeseeable consequence.[3] Reference in this context is necessary to two decisions namely *Fowler v. Lanning*[4] and *Letang v. Cooper*.[5] In the former case, the plaintiff claimed damages for trespass to the person and the statement of claim alleged laconically that "the defendant shot the plaintiff" on a particular date at a particular place. In holding that the statement of claim did not disclose a cause of action, DIPLOCK, J. held that *trespass* to person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant was caused unintentionally and without negligence on his part, that the onus of proving intention or negligence lies on the plaintiff and that he must allege either intention on the part of the defendant, or, if he relies upon negligence, he must state the facts which he alleges constitute negligence. In *Letang v. Cooper*[6] the facts were

1. WEIR, Case book on Tort, 5th edition, p. 267.
2. See Chapter XIX.
3. *Fowler v. Lanning*, (1959) 1 QB 426 : (1959) 2 WLR 241 : (1959) 1 All ER 290; *The Wagon Mound*, (1961) AC 388 : (1961) 2 WLR 126 : (1961) 1 All ER 404 (PC), WEIR, Case book on Tort, 5th edition p. 268.
4. (1959) 1 QB 426 : (1959) 2 WLR 241 : (1959) 1 All ER 290.
5. (1965) 1 QB 232 : (1964) 3 WLR 573 : (1964) 3 All ER 929 (CA).
6. (1965) 1 QB 232 : (1964) 3 WLR 573 : (1964) 3 All ER 929 (CA).

that the plaintiff while she was sunbathing was run over by a car driven negligently by the defendant causing injury to her legs. More than three years after the incident the plaintiff brought an action against the defendant for damages for loss and injury caused by (1) negligence of the defendant in driving the motor-car, and (2) the commission by the defendant of a trespass to the person. The claim for negligence was admittedly barred by statute after three years and the question before the court of Appeal was whether the plaintiff could succeed in an action for trespass. LORD DENNING, M.R. in deciding against the plaintiff expressed his approval of *Fowler v. Lanning*[7] and went one step further in holding that when the injury is not inflicted intentionally but negligently, the only cause of action is negligence and not trespass. The unintended invasions have thus been completely eclipsed by the tort of negligence and what survives now under trespass are intended invasions. Here the rules of trespass remain unchanged. There are two important rules: (1) that it is for the defendant to plead and prove justification and not for the plaintiff to show that the defendant's conduct was unreasonable; and (2) that damage is not an essential element and need not be proved by the plaintiff.[8] This Chapter is confined to intentional trespass to the person, the three chief forms of which are assault, battery and false imprisonment. The importance of trespass lies in that it can be used for protection of one's liberty and vindication of constitutional rights. "Trespass trips up the zealous bureaucrat, the eager policeman and the officious citizen."[9]

2. ASSAULT AND BATTERY

An assault is an attempt or a threat to do a corporeal hurt to another, coupled with an apparent present ability and intention to do the act. Actual contact is not necessary in an assault, though it is in a battery. But it is not every threat, when there is no actual personal violence that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect.[10] "Any gesture calculated to excite in the party threatened a reasonable apprehension that the party threatening intends immediately to offer violence, or, in the language of the Indian Penal Code, is 'about to use criminal force' to the person threatened, constitute, if coupled with a present ability to carry such intention in execution, an assault in law."[11] The intention as well as the act makes an assault. Therefore, if one strikes another upon the hand, or arm, or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strikes at another and misses him, this is an assault; so if he holds up his hand against another, in a threatening manner, and says nothing, it is an assault.[12] The menacing attitude and hostile purpose go to make the assault unlawful, *e.g.* presenting a loaded pistol at any one,[13] or pointing or brandishing a weapon at another with the intention of using it,[14] or riding after a person and obliging him to seek shelter to avoid being beaten.[15] Mere words do not amount to an assault. But the words which the party threatening uses at the time may either give to his gestures such a meaning as may make them amount to an assault, or, on the other hand, may prevent them from being an assault. For instance, where A laid his hands on his sword, and said to Z, "if it were not assize time I would not take such language from

7. (1959) 1 QB 426 : (1959) 2 WLR 241.
8. WEIR, Case book on Tort, 5th edition, p. 268.
9. WEIR, Case book on Tort, 5th edition
10. *Stephens v. Myers*, (1830) 4 C & P 349 : 34 RR 458.
11. PER ARNOULD, C.J., in *A.C. Cama v. H.F. Morgan*, (1864) 1 BHC 205, 206.
12. *Tuberville v. Savage*, (1669) 1 Mod 3.
13. *R. v. James*, (1844) 1 C & K 530; *Osborn v. Veirch*, (1858) 1 F and F 317.
14. *Genner v. Sparkes*, (1704) 1 Salk 79.
15. *Mortin v. Shoppee*, (1828) 3 C & P 373.

you,"[16] this was held not to be an assault, on the ground that the words showed that A did not intend then and there to offer violence to Z (or, in the language of the Indian Penal Code, was not 'about to use criminal force' to Z). Here there was the menacing gesture, showing in itself an intention to use violence, there was the present ability to use violence, but there were also words which would prevent the person threatened from reasonably apprehending that the person threatening was really then and there about to use violence.[17]

A battery is the intentional and direct application of any physical force to the person of another. It is the actual striking of another person, or touching him in a rude, angry, revengeful, or insolent manner. In *Cole v. Turner*,[18] HOLT, C.J., declared: "First, that the least touching of another in anger is a battery. Secondly, if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery. Thirdly, if any of them uses violence against the other, to force his way in a rude inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt will be a battery." ROBERT GOFF L.J. redefined battery as meaning an intentional physical contact which was not 'generally acceptable in the ordinary conduct of daily life'.[19] This definition was accepted by the House of Lords in *Wainwright v. Home Office*.[20]

A battery includes an assault which briefly stated is an overt act evidencing an immediate intention to commit a battery. It is mainly distinguishable from an assault in the fact that physical contact is necessary to accomplish it. It cannot mean merely an injury inflicted by an instrument held in the hand, but includes all cases where a party is struck by any missile thrown by another. It does not matter whether the force is applied directly to the human body itself or to anything coming in contact with it. In order to establish the tort of battery, the plaintiff must however prove that the force used was without lawful justification.[21] Thus to throw water at a person is an assault; if any drops fall upon him it is a battery.[22] So too, of riding a horse at a person is an assault; riding it against him is a battery. Pulling away a chair, as a practical joke, from one who is about to sit on it is probably an assault until he reaches the floor, for while falling he reasonably expects that the withdrawal of the chair will result in harm to him. When he comes in contact with the floor, it is a battery."[23] The term assault is commonly used to include battery.[24] But every laying on of hands is not a battery. The party's intention must be considered.[25] Touching a person, for instance, so as merely to call his attention, is not a battery.[26] A friendly clap on the back of a person may be excused on the ground of implied consent, but not the hostile or rude hand.

In *Stephens v. Myers*[27] the plaintiff was the chairman of a parish meeting. The defendant having been very vociferous, a motion was made and carried by a

16. It was assize time, and the consequence of drawing a sword on another during assize time involved in those days (the later end of Charles I's reign) not only the certain infliction of a heavy fine, but the possible chopping off of the hand by which the sword was drawn: *Tuberville v. Savage, sup.*
17. PER ARNOULD, C.J., in *A.C. Cama v. H.F. Morgan*, (1864) 1 BHC 205.
18. (1704) 6 Mod, 149.
19. *Collins v. Wilcock*, (1984) 3 All ER 374, p. 378.
20. (2003) 4 All ER 969, p. 974, (para 9) (HL).
21. *Jai Bhagwan v. Suman Devi*, (2011) 185 DLT 29.
22. *Pursell v. Horn*, (1832) 3 N & P 564, 8 A & E 602.
23. WINFIELD AND JOLOWICZ on Tort, 12th edition, p. 54.
24. *Blunt v. Beaumont*, (1835) 2 Cr M & R 412; *R v. Coney*, (1882) 8 QBD 534.
25. *James v. Campbell*, (1832) 5 C & P 372.
26. *Coward v. Baddeley*, (1859) 4 H & N 478.
27. *Stephens v. Myers*, (1830) 4 C & P 349 : 34 RR 811.

large majority that he should be turned out. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched towards him; he was thereupon stopped by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to reach the plaintiff; but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman. The jury found for the plaintiff with one shilling damages. TINDAL, C.J. said: "It is not every threat, when there is no actual personal violence, that constitutes an assault, there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped; then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that within a second or two, he would have reached the plaintiff, it seems to me it is an assault in law." And in *Read v. Coker*[28] the defendant told the plaintiff to leave the premises in occupation of the plaintiff. When the plaintiff refused the defendant collected some of his workmen who mustered round the plaintiff, tucking up their sleeves and aprons and threatened to break the plaintiff's neck if he did not leave. The plaintiff left and brought an action of trespass for assault. In holding in favour of the plaintiff, JERVIS, C.J., observed: "The facts here clearly showed that the defendant was guilty of assault. There was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution." In contrast, in *Bavisetti Venkata Surya Rao v. Nandipati Muttayya*,[29] the defendant who was a village Munsiff threatened to distrain the ear-rings which the plaintiff was wearing for recovery of land revenue. The village goldsmith was called on which someone paid the land-revenue on behalf of the plaintiff and the defendant left quietly. As the defendant said nothing after arrival of the goldsmith, it was held that it could not be said that the plaintiff was put in fear of immediate or instant violence and, therefore, the defendant could not be made liable for assault.

Battery requires actual contact with the body of another person so a seizing and laying hold of a person so as to restrain him;[30] spitting in the face,[31] throwing over a chair or carriage in which another person is sitting,[32] throwing water over a person,[33] striking a horse so that it bolts and throws its rider;[34] taking a person by the collar;[35] causing another to be medically examined against his or her will;[36] are all held to amount to battery. Where the plaintiff, who had purchased a ticket for a seat at a cinema show, was forcibly turned out of his seat by the direction of the manager, who was acting under a mistaken belief that the plaintiff had not paid for his seat, it was held that the plaintiff was entitled to recover substantial damages for assault and battery. The purchaser of a ticket for a seat at a theatre or other similar entertainment has a right to stay and witness the whole of the performance, provided he behaves properly and complies with the rules of the management.[37]

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28. 138 ER 1437.
29. AIR 1964 AP 382.
30. *Rawling v. Till*, (1837) 3 M & W 28.
31. *The Queen v. Cotesworth*, (1704) 6 Mod 172.
32. *Hopper v. Reeve*, (1817) 7 Taunt 698 : 1 Moox 407 : 18 RR 629.
33. *Pursell v. Horn*, (1832) 8 A & E 602.
34. *Dodwell v. Burford*, (1670) 1 Mod 24.
35. *Wiffin v. Kincard*, (1807) 2 B & P N R 471.
36. *Latter v. Braddell*, (1881) 28 WR (Eng) 239 : 50 LJQB 448 : 144 369.
37. *Hurst v. Picture Theatres, Ltd.*, (1915) 1 KB 1 : 111 LT 973 : 30 TLR 642.

If the defendant intended to assault, in other words, if he had the capacity to understand the nature of his act, and he struck the plaintiff, he would be liable for assault and battery even if he did not know, because of mental disease, that what he was doing was wrong.[38] But if the mental disease is so severe that the defendant's act of striking the plaintiff was not a voluntary act at all, he would not be liable.[39]

A civil action lies for an assault,[40] and criminal proceedings may also be taken against the wrong-doer. The fact that the wrong-doer has been fined by a criminal court for assault is no bar to a civil action against him for damages.[41] The previous conviction of the wrong-doer in a criminal court is no evidence of assault. The factum of the assault must be tried in a civil court,[42] which is not bound by conviction or acquittal in criminal proceedings.[43] A plea of guilty in a criminal court may, but a verdict of conviction cannot, be considered in evidence in a civil court.[44]

3. FALSE IMPRISONMENT

3(A) What Constitutes False Imprisonment

False imprisonment is a total restraint of the liberty of a person, for, however, short a time, without lawful excuse.[45] The word 'false' means 'erroneous' or 'wrong'. It is a tort of strict liability and the plaintiff has not to prove fault on the part of the defendant.[46]

To constitute this wrong two things are necessary:—

(1) The total restraint of the liberty of a person.

The detention of the person may be either (a) actual, that is, physical, *e.g.* laying hands upon a person; or (b) constructive, that is, by mere show of authority, *e.g.* by an officer telling anyone that he is wanted and making him accompany.[47]

(2) The detention must be unlawful.

The period for which the detention continues is immaterial. But it must not be lawful.[48] "Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets."[49] In the leading case of *Bird v. Jones*, COLERIDGE, J., said:

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38. *Morris v. Marsden*, (1952) 1 All ER 925.
39. *Morris v. Marsden*, (1952) 1 All ER 925, p. 927.
40. *Raghbinder Singh v. Bant Kaur*, (2011) 1 SCC 106, para 8, 9 : (2010) 11 JT 300.
41. *Akhil Chandra Biswas v. Akhil Chandra Dey*, (1902) 6 CWN 915; *Jodhi Ram v. Abdul Mian*, (1893) 13 AWN 62; *Chandan v. Sumera*, (1887) 7 AWN 104.
42. *Ali Buksh Doctor v. Sheikh Samiruddin*, (1869), 4 Beng. LR (ACJ) 31; *Bishonath v. Huro Gobind*, (1866) 5 WR 27.
43. *Jagga Rao, In re*, (1935) 68 MLJ 660 : (1935) MWN 452.
44. *Shumboo Chunder v. Modhoo*, (1868), 10 WR 56.
45. *Bird v. Jones*, (1845) 7 QB 742, 752; *Mahammad Yusuf-ud-din v. Secretary of State for India in Council*, (1903) 30 IA 154 ILR 30 Cal 872, 5 Bom LR 490; *Onkarmal v. Banwarilal*, ILR (1962) Raj 202 : AIR 1962 Raj 127 : (1962) RLW 77.
46. *R. v. Governor of Brockhill Prison (no. 2)*, (2000) 4 All ER 15 pp. 18, 19, 20 (HL).
47. See *Pocock v. Moore*, (1825) R & M 321.
48. *Henderson v. Preston*, (1888) 21 QBD 362; *Morriss v. Winter*, (1930) 1 KB 243. The signing of a charge-sheet, standing alone, is not evidence of anything directly causing the imprisonment of the person charged and will not support an action for false imprisonment against the person who signs : *Sewell v. National Telephone Co. Ltd.*, (1907) 1 KB 557. See *Patton v. Huree Ram*, (1868) 3 Agra HC 409; *Rajah Pedda Vencatapa Naidoo v. Aroovala Roodraya Naidoo*, (1841) 2 MIA 504, as to unlawful detention.
49. BLACKSTONE'S Commentaries on the Laws of England, Vol III, 127.

"A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own."[50] If one compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; the compelling a man to go in a given direction against his will may amount to imprisonment; but if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction he pleases, he cannot be said thereby to imprison him. Imprisonment is a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will whatever inconvenience it may bring on him.[51]

Measures of crowd control adopted by the police resulting in the detention of a crowd, which also included some innocent persons, to prevent breach of peace, and risk of injury to persons or property did not offend Article 5(1) of the European Human Rights Convention, which guarantees everyone right to liberty and security of person and did not also amount to false imprisonment actionable under common law, so long as the measures adopted are taken in good faith, are proportionate and are enforced for no longer than is reasonably necessary.[52]

It is not necessary that a man's person should be touched. Placing a party under the restraint of an officer, who holds a writ for his arrest, is an imprisonment, without proceeding to actual contact.[53] Can a person be imprisoned without his knowing it? *In Merring v. Graham White Aviation Co. Ltd.*,[54] the answer to this question was in the affirmative. In this case the plaintiff was suspected of stealing a keg of varnish from the aviation works of the defendant company where he was employed. He was asked by two of the aviation works' police to go to the defendant's office. He assented and they went to the company's office by a shortcut pointed out by him. He was invited to the waiting room and the two policemen remained somewhere in the neighbourhood. In an action for false imprisonment it was held that the defendant company was liable because the plaintiff was not a free man from the moment that he came under the influence of the two works' police. LORD ATKIN said: "A person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is lunatic. Those are cases where the person might properly complain if he were imprisoned, though the imprisonment began and ceased while he was in that state. Of course, the damages might be diminished and would be affected by the question whether he was conscious of it or not."[55] But in an earlier case, *Herring v. Boyle*,[56] which was not referred in *Merring's* case, the court of Exchequer held that there was no liability for false imprisonment when a student was improperly detained by the school-master during holidays in the school because his

50. *Bird v. Jones*, (1845) 7 QB 742, 744.
51. PER PATTESON, J., in *Bird v. Jones*, (1845) 7 QB 742, 752; *Parankusan v. Stuart*, (1865) 2 MHC 396; *Warner v. Riddiford*, (1858) 4 CBNS 180.
52. *Austin v. Metropolitan Police Commissioner*, (2009) 3 ALL ER 458 (H.L.).
53. *Grainger v. Hill*, (1838) 4 Bing NC 212 : 7 LJPC 85.
54. *Meering v. Graham White Aviation Company Limited*, (1919) 122 LT 44.
55. *Meering v. Graham White Aviation Company Limited*, (1919) 122 LT 44., p. 53.
56. 149 ER 1126.

parents had not paid the fees for the student did not know of the restraint. In holding so, BOLLAND B. observed: "In the present case, as far as we know, the boy may have been willing to stay; he does not appear to have been cognisant of the restraint, and there was no evidence of any act whatsoever done by the defendant in his presence."[57] *Merring's* case has been criticised by GOODHART[58] but is supported by PROSER.[59] *Merring's* case has been approved and the correctness of *Herring's* case doubted by the House of Lords in *Murray v. Minister of Defence*,[60] where it has been held that false imprisonment is actionable without proof of special damage and so it is not necessary for a person unlawfully detained to prove that he knew that he was being detained or that he was harmed by his detention. In the context of a mentally unsound person detained in a hospital the court of appeal observed: "A person is detained in law if those who have control over the premises in which he is, have the intention that he shall not be permitted to leave those premises and have the ability to prevent him from leaving."[61] A person who is unaware that he has been imprisoned and who has suffered no harm can normally expect to recover nominal damages only.[62]

A person is not under imprisonment after his release on bail.[63]

A person who is lawfully arrested and detained in a prison or a convict who is lawfully committed to prison cannot sue for false imprisonment if he is held under physical conditions so intolerable that his health suffers[64] but he will have a public law remedy of judicial review and a private law remedy in negligence.[65] In India the prisoner in such cases may be able to avail of the public law remedy for violation of his fundamental right under Article 21 which has been very widely construed.[66] It has been held that the person detaining the plaintiff in accordance with the state of the law at that time as laid down by the courts may yet be held liable for false imprisonment if that state of the law is later altered by the courts on review and it is found that the plaintiff ought to have been released earlier to the date when he is released. This is so because the tort of false imprisonment is of strict liability and it is no defence that the defendant took reasonable case and acted in good faith.[67]

Insisting upon going on footway.—In *Bird v. Jones*[68] a part of a bridge, generally used as a footway, was appropriated for seats to view a boat-race. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the enclosure. The defendant pulled him back but the plaintiff succeeded in climbing over. Two policemen were then stationed by the defendant to prevent him from passing onwards in the direction in which he wished to go. The plaintiff was told to go back into the carriage way and proceed to the other side of the bridge, if he pleased. The plaintiff refused to do so, and remained where he was so obstructed, about half an hour. It was held that this was no imprisonment.

57. 149 ER 1126.
58. *Restatement* of the Law of Torts (1935) 83 U Pa L Rev 411, 418.
59. False imprisonment : Consciousness of confinement, (1955) Col L Rev 847.
60. (1988) 2 All ER 521 : (1988) 1 WLR 692 : (1988) 132 SJ 852 (HL).
61. *R. v. Bournewood NHS Trust*, (1998) 1 All ER 634 (CA) p. 639.
62. *R. v. Bournewood NHS Trust*, (1998) 1 All ER 634, pp. 647, 648; *Murray v. Minister of Defence*, (1988) 2 All ER 121, p. 129 : (1988) 1 WLR 692 (HL).
63. *Mahammad Yusufuddin v. Secretary of State for India*, (1903) ILR 30 Cal 872 : 30 IA 154 : 5 Bom LR 490.
64. *Hague v. Deputy Governor of Parkhurst Prison*, (1991) 3 All ER 733 (HL). See text and footnote 15, p. 33.
65. *Hague v. Deputy Governor of Parkhurst Prison*, (1991) 3 All ER 733 (HL).
66. See, p. 55, *ante*
67. *R. v. Governor of Brockhill Prison (no. 2)*, (2000) 4 All ER 15 : (2001) 2 AC 19 : (2000) 3 WLR 843 (HL).
68. (1845) 7 QB 742.

Lawful detention.—A woman suspected of theft in a large department store was arrested outside by store detectives and taken back into the shop where the managing director considered the case and, having decided to prosecute, immediately, sent for the police officers to whom she was given in charge. It was held that, inasmuch as she was not detained beyond a reasonable time for the managing director to make his decision, the owners of the shop were not liable in damages for false imprisonment.[69]

The plaintiff paid a penny on entering a wharf to the defendants to stay there till the boat should start and then be taken by the boat to the other side. Then the plaintiff changed his mind and wished to go back. The rules as to the exit from the wharf by the turnstile required a penny for any person who went through. This, the plaintiff refused to pay, and by force, he was prevented from going back through the turnstile. He then claimed damages for assault and false imprisonment. It was held that the defendants were not liable as the toll imposed was reasonable and they were entitled to resist a forcible evasion of it.[70] A miner descended a coal-mine at 9.30 a.m. for the purpose of working therein. He was entitled to be raised to the surface at the conclusion of his shift at 4 p.m. On arriving at the bottom of the mine he was ordered to do certain work which he wrongfully refused to do and at 11 a.m. he requested to be taken to the surface in a lift. His employers refused to permit him to use the lift until 1.30 p.m. although it had been available for the carriage of men to the surface from 1.10 p.m and in consequence he was detained in the mine against his will for twenty minutes. In an action for damages for false imprisonment, it was held that, on the principle of *volenti non fit injuria*, the action could not be maintained.[71]

Under Government orders the ex-Maharaja of Nabha was restricted in his movements to the municipal limits of Kodaikanal. The Maharani was to leave Kodaikanal for Madras in a motor-car, but the Superintendent of Police was wrongly informed that the ex-Maharaja was going with his family to Madras. He telephoned to a Sub-Inspector to prevent the ex-Maharaja from leaving Kodaikanal. The Sub-Inspector misunderstood the message and took it to be a direction to prevent the Maharani from leaving Kodaikanal. When the Maharani came with her daughter by car to the Kodaikanal railway station to leave for Madras by train, the Sub-Inspector requested her not to board the train which had arrived and posted two constables near the railway compound to prevent her car from being taken out of the compound. In a suit for damages by the Maharani and her daughter alleging that the acts of the police officers were purported to be done by them in their official capacity and were quite irregular and without justification, it was held that no wrongful confinement could be said to have taken place. The offences of wrongful restraint or wrongful confinement are offences affecting the human body and cannot be said to have been committed if a person is not himself restrained or confined but the liberty of going in the conveyance to which he wishes to go or of taking the article which he wishes to carry and without which he is not willing to proceed is denied to him.[72]

3(B) Who is Liable?

A person may be liable for false imprisonment not only when he directly arrests or detains the plaintiff, but also when he was "active in promoting or causing" the arrest or detention.[73] Apart from cases where liability can be fastened vicariously when the

69. *John Lewis & Co. v. Times*, (1952) AC 676 : (1952) 1 All ER 1203.
70. *Robinson v. Balmain New Ferry Co.*, (1910) AC 295.
71. *Herd v. Weardale Steel etc. Co. Ltd.*, (1915) AC 67 : 111 LT 60 : 30 TLR 620.
72. *Maharani of Nabha v. Province of Madras*, ILR (1942) Mad 696.
73. *Aitken v. Bedwell*, (1827) Mood & M 68.

wrong is committed by a servant or agent,[74] liability can also arise when arrest or detention is procured through the instrumentality of some officer. In *Rafael v. Verelst*,[75] the defendant who was Governor of Bengal was held liable for false imprisonment of the plaintiff, an Armenian trader in Oudh, who was arrested and sent to Calcutta by the Nawab of Oudh on invitation of the defendant for the Nawab, though a sovereign, acted as "a mere machine—an instrument and engine of the defendant" whom he did not dare to offend. A distinction in this context is made between cases where arrest is effected by a ministerial officer without intervention of a court and cases where a judicial act intervenes before the arrest is made. In the former class of cases if the defendant laid a charge on which it was the duty of the constable to arrest, he is clearly liable.[76] The defendants by their agents gave the plaintiff into the custody thinking that the plaintiff was guilty of theft. The agent signed the charge-sheet and in his evidence stated "I did give him in charge." It was held that the defendants were liable for false imprisonment.[77] If a person gets another arrested by police on a false complaint, he is liable for damages for false imprisonment.[78] In all cases where a person is arrested by Police on a complaint made by another person the question to be examined is whether the person making the complaint had merely given information to a Police authority on which that authority could act or not as it saw fit or whether he himself was instigator, promoter and active inciter of the arrest, and imprisonment.[79] In the former class of cases the person giving the information would not be liable whereas in the latter class of cases he would be liable.[80] Thus in a case where the plaintiff was arrested on a charge of theft on a *bona fide* but wrong information given by a shop detective and where the police officers gave evidence that they had exercised their own judgment in arresting the plaintiff, the shop detective and his master the shop-owner were not held liable for false imprisonment.[81] Where the defendant makes a complaint to a Judicial Officer and the plaintiff is taken into custody on orders of the judicial officer, the defendant is not liable for false imprisonment although he may be liable for malicious prosecution. "The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a Judicial Officer are interposed between the charge and the imprisonment."[82] Therefore, when the plaintiff is arrested without a warrant and produced before a Magistrate who remands him in custody, his remedies for detention before and after remand are different. For detention prior to remand he can sue in trespass for false imprisonment whereas for detention after remand, he can sue for malicious prosecution.[83] When a police officer arrests a person erroneously named in a warrant he is not liable for false imprisonment as his

74. For vicarious liability, see Chapter VIII, title 2.
75. (1776) 96 ER 62; WEIR, Case-Book on Tort, 5th edition, p. 293.
76. *Hopkins & Crowe*, (1836) 4 A & E 774; *Roberts v. Buster's Auto Towing Service Ltd.*, (1977) 4 WWR 428.
77. *Clubb v. Wimpey & Co. Ltd.*, (1936) 1 All ER 69.
78. *Gouri Prasad Dey v. Chartered Bank of India, Australia and China*, (1925) ILR 52 Cal 615; *Graham v. Henry Gidney*, (1933) ILR 60 Cal 955; *Sakik Hussain Khan v. Taffazal Khan*, (1939) 43 CWN 1080; *Gorikapati v. Arza Bikasham*, AIR 1979 AP 31.
79. *Davidson v. Chief Constable of North Wales*, (1994) 2 All ER 597 (CA).
80. *Davidson v. Chief Constable of North Wales*, (1994) 2 All ER 597 (CA).
81. *Davidson v. Chief Constable of North Wales*, (1994) 2 All ER 597 (CA) see further *Gosden v. Elphik*, (1849) 4 Ex 445; *Grinham v. Willey*, (1859) 4 H & N 496; *Sewell v. National Telephone Co.*, (1907) 1 KB 557 (CA).
82. *Austin v. Dowling*, (1870) LR 5 CP 534, (p. 540) (WILLES, J.); *Reid v. Webster*, (1966) 59 DLR (2d) 189 (196); *Brown v. Chapman*, (1848) 6 CB 365; *Biharilal Bhawasinka v. Jagannath Prasad Kajriwal*, AIR 1959 Pat 490.
83. *Lock v. Aston*, (1848) 12 QB 871 : 76 RR 439.

only duty is to execute the warrant as it is an its face.[84] When a wrong person is arrested and imprisoned under a decree to which he was not a party, the person setting the court in motion is not liable for false imprisonment.[85] Similarly, when a Magistrate grants a warrant on which the party charged in a complaint is arrested, the party laying the complaint is not liable for false imprisonment although the case is one in which the Magistrate has no jurisdiction to act.[86] But when the complainant not content by merely taking formal steps for moving the court participates in the arrest by personal intervention, he will be liable for false imprisonment.[87] So when the complainant having accompanied the constable charged with the execution of the warrant, pointed out to him the person to be arrested, it was held that this was evidence of participation in arrest making him liable for false imprisonment.[88]

There is a real distinction between a suit for false imprisonment and a suit for abuse of process of the court of which malicious prosecution is the most important form. In the former once the arrest is established, the burden to prove *justification lies* on the defendant who made or caused the arrest.[89] But in the latter, the burden to prove want of reasonable and probable cause as also malice lies on the plaintiff.[90] The defendant is thus in a more advantageous position in a suit for abuse of process of the court as compared to a suit for false imprisonment.

3(C) Arrest by Public Officer

Section 41(1) of the Code of Criminal Procedure, 1973 provides that a Police Officer may arrest a person "who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists of having been so concerned." The existence of a reasonable suspicion that the person to be arrested is concerned in any cognizable offence is the minimum requirement before an arrest can be made by a police officer.[91] No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.[92] Every person who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the period without the authority of a Magistrate.[93]

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84. *McGrath v. Chief Constable of the Royal Ulster Constabulary*, (2001) 4 All ER 334, pp. 340, 341 (H.L.)
85. *Bheema v. Deuti*, (1875) 8 MHC 38. But see *Velji Bhimsey & Co v. Bachoo Bhaidas*, (1924) 26 Bom LR 349.
86. *West v. Smallwood*, (1838) 3 M & W 418.
87. *Painter v. Liverpool Gas Co.*, (1836) 3 A & E 433; *Cooper v. Harding*, (1845) 7 QB 928.
88. *West v. Smallwood, supra.*
89. *Anwar Hussain v. Ajoy Kumar Mukherjee*, AIR 1959 Assam 28.
90. See Chapter XIII, title 1(D), (E), and 4.
91. *Gulabchand Kannoolal v. State of M.P.*, 1982 MPLJ 7 (17), (FB). But a statute may confer power to arrest on mere 'suspicion' as distinguished from 'reasonable suspicion'. S. 11(1) of the Northern Ireland (Emergency Provisions) Act, 1978, confers power on a police officer to "arrest without warrant any person whom he suspects of being a terrorist." A constable made an arrest of a person on instructions from his superior officer. After being questioned for 18 hours, he was released. In a suit for damages for unlawful arrest, the House of Lords held against the plaintiff and observed that on the wordings of the Act, a constable made a lawful arrest if he had an honest, though not necessarily a reasonable suspicion that the person being arrested was a terrorist and that the arresting officer was entitled to have an honest suspicion merely from the fact of the instructions given by his superior which he could not question. *McKee v. Chief Constable for Northern Ireland*, (1985) 1 All ER 1 : (1984) 1 WLR 1358 : 128 SJ 836 (HL).
92. Article 22(1), Constitution of India.
93. Article 22(2), Constitution of India.

"An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make inquiries."[1] Arrest once made continues until terminated by release on bail or otherwise or by an order of remand passed by a Magistrate. As observed by LORD DIPLOCK; "Arrest is a continuing act: it starts with the arrest or taking a person into custody (by action or words restraining him from moving anywhere beyond the arrestor's control), and it continues until the person so restrained is either released from custody, or having been brought before a Magistrate, is remanded into custody by the Magistrate's judicial act."[2]

Since arrest involves trespass to the person, the onus lies on the arrestor to justify the trespass by establishing that the arrest was lawful and was made atleast on reasonable suspicion.[3] A law enforcement officer arresting a person *bona fide* on reasonable suspicion for commission of an offence under a law is not guilty of false imprisonment if the law is later declared invalid although the person arrested cannot be convicted because of such a declaration.[4] Similarly, police officers honestly believing that the Assam Foodgrains Control Order 1961 was in force, as the Government had instructed to implement the said order and *bona fide* arresting and detaining a trader and prosecuting him for violation of that order could not be held liable when it was later found that the control order was then not in force and the trader was discharged as the order had been rescinded by the Central Government.[5] In the last mentioned case, the court did not consider as to why the Government in directing implementation of an order, which had been rescinded, resulting in illegal arrest and detention of a person could not be held liable in public law for violation of Article 21 of the constitution[6] for the claim in that case was essentially a claim for damages for malicious prosecution.

There is a distinction between reasonable suspicion which is the foundation of the power to arrest and *prima facie* proof. "Suspicion in its ordinary meaning is a state of conjecture or surmise when proof is lacking. I suspect what I cannot prove. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end."[7] Reasonable suspicion must exist at the time of arrest. If it arises subsequent to the arrest as a result of questioning the accused, the arrest and detention till that stage would be invalid giving rise to a claim for damages for false imprisonment for that period.[8] In *Shabban Bin Hussain's* case,[9] the two plaintiffs were arrested between 8 and 9 a.m. on 11th July 1965 for offences under section 304 of the Penal Code (Malaysian) and section 34 of the Road Traffic Act (Malaysian) on a complaint made on 10th July that a lorry was coming in the off-side direction with a trailer loaded with timber and as the complainant passed in his car a piece of timber fell off the lorry, hitting his windscreen and two of the men in the car were injured and one of them died. The lorry was found stationary on July 11th near a Coffee

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1. *Shabban Bin Hussain v. Chong Fook Kam*, (1969) 3 All ER 1626 (PC) (LORD DEVLIN).
2. *Holgate Muhammad v. Duke*, (1984) 1 All ER 1054 (1056) : (1984) AC 437 : (1984) 2 WLR 660 (HL).
3. *Dallisan v. Caffey*, (1964) 2 All ER 610 p. 619 : (1965) 1 QB 348 (C.A., DIPLOCK LJ); *O'Hara v. Chief Constable of The Royal Ulster Constabulary*, (1997) 1 All ER 129 p. 137 (HL).
4. *Perrey v. Hall*, (1996) 4 All ER 523.
5. *Ravinder Kumar Sharma v. Sate of Assam*, AIR 1999 SC 3571, pp. 3576, 3577 : (1999) 7 SCC 435.
6. See, pp. 47-57.
7. *Shabban Bin Hussain v. Chong Fook Kam, supra*; *Holgate Muhammad v. Duke, supra*, p. 1057; *Gulabchand Kannoolal v. State of M.P.*, 1982 MPLJ 7 (p. 17) (FB) (G.P. SINGH C.J.).
8. *Shabban Bin Hussain v. Chong Fook Kam*, (1969) 3 All ER 1626 (PC).
9. *Shabban Bin Hussain v. Chong Fook Kam*, (1969) 3 All ER 1626 (PC).

shop. The two plaintiffs, who were driver and attendant of the lorry, were arrested, as earlier stated, between 8 and 9 a.m. on 11th. They were interrogated at about 1 p.m. on which they denied to have been present at the scene of the accident at the relevant time. They also gave an account of their movements. This was not supported by the witnesses of the place where the plaintiffs alleged they were at the time of the accident, who were questioned between 5 and 6 p.m. The plaintiffs were detained overnight and produced on 12th July before a Magistrate, who granted a remand of seven days for further investigation. They were released next day as the police did not find sufficient evidence against either of them. It was agreed that the false imprisonment, if any, was brought to an end by the Magistrate's order of remand. The Privy Council on these facts held that at the time of arrest the police had good reason to suspect that one or the other of the plaintiffs was driving the lorry from whose trailer the piece of timber fell but there could be no reasonable suspicion at that stage that the lorry was being driven recklessly or dangerously, and the plaintiffs or either of them, was guilty of reckless driving for which arrest was made. It was further held that as the alibi given out by the plaintiffs on interrogation was found to be not true, this fact, coupled with the fact that the plaintiffs did not stop the lorry after the accident, could give rise to a reasonable suspicion that they were concerned in a piece of reckless driving though these facts also fell short of *prima facie* proof. The Privy Council concluded that the police made the mistake of arresting before questioning and awarded damages for false imprisonment for approximately nine hours detention in the company of police.

It will be noticed that the exercise of power to arrest is open to challenge on Wednesbury Principles.[10] But with the enforcement of the Human Rights Act 1998 in the United Kingdom and consequent European influence it has now to face, the test of proportionality[11] which is a much stricter test of reasonableness when the question is of impairment of human rights/fundamental rights. The test of proportionality has also been accepted by the Supreme Court so the same test may be applied in India also for adjudicating on the validity of arrest.[12]

Another important point, that follows from the Privy Council's decision in *Shabban Bin Hussain's* case[13] which has been elaborated by the House of Lords in the case of *Holgate Muhammad v. Duke*,[14] is that even when the police has a reasonable suspicion that a person is concerned in a cognizable offence, it does not follow that he must be arrested and the police has a discretion which has to be reasonably exercised. As observed by LORD DIPLOCK[15] the exercise of the executive discretion to arrest or not to arrest conferred by statutory words "may arrest" can be questioned in a court of law on the principles laid down by LORD GREENE, M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*,[16] popularly known as the Wednesbury principles. These principles are that the person on whom the discretion is conferred must exercise it in good faith for furtherance of the object of the statute, he must not proceed upon a misconstruction of the statute; he must take into account matters relevant for exercise of the discretion, and he must not be influenced by irrelevant matters. In *Holgate Muhammad's* case,[17] the plaintiff was a lodger in a house from which in a burglary some jewellery was stolen. A few months

10. See text and footnotes 14-17 *infra*.
11. *R (on the application of Laporte) v. Chief Constable of Gloucestershire*, (2007) 2 All ER 529.
12. See Principles of Statutory Construction, 12th edition, pp. 441, 442.
13. Footnote 7 *supra*.
14. (1984) 1 All ER 1054 : (1984) AC 434 : (1984) 2 WLR 660 (HL).
15. (1984) 1 All ER 1054, p. 1057.
16. (1947) 2 All ER 680 (CA).
17. *Holgate Muhammad v. Duke*, (1984) 1 All ER 1054 (HL).

later, the owner recognised the stolen articles in the window of a jeweller's shop. The jeweller gave a description of the person from whom he purchased the jewellery which in the owner's opinion fitted the plaintiff. A constable investigating the owner's complaint considered that he had reasonable cause for suspecting that the appellant was the thief. The constable also considered that the jeweller's evidence would not be sufficient to convict the plaintiff but he believed that if arrested and questioned the plaintiff may confess. The plaintiff was, therefore, arrested under section 2(4) of the Criminal Law Act, 1967[18] and brought to the police station where she was interrogated but as no evidence was discovered, she was released after six hours. In a suit for damages for false imprisonment, the House of Lords held that the statutory discretion to arrest was properly exercised. The constable acted in good faith, he had reasonable suspicion that the plaintiff was guilty of burglary and he believed that there was a greater likelihood that the plaintiff if questioned under arrest in the police station would respond truthfully to questions about the crime than if he was questioned in his own home and this was not an extraneous consideration for making the arrest.[19] In the same case, the House of Lords observed that section 2(4) of the Criminal Law Act required an objective test of reasonableness for determining whether the constable had a reasonable cause for suspecting the plaintiff to be guilty of an arrestable offence.[20] These points were reiterated in *O'Hara v. The Chief Constable of the Royal Ulster Constabulary*,[21] which dealt with section 12(1) of the Prevention of Terrorism (Temporary Provisions) Act, 1984 (U.K.) which provided: 'A constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be a person concerned in the commission etc. of the acts of terrorism.' Interpreting this section the House of Lords laid down some general propositions as follows: "(1) In order to have a reasonable suspicion the constable need not have evidence amounting to a *prima facie* case. *Ex hypothesi* one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough (see *Shabban Bin Hussain v. Chang Fook Kam, supra*). (2) Hearsay information may therefore afford a constable reasonable ground to arrest. Such information may come from other officers. (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest. The executive discretion to arrest or not to arrest as LORD DIPLOCK described in *Holgate Mohammad v. Duke (supra)* vests in the constable, who is engaged on the decision to arrest or not and not in his superior officers."[22] It was further held that section 12(1) "relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in act of terrorism. In part it is also an objective one, because there must also be reasonable grounds for the suspicion which he has formed".[23] It is not sufficient to meet the objective test that the arresting officer himself thought that the grounds of suspicion that he had were reasonable. What is required is that a reasonable man would be of that opinion having regard to the information which was in the mind of the arresting officer considered in its context and the whole surrounding

18. Section 2(4) of the Criminal Law Act, 1967 (UK) provides : "Where a constable with reasonable cause suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence."
19. *Holgate Muhammad v. Duke*, (1984) 1 All ER 1054 (1059, 1060) : (1984) AC 434 : (1984) 2 WLR 660 (HL).
20. *Holgate Muhammad v. Duke*, (1984) 1 All ER 1054, 1059 (Letter I).
21. (1997) 1 All ER 129 : 1997 AC 286 : (1997) 2 WLR 1 (HL).
22. (1997) 1 All ER 129, p. 134.
23. (1997) 1 All ER 129, p. 138.

circumstances.[24] It is submitted that these principles equally apply to an arrest under section 41(1) of the Code of Criminal Procedure, 1973. Indeed the Supreme Court laid down stricter requirements for making an arrest. The court said that "no arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another."[25] The court further observed: "No arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and *bona fides* of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the station house and not to leave station without permission would do."[26] Reasons for arrest must be reflected in the case diary and a relative or friend of the person arrested must also be informed of the arrest and the place of detention.[27]

Another important requirement while making an arrest as already seen is that the person arrested shall be informed as soon as may be, of the grounds of arrest. This constitutional requirement[28] is not available when the arrest is made under a judicial warrant or when the arrest is not for commission of any offence but for some other purpose,[29] *e.g.* for sending the person taken into custody to the officer-in-charge of the nearest camp under section 4 of the Abducted Persons (Recovery and Restoration) Act, 1949[30] or for recovery of income-tax[31] or arrears of land revenue.[32] But the Constitutional protection of being informed, as soon as may be, is available when the police makes an arrest on reasonable suspicion that the person arrested is concerned in a cognizable offence[33] and violation of this requirement will make the arrest invalid.[34] The person arrested must be informed of the ground of his arrest. If the ground disclosed to the person arrested for his arrest is unsustainable in law, his suit for damages for false imprisonment cannot be defeated by pleading another ground of arrest which may have existed but which was not disclosed to him at the time of his arrest.[35] Where after arrest the police reach the conclusion that *prima facie* proof of the arrested person's guilt is unlikely to be discovered by further inquiries of him or of other potential witnesses, it is their duty to release him from custody.[36]

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24. (1997) 1 All ER 129, p. 139. In England Part IV of the Criminal Evidence Act, 1984 provides many safeguards for continuing a person in police detention and one of these safeguards is periodic review of the detention, the first review being not later than six hours after the detention was first authorised. Omission to review the detention makes it illegal and can give rise to action for false imprisonment : *Roberts v. Chief Constable*, (1999) 2 All ER 326 (CA).
25. *Joginder Kumar v. State of U.P.*, AIR 1994 SC 1349 p. 1353 : (1994) 3 JT 423 p. 429 : (1994) 4 SCC 260.
26. *Joginder Kumar v. State of U.P.*, (1994) 3 JT 423, pp. 429, 430: AIR 1994 SC 1349, pp. 1353, 1354.
27. *Joginder Kumar v. State of U.P.*, AIR 1994 SC 1349,, p. 1354. See further *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610 : (1997) 1 SCC 416 where more safeguards for the benefit of arrested person were laid down.
28. Article 22 (1) of the Constitution of India.
29. *State of Punjab v. Ajaib Singh*, AIR 1953 SC 10 : 1953 SCR 254.
30. *State of Punjab v. Ajaib Singh*, AIR 1953 SC 10 : 1953 SCR 254.
31. *Purshottam Govindji Halai v. D.M. Desai*, AIR 1956 SC 20 : 1955 SCR 887.
32. *Collector of Malabar v. Erimal Ebrahim Hajee*, AIR 1957 SC 688.
33. *State of Punjab v. Ajaib Singh*, AIR 1953 SC 10 : 1953 SCR 254.
34. *State of Punjab v. Ajaib Singh*, AIR 1953 SC 10 : 1953 SCR 254, *Christie v. Leachinsky*, (1947) 1 All ER 567 : (1947) AC 573 (HL); In the matter of, *Madhu Limaye*, AIR 1969 SC 1014 : (1969) 1 SCC 292 . But if reasons for arrest are subsequently told, the unlawful arrest from that point will become lawful; *Lewis v. Chief Constable of the South Wales Constabulary*, (1991) 1 All ER 206 (CA).
35. *Christie v. Leachinsky*, (1947) AC 573 : (1947) AC 573 (HL).
36. *Wiltshire v. Barret*, (1965) 2 All ER 271; *Holgate Muhammad v. Duke*, (1984) 1 All ER 1054 (1058).

A lawful arrest made on proper grounds in respect of an offence which is also disclosed does not become illegal simply on the ground that there was a collateral motive of investigating a more serious crime in making the arrest.[37]

The safeguards in matters of arrest by a police officer in a cognizable offence judicially introduced by the Supreme Court in the cases of *Joginder Kumar, D.K. Basu* and other cases have now found statutory recognition in section 41(1)(a), and (b) as amended by the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) which received the Presidential assent on 7th January 2009. Section 41(1)(a), (b) and (ba) as amended read as follows:

> "41(1) When police may arrest without warrant.—Any police officer may without an order from a magistrate and without a warrant arrest any person:
>
> (a) who commits, in the presence of a police officer, a cognizable offence;
>
> (b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—
>
> (i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;
>
> (ii) the police officer is satisfied that such arrest is necessary—
>
> (a) to prevent such person from committing any further offence; or
>
> (b) for proper investigation of the offence; or
>
> (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
>
> (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to the police officer; or
>
> (e) as unless such person is arrested, his presence in the court whenever required cannot be ensured,
>
> and the police officer shall record while making such arrest, his reasons in writing:
>
> [38][Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest;]
>
> (ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence."

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37. *Christie v. Leachinsky*, (1947) 1 All ER 567, pp. 575, 581, 582 (HL); *R. v. Chalkley*, (1998) 2 All ER 155, pp. 176, 176 (CA).
38. Ins. by Act 41 of 2010, section 2 (w.e.f. 2-11-2010).

An arrest made by a police officer which does not comply with the safeguards so enacted or does not contain the reasons for arrest as required by clauses a to e of Section 41(1) b (ii) will be held illegal.

If investigation is not completed within 24 hours but there are grounds for believing that the information or accusation is well founded, the person arrested must be produced before a Magistrate.[39] Detention beyond 24 hours can only be under orders of a Magistrate before whom the arrested person is produced. Non-production of the person arrested before a Magistrate within twenty-four hours as required by Article 22(1) of the Constitution will make the arrest invalid.[40] Further, once it is shown that the arrests made by the police officers were illegal, patently routine remand orders passed mechanically by a Magistrate without applying his mind cannot make the arrest and detention legal.[41] In *Bhimsingh v. State of Jammu & Kashmir*,[42] Bhimsingh an M.L.A., was arrested on September 9, 1985 to prevent him from attending the Assembly Session on September 11. Remand orders were obtained from a Magistrate and a Sub-Judge, without producing him before the Magistrate and the Sub-Judge who acted in a casual way in granting the orders. Bhimsingh was released during the pendency of his petition under Article 32 of the Constitution before the Supreme Court and so the necessity of passing any release order did not arise but the court awarded Rs. 50,000 as compensation against the Kashmir Government for illegal arrest and imprisonment.

Even when the imprisonment is sanctioned by a court order it will become illegal after that sanction is over. For example when an undertrial prisoner suffered prolonged detention in prison even after his acquittal by the Court, he was held entitled to compensation against the State.[43] Similarly, when a prisoner's jail sentence is over, his detention thereafter will result in false imprisonment. But the jail authorities would not be liable if the warrant of detention issued by the court contains the mistake about the period of detention and the prisoner suffers excess detention because of that mistake.[44] In such a case in England even the crown would not be liable.[45]

Even a judicial officer who issues a warrant of arrest against a person recklessly or maliciously cannot be said to be acting judicially and will be liable for false imprisonment.[46] In a case where a person had to suffer a few days imprisonment because of orders of a High Court, the Supreme Court in appeal in the same case allowed him Rs. 10,000 as compensation against the State as there was "total non-application of mind at the stage of passing of the orders".[47]

Apart from arrest for criminal offences, a person may be arrested under special statutes, *e.g.* for recovery of abducted persons,[48] realisation of income-tax,[49] or

39. *Gulabchand Kannoolal v. State of M.P.*, 1982 MPLJ 7(18) (FB).
40. *Gunnupati Keshavram Reddy v. Nafisul Hasan*, AIR 1954 SC 636 : 1954 Cr LJ 1704. (This was a case of arrest on the warrant issued by the Speaker); *Manoj v. State of Madhya Pradesh*, AIR 1999 SC 1403, p. 1406.
41. In the matter of, *Madhu Limaye*, AIR 1969 SC 1014 : (1969) 1 SCC 292.
42. (1985) 4 SCC 677: AIR 1986 SC 494.
43. *Rudul Shah v. State of Bihar*, AIR 1983 SC 1086 : (1983) 4 SCC 141.
44. *Quinland v. Governor of Swaleside Prison*, (2003) 1 All ER 1173 (CA).
45. *Quinland v. Governor of Swaleside Prison*, (2003) 1 All ER 1173 (CA).
46. *Anwar Hussain v. Ajoy Kumar*, AIR 1965 SC 1651 : (1965) 2 Cr LJ 686; *State v. Tulsiram*, AIR 1971 All 162. See further Chapter 5, title (2) 'Judicial Acts'.
47. *Omwanti v. State of U.P.*, (2004) 4 SCC 425, p. 426.
48. *State of Punjab v. Ajaib Singh*, AIR 1953 SC 10 : 1953 SCR 254.
49. *Purshottam Govindji Halai v. D.M. Desai*, AIR 1956 SC 20 : (1955) 2 SCR 887.

arrears of land revenue[50] or being detained as a lunatic.[51] In all such cases, though Article 22(1) of the Constitution is not available,[52] the conditions laid down in the relevant statutes must be strictly complied with and the power honestly exercised, otherwise the arrest would be illegal; and, subject to any special protection conferred by the statute, will give rise to a claim for false imprisonment.[53]

3(D) Arrest by Private Person

Section 43 of the Code of Criminal Procedure, 1973 provides that a private person may arrest any person who in his view has committed a non-bailable and cognizable offence or is a proclaimed offender. After making the arrest the person arresting must make over the person arrested to a police officer of the nearest police station. It is not essential that a private individual, in whose presence a non-bailable and cognizable offence is committed, should himself physically arrest the offender. He may cause such offender to be arrested by another person.[54]

4. JUSTIFICATION

It has already been seen that in an action for trespass the burden to prove justification is on the defendant.[55] The action for trespass is available not only against a private person but also against the State and its officers. Undue extension of categories of justification will diminish the circumstances when a citizen can enforce his constitutional right of liberty against the State. Therefore, although categories of justification are not closed, extreme caution is necessary in extending them.[56] Apart from (1) Leave and Licence; and (2) Private Defence which have already been dealt with in Chapter V, trespass to person may be justified on grounds of (1) expulsion of trespasser; (2) retaking of goods; (3) lawful correction; (4) preservation of public peace; and (5) Statutory authority.

4(A) Expulsion of Trespasser

If a man enters into the house or land of another with force and violence, the owner is justified in turning him out without a previous request to depart and may use such force as is necessary,[57] but if he enters quietly, he must be first requested to retire before hands can be lawfully laid upon him to turn him out. A trespasser can be turned off by the owner before he has gained possession and he does not gain possession until there is acquiescence in the physical fact of his occupation by the owner.[58] This rule applies to squatters also who say that they are homeless.[59] An occupier is entitled to expel a trespasser and if necessary, even forcibly remove him from the premises. The law also allows a person to resort to a reasonable degree of force for the protection of himself or any other person against an unlawful use of force. Force is not reasonable if

50. *Collector of Malabar v. Erimal Ebrahim Hajee*, AIR 1957 SC 688 : 1957 CrLJ 1030.
51. *Everett v. Griffiths*, (1921) 1 AC 631 (HL).
52. See cases in footnotes in 48 to 50, *supra* and text and footnotes 29 to 32, p. 258.
53. *Everett v. Griffiths*, *supra*. See further *Holgate Muhammad v. Duke*, (1984) 1 All ER 1054 : (1984) AC 434 : (1984) 2 WLR 660 (HL) which lays down that statutory discretion to arrest can be challenged on Wednesbury principles. See text and notes 5 to 7, p. 267, *supra*.
54. *Gouri Prasad Dey v. Chartered Bank of India, Australia and China*, (1925) ILR 52 Cal 615.
55. See title (1), Introduction, text and note 8, p. 256, *supra*.
56. WEIR, Case Book on Tort, 5th edition, p. 269.
57. *Polkinhorn v. Wright*, (1845) 8 QB 197.
58. *McPhail v. Persons Unknown*, (1973) 3 All ER 393 : 1973 Ch 447 : (1973) 3 WLR 71 (CA).
59. *McPhail v. Persons Unknown*, (1973) 3 All ER 393 : 1973 Ch 447 : (1973) 3 WLR 71 (CA).

it is either unnecessary, *i.e.* greater than is requisite for the purpose or disproportionate to the evil to be prevented.[60] A shopkeeper is not bound to sell goods at the prices marked over them, and if one enters a shop and insists on having the goods and refuses to leave the shop, force may be used to remove him.[61] The plaintiff was a passenger by the defendant's railway. He having lost his ticket was unable to produce it when required. He was asked to pay the fare from the station whence the train originally started according to a condition published in the company's time-table. On his declining to do so, he was forcibly removed by the defendant's servants from the carriage in which he was travelling. He sued the company for assault. It was held that as the contract between the plaintiff and the defendants did not authorize the removal of a person failing to pay under such circumstances, the defendants were liable.[62] In another case, the plaintiff entered a carriage on the defendants' railway for the purpose of proceeding to B but without procuring a ticket through oversight. He asked for a ticket at intermediate stations but was refused. At the last place where he asked for a ticket he was asked to get out of the carriage, and on his not complying with the order he was forcibly removed from it. In an action by the plaintiff for this forcible removal, it was held that he was a trespasser and therefore his removal was not wrongful.[63]

4(B) Retaking of Goods

The rightful owner (or his servant by his command) may justify an assault in order to repossess himself of land or goods which are wrongfully in the possession of another, who refuses to deliver them up on request, so long as no unnecessary violence is used.[64]

4(C) Lawful Correction

Assault may be justified on the ground that it was done in exercise of parental or *quasi*-parental authority, *i.e.* for the correction of a pupil,[65] child, apprentice, or sailor on board a ship or a soldier. Here the chastisement must not be excessive or unreasonable.

4(D) Preservation of Public Peace

A person who disturbs public worship or a public meeting or a lawful game may be lawfully removed. Here the force used should not be more than what is necessary. Every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those steps in appropriate cases will include detaining him against his will.[66]

4(E) Statutory Authority

Assault may be justified on the ground that it was done in serving legal process, including search under any law. Statutory power of arrest and detention which is inherent in this context has already been considered.[67]

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60. *Sitaram v. Jaswant Singh*, 1951 NLJ 477.
61. *Timothy v. Simpson*, (1835) Cr M & R 757.
62. *Butler v. Manchester, Sheffield & Lincolnshire Ry. Co.*, (1888) 21 QBD 207.
63. *Pratap Daji v. B.B. & C.I. Ry.*, (1875) ILR 1 Bom 52.
64. *Blades v. Higgs*, (1861) 10 CB NS 713; *Anthony v. Haney*, (1832) 8 Bing 186.
65. *Clearly v. Booth*, (1893) 1 QB 465; *Mansell v. Griffin*, (1908) 1 KB 160.
66. *Albert v. Lacin*, (1981) 3 All ER 878, p. 880 : (1982) AC 546 : (1981) 3 WLR 955 (HL).
67. See title 3(C) *ante*.

5. DAMAGES

The plaintiff is entitled to recover by way of general damages compensation for the indignity or suffering which the trespass has caused. Damages should be commensurate with the injury and annoyance caused even though there has been no serious personal injury.[68] Damages will vary according to the circumstances of each case. But generally they should be exemplary where the plaintiff's complaint is oppressive, arbitrary and unconstitutional action by the State or its servants.[69]

The circumstances of time and place as to when and where the assault was committed, and the degree of personal insult must be considered in estimating the nature of the offence and the amount of damages. It is a greater insult to be beaten in a public place than in a private room. But if punishment in person is resorted to, that must always be an important element in mitigation in subsequently estimating the amount of damages.[70] The plaintiff's position should be considered for the purpose of seeing how far the compensation awarded is commensurate with the injury inflicted.[71] For the loss of an eye the plaintiff besides getting special damages is entitled to damages for loss of earnings, medical expenses incurred, pain and suffering, loss of earning capacity, and for risk of becoming permanently blind if the other eye is damaged.[72]

When it is proved that there was no justification for an assault, a person is liable for all the direct consequences flowing from the wrongful injury caused.[73]

When the assault has been carried to the extent of maiming or crippling, or of wounding a person, damages will be greater than those awarded for a mere assault or battery.

In the case of a joint assault, the true criterion of damages is the whole injury which the plaintiff has sustained from the joint act of trespass.[74]

Dealing with a case of false imprisonment by the police, LORD DEVLIN, speaking for the Privy Council, observed: "The court is not in this category of case confined to awarding compensation for loss of liberty and for such physical and mental distress as it thinks may have been caused. It is also proper for it to mark any departure from constitutional practice, even only a slight one, by exemplary damages."[75] The Privy Council[76] also approved in this context the observations of SCOTT, L.J. in *Dumbell v. Roberts*;[77] "The more highhanded and less reasonable the detention is, the larger may be the damages; and conversely, the more nearly reasonably the defendant may have

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68. *Ramjoy v. Russell*, (1864) WR (Gap No.) 370; *Bhyrau Pershad v. Isharee*, (1871) 3 NWP 313. A plaintiff in claiming damages for a criminal assault is not entitled to include in his claim costs incurred by him in successfully prosecuting the defendant for the hurt caused to the plaintiff by the defendant: *Jagan Nath v. Hakim*, (1915) PR No. 17 of 1916; *Lahori v. Ram Chand*, (1931) 32 PLR 42. Where the damages awarded in compensation for an assault were beyond the means of the defendant, the Court reduced them on the defendant's tendering a written apology to the plaintiff, expressing his regret for what had passed : *MacIver v. Shungeshur Dutt*, (1866) 6 WR 95.
69. *Rookes v. Barnard*, 1964 AC 1129 (HL), p. 1226 : (1964) 2 WLR 269 : (1964) 1 All ER 367 ; *Cassell & Co. Ltd. v. Broome*, (1972) AC 1027 (HL).
70. *Misr. Ramji v. Jiwan Ram; Kidar Nath v. Misr. Ramji*, (1881) 1 AWN 131.
71. *Joypal Roy v. Mukoond Roy*, (1872) 17 WR 280.
72. *Abdul Ghaffar Khan v. Gokul Prasad*, ILR (1936) Nag 1.
73. *Sitaram v. Jaswant Singh*, 1951 NLJ 477.
74. *Clark v. Hewsam*, (1847) 1 Ex 131; *Ramessur v. Shib Narain*, (1870) 14 WR 419.
75. *Shabban Bin Hussien v. Chong Fook Kam*, (1969) 3 All ER 1626 (PC).
76. *Shabban Bin Hussien v. Chong Fook Kam*, (1969) 3 All ER 1626 (PC).
77. (1944) 1 All ER 326.

acted, the smaller will be the proper assessment."[78] The assessment will include compensation for indignity, mental suffering, disgrace, humiliation, and loss of social status and reputation.[79]

The topic of exemplary damages has been also separately dealt with in Chapter IX (pp. 194 to 196). Further, cases relating to award of damages against the state for violation of right to life and personal liberty as guaranteed under Article 21 of the Constitution have been discussed in Chapter III title 8(B).

78. (1944) 1 All ER 326., p. 329.
79. *State of Rajasthan v. Rikhabchand*, AIR 1961 Raj 64; *S. Pande v. S.C. Gupta*, AIR 1969 Pat 194 (202).

CHAPTER XII

DEFAMATION

SYNOPSIS

1. GENERAL

EVERY man has a right to have his reputation preserved inviolate. This right of reputation is acknowledged as an inherent personal right of every person as part of the right of personal security.[1] It is a *jus in rem*, a right good against the entire world. A man's reputation is his property, more valuable than other property.[2] No mere poetic fancy suggested the truth that a good name is rather to be chosen than great riches. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter.[3] But the law of defamation like many other branches of the law of torts provides for balancing of interests. The competing interest which has to be balanced against the interest which a person has in his reputation is the interest which every person has in freedom of speech. The wrong of defamation protects reputation and defences to the wrong, *viz.* truth and privilege protect the freedom of speech. The existing law relating to defamation is a reasonable restriction on the fundamental right of freedom of speech and expression conferred by Article 19(1)(a) of the Indian Constitution and is saved by clause (2) of Article 19.[4] Many people in England feel that the present law of defamation gives too

1. Blackstones Commentary of the Laws of England, Vol. 1 (IV edition), p. 101; Corpus Juris Secundum, Vol. 77, p. 268; *D.F. Marin v. Davis*, 55 American Law Reports, p. 171; *Smt. Kiran Bedi & Jinder Singh v. Committee of Inquiry*, AIR 1989 SC 714, pp. 725, 726.
2. *Dixon v. Holden*, (1869) LR 7 Eq 488.
3. *De Crespigny v. Wesllеley*, (1829) 5 Bing 392.
4. SEERVAI, Constitutional Law of India, 3rd edition, Vol. 1, p. 495; *S.N.M. Abdi v. Prafulla K. Mahanta*, AIR 2002 Gau 75, p. 76.

much protection to reputation and imposes too great a restriction on the freedom of speech.[5]

The wrong of defamation may be committed either by way of writing, or its equivalent, or by way of speech. The term 'libel' is used for the former kind of utterances, 'slander' for the latter. Libel is a written, and slander is a spoken, defamation. A learned judge of Madhya Pradesh High Court holds that there may be a hybrid type of defamation not falling within the recognised categories of libel and slander. In that case it was held that the bridegroom and his father in refusing to take the bride to their home after marriage in full gaze of the guests committed the tort of defamation and damages could be awarded for loss of reputation.[6]

A defamatory statement is a statement calculated to expose a person to hatred, contempt or ridicule, or to injure him in his trade, business, profession, calling or office, or to cause him to be shunned or avoided in society. To be defamatory, a statement need only have the tendency to affect a person's reputation; it need not actually lower it. However, the standard to be applied is whether his reputation is affected in the estimation of right-thinking members of the society generally. Mere insult or abuse do not by itself constitute defamation, although it may be offensive to a man's dignity, unless and until it is proved to have lowered his reputation in the estimation of others.[7]

A *libel* is a publication of a false and defamatory statement tending to injure the reputation of another person without lawful justification or excuse. The statement must be expressed in some permanent form, *e.g.*, writing, printing, pictures, statue, waxwork effigy, *etc.*

A *slander* is a false and defamatory statement by spoken words or gestures tending to injure the reputation of another.

2. DISTINCTION BETWEEN LIBEL AND SLANDER

There are the following three points of difference between a libel and a slander:

(1) A libel is a defamation in some permanent form, *e.g.*, a written or printed defamation. A slander is defamation in a transient form, *e.g.*, spoken words and gestures.

(2) At common law a libel is a criminal offence as well as a civil wrong, but a slander is a civil wrong only; though the words may happen to come within the criminal law as being blasphemous, seditious, or obscene, or as being a solicitation to commit a crime or as being a contempt of Court.[8] Under the Indian law, both libel and slander are criminal offences.[9]

(3) A libel is of itself an infringement of a right and no actual damage need be proved in order to sustain an action. At common law, a slander is actionable only when special damage can be proved to have been its natural consequence, or when it conveys certain imputations. An action may be maintained for defamatory words reduced into writing, which would not have been actionable if merely spoken.[10] But there are exceptions under the English law where slander is actionable without proof of special damage.

5. WEIR, Case Book on Tort, 5th edition, p. 435.
6. *Noor Mohd. v. Mohd. Jiauddin*, AIR 1992 MP 244, p. 249 (para 15).
7. *B. Kalyani v. District Collector, Villupuram*, (2012) 2 MWN (Civil) 133:(2012) 2 Mad LJ 881.
8. *The Queen v. Holbrook*, (1878) 4 QBD 42, 46.
9. Section 499, Penal Code.
10. *Thorley v. Earl of Kerry*, (1809) 3 Camp. 214 n.

These exceptions[11] are when the slander contains imputation of: (a) a criminal offence punishable with imprisonment,[12] (b) a contagious or infectious disease likely to prevent other persons from associating with the plaintiff;[13] (c) unchastity or adultery to any woman;[14] and (d) unfitness, dishonesty, or incompetence in any office, profession, calling, trade or business held or carried on by the plaintiff at the time when the slander was published.[15] THE FAULKS Committee in its Report in 1975 recommended abolition of the distinction which when implemented will mean that no human plaintiff need prove any special damage but institutional plaintiffs should prove that the words actually caused loss or were likely to do so.[16] The consensus of opinion is not to apply in India this distinction of the common law and to hold that slander too is actionable without proof of special damage.[17]

Three reasons are assigned for this difference:—

(1) In a libel the defamatory matter is in some permanent form—in writing or painting —*e.g.*, a statue, effigy, caricature, signs or picture marks on a wall. A slander is in its nature transient, and is in the form of spoken words or significant gestures.

(2) A slander may be uttered in the heat of the moment, and under a sudden provocation; the reduction of the charge into writing and its subsequent publication in a permanent form show greater deliberation and raise a suggestion of malice.[18]

(3) A libel conduces to a breach of the peace; a slander does not. This distinction which is recognised in the English law is severely criticised by the framers of the Indian Penal Code.[19]

3. LIBEL

In order to found an action for libel it must be proved that the statement complained of is (*i*) false; (*ii*) in writing; (*iii*) defamatory; and (*iv*) published.

3(i) False

The falsity of the charge is presumed in the plaintiff's favour.[20] The burden of proof that the words are false does not lie upon the plaintiff. Defamation of a person is taken to be false until it is proved to be true. Further if a man has stated that which is false and defamatory, malice is also assumed.[21] It is, however, customary for the plaintiff to allege in his plaint that the imputation is false and malicious. 'Malicious' here means that the publication was without just cause or excuse. The motive of the defendant is not material in determining liability. Existence of malice in the sense of evil motive may be relevant in assessment of damages, otherwise no notice of it need be taken during the trial except when the plea is of unintentional defamation under

11. See title 4(*i*), p. 286, *post* for detailed discussion.
12. *Simmons v. Mitchell*, (1880) 6 AC 156 : 43 LT 710 (PC).
13. *Bloodworth v. Gray*, 7 Man & G 334.
14. Section 1, C. 51, Slander of Women Act, 1891 (UK).
15. 52, Defamation Act, 1952 (UK).
16. WEIR, Case Book on Tort 5th ed., p. 435.
17. See title 4 (ii), p. 289, *post*.
18. *Clement v. Chivis*, (1829) 9 B & C 172.
19. See RATANLAL AND DHIRAJLAL, Law of Crimes, 23rd edition, section 499, Comment.
20. *Belt v. Lawes*, (1882) 51 LJ QB 359.
21. *Ogilvie v. The Punjab Akhbarat & Press Co.*, (1929) ILR 11 Lah 45; *Lt. Col. Gidney v. The A.I. & D.E. Federation*, (1930) ILR 8 Ran 250; *Narayanan v. Narayana*, AIR 1961 Mad 254; *Clarke v. Malyneux*, (1877) 3 QBD 237, 247, followed in *Ratan v. Bhaga*, (1896) PJ 376. See *Dhurmo Dass v. Kaylash*, (1869) 12 WR 372.

the Defamation Act, 1952 (English) or principles analogous to it;[22] of fair comment[23] or of qualified privilege.[24]

3(ii) In Writing

The defamatory statements may be in writing or in printing, or may be conveyed in the form of caricatures or any other similar representations, *e.g.*, a scandalous picture.[25] Defamation through the agency of mechanically reproduced pictures and words for example, a talking cinematograph film—constitutes a libel. Princess Irina of Russia, the wife of Prince Youssoupoff, claimed damages for a libel contained in a sound film entitled "Rasputin the Mad Monk", alleging that *Metro-Goldwyn-Mayer Pictures Limited*, had published pictures and words in the film which were understood to mean that she, therein called "Princess Natasha", had been raped or seduced by Rasputin. The jury returned a verdict in favour of the Princess and awarded £ 25,000 damages and the trial court entered judgment for her for that amount which was confirmed by the court of Appeal. SLESSER, L.J., said: "There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter, to be seen by the eye, and is the proper subject of an action for libel, if defamatory. I regard the speech which is synchronised with the photographic reproduction and forms part of one complex common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen."[26] There is a difference of opinion—though it has not been judicially decided—whether defamatory matter recorded on a gramophone disc is libel or slander.[27] The record being a permanent form, it supports the view that the distribution of the record by the manufacturer, like the distribution of any printed matter, is libel and the speaker whose voice is recorded will be vicariously liable for libel along with the manufacturer or the distributor although at the time when his voice was recorded, he was uttering only a slander. On the other hand, as the matter recorded on the record cannot be communicated to anyone until it is played in the machine and communication takes the form of speech, this supports the view that the record though in permanent form is only potential slander. Under the Defamation Act, 1952,[28] the broadcasting of words by means of wireless telegraphy *i.e.* radio and television is treated as publication in permanent form. Similarly by the Theatres Act, 1968 (UK), theatrical performances are treated as publication in permanent form *i.e.* libel.

3(iii) Defamatory

Any words will be deemed defamatory which

(a) expose the plaintiff to hatred, contempt, ridicule, or obloquy; or

(b) tend to injure him in his profession or trade; or

(c) cause him to be shunned or avoided by his neighbours.

The test is whether the words would "tend to lower the plaintiff in the estimation of right-thinking members of society generally".[29] In applying this test the statement

22. For unintentional defamation see title 3(iii)(f), p. 280, *Post*.
23. For fair comment, see title 6(ii), p. 293, *Post*.
24. See title 6 (iii) (c), p. 306, *Post*.
25. *Du Bost v. Beresford*, (1810) 2 Camp 511; *Carr v. Hood*, (1808) 1 Camp 355n.
26. *Yousoupoff v. Metro-Goldwyn-Mayer Pictures Limited*, (1934) 50 TLR 581, 587 : 78 SJ 617.
27. WINFIELD & JOLOWICZ think it is slander; Tort, 12th edition., p. 296. In SALMOND & HEUSTON on Torts, it is submitted that it is libel; 18th edition., p. 131. See further POLLOCK, Torts, 15th edition, p. 176n.
28. 15&16 Geo. 6&1 Eliz 2, c. 66, secs. 1, 16.
29. *Sim v. Stretch*, (1936) 2 All ER 1237, (1240) : (1936) 52 TLR 669 : 80 SJ 703 (HL) (LORD ATKIN).

complained of has to be read as a whole and the words used in it are to be given their natural or ordinary meaning which may be ascribed to them by ordinary men.[30] The ordinary man after reading the writing does not contemplate of reading it again and again for deriving its meaning. So the meaning of words in a libel action "is a matter of impression as an ordinary man gets on the first reading, not on a later analysis".[31] This is especially the case for a viewer of television who receives a succession of spoken words and visual images which he is unable to have repeated for the purpose of rejection or clarification.[32] The question is not of construction in the legal sense for the ordinary man "is not inhibited by a knowledge of the rules of construction and he can and does read between the lines in the light of his general knowledge and experience of worldly affairs";[33] and further "the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory."[34]

If the defamatory statement consists of an article with a headline and photograph the whole of the article including the headline and photograph has to be taken together and considered whether in its natural and ordinary meaning which may be ascribed to it by ordinary men it is defamatory of the plaintiff.[35]

It may be that the impression created by one part of the statement is that it is defamatory but this is not enough for the statement has to be taken as a whole. In the classic words of Alderson, B, "the bane and antidote must be taken together," though it is often a debatable question whether the antidote is effective to neutralise the bane and in determining this question, one may have to consider the mode of publication and the relative prominence given to different parts.[36] The above rule that the statement must be read as a whole is not displaced by the fact that many readers may not read the whole of the statement or by the fact that different readers may understand it differently. In cases where no legal *innuendo* is alleged, the court after reading the published statement as a whole "is required to determine the single meaning which the publication conveyed to the notional reasonable reader."[37]

There are statements which without any reasonable doubt are defamatory. For example, it is libellous to publish that a newspaper proprietor is a 'libellous journalist,'[38] or that a barrister is a 'quack lawyer' and 'mounte-bank' and an 'imposter',[39] or that a pleader got up a receipt with false recitals in respect of his remuneration,[40] or that a Zamindar is an 'insolent upstart'.[41] To say of an actor in two articles that he was 'hideously ugly' could be defamatory,[42] similarly to say of a woman that she has been ravished is defamatory of her as tending to cause her to be

30. *Ramakant v. Devilal*, 1969 MPLJ 805 (G.P. SINGH, J.).
31. *Hayward v. Thompson*, (1981) 3 All ER 450 (458) (CA). See further *Telnikoff v. Matusevitch*, (1991) 4 All ER 817 : (1992) 2 AC 343 : (1991) 3 WLR 952 (HL) (Letter published in response to an article should be considered without reference to the article as many readers may not have read the article).
32. *Channel Seven Adelade Pty Ltd. v. Manock*, (2007) 82 ALJR 303 p. 314 para 37.
33. *Lewis v. Daily Telegraph Ltd.*, (1963) 2 All ER 151 (HL) (154) : 10 SJ 356. (LORD REID); *Ramakant v. Devilal, supra; Keays v. Murdoch (U.K.) Ltd.*, (1991) 1 WLR 1184 (C.A.), p. 1192.
34. *Lewis v. Daily Telegraph Ltd., supra*, p. 169 (LORD DEVLIN).
35. *Charleston v. News Group Newspapers Ltd.*, (1995) 2 All ER 313 : (1995) 2 AC 65 (HL).
36. *Charleston v. News Group Newspapers Ltd.*, (1995) 2 All ER 313, pp. 316, 317.
37. *Charleston v. News Group Newspapers Ltd.*, (1995) 2 All ER 313, p. 317.
38. *Wakley v. Cooke*, (1849) 4 Ex 511.
39. *Wakley v. Healey*, (1849) 7 CB 591.
40. *Vaidianatha Sastriar v. Somasundar Thambiran*, (1912) 24 MLJ 8.
41. *Brij Nath Sarin v. F.M. Byrne*, (1912) 9 ALJR 253.
42. *Berkoff v. Burchill*, (1996) 4 All ER 1008 : (1997) EMLR 139 (CA).

shunned and avoided although it involves no moral turpitude on her part.[43] It is libellous to write and publish of a man that he is "a villain",[44] a man of gross misconduct,[45] a man of straw,[46] and unfit to be trusted with money.[47] An obituary notice of a living person,[48] and an ironical praise,[49] or a caricature of an amateur golfer for advertising goods if his status is likely to be lost,[50] may be libels. The exhibition of a waxen effigy of a person who had been tried for murder and acquitted in company of notorious criminals, may be defamatory because this shows that though not found guilty he was a criminal himself.[51] It is not necessary that the act or conduct imputed to the plaintiff should be prohibited by law and it would amount to defamation if the conduct imputed is disgraceful; for example a statement alleging that the plaintiff got elected as President of the District Congress Committee by paying money to the voters was held to be defamatory.[52] Defendant published about plaintiff that he was involved in a murder and was liable to be sent to jail. Plaintiff filed a suit for defamation as *fourma papuris* i.e. pauper suit. Trail court dismissed the suit on grounds that plaintiff's relatives are involved in a criminal case. It was also observed that suit filed is a pauper suit and plaintiff does not have worldly possessions. Trial court held that under such circumstances, plaintiff cannot be possessed of either integrity or reputation capable of being hurt. In appeal, High Court set aside the judgment of Trial Court terming holding the reasoning to be completely erroneous. It was held that wealth does not determine reputation and plaintiff has a right to safeguard his reputation and live with dignity.[53] Making and publicly exhibiting an effigy of a person, calling it by the person's name, and beating it with shoes, are acts amounting to defamation.[54] A wrote letters to the husband of X, in which he alleged that X was a witch and had by her sorcery caused the death of some relations of A. A also made similar statements to their castemen. It was held that A was liable.[55] The defendant falsely published statements to the effect that plaintiff's wife was a woman of low caste, between which and the plaintiff's own caste inter-marriage and intercourse of any kind were prohibited; upon this the plaintiff's brotherhood expelled him and his wife from caste. It was held that the above facts furnished ample grounds for an action for defamation.[56] Allegations that the plaintiff managing director of a co-operative Society indulged in malpractices and was having illicit intimacy with several ladies were held to be *perse* defamatory.[57] Where the defendant published in a newspaper of a woman, who was an instructress in physical culture and dancing, and who also ran an industrial institution for poor Parsi girls, that she was unfit to carry on her profession or work, and that by carrying it on she would be in a position to ruin the future of the girls taking their training in her classes, it was held that that was a gross libel.[58]

43. *Youssoupoff v. Metro-Goldwyn-Mayer Pictures Limited*, (1934) 50 TLR 581 : 78 SJ 617.
44. *Bell v. Stone*, (1798) 1 B & P 331.
45. *Clement v. Chivis*, (1829) 9 B & C 172.
46. *Eaton v. Johns*, (1842) 1 Dowl NS 602.
47. *Cheese v. Scales*, (1842) 10 M & W 488.
48. *McBride v. Ellis*, 9 Rich 313.
49. *Boydell v. Jones*, (1838) 4 M & W 446; *Hick's* Case, (1618) Poph 139.
50. *Tolley v. J.S. Fry & Sons Ltd.*, (1931) AC 333 : 145 LT 1 : 47 TLR 351.
51. *Monson v. Tussauds*, (1894) 1 QB 671.
52. *Ramakant v. Devilal*, 1969 MPLJ 805 : 70 LT 355.
53. Mushtaq Ahmad Mir v. Akash Amin Bhat, AIR 2010 J&K 11.
54. *Pitumber Dass v. Dwarka Prashad*, (1870) 2 NWP 435. Burning a man's effigy is a libel: *Eyre v. Garlick*, (1878) 42 I P 68.
55. *Shoobhagee Koeri v. Bokhori Ram*, (1906) 4 CLJ 393. It was further held that the husband had no cause of action against A.
56. *Sant v. Bhag Mal*, (1882) PR No 140 of 1882.
57. *Gorantla Venkateshwarlv v. B. Demudu*, AIR 2003 AP 251 : (2003) 2 ALD 649.
58. *Mitha Rustomji Murzhan Nusserwamji Engineer*, (1941) 43 Bom LR 631.

Words which imputed unworthiness to remain a member of a caste were held to be defamatory.[59] To say that a person is insolvent or that he is in charge as director of a family company which is insolvent may be construed as defamatory.[60] It was defamatory to publish an unskilful reproduction of an artist's work.[61] A single letter may not be defamatory, but the cumulative effect of several letters may be so.[62]

There are cases which give rise to sharp divergence of opinion as to the meaning which an allegedly offensive statement could convey. In *Lewis v. Daily Telegraph Ltd.*,[63] the Daily Mail and the Daily Telegraph published respectively news-items with headings "Fraud squad Probe Firm" and "Inquiry on Firm by City Police." SALMAN, J., who tried the case, DAVIES L.J., in the court of Appeal and LORD MORRIS in the House of Lords were of opinion that the words quoted above were capable of conveying that the firm was guilty of fraud. On the other hand, HOLROYD PEARCE, L.J., HOVERS, J., LORDS REID, HODSON and DEVLIN were of the view that the words could not convey guilt but only suspicion and could be defamatory only to that extent.

In England the rule to be applied by a Judge in deciding whether or not words were capable of a defamatory meaning is whether a reasonable jury would be justified in finding that the words complained of were defamatory, and, notwithstanding the various inoffensive meanings which the words complained of might be said to be capable of bearing, it should be impossible to hold that they were not capable of a defamatory meaning.[64] In a jury trial, it is for the Judge to rule whether the words are capable of bearing each of the meanings contended for by the plaintiff and to direct the jury clearly if the words are incapable of bearing any meaning alleged by the plaintiff.[65] But if the words are capable of bearing a meaning alleged by the plaintiff the question whether they were understood in that sense or in some other sense contended for by the defendant should be left to the jury.[66] In India, where a defamation suit is not tried by jury, it is for the Judge to decide finally the meaning of the words alleged to be defamatory bearing in mind the test of ordinary man. In a case of libel, it is not necessary to prove the actual loss of reputation; it is sufficient to establish that the defamatory statements made could damage one's reputation.[67]

3(iii)(a) Defamatory Statement Must Refer to Plaintiff

In an action for defamation the plaintiff must show that the defamatory statement refers to him. It is not necessary for this purpose that the plaintiff should have been described by his own name. It is sufficient if he is described by the initial letters of

59. *Cooppoosami Chetty v. Duraisami Chetty*, (1909) ILR 33 Mad 67; *Ravunni Menon v. Neelakandan Nambudri*, (1934) MW No. 345. But a person is not liable for defamation when the words used do not amount to saying that the plaintiff has lost caste or has done acts which necessarily involve the losing of caste but simply amount to an expression of unwillingness on the part of the defendant to associate with the plaintiff or to utilize his services by reason of his sympathy with widow marriage shown by dining with remarried widows or associating with persons who have dined with them; *Venkayya v. Venkataramiah*, (1914) 28 MLJ 58.
60. *Aspro Travel Ltd. v. Owners Abroad Group plc.*, (1995) 4 All ER 728 (CA) p. 733 : (1996) 1 WLR 132.
61. *Krishnappa v. S. Akhanda Nanda*, (1938) 42 CWN 1045.
62. *Irwin v. Reid*, (1920) ILR 48 Cal 304.
63. (1963) 2 All ER 151 : (1964) AC 234 : (1963) 2 All ER 1063 (HL).
64. *Morris v. Sandess Universal Products*, (1954) 1 All ER 47.
65. *Capital and Counties Bank Ltd. v. Henty and Sons*, (1882) 7 AC 741 : 52 LTQB 232; *Lewis v. Daily Telegraph Ltd.*, (1963) 2 All ER 151 : (1964) AC 234 : (1963) 2 All ER 1063 (HL).
66. *Capital and Counties Bank Ltd. v. Henty and Sons*, (1882) 7 AC 741 : 52 LTQB 232
67. *Sadashiba v. Bansidhar*, AIR 1962 Ori 115. See also *Habib Bhai v. Pyarelal*, AIR 1964 MP 62 : (1943) KB 80 : 167 LT 376 : (1942) 2 All ER 555.

his name, or even by a fictitious name, provided he can satisfy the court that he was the person referred to.[68] It is immaterial whether the defendant intended the defamatory statement to apply to the plaintiff, or knew of the plaintiff's existence, if the statement might reasonably be understood by those who knew the plaintiff to refer to him. The reason is that a man publishing a libel does so at his own risk. "A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame or that he intended not to defame the plaintiff, if in fact he did both."[69] The intention or motive with which the words are used is immaterial, and, if the matter complained of does refer, or would be deemed by reasonable people to refer, to the plaintiff, the action can be maintained.[70] "Liability for libel does not depend on the intention of the defamer; but on the fact of defamation."[71] It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant.[72]

In *E. Hulton & Co. v. Jones*[73] an article was published by the defendants in the Sunday Chronicle by their Paris Correspondent describing a motor festival at Dieppe in which reference was made to one Artemus Jones, a church warden, at Peckham and it was stated that he was having a gay time and was in the company of a woman who was not his wife. The plaintiff who was a barrister was baptised as Thomas Jones but later took the additional name of Artemus. He was not a church-warden, he did not live at Peckham and had not been to the Dieppe festival. The plaintiff accepted that the writer of the article and the editor of this paper knew nothing of him and did not intend the article to refer to him. Plaintiff's witnesses, however, deposed that they took the article to refer to him. CHANNEL, J. in his direction to the Jury laid down the law as follows: "The real point upon which your verdict must turn is, ought or ought not sensible and reasonable people reading this article to think that it was a mere imaginary person. If you think any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that people would suppose it to mean some real person—those who did not know the plaintiff of course would not know who the real person was, but those who did know of the existence of the plaintiff, would think that it was the plaintiff—then the action is maintainable." The jury awarded damages and judgment was entered for the plaintiff. Appeals to the court of Appeal and House of Lords were dismissed. LORD LOREBURN, L.C.[74] expressly approved the law stated by CHANNEL, J. It is not even necessary that the plaintiff should have been named at all nor is it necessary that the statement in question should contain a key or pointer

68. *Le Fanu v. Malcolmson*, (1848) 1 HLC 637, 668; *Knupffer v. London Express Newspapers Ltd.*, (1944) AC 116. If the defamatory statements relate to the members of the executive Board of a cooperative society and not to the society, the society cannot sue for defamation : *Ritnand Balved Education Foundation v. Alok Kumar*, AIR 2007 Del 9 : (2006) 131 DLT 563 : (2006) 9 DRJ 714.
69. *E. Haulton & Co. v. Jones*, (1910) AC 20, 23 : 101 LT 831 : 26 TLR 128; *Ogilvie v. The Punjab Akhbarat and Press Company*, (1929) ILR 11 Lah 45.
70. *Jones v. E. Houlton & Co.*, (1909) 2 KB 444, 455; *Newstead v. London Express Newspapers Ltd.*, (1939) 2 KB 317, (1940) 1 KB 377 : 167 LT 17; *W.A. Providence v. P.T. Christensen*, (1914) 7 BLT 155; *Union Benefit Guarantee Company v. Thakorlal Thakor*, (1935) 37 Bom LR 1033; *Baba Gurdit Singh v. "Statesman" Ltd.*, (1935) ILR 62 Cal 838.
71. *Cassidy v. Daily Mirror Newspapers*, (1929) 2 KB 331, 354 : 45 TLR 485 : 98 LJ KB 595. For statutory reform in this respect see title 3(iii)(f), p. 280, *post*.
72. *Bourke v. Warren*, (1826) 2 C&P 307 (309); *Nevill v. Fine Art & G.I. Co.*, (1897) AC 68, 73; *Hough v. London Express Newspapers Ltd.*, (1940) 2 KB 507 : (1940) 3 All ER 31. Whether any or what portion of an alleged libel applies to the plaintiff is a question of fact : *Naganatha v. Subramania*, (1917) 21 MLJ 324. To come to a conclusion as to whether certain words referred to a particular individual or not, the view of the ordinary responsible reader of the article in question should be given effect to : *Oglivie v. The Punjab Akhbarat and Press Co.*, (1929) ILR 11 Lah 45; *Lachhmi Narain v. Shambhu Nath*, (1930) 29 ALJR 16.
73. (1910) AC 20 (HL).
74. (1910) AC 20 (HL).

indicating that it refers to him. In *Morgan v. Odham's Press Ltd.*[75] it was published in a newspaper article that a girl had been kidnapped by a dog-doping gang and kept in a flat at Kilburn during a specified week. The girl was staying in the plaintiff's flat at Cricklewood in the previous week. The plaintiff produced witnesses who deposed that on reading the article, they understood that he was in some way connected with the gang. The jury awarded damages to the plaintiff. The court of Appeal dismissed the claim on the ground that the article contained no key or pointer which referred to the plaintiff. The House of Lords reversed the court of Appeal and held that it is not essential that the plaintiff should be named or there should be some key or pointer referring to him and that the jury could reasonably hold that readers of the articles would ignore the discrepancies of place and time and think of the plaintiff while reading the article. It was also held that it was immaterial that no person who read the defamatory statement believed in it.

The court of Appeal in *Newstead v. London Express*[76] has made it possible that a statement referring to a real person and alleging something true about him may yet be defamatory of another person bearing the same name. In that case, the statement was that "Harold Newstead, thirty year old Camberwell man" had been found guilty of bigamy. This statement was true of a barman of that name of Camberwell. The plaintiff bearing the same name and aged about thirty, who carried on hair dressing business at Camberwell and about whom the statement was untrue succeeded in recovering damages in an action for defamation.

Although when a statement on the face of it is not defamatory, a subsequent statement cannot be relied upon to show that it was defamatory, but when the statement is defamatory and the only question is as to the identity of the person intended to be defamed, a subsequent statement by the same party may be referred to.[77] When the statement does not expressly refer to the plaintiff, extrinsic evidence is admissible to show that persons knowing the plaintiff understood the statement to relate to him.[78]

3(iii)(b) Innuendo

Words are *prima facie* defamatory when their natural, obvious and primary sense is defamatory. Words *prima facie* innocent are not actionable unless their secondary or latent meaning is proved by the plaintiff. Where the words alleged to be defamatory do not appear to be such on their face, the plaintiff must make out the circumstances which made them actionable, and he must set forth in his pleading the defamatory sense he attributes to them.[79] Such explanatory statement is called an *innuendo*. An *innuendo* is an explanatory averment in the statement of claim defining the meaning which the plaintiff assigns to the words complained of or specifying the plaintiff as the person to whom they apply. It is the office of an *innuendo* to define the defamatory meaning which the plaintiff sets on the words; to show how they come to have that defamatory meaning; and also to show how they relate to the plaintiff

75. (1971) 1 WLR 1239 (HL).
76. (1940) 1 KB 377 : (1939) 4 All ER 319 : 167 LT 17 : 83 SJ 942.
77. *Hayward v. Thompson*, (1981) 3 All ER 450 : (1982) QB 47 (CA) distinguishing *Grappelli v. Derek Block (Holdings) Ltd.*, (1981) 2 All ER 272 : (1981) 1 WLR 822 : 125 SJ 169 (CA).
78. *E. Houlton & Co. v. Jones*, (1910) AC 20 (HL); *Morgan v. Odhams Press Ltd.*, (1971) 1 WLR 1239 : (1971) 2 All ER 1156 (HL).
79. *Jacobs v. Achmaltz*, (1890) 62 LT 121. When a plaintiff complains of words in their natural and ordinary meaning he must accept that meaning and all its derogatory imputations and he cannot select some of the imputations and reject others: per LORD DENNING, M.R. in *Slim v. Daily Telegraph Ltd.*, (1968) 1 All ER 497 : (1968) 1 QB 157 : (1968) 2 WLR 599; See also, *Seagram India Pvt. Ltd. v. Vipin Sohanlal Sharma*, (2010) 170 DLT 747.

whenever that is not clear on the face of them.[80] In the absence of an *innuendo*, no evidence can be admitted to prove a special meaning, and the suit will be dismissed. An *innuendo* is necessary where the imputation is made in an oblique way, or by way of question, exclamation, or conjecture, or irony. An *innuendo*, properly so called, which provides a separate cause of action, must be supported by extrinsic facts or matter and cannot be founded on mere interpretation.[81] It has already been seen that there is no rule that, before an article could be said to be defamatory of a person, it must contain within itself some 'key or pointer' indicating that it referred to him; where necessary extrinsic evidence is admissible to import a defamatory meaning to words otherwise innocent.[82]

The cause of action based on natural or ordinary meaning is materially different from a cause of action based on some special meaning derived from special circumstances. There may also be difference of opinion as to what is the ordinary meaning of certain words without reference to any special circumstances. If that is the position, the plaintiff will state in the plaint what in his view is the natural and ordinary meaning and the person or persons to whom the statement was published, save in the case of a newspaper or periodical or a book which is published to the world at large.[83] When the plaintiff relies on the natural and ordinary meaning without reference to any special circumstances and pleads the meaning which according to him is the natural meaning, such a plea is also popularly called as pleading an *innuendo*.[84] But this is materially different from a cause of action based on a true or legal *innuendo* which arises when the plaintiff relies on some special circumstances which convey to some particular person or persons knowing these circumstances a special defamatory meaning.[85] The plaintiff when he bases his claim on a legal *innuendo*, must in his statement of claim specify the particular person or persons to whom the statement was published and the special circumstances known to that person or persons, for the simple reason that these are the 'material facts' on which he relies, and must rely for this cause of action.[86] In this cause of action (legal *innuendo*) there is no exception in the case of a newspaper, because the words would not be so understood by the world at large, but only by the particular person or persons who know the special circumstances.[87]

Where the plaintiff has succeeded in proving that certain statements published in a newspaper were clearly defamatory of the plaintiff, it is immaterial whether the plaintiff succeeds or fails in establishing the *innuendos* alleged by him. If he fails, he can treat the unproved *innuendo* as surplusage and still contend that the words of the publication are defamatory in their natural and ordinary meaning.[88]

If a statement is itself innocent, that is not libellous, it is not possible, by pleading *innuendos*, to make the defendant responsible for defamatory statements by other

80. ODGERS, 6th edition, p. 99; *Cooppoosami Chetty v. Duraisami Chetty*, (1909) ILR 33 Mad 67; *General Lord Strickland v. Carmelo Misfud Bonnici*, (1934) 41 LW 665, (PC); *Hough v. London Express Newspapers Ltd.*, (1940) 2 KB 507 : 109 LJQB 524 : (1940) 3 All ER 31.
81. *Grubb v. Bristol United Press Limited*, (1962) 2 All ER 380 : (1963) 1 QB 309, approved in *Lewis v. Daily Telegraph Limited*, (1963) 2 All ER 151 (HL).
82. *Morgan v. Odhams Press Ltd.*, (1971) 2 All ER 1156 (HL); (1971) 1 WLR 1239 (HL).
83. *Fullam v. Newcastle Chronicle and Journal Ltd.*, (1977) 3 All ER 32 (CA) p. 35 : (1977) 1 WLR 651 (LORD DENNING M.R.).
84. *Fullam v. Newcastle Chronicle and Journal Ltd.*, (1977) 3 All ER 32 (CA) : (1977) 1 WLR 651
85. *Fullam v. Newcastle Chronicle and Journal Ltd.*, (1977) 3 All ER 32 (CA) : (1977) 1 WLR 651
86. *Fullam v. Newcastle Chronicle and Journal Ltd.*, (1977) 3 All ER 32 (CA) : (1977) 1 WLR 651
87. *Fullam v. Newcastle Chronicle and Journal Ltd.*, (1977) 3 All ER 32 (CA) : (1977) 1 WLR 651
88. *Tushar Kanti Ghose v. Bina Bhowmick*, (1952) 57 CWN 378.

persons which are not either expressly or by implication approved, adopted or repeated in the statement by the defendant in respect of which the action is brought.[89]

The case of *Morgan v. Odhams Press Ltd.*[90] which has already been noticed[91] is illustrative of a legal *innuendo*. The offending article did not refer to the plaintiff at all. It only stated that a girl had been kidnapped by a dog-doping gang and kept in a flat. The plaintiff pleaded a special circumstance that the girl at the relevant time stayed in his flat and also pleaded that a special meaning was attributed by those who knew this circumstance that the plaintiff was a member of the gang. Similarly, in *Cassidy v. Daily Mirror Newspaper Ltd.*,[92] a man named Cassidy who was also known as Corrigan had gained notoriety in racing circles and in indiscriminate relations with women. At a race meeting, he posed, in company with a lady to a race photographer to whom he said that he was engaged to marry the lady and the photographer might announce it. The photograph was published by the defendants with the following underneath: "*Mr. M. Corrigan*, the race-horse owner and Miss X, whose engagement has been announced." The plaintiff was married to Mr. Cassidy and called herself Cassidy or Mrs. Corrigan. She lived in a flat. The husband occasionally came and stayed in the flat and met her acquaintances. The plaintiff's case depended on the *innuendo* that the words published conveyed to her acquaintances that she was an immoral woman and cohabited with Mr. Cassidy without being married to him. Some female acquaintances deposed in her favour. The jury awarded damages and the verdict was upheld by the court of Appeal. In *Tolley v. J.S. Fry & Sons Ltd.*,[93] a caricature of the plaintiff, an amateur golfer, was published for advertising Fry's chocolate. The plaintiff did not eat Fry's chocolate and the advertisement was made without his permission. The plaintiff recovered damages on the *innuendo* that the use of his portrait gave rise to the impression that he had permitted it to be used for reward and had thus prostituted his reputation as an amateur golfer.

3(iii)(c) Defamation of Deceased Person

It is not a tort to defame a deceased person.[94] This legal proposition is implicit in the requirement that the plaintiff to succeed in a suit for defamation must prove that the offending words referred to him. Further such an action does not survive for the benefit of the plaintiff's estate on his death. But if the statement though referring expressly to the deceased reflects upon the plaintiff and affects his reputation an action will be maintainable. For example, if the statement is that W (the deceased mother of the plaintiff) was a prostitute, the plaintiff may sue in defamation on the ground that the statement affects his reputation but not on the ground that it defames his deceased mother. The person defaming a dead person may, however, be criminally prosecuted if the imputation would have injured the reputation of that

89. *Astaire v. Compling*, (1965) 3 All ER 666 : (1966) 1 WLR 34 : 109 SJ 854.
90. (1971) 1 WLR 1239 : (1971) 2 All ER 1156 (HL).
91. See text and footnote 78, p. 273, *ante*.
92. (1929) 2 KB 231 : 141 LT 404 : 45 TLR 845
93. (1931) AC 333 : 100 LJKB 328 : 145 LT 1 (HL).
94. FLEMING, Torts, 6th edition p. 501 *Citing Broom v. Richie*, (1904) F 942.

person if living, and is intended to be hurtful to the feelings of his family or other near relatives.[1]

3(iii)(d) Defamation of Class of Persons

It may amount to defamation to make an imputation concerning members of a definite body of persons, *e.g.*, a firm of partners. If a libel applies to a class of persons, an individual can only bring an action if he can show that it applies to himself. If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual.[2] If the plaintiff can show that he was specially referred to, it is immaterial whether the words complained of described him by his own name or its initial letter,[3] or by asterisks,[4] or by fictitious name,[5] or by name of somebody else.[6] If a defamatory statement made of a class or group can reasonably be understood to refer to every member of it, each one has a cause of action.[7] As explained by LORD ATKIN: "The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. It is irrelevant that the words are published of two or more persons if they are proved to be published of him, and it is irrelevant that the two or more persons are called by some generic or class name. There can be no law that a defamatory statement made of a firm, or trustees, 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 why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalisations is ingrained in uneducated and vulgar minds, or the words are occasionally understood to be a facetious exaggeration. Even in such cases, words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group or at any rate of himself."[8]

A partnership firm cannot maintain a suit for libel or slander because a firm name is merely a compendious artificial name adopted by the partnership and is not itself a legal entity. The remedy lies at the hands of its individual members who can personally sue if they have been defamed.[9]

3(iii)(e) Defamation of Company or Corporation

In the case of a company or a trading corporation, words calculated to reflect upon it in the way of its property or trade or business, and to injure it therein, are actionable without proof of special damage; but if they refer only to the personal character or reputation of its officers, then proof of special damage is necessary.[10]

The rule of English law that a trading corporation or company can sue in libel for general damages when it could prove no financial loss has been held to be not

1. Indian Penal Code, section 499, *Expln.* 1.
2. PER WILLES, J., in *Eastwood v. Holmes*, (1858) 1 F & F 347, 349; *Government Advocate, B & O v. Gopabandhu Das*, (1922) ILR 1 Pat 414; *Baba Gurdit Singh v. Statesman Ltd.*, (1935) ILR 62 Cal 838; *Advocate Co. Ltd. v. Arthur Leslie Abraham*, AIR 1946 PC 13.
3. *Roach v. Garvan*, (1742) 1 Ve Sen 157 : 2 Atk 469.
4. *Bourke v. Warren*, (1826) 2 C & P 307.
5. *R. v. Clerk*, (1728) 1 Barn, 304; *Munshi Ram v. Mela Ram Wafa*, (1935) ILR 17 Lah 332.
6. *Levi v. Milne*, (1827) 4 Bing 195.
7. *Knupffer v. London Express Newspapers Ltd.*, (1944) AC 116.
8. *Knupffer v. London Express Newspapers Ltd.*, (1944) AC 116.
9. *P.K.O.H. Mills v. Tilak Chand*, AIR 1969 Punj 150.
10. *Union Benefit Guarantee Company v. Thakorlal Thakor*, (1935) 37 Bom LR 1033; *D. & L. Caterers Ltd. v. D'Ajou*, (1945) KB 364.

incompatible with the European convention enforced by the Human Rights Act, 1998 and has been reaffirmed.[11]

3(iii) (e1) Defamation of Government, Local Authorities and Political Parties

In a democracy governed by the rule of law where freedom of speech is a fundamental right "every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely."[12] In a free democratic society "those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind."[13] Further, "what has been described as the 'chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public."[14] The above considerations have led to the rule which is the same in United States,[15] United Kingdom,[16] South Africa[17] and India[18] that "so far as the government, local authority and other organs and institutions exercising governmental power are concerned they cannot maintain a suit for damages for defaming them."

The above principles also apply to political parties seeking power at an election.[19]

3 (iii)(e2) Defamation of Public Officials

A. General

The right to freedom of speech has also been interpreted in the United States to bar a public official from recovering damages for a defamatory falsehood relating to his official conduct unless the statement was made with knowledge that it was false or with reckless disregard of whether it was true or false.[20] The above view has also been accepted in India.[21] In the same context it has been laid down that it would be enough for the defendant to prove that he acted after a reasonable verification of the facts and that it is not necessary for him to prove that what he has written is true.[22] Of course, where the publication is proved to be false and actuated by malic or personal animosity the defendant would be liable for damages.[23]

11. *Jameel v. Wall Street Journal*, (2006) 4 All ER 1279 (H.L.); See also, *Seagram India Pvt. Ltd. v. Vipin Sohanlal Sharma*, (2010) 170 DLT 747.
12. *City of Chicago v. Tribune Co.*, (1923) 307 Ill 595 p. 607 (THOMPSON C.J. of Supreme Court of Illinois); *Derby Shire County Council v. Times Newspapers Ltd.*, (1993) 1 All ER 1011 (HL) p. 228.
13. *Hector v. A.G. of Antiqua and Barbuda*, (1990) 2 All ER 103 (PC) p. 106 (LORD BRIDGE).
14. *Derby Shire County Council v. Times Newspapers Ltd.*, (1993) 1 All ER 1011 (HL) p. 1018 (LORD KEITH).
15. *New York Times v. Sullivan*, (1964) 376 US 254.
16. *Derby Shire County Counsil v. Times Newspapers Ltd., Supra.*
17. *Die Spoorbond v. South African Railways*, (1946) AD 999 (Supreme Court of South Africa).
18. *Raj Gopal v. State of Tamil Nadu*, (1994) 6 JT 514 p. 530: AIR 1995 SC 264 p. 277 : (1994) 6 SCC 632.
19. *Goldsmith v. Bhoyrul*, (1997) 4 All ER 268 (QBD).
20. *New York Times v. Sullivan*, (1964) 376 US 254.
21. *Raj Gopal v. State of Tamil Nadu, supra* p. 530 (JT); 277 (AIR); *Fr. Jegath Gaspar Raj v. Editor, Kumudham Reporter (Magazine)* (2012) 6 CTC 771
22. *Raj Gopal v. State of Tamil Nadu*, (1994) 6 JT 514: AIR 1995 SC 264 : (1994) 6 SCC 632.
23. *Raj Gopal v. State of Tamil Nadu*, (1994) 6 JT 514: AIR 1995 SC 264 : (1994) 6 SCC 632

In Australia freedom of communication on matters of government and politics has been held to be an indispensable incident of the representative government under the constitution which expressly contains no fundamental rights. This will include publication relating to a former prime minister or minister in respect of matters while he held that office.[24] But to seek protection in a suit for defamation the publisher will have to show that his conduct in publishing the matter was reasonable. As a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be held reasonable unless the defendant had reasonable ground for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Further, the defendant's conduct will not be held reasonable unless the defendant had sought response from the person defamed and published the response (if any) made except in cases where the seeking or publication of the response was not practicable or it was unnecessary to give him an opportunity to respond.[25]

In England the House of Lords[26] has, however, not accepted that any principle other than the common law approach of qualified privilege to misstatement of facts should be applied to defamatory statements relating to persons holding or who had held elected offices or that 'political information' should be developed as a new category of qualified privilege, whatever the circumstances. Such a development according to the court, would not provide adequate protection for reputation which was an integral part of the dignity of the individual and formed the basis of many decisions fundamental to the wellbeing of a democratic society and that it was unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The court was of the view that the elasticity of the common law principle of qualified privilege based on a consideration of all the circumstances of the publication, enabled the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern and confined interference with the freedom of speech to what was necessary in the circumstances of the case. Those circumstances are not to be considered separately from the duty-interest test, but rather to be taken into account in determining whether that test, was satisfied or, putting it more simply and directly, whether the public was entitled to know the particular information. The matters to be taken into account (without meaning the test to be exhaustive) are: the seriousness of the allegations, the nature of the information and the extent to which the subject was a matter of public concern, the source and status of the information, the urgency of the matter; whether comment had been sought from the plaintiff; whether the article contained the gist of the plaintiffs' story; the tone of the article and the circumstances of the publication including the timing.

B. Reynold Defence

Reynold v. Times News Papers Ltd.[27] Reynolds was a former Prime Minister of Ireland connecting whom a report was published in the British mainland edition of Sunday Times. The allegations contained in the report against Reynolds were found to be untrue by the jury. The trial judge held that the defence of qualified privilege was not established and awarded nominal damages. The court of Appeal also held

24. *Langer v. Australian Broadcasting Corporation,* (1997) 71 ALJR 818, p. 833.
25. *Langer v. Australian Broadcasting Corporation,* (1997) 71 ALJR 818, pp. 834, 835.
26. *Reynolds v. Times Newspaper Ltd.*, (1999) 4 All ER 609, pp. 625, 626 : (2001) 2 AC 127 : (1999) 3 WLR 1010 (HL), see further, KEVIL WILLIAMS, 'Defaming Politicians : The not so common Law' (2000) 63 Modern Law Review 748. For qualified privilege generally, see p. 306.
27. (1999) 4 All ER 609.

that the publishers would not be able to rely on the defence of qualified privilege but ordered a new trial. The publishers appealed to the House of Lords. The House did not accept the submission to recognize a new category of qualified privilege on the lines as accepted in Australia to the dissemination of political information. But the House unanimously agreed that the traditional ambit of qualified privilege should be extended somewhat to afford some protection to communication of information and comment on political, matters by 'responsible journalism'. Lord Nicholls in *Reynolds*[28] set out a number of matters to be taken into account in coming to that decision. He made it clear that the list was not exhaustive, but was illustrative only and the weight to be given to those and other relevant factors would vary from case to case. Depending upon the circumstances of the case they include the following:

> "(1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing."

The judicial basis of this extension in *Reynolds* has been a matter of debate whether it is different from the traditional form of privilege as held by Lord Hoffman in *Jameel v. Wall Street journal*[29] or it is built upon the traditional duty interest privilege as held by the majority in that case.

In *Jameel*[30], the claimants were a Saudi Arabian Trading Company and its general manager who brought a libel action against the defendant, a respected and influential newspaper for publishing an article in which they were named. The newspaper advanced the *Reynolds Defence'* of 'responsible journalism' which succeeded in the House of Lords.

But there is now no doubt as held in *Seaga v. Harper*[31] that *Reynold's* case "was intended to give and has given a wider ambit of privilege to certain types of communication to the public in general than would have been afforded by the traditional rules of law".[32] This extension known as '*Reynolds defence*' is not restricted to the press or broadcasting media but covers "any person who publishes material of public interest in any medium, so long as the conditions framed by Lord Nicholls as being applicable to responsible journalism are satisfied".[33] The matters set out by Lord Nicholls are not like a statute, nor are they a series of conditions each of which has to be satisfied or tests which the publication has to pass. "The standard of conduct

28. (1999) 4 All ER 609, p. 626.
29. (2006) 4 All ER 1279 (H.L.).
30. (2006) 4 All ER 1279 (H.L.).
31. (2008) 1 All ER 965 (H.L.).
32. (2008) 1 All ER 965, para 10.
33. (2008) 1 All ER 965, para 11.

required of the publisher of the material must be applied in a practical manner and have regard to practical realities. The material should be looked as a whole, not dissected or assessed piece by piece, without regard to the whole context".[34] In *Seaga v. Harper*[35] the defendant was the leader of opposition in Jamaica. In a public meeting organized by his party at which representatives of the press and broadcasting media were invited, he spoke about the impending appointment of a Commissioner of Police and made a statement about the claimant one of the Deputy Commissioners who brought proceedings for slander. The defendant relied upon Reynolds principles for his defence. The House of Lords held that Reynolds principles applied but the defence failed because the defendant failed to take sufficient care to check the reliability of the information which he disseminated.

3 (iii)(e3) Defamation of Public Figures

All that has been stated above in respect of public official has also been applied in the United States to all statements about public figures in or out of government for example a prominent football coach.[36] The reasoning behind it is that public figures like public officials have an influential role in ordering society; they have access to mass media communication both to influence the policy and to counter criticism of their views and activities; and a citizen has a legitimate and substantial interest in the conduct of such persons.[37]

3(iii)(f) Unintentional Defamation

From *E. Houlton & Co. v. Jones*,[38] *Cassidy v. Daily Mirror Newspapers Ltd.*,[39] and *Newstead v. London Express*,[40] cases which have already been noticed, it is quite clear that under the common law a person may become liable for defamation without any intention or fault on his part. Although in such cases normally the awards of damages are of very small sums, a farthing only in *Newstead's* case,[41] yet there was protest by authors and writers who could be made liable while using even a fictitious name in their writings depicting a disparaging character if the name used resembled accidentally the name of some living person. In the United States imposition of liability for defamation without any fault was held to be violative of the freedom of speech and the press and replaced by a minimal requirement of proven fault.[42] Statutory reform was introduced in England by the Defamation Act, 1952 (since adopted also in New South Wales, Tasmania and New Zealand)[43] which provides for exoneration from liability of a defendant for innocent publication who has made an offer of amends. The Act defines innocent publication and lays down the steps which the defendant has to take for getting exoneration. Words are innocently published if (a) the publisher did not intend to publish them of and concerning the party aggrieved and did not know the circumstances by virtue of which they might be understood to refer to him; or (b) the words were not defamatory on the face of them and the publisher did not know of the circumstances by virtue of which they might be understood to be defamatory of that person, and in either case the publisher exercised

34. (2008) 1 All ER 965, para 12.
35. *Supra* footnote 31.
36. *Curtis Publishing Co. v. Butts*, 388 US 130 (1967).
37. *Raj Gopal v. State of Tamil Nadu*, JT 1994 (6) SC 514 p. 526: AIR 1995 SC 264 p. 274.
38. (1910) AC 20. See text and footnotes 73, 74, p. 272, *ante*.
39. (1929) 2 KB 331 : 114 LT 404 : 45 TLR 485. See text and footnote 71, p. 272, *ante*.
40. (1940) 1 KB 377 : (1939) 4 All ER 319 : 162 LT 17. See text and footnote 76, p. 273, *ante*.
41. (1940) 1 KB 377 : (1939) 4 All ER 319 : 162 LT 17
42. *Gertz v. Wesj*, (1914) 418 US 323; Rest 2d 558, 580 A and B.
43. FLEMING, Torts, 6th edition, p. 511.

all reasonable care in relation to the publication. If a person claims that the publication was innocent, he can make an offer of amends to the party aggrieved. Offer of amends is an offer to publish or join in the publication of a suitable correction or apology and, where copies of the offending document or record have been distributed, to take such steps as are reasonably practicable for notifying persons to whom distribution has been made that the words are alleged to be defamatory by the party aggrieved. If the offer of amends is accepted by the party aggrieved, that extinguishes the cause of action for defamation. If the offer is not accepted, it can be pleaded in defence provided the publication was innocent as defined above, and, if the publication was of words of which the defendant was not the author, the words were written by the author without malice. Although there is no corresponding Indian statute, the principle of the English Act can be applied in India on the ground that it is more just and equitable as compared to the common law which it has modified.[44]

3(iv) Publication

Communicating defamatory matter to some person other than the person of whom it is written is publication in its legal sense. If the statement is sent straight to the person of whom it is written, there is no publication of it, for you cannot publish a libel of a man to himself.[45] That cannot injure his reputation, though it may injure his self-esteem. A man's reputation is the estimate in which others hold him, not the good opinion which he has of himself. The words complained of should be communicated to some person other than the plaintiff.[46] But if the defamatory matter be transmitted in a telegram,[47] or be written on a *postcard* and sent to the person libelled,[48] it is a publication. Facilities for postal and telegraphic communications are not to be used for the purpose of easily disseminating libels. Again, if the defendant knows that the letters sent to the plaintiff are usually opened by his clerk[49] or he ought to have anticipated that they would be opened by his spouse[50] and the defendant sends a libellous letter which is in fact opened by the clerk or the spouse, the defendant is liable. But if a servant in breach of his duty and out of curiosity takes a letter out of an unclosed envelope and reads it, there is no publication.[51]

Under English Law each publication is a separate tort. The English Law and the community law also do not recognise any global theory of jurisdiction and separate actions in each relevant jurisdictions are permissible.[52]

44. *T.V. Rama Subba Iyer v. Am. Ahmad Mohideen*, AIR 1972 Mad 398. See further *Dainik Bhaskar v. Madhusudan Bhaskar*, AIR 1991 MP 162, p. 168.
45. PER ESHER, M.R. in *Pullman v. Hill & Co.*, (1891) 1 QB 524, (525) : 39 WR 263 : 64 LT 691; *Komul Chander v. Nobin Chunder*, (1868) 10 WR 184; *Mohamed Ismail Khan v. Mohamed Tahir Alias Motee Mean*, (1873) 6 NWP 38; *Rawlins v. Anant Lal*, (1920) 2 PLT 176; *Kunwar Radha Krishen v. H.S. Bates*, (1951) ALJ 268. Publication does not require communication to more persons than one: *Govindan Nair v. Achutha Menon*, (1915) ILR 39 Mad 433. Sending of a defamatory article to the editor and printer of a newspaper constitutes publication. The appearance of the article in the paper is a second publication and constitutes a separate cause of action: *Makhanlal v. Panchamlal*, (1934) 31 NLR 27; *S.Gurusamy Reddiar v. Dr. Jayachandran* (2012) 5 CTC 60.
46. *Barrow v. Lewellin*, (1615) Hob. 62; *Pullman v. Hill & Co.*, (1891) 1 QB 524 : 39 WR 263 : 64 LT 691; *White v. J and F. Stone (Lighting and Radio), Ltd.*, (1939) 2 KB 827 : 83 SJ 603 : 55 TLR 949.
47. *Whitfield v. S.E. Ry.*, (1858) EB&E 115; *Williamson v. Freer*, (1874) LR 9 CP 393.
48. *Robinson v. Jones*, (1879) LR 4 Ir 391. See *Sadgrove v. Hole*, (1901) 2 KB 1 : 49 WR 473 : 17 TLR 332.
49. *Dalacroix v. Thevenot*, (1817) 2 Stark. 63; *Gamersall v. Davies*, (1898) 14 TLR 430. See *Keogh v. Dental Hospital of Ireland*, (1910) 2 IR 577.
50. *Theaker v. Richardson*, (1962) 1 WLR 151.
51. *Huth v. Huth*, (1915) 3 KB 32 : 31 TLR 350.
52. *Berezovsky v. Michales*, (2000) 2 All ER 986 p. 993 : (2000) 1 WLR 1004 (HL).

A communication to a husband or wife of a charge against the wife or husband constitutes a sufficient publication.[53] But uttering of a libel by a husband to his wife is no publication on the common law principle that husband and wife are one.[54] The Supreme Court of India in a criminal prosecution for defamation under the Penal Code has held that this rule of common law has no application in the Indian Criminal Law and that a letter written by the husband to the wife containing a libel against the wife's father and passed on by the wife to him can be admitted into evidence if it can be proved without calling the wife as a witness.[55]

A person cannot excuse himself on the ground that he published the libel by accident, or mistake,[56] or in jest,[57] or with an honest belief in its truth. Publication need not be intentional. It is sufficient if it is due to the negligence of the defendant, *e.g.*, circulating a book containing the libel.[58] If there is no negligence, then the innocent disseminator of defamatory matter is not liable, *e.g.*, where a news-vendor sells a paper containing a defamatory statement.[59] Where the actual publisher of a libel is quite unconscious of the nature of his act he will not be liable though his employer may be. An internet server provider which performed no more than a passive role in facilitating postings on the internet could not be held liable as a publisher at common law in a libel action in respect of defamatory statements posted on websites.[60]

Where there is a duty, whether of perfect or imperfect obligation, as between two persons, which forms the ground of privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business, *e.g.*, where a business communication containing defamatory statements concerning the plaintiff is communicated by the defendant to his clerks in the reasonable and ordinary course of business, that will not destroy the privilege.[61] If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business; and it is in accordance with the reasonable and usual course of business for a businessman to dictate his business letters to a typist, even though these letters contain statements defamatory of a third person.[62]

Publication—Examples.—A solicitor, acting on behalf of his client, wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was

53. *Wenman v. Ash*, (1853) 13 CB 836; *Jones v. Williams*, (1885) 1 TLR 572; *Shoobhagee Koeri v. Bakhari Ram*, (1906) 4 CLJ 390.
54. *Wennhak v. Morgan*, (1888) 20 QBD 635 : 59 LT 28.
55. *M.C. Verghese v. T.J. Poonan*, AIR 1970 SC 1876.
56. *Blake v. Stevens*, (1864) 4 F&F 232; *Shepheard v. Whitaker*, (1875) LR 10 CP 502.
57. *Donoghue v. Hayes*, (1831) Haye's Ir. Ex Rep 265.
58. *Vizetelly v. Mudies Select Library Ltd.*, (1900) 2 QB 170.
59. *Emmens v. Pottle*, (1885) 16 QBD 354 : 55 LJQB 51 : 34 WR 116. See further title 3(v) text and notes 81 to 84, p. 298, *post*.
60. *Bunt v. Tilley*, (2006) 3 All ER 396.
61. *Edmondson v. Birch & Co. Ltd., & Horner*, (1907) 1 KB 371; *Boxsius v. Goblet Freres*, (1894) 1 QB 842 : 34 TLR 485; *Roff v. British and French Chemical Manufacturing Co.*, (1918) 2 KB 677 : 34 TLR 485. If a statement is false to the knowledge of the defendant then there is an end of privilege, and publication of such statement to his clerk will not be protected : *Vaidianatha Sastriar v. Somasundara Thambiran*, (1913) 24 MLJ 8.
62. *Osborn v. Thomas Boulter & Son*, (1930) 2 KB 226 : 143 LT 460, not following *Pullman v. Hill & Co.* (1891) 1 QB 524, as being a decision on facts, and following *Edmondson v. Birch & Co.* (1907) KB 371; See further *Brayanston Finance Ltd. v. de Vries*, (1975) 2 All ER 609 (CA) p. 630 (LAWSON L. J.), pp. 622, 623 (LORD DIPLOCK).

dictated to a clerk in the office, and was copied into the letter-book by another clerk. In an action against the solicitor for libel it was held that the publication to his clerks was necessary and usual in the discharge of his duty to his client, and was made in the interest of the client.[63] Where the plaintiff told some friends a ludicrous story about himself, and the defendant published it in his newspaper, simply for the purpose of amusing his readers, and believing that the plaintiff would not object, the defendant was held liable.[64] The plaintiff was elected to the office of guardian of the poor for a certain parish. The defendants, rate-payers of the parish and entitled to vote at the election, sent to the board of guardians a letter complaining that the plaintiff was guilty of treating electors with drink and that he had tampered with some of the voting papers. The board of guardians could take no action in the matter and had no power to avoid the plaintiff's election, though the defendants honestly believed that the board of guardians was the proper authority to whom to apply. It was held that the occasion was not privileged, and the defendants were liable for the statements which the plaintiff had proved to be untrue.[65]

The defendant sent a registered notice to the plaintiff's home address which contained defamatory allegations against him. The notice was in the Urdu script and the plaintiff was not conversant with that script. He got the notice read over by another person in the presence of some other persons. It was held that in the absence of a pleading and finding that the defendant wrote the notice in the Urdu character knowing that the plaintiff did not know Urdu and therefore it would necessitate asking somebody to read the notice to him, the defendant was not responsible for the publication of the libellous matter.[66]

3(v) Newspaper Libel

Newspapers are subject to the same rules as other critics, and have no special right or privilege, and in spite of the latitude allowed to them, they have no special right to make unfair comments, or to make imputations upon a person's character, or imputations upon or in respect of a person's profession or calling. The range of a journalist's criticism or comments is as wide as that of any other subject, and no wider. Even if in a sense newspapers owe a duty to their readers to publish any and every item of news that may interest them, this is not such a duty as makes every communication in the paper relating to a matter of public interest a privileged one.[67] Just because something interests the public, it is not necessarily in public interest to publish it.[68]

A Journalist who publishes complaints of a defamatory nature which are not true is not specially privileged; on the contrary he has a greater responsibility to guard against untruths for the simple reason that his utterances have a larger publication than have the utterances of an individual, and they are more likely to be believed by the ignorant by reason of their appearing in print.[69]

63. *Boxsius v. Goblet Freres*, (1894) 1 QB 842 : 34 TLR 485.
64. *Cook v. Ward*, (1830) 6 Bing 409.
65. *Hebditch v. Mac Ilwaine*, (1894) 2 QB 54 : 42 WR 422 : 70 LT 626. *Thompson v. Dashwood*, (1883) 11 QBD 43 in which the defendants wrote defamatory statements of the plaintiff in a letter to W under circumstances which made the publication of the letter to W privileged but by mistake the letter was placed in an envelope directed to another person who read the letter and the defendant was held not liable on the ground of absence of malice in fact, was disapproved.
66. *Mahender Ram v. Harnandan Prasad*, AIR 1958 Pat 445.
67. *Mitha Rustomji Murzban v. Nusserwanji Engineer*, (1941) 43 Bom LR 631.
68. *London Artists Ltd. v. Littler*, (1968) 1 WLR 607, 615.
69. *Khair-ud-Din v. Tara Singh*, (1926) ILR 7 Lah 491; See *The Englishman, Ltd. v. The Hon'ble Antonio Arrivabene*, (1930) 35 CWN 271 : 52 CLJ 345, where the plaintiff's complaint about an interview was published along with the editor's note as to the reliability of the reporter who took the interview; *K. P. Narayanan v. Mahendrasingh*, ILR (1956) Nag 439.

A journalist like any other citizen has the right to comment fairly and, if necessary, severely on a matter of public interest, provided the allegation of facts he has made are accurate and truthful, however, defamatory they may be otherwise. Since his right to comment on matters of public interest is recognised by law, the journalist owes an obligation to the public to have his facts right.[70] In reporting or making comments on matters of public interest the newspaper must follow the rule of 'responsible journalism' as held in *Reynolds v. Times Newspapers Ltd.*[71]

Investigative journalism does not enjoy any special protection. Therefore, when newspapers publish accusations of criminal guilt against a person as a result of their investigation, they do so at their own risk and they do not enjoy any qualified privilege.[72]

Newspapers are not compelled to disclose the source of their information at an interim stage in answer to interrogatories. This rule is known as the "newspaper rule" and has been applied in India.[73] But except in respect of administration of interrogatories, newspapers have never been held to enjoy the privilege of not being compellable to disclose the sources of their information.[74] The courts have no doubt an inherent wish to respect the confidentiality of information between a journalist and his sources, but the journalists and the information media have no privilege protecting them from the obligation to disclose their sources of information if such disclosure is required by the court in the interest of justice.[75] The matter is now governed in England by section 10 of the Contempt of Courts Act, 1981 which provides that no court may require a person to disclose the source of information contained in a publication for which he is responsible unless the disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.[76] The section is so cast that a journalist is *prima facie* entitled to refuse to reveal his source and a court may make no order compelling him to do so unless the party seeking disclosure has established that it is necessary under one of the four heads of public interest identified in the section *viz.*, in the interests of justice or national security or for the prevention of disorder or crime.[77] The word justice in the phrase 'interests of justice' is not confined to administration of justice in the course of legal proceedings in a court of law. It is in 'the interests of justice' that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain those objectives. The judge's task in determining whether disclosure is necessary 'in the interests of justice' will be a balancing exercise. The task will be to weigh in the scales the importance of enabling the ends of justice to be attained on the one hand against the importance of protecting the source on the other hand. In this balancing exercise, it is only if the judge is satisfied that the disclosure in the interests of justice is of such preponderating

70. *Rustom K. Karanjia v. Thackersey*, (1969) 72 Bom LR 94. See further *Dainik Bhaskar v. Madhusudan Bhaskar*, AIR 1991 MP 162, p. 166 (The Court must analyse the alleged defamatory news and views with due care, caution and circumspection and eschew hyper-sensitivity in doing so for the role of press as crusader against social evil is progressively acquiring greater importance and newer dimensions with the niche found by investigative journalism).
71. (1999) 4 All ER 609. For discussion of this case see p. 278 *supra*.
72. *Grobbelaar v. News Group Newspapers Ltd.*, (2001) 2 All ER 437 (CA).
73. *Nishi Prem v. Javed Akhtar*, AIR 1988 Bombay 222.
74. *Mc Guinnes v. Attorney General of Victoria*, (1940) 63 CLR 73; *British Steel Corporation v. Granda Television Ltd.*, (1981) 1 All ER 417 : (1980) 3 WLR 774 : 124 SJ 812 (HL).
75. *Mc Guinnes v. Attorney General of Victoria*, (1940) 63 CLR 73.
76. *Secretary of State for Defence v. Guardian News Papers Ltd.*, (1984) 3 All ER 601 (1985) AC 339 : (1984) 3 WLR 986 (HL); *Max Well v. President Ltd.*, (1987) 1 All ER 656 (CA).
77. *Re an Enquiry under the Company Securities (Inside Dealing) Act*, (1988) 1 All ER 203 (HL), p. 205.

importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached to enable him to order disclosure.[78]

If a libel appears in a newspaper, the proprietor, the editor, the printer, and the publisher are liable to be sued either separately or together. In all cases of joint publication each defendant is liable for all the ensuing damage. The proprietor is liable for any libel which appears in its columns even though the publication is made in his absence, without his knowledge, or even contrary to his orders.[79]

Where a libel is contained in a newspaper the sale of each copy of the newspaper containing the libel is *prima facie* a publication thereof, rendering the distributor as well as the principal responsible for the libel. But the defendant is excused if he can prove (1) that he did not know that it contained a libel; (2) that his ignorance was not due to any negligence on his own part; and (3) that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter.[80] This principle is only applicable where the defendant is a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken a subordinate part in disseminating it.[81]

The principle will thus cover only persons concerned in the mechanical distribution of the matter such as news-agents or newspaper vendors, librarians, booksellers, bookbinders and carriers. On this point LORD DENNING, M.R., in *Goldsmith v. Sperrings Ltd.*,[82] observed: "The printers and publishers are of course, responsible for every libel in them (newspapers and periodicals). But are the newspaper agents who sell them also liable to be sued? Is the burden on them to prove their innocence? The distributors of newspapers and periodicals are nothing more than conduit pipes in the channel of distribution. They have nothing whatsoever to do with the contents. They do not read them, there is no time to do so. Common sense and fairness require that no subordinate distributor, from top to bottom, should be held liable for a libel contained in it unless he knew or ought to have known that the newspaper or periodical contained a libel on the plaintiff which could not be justified or excused; and I should have though that it is for the plaintiff to prove this. I suppose that there may be some publications which are so bad, so prone to libel anyone without just cause or excuse, that no distributor should handle them; or at any rate should do so only at his peril. But there would have to be very strong evidence before it reached that point. Short of that, I do not think any distributor should be held liable simply because he distributed a newspaper or periodical."[83]

Where a statement made by a witness in judicial proceedings is reported and commented on in a newspaper, the fact that the statement turns out to be false does not destroy a plea of fair comment in respect of comment based on it in subsequent proceedings for libel.[84]

78. *X Ltd. v. Morgan Grampian (Publishers) Ltd.*, (1990) 2 All ER 1 (HL), p. 9. : (1991) 1 AC 1. See further, *Ashworth Hospital Authority v. MGN Ltd.*, (2001) 1 All ER 991, p. 1012 (CA) affirmed (2002) 4 All ER 193, pp. 203, 204 (HL).
79. *Dina Nath v. Sayad Habib*, (1929) ILR 10 Lah 816; *Tushar Kanti Ghose v. Bina Bhowmik*, ILR (1955) 2 Cal 161; *K.P. Narayanan v. Mahendrasingh*, ILR (1956) Nag 439.
80. *Emmens v. Pottle*, (1885) 16 QBD 354 : 34 WR 116.
81. PER ROMER, L. J., in *Vizetelly v. Mudie's Select Library, Ltd.*, (1900) 2 QB 170, 180. *Bottamley v.Woolworth & Co.*, (1932) 48 TLR 521 : 146 LT 68 : 48 TLR 39; *Sun Life Assurance Co. of Canada v. W. H. Smith & Sons Ltd.*, (1934) 150 LT 211.
82. (1977) 2 All ER 566 : (1997) 1 WLR 478 (CA).
83. (1977) 2 All ER 566, pp. 572, 573.
84. *Grech v. Odhams Press*, (1958) 1 QB 310 : (1958) WLR 16 : (1958) 2 All ER 462.

4. SLANDER

(i) English Law

As in the case of a libel, it must be proved that the words complained of are (1) false, (2) defamatory, (3) published by the defendant, and in addition that (4) some special damage has resulted from their use.

Where a document containing defamatory statements is published by being read out to a third person, or where the publication of the defamatory statement is to a clerk to whom it is dictated, the communication in either case amounts to slander and not to libel.[1]

The special damage must appear to be the natural consequence of the words spoken,[2] *e.g.*, the loss of a customer,[3] or the loss,[4] or refusal,[5] of some appointment or employment,[6] or the loss of a gift,[7] or of hospitality of friends,[8] or the loss of the consortium of one's husband.[9] Mental anguish accompanied by the impairment of the physical health of the person slandered is not such special damage as will enable a party to maintain an action.[10] In this case an action was brought by husband and wife for slander, imputing incontinency to the wife, alleging that by reason thereof, the wife became ill and unable to attend to her necessary affairs and business, and that the husband was put to expense in endeavouring to cure her. It was held that no action lay.[11]

Where the words are not *per se* defamatory in their ordinary sense, or have no meaning at all in ordinary acceptation, an *innuendo* must be pleaded in order to admit evidence that in a peculiar sense they are defamatory.[12]

Words not actionable without special damage.—To call a man a swindler,[13] or a cheat,[14] or a blackleg,[15] is not actionable without special damage.

Too remote damage.—The plaintiff alleged that he had engaged a performer to sing at his oratorio, and that the defendant published a libel concerning her in consequence of which she was prevented from singing from an apprehension of being hissed, whereby the plaintiff lost the benefit of her services; it was held that the injury complained of was too remote.[16]

An action of slander may be maintained, without proof of special damage, in the following cases:—

1. If a criminal offence (not necessarily an indictable offence) be imputed to the plaintiff.[17]

1. *Osborn v. Thomas Boulter & Son*, (1930) 2 KB 226 : 143 LT 460, SCRUTTON and SLESSER, L.JJ. (contra GREER, LJ)
2. *Lynch v. Knight*, (1861) 9 HLC 577, 600; *Speake v. Hughes*, (1904) 1 KB 138 : 89 LT 576.
3. *Storey v. Challandas*, (1837) 8 C & P 234; *Riding v. Smith*, (1876) 1 Ex. D 91.
4. *Payee v. Beuwmorris*, (1669) 1 Lev 248.
5. *Sterry v. Foreman*, (1827) 2 C & P 592.
6. *Martin v. Strong*, (1836) 5 A & E 535.
7. *Corcoran v. Corcoran*, (1857) 7 Ir CLR 272.
8. *Moore v. Meagher*, (1807) 1 Taunt 39; *Davies v. Solomon*, (1871) LR 7 QB 112.
9. *Lynch v. Knight*, (1861) 9 HLC 577, 589.
10. *Allsop v. Allsop*, (1860) 5 H & N 534.
11. *Allsop v. Allsop*, (1860) 5 H & N 534.
12. *Rawlings v. Norbury*, (1858) 1 F & F 341.
13. *Savile v. Jardine*, (1795) 2 HB 1, 531.
14. *Savage v. Robery*, (1699) 2 Salk 694; *Hopwood v. Thorn*, (1849) 8 C & B 293 : 79 RR 503.
15. *Barnett v. Allen*, (1858) 3 H & N 376.
16. *Ashley v. Harrison*, (1793) 1 Esp 47; *Chamerlain v. Boyd*, (1883) 11 QBD 407.
17. *Webb v. Beavan*, (1883) 11 QBD 609.

2. If a contagious or infectious disorder, tending to exclude the plaintiff from society, be imputed to him.

3. If any injurious imputation be made, affecting the plaintiff in his office, profession, trade, or business, and the imputation imputes to him unfitness for, or misconduct in, that calling.[18]

4. If the plaintiff is a woman or girl, and the words impute unchastity or adultery to her.[19]

In the above cases the imputation cast on the plaintiff is on the face of it so injurious that the court will presume, without any proof, that his reputation has been thereby impaired. Spoken words which afford a cause of action without proof of special damage are said to be actionable *per se*.

Crime.—Spoken words are actionable if they impute a crime, that is to say, words which, in the opinion of the tribunal which ultimately deals with the matter, appear to have been not necessarily intended by the speaker to impute a crime, but are capable of being understood by the hearers as imputing a crime.[20] The crime or misdemeanour must be one for which corporal punishment[21] may be inflicted, *e.g.*, murder,[22] robbery,[23] perjury,[24] adultery,[25] theft,[26] tampering with the loyalty of sepoys,[27] *etc.* Mere liability to arrest is not sufficient to make the crime one for which the offender can be said to suffer corporally.[28] Arrest is not a punishment. Where the penalty is merely pecuniary, an action will not lie, even though in default of payment imprisonment is prescribed by the statute, imprisonment not being the primary and immediate punishment for the offence.[29]

Words merely imputing suspicion of a crime are not actionable without proof of special damage.[30]

Words imputing past conviction for an offence are actionable without proof of special damage as they cause other people to shun that person and to exclude him from society.[31]

Contagious disease.—Words imputing to the plaintiff that he has an infectious or contagious disease such as leprosy, venereal disease, plague, itch,[32] *etc.* are actionable without proof of special damage. For the effect of such an imputation is naturally to exclude the plaintiff from society. An assertion that the plaintiff has had

18. *Jones v. Jones*, (1916) 2 AC 481; *Hopwood v. Muirson*, (1945) 1 KB 313.
19. Slander of Women Act, (1891) 54 & 55 Vic., c. 51.
20. *Marks v. Samuel*, (1904) 2 KB 287, 290.
21. *Webb v. Bevan*, (1883) 11 QBD 609; *Lemon v. Simmons*, (1888) 57 LJQB 260.
22. *Button v. Heyward*, (1722) 8 Mod 24.
23. *Rowcliffe v. Edmonds*, (1840) 7 M & W 12; *Lawrence v. Woodward*, (1625-41) Cro Car 277.
24. *Bridges v. Playdel*, (1676) Br & G 2; *Roberts v. Camden*, (1807) 9 East 93.
25. *Ratan v. Bhaga*, (1896) PJ 376; *Jogeshwar Sarma v. Dinaram Sarma*, (1898) 3 CLJ 140.
26. To call a man a thief would *prima facie* be actionable without allegation of special damage; but if the words were used as abuse it would not be: *Cristie v. Cowell*, (1790) 1 Peake NPC 4.
27. *The "Englishman" Limited v. Lala Lajpat Rai*, (1910) 14 CWN 713.
28. *Hellwig v. Mitchell*, (1910) 1 KB 609, 614.
29. *Ogden v. Turner*, (1705) 6 Mod 104.
30. *Simmons v. Mitchell*, (1880) 6 App Cas 156 : 43 LT 710; *Mitha Rustomji Murzban v. Nusserwanji Engineer*, (1941) 43 Bom LR 631.
31. *Gray v. Jones*, (1939) 1 All ER 798 : 55 TLR 437.
32. *Villers v. Monsley*, (1769) 2 Wils 403.

such a disease is not actionable because it is no reason why the company of such person should be avoided.[33]

Office, profession, or trade.—Where words affect a plaintiff in his office, profession, or trade, and directly tend to prejudice him therein, no further proof of damage is necessary. It must be shown that he held such office, or was actively engaged in such profession or trade at the time the words were spoken.[34] It is not necessary that the words should hold him up to hatred, contempt, or ridicule.[35] The words must impeach the plaintiff's official or professional conduct or his skill or knowledge. His special office or profession need not be expressly named or referred to, if the charge made be such as must necessarily affect him in it. If a certain degree of ability, skill or training be essential to the due conduct of his office or profession, words denying his skill and ability, or disparaging his training, are actionable; for they imply that he is unfit to continue therein. The words must touch the plaintiff in his office or profession.[36] But words which merely charge him with some misconduct outside his office, or not connected, with his special profession or trade, will not be actionable.[37] For example, an imputation of immorality against the head-master of a school, made without any relation to his position as a school-master, is not actionable *per se*.[38] The Defamation Act, 1952, however, says that it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

A limited liability company can sue for slander without proof of actual damage where the slander relates to its trade or business.[39]

To call a person, who is in the employment of a Jew, that he is a Jew-hater is actionable without proof of a special damage as the words affect that person in relation to his business.[40] Similarly, it is defamatory to state of a businessman that he was "not conversant with normal business ethics."[41]

The plaintiff sued the defendant for damages for slander as the latter got a tom tom made in the following words: S. B.'s goods (S.B. was the plaintiff) are being sold by public auction. On a question whether these words suggest the *innuendo* of the insolvency of the plaintiff it was held that the mere statement that the goods were being sold by public auction without the addition that they were sold in pursuance of a decree or through the Official Receiver did not by itself suggest the inference that the goods were sold by public auction because the owner of the goods did not pay his debts. The words complained of did not suggest the *innuendo* that plaintiff was not solvent and that his goods were being brought to sale by auction by the creditor.[42]

Unchastity.—At common law words imputing unchastity to a woman were not actionable without proof of special damage. But the Slander of Women Act, 1891[43]

33. *Taylor v. Hall*, (1742) 2 Str .1189; *Bloodworth v. Gray*, (1844) 7 M & G 334; *Carslake v. Mapledoram*, (1788) 2 TR 473.
34. *Bellamy. v. Burch*, (1847) 16 M & W 590.
35. *Mitha Rustomji Murzban v. Nusserwanji Engineer*, (1941) 43 Bom LR 631.
36. *Doyley v. Roberts*, (1837) 3 Bing NC 835.
37. *Lumby v. Allday*, (1831) 1 Cr & J 301. In this case the plaintiff was a clerk of a gas company, and the defendant spoke of him, "you are a fellow, a disgrace to the town, unfit to hold your situation, for your conduct with whores." It was held that the words were not actionable.
38. *Jones v. Jones*, (1916) 2 AC 481 : 115 LT 432.
39. *D. & L. Caterers, Ltd. v. D' Anjou*, (1945) 1 All ER 563 : (1945) 1 KB 364.
40. *De Stempel v. Dunkels*, (1938) 1 All ER 238 : (1938) Ch 352.
41. *Angel v. H.H. Bushell & Co. Ltd.*, (1967) 1 All ER 1018 : (1968) QB 813 : (1967) 2 976.
42. *Sukhraji Bikaji v. Kundammal Packraj*, (1948) 2 MLJ 270 : (1948) MWN 629 : 61 LW 589.
43. 54 & 55 Vic., c. 51.

abolished the need of showing special damage in the case of words which impute unchastity or adultery to any woman or girl.

4(ii) Indian Law

The common law rule that slander is not actionable *per se* has not been followed in India except in a few decisions. The reason given is that the rule is "not founded on any obvious reason or principle," and that it is not consonant with "justice, equity and good conscience". Both libel and slander are criminal offences under section 499 of the Penal Code and both are actionable in Civil Court without proof of special damage.[44]

The Indian cases fall under the following categories, namely:—

Imputation of crime.—An action can be maintained where the words complained of impute the commission of a criminal offence which is cognizable. Mere hasty expression spoken in anger or filthy abuse to which no hearer would attribute any set purpose to injure character would, of course, not be actionable. If the crime imputed be one, of which the plaintiff could not by any possibility be guilty and all who heard the imputation knew that he could not by any possibility be guilty of it, no action lies, for the plaintiff is never in jeopardy nor is his reputation in any way impaired.[45]

Vulgar abuse.—In India, a distinction has been made between abusive language which amounts merely to an insult and abusive language which is both insulting and defamatory. In the former case it has been held, following the English law, that no action lies at all,[46] in the latter, that an action does lie even without proof of special damage. The leading case on the subject is *Parvathi v. Mannar*,[47] In that case the defendant abused the plaintiff and said that she was not the legally married wife of her husband, but a woman who had been ejected from several places for unchastity. It was held that the defendant was liable though no special damage was proved. The point of the decision appears to be that mental distress caused by abusive words which amount merely to an insult is not actionable, but mental distress caused by words of abuse which are also defamatory is actionable and no special damage need be proved. This, of course, is a departure, and a wholesome departure, from the common law of England. *Parvathi's* case has been followed in numerous decisions where the words complained of were both abusive and defamatory.[48] As against these decisions, there is an old Bombay case,[49] where it was held that mere verbal

44. *Mst. Ramdhara v. Mst. Phulwatibai*, 1969 MPLJ 483.
45. *Jeffrey J. Diermeier v. State of West Bengal*, (2010) 6 SCC 243. See also, *Murlidas v. Sricharan Mahapatra*, ILR (1949) 1 Cut 645.
46. *Girish Chunder Mitter v. Jatadhari Sadhukhan*, (1899) 26 Cal 653, F.B., where the words used were "sala", "haramazada", "soor" and "baperbeta". *Bhoomi Money Dossee v. Natobar Biswas*, ILR (1901) 28 Cal 452; *Girwar Singh v. Siraman Singh*, (1905) ILR 32 Cal 1060; *Maung Kyaw v. Tha Dun U*, (1907) 4 LBR 50; *Girdhari Lal v. Punjab Singh*, (1933) 34 PLR 1071.
In *Suraj Narain v. Sita Ram*, (1939) ALJR 394, it has been held that insulting words which are likely to expose a person to ridicule and humiliation are actionable.
47. (1884) ILR 8 Mad 175, 180; *Konee Subhadra v. Subbarayadu*, (1900) 10 MLJ 83; *Leslie Rogers v. Hajee Fakir Muhammad Sait*, (1918) 35 MLJ 673; *Subbaraidu v. Sreenivasa Charyulu*, (1926) 52 MLJ 87.
48. *Dawan Singh v. Mahip Singh*, (1888) ILR 10 All 425, where the words conveyed the meaning that the plaintiff's descent was illegitimate; *Harakh Chand v. Ganga Prasad Rai*, (1924) ILR 47 All 391, where the words complained of were "bahinchod", "sala" and "harami" (bastard); *Sagar Ram v. Babu Ram*, (1904) 1 ALJR 102, where the words complained of were that the plaintiff drank wine, committed adultery and had no religion; *Subbaraidu v. Sreentivasa Charyulu*, (1926) 52 MLJ 87, where the defendant called the plaintiff, who was a rival candidate at an election, a drunkard in public. See further *Mst. Ramdhara v. Mst. Phulwatibai*, 1969 MPLJ 483.
49. *Kashiram Krishna v. Bhadu Bapuji*, (1870) 7 BHC (ACJ) 17. In Burma this case is followed. But see *Mi Nu v. Mi Nwe*, (1898) 5 Burma LR 33; *Ma Pan Ye v. Maung Pan Aung*, (1905) 2 UBR Tort (1904-06) 1.

abuse was actionable without proof of special damage, on the ground that it would cause an outrage to the plaintiff's feelings. This case is not likely to be followed even in Bombay.

Insult, it may be observed, is an offence under section 503 of the Indian Penal Code, if the provocation is such as to cause a breach of the public peace.

The defence that the words complained of did not and were not understood to impute any defamatory meaning, but were merely words of vulgar abuse, should be specifically pleaded in the written statement.[50]

During the trial of a criminal case instituted by A against B for cheating, A was asked in cross-examination by B's pleader whether B's firm was the largest firm of grain-dealers in the city, and A said "Yes". Thereupon R, the mukhtar, who was appearing for A in the case, interjected the remark, audible to several persons in Court, that B's firm was also the most dishonest in the city. The case terminated in a dismissal of the complaint. B then sued R for damages for slander. It was held that the imputation was defamatory and was therefore actionable without proof of special damage.[51] It would seem that the imputation was in the way of B's trade; if so, it would be actionable *per se* under the English law also and the distinction made by the court between the English and the Indian law of slander was unnecessary.

The omission of a mere courtesy could not be taken to be equivalent to slandering or libelling a man, and is not an actionable wrong.[52] A railway guard, having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station, called upon the plaintiff and other passengers to produce their tickets. As a reason for demanding the production of the plaintiff's ticket he said to him in the presence of the other passengers, "I suspect you are travelling with a wrong (or false) ticket," which was the defamation complained of. The guard was held to have spoken the above words *bona fide*. It was held that the plaintiff was not entitled to recover damages.[53]

Imputing unchastity to a woman.—An imputation of unchastity to a woman is actionable in England under the Slander of Women Act, 1891,[54] without proof of special damage. An allegation that a woman is a 'lesbian' is an imputation of unchastity within the meaning of the Act.[55] At common law an imputation of unchastity to a woman was not actionable. The English Act, however, does not extend to India. The question then arises whether in India words imputing unchastity to a woman are actionable without proof of special damage. In a case which arose in the town of Calcutta, the High Court of Calcutta applied the common law rule, and held that the words were not actionable in the absence of proof of special damage.[56] In a case, however, which arose in the mofussil of Calcutta, the same High Court held that such an imputation was actionable without proof of special damage, and, further, that it was also actionable at the suit of the husband, as the imputation involved that the husband ate the food cooked by an unchaste woman and had therefore lost his caste.[57] The Madras High Court has held that a suit for defamation in

50. *H.C.D'Silva v. E.M. Potenger*, ILR (1946) 1 Cal 157.
51. *Rahim Bakhsh v. Bachcha Lal*, (1928) ILR 51 All 509.
52. *Sri Raja Sitarama v. Sri Raja Sanyasi*, (1866) 3 MHC 4.
53. *South Indian Ry. Co. v. Ramakrishna*, (1889) ILR 13 Mad 34.
54. 54 & 55 Vic., c. 51.
55. *Kerr v. Kennedy*, (1942) 1 KB 409 : (1942) 1 All ER 412.
56. *Bhoomi Money Dossee v. Natobar Biswas*, (1901) 28 Cal 452.
57. *Sukan Teli v. Bipal Teli*, (1905) 4 CLJ 388. In this case it was held that the words imputing unchastity to a person's wife constituted defamation not only of the wife but also of the husband himself, and he was therefore entitled to maintain an action on his own account. The former Chief Court of Upper Burma was of opinion that special damage was not essential where there was a false charge of unchastity : *Nga Nyo v. Mi Te*, (1915) UBR (1914-16) 98; *Ma Win v. Ma Ngon*, (1922) 1 Burma LJ 148. See *Changaram v. Raya*, (1913) 7 LBR 86.

respect of spoken words imputing unchastity is maintainable by a Hindu woman on the Original Side of the High Court without proof of special damage.[58] The Bombay High Court has held that though Parsis are governed by common law, yet words imputing adultery to a Parsi married woman are actionable without proof of special damage as adultery with a married woman is an offence under the Penal Code.[59]

Aspersion on caste.—It is actionable without proof of special damage to say of a high caste woman that she belongs to an inferior caste. The action may be brought not only by the woman, but by her husband, for if the husband himself is a high caste Hindu, the imputation would involve that he has married a low caste woman.[60]

The plaintiff sued certain persons for damages for defamation, for having in the course of a caste inquiry declared him an outcaste for committing adultery without giving him an opportunity to vindicate his character. It was held that the defendants had not acted *bona fide* in making the declaration, and that the plaintiff was entitled to recover damages.[61]

5. REPETITION OF LIBEL AND SLANDER

It is no defence to an action for libel or slander that the defendant published it by way of repetition or hearsay. "Tale-bearers are as bad as tale-makers." Every repetition of defamatory words is a new publication and a distinct cause of action.[62]

The originator will be liable for the damage resulting from repetition.

(1) where the originator authorized or intended the repetition;[63] or

(2) where the repetition was the natural and probable consequence of his act; or

(3) where there was a moral obligation on the person in whose presence the slander was uttered to repeat it.[64]

Briefly stated the originator will be liable for repetition of the slander by a third person when it was just to hold him liable e.g. when it was foreseeable that the slander was likely to be repeated.[65]

Where the defendant imputed adultery to the plaintiff's wife in his absence, and she voluntarily repeated the slander to her husband whereby he refused to cohabit with her, it was held that no action was maintainable against the defendant.[66]

58. *Narayana Sah v. Kannamma Bai*, (1931) ILR 55 Mad 727.
59. *Hirabai v. Dinshaw*, (1926) 28 Bom LR 391, 1334, ILR 51 Bom 167.
60. *Gaya Din Singh v. Mahabir Singh*, ILR (1926) 1 Luck 386.
61. *Vallabha v. Madusudanan*, (1889) ILR 12 Mad 495.
62. *Kaikhusru Naoroji Kabraji v. Jehangir Byarmji Muzban*, (1890) 14 Bom 532; *Watkin v. Hall*, (1868) LR 3 QB 396; *Waithman v. Weaver*, (1882) 11 Price 257. See, *Mi Ngwe Hmon v. Mi Pwa Sa*, (1913) 7 BLT 253; A newspaper publishing defamatory statements made in a pending action comes within the repetition rule and cannot claim privilege and is liable for damages: *Stern v. Piper*, (1996) 3 All ER 385 (CA). Unauthorised publication breaks the chain of causation but if it is the natural and probable consequence of the original publication the original publisher is also liable for the subsequent publication: *Slipper v. British Broadcasting Corp.*, (1991) 1 All ER 165 (CA).
63. *Ward v. Weeks*, (1830) 7 Bing 211.
64. *Speight v. Gosnay*, (1891) 60 LJQB 231; *Derry v. Handley*, (1867) 16 LTNS 263.
65. *MC Manus v. Beckham*, (2002) 4 All ER 497, p. 514 (CA).
66. *Parkins v. Scott*, (1862) 1 H & C 153 : 6 LT 394 : 10 WR 562.

6. DEFENCES

6(i) Justification by Truth

The truth of defamatory words is a complete defence to an action of libel or slander though it is not so in a criminal trial.[67] Truth is an answer to the action, not because it negatives the charge of malice but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to, possess.[68] It would make no difference in law that the defendant had made a defamatory statement without any belief in its truth, if it turned out afterwards to be true when made. If the matter is true the purpose or motive with which it was published is irrelevant. The defendant must show that the imputation made or repeated by him was true as a whole and in every material part thereof.[69] If A says that B told him that C was guilty of adultery, in a suit by C against A, A cannot succeed by merely proving that in truth B told him like that but by proving that C was in fact found guilty of adultery.[70] But it is not necessary to justify every detail of the charge or general terms of abuse, provided that the gist of the libel is proved to be in substance correct, and that the details, *etc.*, which are not justified, produce no different effect on the mind of the reader than the actual truth would do.[71] Thus, it is enough if the statement though not perfectly accurate is substantially true, *e.g.*, a statement that the plaintiff was imprisoned for three weeks for travelling in a train without ticket, when in reality he was imprisoned for two weeks.[72] If there is gross exaggeration, the plea of justification will fail, *e.g.*, to say that a person has been suspended for extortion three times when he has been suspended only once,[73] or to call an editor of a paper 'a felon editor' when he was once convicted.[74] It is not sufficient justification to prove that there was some sort of rumour, it must be proved that it was true.[75] In case of two or more distinct charges, the rule of common law is that each charge must be proved to be true to avail of the defence of justification.[76] This rule has been altered in England by section 5 of the Defamation Act, 1952 which provides that the defence of justification shall not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

The defendant must make clear in the particulars of justification the case which he is seeking to set up and must state clearly the meaning or meanings which he seeks to justify.[77] The scope of the defence of justification in a defamation action does not depend on the way in which the plaintiff pleads his case, but on the meanings, which the words published are capable of bearing; accordingly the defendant is entitled to plead justification of any alternative meaning which those words are reasonably

67. *Raghunath Damodhar v. Janardhan Gopal*, (1891) ILR 15 Bom 599; *Reynolds v. Times Newspapers*, (1999) 4 All ER 609, p. 614 (HL). See also, *Joseph M. Puthussery v. T.S. John*, (2011) 1 SCC 503
68. *M. Pherson v. Daniels*, (1829) 10 BC 263 (272).
69. *Weaver v. Lloyd*, (1824) 4 D & R 230; *Khair-ud-Din v. Tara Singh*, (1926) ILR 7 Lah 49.
70. *Truth (N.Z.) Ltd. v. Holloway*, (1960) 1 WLR 997 : 104 SJ 745.
71. PER LORD DENMAN in *Cooper v. Lawson*, (1838) 8 AD & E 746, 753; *Dainik Bhaskar v. Madhusudan Bhaskar*, AIR 1991 MP 162, p. 168.
72. *Alexander v. N.E. Ry.*, (1865) 11 Jur NS 619.
73. *Clarkson v. Lawson*, (1829) 6 Bing 266.
74. *Leyman v. Latimer*, (1877) 3 Ex D 15, on appeal, (1878) ib 352.
75. *Watkin v. Hall*, (1868) LR 3 QB 396.
76. *Helsham v. Blackwood*, (1851) 11 CB 111.
77. *Lucas Box v. News Group Newspapers Ltd.*, (1986) 1 All ER 177 : (1986) 1 WLR 147 (CA); *Morrel v. International Publishing Ltd.*, (1989) 3 All ER 733 (CA).

capable of bearing.[78] In a defamation suit, where defendants had supplied the source of information and justification for each and every statement made by them in their book, the High Court refused to grant any injunction restraining publication of the book.[79]

If the statement is false, it is no justification that the defendant honestly and on reasonable grounds believed it to be true.

The maxim "the greater the truth the greater the libel" never had an application to civil actions for damages. In criminal law truth is only a justification if it is shown that the publication was for the public good. According to the Indian Penal Code, it is not enough that the words complained of are true, the defendant must then be prepared to go further and prove that not only are the words true, but that it is also for the public benefit that they should be published.[80]

6(ii) Fair and bona fide Comment

A fair and *bona fide* comment on a matter of public interest is no libel.[81] Thus, legitimate criticism is no tort; should loss ensue to the plaintiff, it would be *damnum sine injuria*.[82] Matters of public interest are not to be understood in a narrow sense. They include matters in which the public is legitimately interested as also matters in which the public is legitimately concerned.[83]

Some examples of matters of public interest are:—

(1) Affairs of State. Public acts of ministers and officers of State can be commented on.[84]

(2) The administration of justice.[85]

(3) Public institutions and local authorities.[86]

(4) Ecclesiastical matters.[87]

(5) Books,[88] pictures,[89] and works of art.

(6) Theatres,[90] concerts and other public entertainments.[91]

78. *Prager v. Time Newspapers Ltd.*, (1988) 1 All ER 300 : (1987) 132 SJ 55 (CA).
79. *Dominique Lapierrer v. Swaraj Puri*, AIR 2010 MP 121.
80. See, RATANLAL DHIRAJLAL, The Indian Penal Code, 27th edition, p. 573 (section 499, exception 1). *Altaf Hossein v. Tasuddook Hossein*, (1867) 2 Agra HC 87.
81. *Merivale v. Carson*, (1887) 20 QBD 275 : 58 LT 331; *Broadway Approvals Ltd. v. Odhams Press Ltd.*, (1965) 2 All ER 523; *Ahsanali v. Kazi Syed Hifazat Ali*, ILR (1956) Nag 378; *Dainik Bhaskar v. Madhusudan Bhaskar*, AIR 1991 MP 162, pp. 166, 167.
82. *Merivale v. Carson*, (1887) 20 QBD 275 : 58 LT 331.
83. *London Artists Ltd. v. Littler*, (1969) 2 QB 375, p. 391 : (1969) 2 WLR 409 : (1969) 2 All ER 193.
84. *Watson v. Walter*, (1868) LR 4 QB 73; *Davis v. Shepstone*, (1886) 11 App Cas 187, 190.
85. *Lewis v. Levy*, (1858) EB & E 537; *Reg. v. O'Dogherty*, (1848) 5 Cox 348; *Woodgate v. Ridout*, (1865) 4 F & F 202, 223.
86. *Purcell v. Sowler*, (1877) 2 CPD 215; *Cox v. Feeney*, (1863) 4 F & F 13.
87. *Kelly v. Tinling*, (1865) LR 1 QB 699.
88. *Strauss v. Francis*, (1866) 4 F & F 1107; *Eraser v. Berkley*, (1836) 7 C & P 621.
89. *Thompson v. Shackell*, (1828) Mood & Malk 187.
90. *Gregory v. Duke of Brunswick*, (1843) 1 C & K 21.
91. *Green v. Chapman*, (1837) 4 Bing NC 92; *Dibbin v. Swan and Bostork*, (1793) 1 Esp 28.

(7) Other appeals to the public, *e.g.*, a medical man bringing forward some new method of treatment and advertising it,[1] a man appealing to the public by writing letters to a newspaper.[2]

For the purposes of the defence of fair comment on a matter of public interest such matters must be (a) in which the public in general have a legitimate interest, directly or indirectly, nationally or locally, *e.g.*, matters connected with national and local government, public services and institutions, and (b) matters which are at public theatres and performances of theatrical artists offered for public entertainment but not including the private lives of public performers.[3]

The word 'fair' embraces the meaning of honest and also of relevancy. The view expressed must be honest and must be such as can fairly be called criticism.[4] The word "fair" refers to the language employed, and not to the mind of the writer. Hence, it is possible that a fair comment should yet be published maliciously.[5] Mere exaggeration or even gross exaggeration would not make the comment unfair.[6] But malice may negative fairness.[7]

Comment in order to be fair must be based upon facts, and if the defendant cannot show that his comments contain no misstatements of fact he cannot prove a defence of fair comment.[8] It has been held that distinction between 'comment' and 'allegation of fact' must always be borne in mind while determining a fair comment.[9] Facts upon which the comment is founded must be truly stated though later on they may not turn out to be true at all. A fact may be truly stated and may yet be utterly untrue. Where the facts on a matter of public interest have been correctly stated, the test of fair comment is whether the opinion which is expressed in the comment even though it might be exaggerated, obstinate or prejudiced was honestly held by the writer.[10] The comment to be fair must be based on true facts and must be objectively fair in the sense that any man, however, prejudiced and obstinate could have honestly held the views expressed.[11] The defence is concerned with protection of comments and not imputation of fact.[12] The law has developed the rule that comments may only be defended as fair if it is comment on facts (meaning true facts) stated or sufficiently indicated.[13] It must be

1. *Morrison v. Harmer*, (1837) 3 Bing NC 759.
2. *Odger v. Mortimer*, (1873) 28 LT 472; *O'Donoghue v. Hussey*, (1871) Ir R 5 CL 124; *Davis v. Duncan*, (1874) LR 9 CP 396.
3. *London Artists Ltd. v. Littler*, (1968) 1 All ER 1075 : (1969) 1 WR 607. An appeal against this case was dismissed on the ground that the plea of fair comment had failed: (1969) 2 All ER 193 : (1969) 2 QB 375. See also, *British Chiropractic Association v. Singh*, [2011] 1 WLR 133 (CA).
4. *McQuire v. Western Morning News Co.*, (1903) 2 KB 100, 110. See, *The Madras Times Ltd. v. Rogers*, (1915) 30 MLJ 294.
5. Proof of malice may take a criticism that is *prima facie* fair outside the limits of fair comment: *Thomas v. Bradbury Agnew & Co. Ltd.*, (1906) 2 KB 627 : 75 LT 23 : 22 TLR 656. Whether a libel was justified or exceeded the bounds of fair comment is a question of fact: *Naganatha v. Subramania*, (1917) 21 MLT 324.
6. *Merivale v. Carson*, (1887) 20 QBD 275, which overruled the case of *Henwood v. Harrison*, (1872) LR 7 CP 606 and followed *Cambhell v. Spottiswoode*, (1863) 3 B & S 769 : 32 LJ QB 185. See, *South Hetton Coal Co. v. N.E. News Assn.*, (1894) 1 QB 133 (143).
7. *Thomas v. Bradbury, Agnew & Co. Ltd.*, (1906) 2 KB 627 : 75 LT 23 : 22 TLR 656.
8. *Digby v. Financial News*, (1907) 1 KB 502, (507); *Peter Walker & Sons Ltd. v. Hodgson*, (1909) 1 KB 239, 256. See, *Irwin v. Reid*, (1920) ILR 48 Cal 304; *Subhas Chandra Bose v. R. Knight & Sons*, (1928) ILR 55 Cal 1121; *Raghunath Singh Parmar v. Makundi Lal*, (1936) ALJR 1014. *Truth and Sportsman Ltd. v. George Stanley Thompson*, AIR 1933 PC 36.
9. *K.S.Sundaram v. S Viswanathan*, (2012) 4 CTC 361
10. *Silken v. Beaverbrook Newspapers*, (1958) 2 All ER 516 : (1958) 1 WLR 743 : 102 SJ 491; *Reynolds v. Times Newspapers*, (1999) 4 All ER 609, p. 615
11. *Telnikoff v. Matusevitch*, (1991) 4 All ER 817 : (1992) 2 AC 343 (HL); *Reynolds v. Times Newspapers*, *supra*.
12. *Telnikoff v. Matusevitch*, (1991) 4 All ER 817 : (1992) 2 AC 343 (HL)
13. *Channel Seven Adelaide Pty. Ltd. v. Manock* (2007) 82 ALJR 303, p. 313 para 35.

indicated with reasonable clarity by the words themselves taking them in the context and the circumstances in which they were published that they purport to be comment and not statement of fact.[14] In *Channel Seven Adelaide Pty. Ltd. v. Manock*,[15] the facts were that one Anna Jones was found dead in her bath and her fiancé Henry Keogh was charged with her murder. Dr. Colin Manock, the plaintiff, was a pathologist on whose evidence Keogh was convicted of murder. In a broadcast by Channel Seven, the defendant, the presenter said: 'The new Keogh facts. The evidence they kept to themselves. The data, dates and documents that don't add up. The evidence changed from one court to the next.' While these words were being said a picture of the plaintiff was displayed in the background, slightly above the presenter. It was held that the statement in the broadcast was not comment but statement of fact implying that the plaintiff an expert witness concealed facts which led to miscarriage of justice. As a result the defence of fair comment was struck out.

A comment though based on facts is to be distinguished from a fact. A comment is an expression of opinion and not an assertion of fact, but it is difficult to draw a distinction between the two. The same words may in one context amount to an opinion whereas in another context a statement of fact.[16] Illustrations (C) and (D), to sixth exception of section 499 of the Penal Code may usefully be cited here. A says of a book published by Z—"Z's book is foolish; Z must be a weak man; Z's book is indecent, Z must be a man of impure mind." This is an example of comments on Z's book. But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine." In this example the allegation that Z is a weak man and a libertine is an assertion of fact and not an expression of opinion. Critics are advised to take pains to see that the facts and comments are severable from one another for if it is not clear that what he has stated is a comment he would be precluded in taking the defence of fair comment.[17] Mention must also be made of section 6 of the Defamation Act, 1952 (English) which provides that in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

Every person has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander.[18] "Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science."[19]

A journalist does not transgress the limits of fair comment if all material facts are truly stated in the article, though it may be that there are one or two small deviations from absolute accuracy on minor points which have no influence on the conclusions, and the conclusions are such as ought to be drawn from the premises by a critic

14. *Channel Seven Adelaide Pty. Ltd. v. Manock* (2007) 82 ALJR 303
15. *Channel Seven Adelaide Pty. Ltd. v. Manock* (2007) 82 ALJR 303
16. ODGERS' on Libel and Slander, 6th edition, p. 166 cited in *Kemsley v. Foot*, (1952) AC 345 : (1952) 1 TLR 532 (1952) 1 All ER 501 (HL).
17. *Hunt v. Star Newspaper Co. Ltd.*, (1908) 2 KB 320 : (1908-10) All ER 513; *London Artists Ltd. v. Littler*, (1969) 2 QB 375, p. 395 : (1969) 2 WLR 409. *Truth and Sportsman Ltd. v. George Stanley Thompson*, AIR 1933 PC 36.
18. *Parmiter v. Coupland*, (1840) 6 M & W 105 (108); *E.I. Howard v. Mull*, (1866) 1 BHC (Appx) 85, 91; *Lala Lajpat Rai v. The "Englishman" Ltd.*, (1909) 13 CWN 895, (1910) 14 CWN 713; *Tushar Kanti Ghose v. Bina Bhowmick*, (1952) 57 CWN 378.
19. PER LORD ELLENBOROUGH in *Tabart v. Tipper*, (1808) 1 Camp 350 (351, 352, 356).

bringing to his work the amount of care, reason and judgment which is required of a journalist.[20] But if the statement of fact is itself privileged, the plea of fair comment is not excluded by the fact that the statement is erroneous.[21]

A writer in a public paper may comment on the conduct of a public man in the strongest terms but if he imputes dishonesty, he must be prepared to justify it.[22] The privilege does not extend to calumnious remarks on the private character of the individual.[23] A newspaper has no privilege beyond any other member of the community in commenting on any matter of public interest. If the facts on which the comment purports to be made do not exist, there is no defence.[24]

The plea in an action for libel that in so far as the words complained of consist of allegations of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice on a matter of public interest is known as the "rolled up plea." It is not a plea partly of justification and partly of fair comment, but is a plea of fair comment only.[25] When fair comment is pleaded the defendant must spell out with sufficient precision the comment which he seeks to say attracts fair comment so that the plaintiff is able to know the case he has to meet.[26]

A newspaper published a letter, which purported to give the name and address of the writer, commenting unfavourably on a broadcast entertainment conducted by the plaintiff. In an action by the plaintiff it was held that it was not necessary in order to sustain the defence of fair comment to prove that the writer of the letter honestly held the opinion expressed in it, that there was no duty on a newspaper to verify the name and address of a correspondent and therefore the fact that the writer had given a fictitious name and address was irrelevant and in no way prevented the defendants from relying on the defence of fair comment.[27]

Newspapers, being submitted to the public, are a proper subject-matter of comment in the same way as literary works and the comment on them, in order to be fair, need not be confined to their literary content.[28]

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20. *Surajmal v. Horniman*, (1917) 20 Bom LR 185; *Union Benefit Guarantee Company v. Thakorlal Thakor*, (1935) 37 Bom LR 1033.
21. *Mangena v. Wright*, (1909) 2 KB 958.
22. *Campbell v. Spottiswoode*, (1863) 3 B & S 769 : 32 LJ QB 185, 196, 199; *Joynt v. Cycle Trading Publishing Co.*, (1904) 2 KB 292; *Hunt v. Star Newspaper Co. Ltd.*, (1908) 2 KB 309, 320 : 98 LT 629 : (1908-10) All ER 513.
23. *Stuart v. Lovell*, (1817) 2 Stark 93, 96; *Carr v. Hood*, (1808) 1 Camp 355n; *Gathercole v. Miall*, (1846) 15 M & W 319. Writers in public papers must be careful as to the language they use while commenting on the proceedings of Courts of Justice and on matters of public interest: they should be careful that they do not wantonly assail the character of others or impute criminality to them; *Barrow v. Hem Chunder Lahiri*, (1908) ILR 35 Cal 495; *The Englishman Ltd. v. Lala Lajpat Rai*, (1910) 14 CWN 713; *Subhas Chandra Bose v. R. Knight & Sons*, (1928) ILR 55 Cal 1121.
24. *Subhas Chandra Bose v. R. Knight & Sons, sup; Mitha Rustomji Murzban v. Nusserwanji Engineer*, (1941) 43 Bom LR 631; *Cohen v. Daily Telegraph Ltd.*, (1968) 2 All ER 407 : (1968) 1 WLR 916. See further, *Sewakram Sobhani v. R.K. Karanjia, Chief Editor, Weekly Blitz*, (1981) 3 SCC 208, (217).
25. *Sutherland v. Stopes*, (1925) AC 47 : 132 LT 550 : 41 TLR 106. The defendant is entitled to give particulars of the facts upon which he based his comments, although those facts are defamatory of the plaintiff and there is no plea of justification: *Burton v. Board*, (1929) 1 KB 301. The defendant raising a general plea of fair comment is not required to particularise which words complained of are facts and which are comments, but he must give particulars of the basic facts supporting the plea; *Lord v. Sunday Telegraph Ltd.*, (1970) 3 All ER 504.
26. *Control Risks Ltd. v. New English Library Ltd.*, (1989) 3 All ER 577 : (1990) 1 WLR 183 (CA).
27. *Lyon v. The Daily Telegraph Ltd.*, (1943) 1 KB 746.
28. *Kemsley v. Foot*, (1952) AC 345 : (1952) 1 TLR 532 : (1952) 1 All ER 501.

6(iii) Privilege

(iii)(a) General

'Privilege' means that a person stands in such relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else.[29] The general principle underlying the defence of privilege[30] is the common convenience and welfare of society or the general interest of society.

Privilege is of two kinds:—(1) absolute, and (2) qualified.

(1) A statement is absolutely privileged when no action lies for it even though it is false and defamatory, and made with express malice. On certain occasions the interests of society require that a man should speak out his mind fully and frankly, without thought or fear of consequences, *e.g.*, in Parliamentary proceedings or in the course of judicial, military, naval, or State proceedings. To such occasions, therefore, the law attaches an absolute privilege. It is based upon the principle that interest of the community at large overrides the interest of the individual. Recognised categories of absolute privilege are not to be lightly extended. "The general rule is that the extension of absolute privilege is viewed with the most jealous suspicion and resisted unless its necessity is demonstrated."[31]

(2) A statement is said to have a qualified privilege when no action lies for it even though it is false and defamatory, unless the plaintiff proves express malice. In certain matters the speaker is protected if there is absence of malice. These are—(1) communications made (a) in the course of legal, social or moral duty, (b) for self-protection, (c) for protection of common interest, (d) for public good; and (2) reports of Parliamentary and judicial proceedings, and proceedings at public meetings.

Where the defendant sets up the plea that the publication had a qualified privilege, the plaintiff must prove the existence of express malice, which may be inferred either from the excessive language of the defamatory matter itself or from any facts which show that the defendant was actuated by spite or some indirect motive.[32]

The distinctions between absolute and qualified privilege are—

(1) In the case of absolute privilege, it is the occasion which is privileged, and when once the nature of the occasion is shown, it follows as a necessary inference, that every communication on that occasion is protected. But in the case of qualified privilege the defendant does not prove privilege until he has shown how that occasion was used. It is not enough to have an interest or a duty in making a communication, the interest or duty must be shown to exist in making the communication complained of.[33]

(2) Even after a case of qualified privilege has been established, it may be met by the plaintiff proving in reply actual malice on the part of the defendant.[34] The cases

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29. Folkard.
30. *M.G. Perera v. Andrew Vincent Peiris*, AIR 1949 PC 106.
31. *Mann v. O'Neill*, (1997) 71 ALJR 903, p. 907 (High Court of Australia); *Taylor v. Serious Fraud Office*, (1998) 4 All ER 801 (HL); *Darker v. Chief Constable of the West Midlands Police*, (2000) 4 All ER 193, p. 216 (HL). See further text and footnote 33, p. 306.
32. *Adam v. Ward*, (1917) AC 309 : 117 LT 34 : 33 TLR 277; *Maroti Sadashiv v. Godabai*, (1958) 61 Bom LR 143.
33. PER DOWSE, B., in *Lynam v. Gowing*, (1880) LR 6 Ir 259, 269; *Keshavlal v. Bai Girja*, (1899) 1 Bom LR 478 : ILR 24 Bom 13; *Ma Mya Shwe v. Maung Maung*, ILR (1924) 2 Rang 333.
34. *Clarke v. Molyneux*, (1877) 3 QBD 237 : 47 LJ QB 230 : 42 JP 277; *Jenoure v. Delmege*, (1891) AC 73; *Keshavlal v. Bai Girja*, (1899) 1 Bom LR 478 : ILR 24 Bom 13; *Mati Lal Raha v. Indra Nath Bannerjee*, ILR (1909) 36 Cal 907; *Vaidianatha Sastriar v. Somasundara Thambiran*, (1912) 24 MLJ 8; *Baba Gurdit Singh v. "Statesman" Ltd.*, (1935) ILR 62 Cal 838.

of absolute privilege are protected in all circumstances, independently of the presence of malice.

6(iii)(b) Absolute Privilege

Occasions absolutely privileged may be grouped under four heads:

1. Parliamentary proceedings.
2. Judicial proceedings.
3. Military and Naval proceedings.
4. State proceedings.

Parliamentary proceedings

Statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, howsoever injurious they might be to the interest of a third person.[35] But this privilege does not extend to anything said outside the walls of the House, or to a speech printed and privately circulated outside the House[36] or to a statement made outside the House affirming what was said in Parliament even without repeating it.[37] For such a speech only, a qualified privilege can be claimed.[38]

A petition to Parliament is absolutely privileged.[39]

Statements of witnesses before Parliamentary Select Committee of either House are also privileged.[40]

The important public interest protected by the privilege is to ensure that a member or witness, when he spoke, was not inhibited from stating fully and freely what he had to say. The courts and Parliament are both astute to recognise their respective constitutional roles and the courts do not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges. These principles prohibit any suggestion to be made in a court proceeding (whether by way of direct evidence, cross examination or submission) that statements made in Parliament were lies, or were motivated by a desire to mislead. These principles also prohibit any suggestion that proceedings in Parliament were initiated or carried through into legislation in pursuance of the alleged conspiracy. The fact that the maker of the statement is the initiator of the court proceedings could not affect the applicability of the above principles for the privilege protected is the privilege of Parliament and not of an individual member.[41]

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35. *Ex Parte Wason*, (1869) LR 4 QB 573 (576); *Dillion v. Balfour*, (1887) 20 Ir LR 600; *Lala Lajpat Rai v. The Englishman Ltd.*, (1909) 13 CWN 895. See further, *Dingle v. Associated Newspapers Ltd.*, (1960) 2 QB 405; Re Parliamentary Privilege Act, 1770, (1958) AC 331 (PC); *Chenard & Co. v. Joachim Arissol*, (1949) AC 127 (PC).
36. *The King v. Lord Abingdon*, (1794) 1 Esp 226.
37. *Buchanan v. Jennings*, (2005) 2 All ER 273 (PC). In case of this nature what he said in the House can be proved as a historical fact to explain what he said outside the House.
38. *Davison v. Duncan*, (1857) 7 E & B 229.
39. *Lake v. King*, (1780) 1 Saund, 131b.
40. *Goffin v. Donnelly*, (1881) 6 QBD 307.
41. *Prebble v. Television New Zealand Ltd.*, (1994) 3 All ER 407 : (1995) 1 AC 321 : (1994) 3 WLR 970 (PC).

Under the Parliamentary Papers Act, 1840,[42] (English), all reports, papers, votes and proceedings ordered to be published by either House of Parliament, are absolutely privileged. At common law the order of the House of Commons for the publication and sale by booksellers of reports laid before the House did not exempt such booksellers from liability for any defamatory matter in any such report.[43] The above statute was passed to alter the common law.

The question whether it is open to a member of Parliament or former member of Parliament, to bring a libel action on a publication made outside Parliament, containing defamatory imputations concerning the MP's activities and conduct as a member in Parliament, on which adverse findings were made by the Parliamentary Commissioner for Standards, which were subsequently left undisturbed by the Standing Committee on Standards and Privileges and by the House of Commons itself, was considered by the House of Lords in *Hamilton v. Al Fayed*.[44] It was held that parliamentary privilege would have prevented the court from entertaining any evidence cross-examination or submission which challenged the veracity or propriety of anything done in the course of parliamentary proceeding for example, it would have been impossible for the MP to challenge the evidence relied upon by the parliamentary committee against him and similarly the defendant would have been precluded in challenging the member's conduct in Parliament. In such a situation it would not have been possible to have a fair trial of the issues involved and the suit would have been stayed. But this eventuality did not arise in that particular case because of waiver of privilege by the plaintiff MP which is permissible under section 13 of the Defamation Act, 1996 and the trial was allowed to proceed. Section 13 in so far as relevant provides as follows: (1) Where the conduct of a person in or in relation to proceeding in Parliament is in issue in defamation proceedings, he may waive for the purpose of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament. (2) When a person waives that protection (*a*) any such enactment or rule of law shall not apply to prevent evidence being given, questions being asked or statements, or submissions, comments or findings being made about his conduct and (*b*) none of those things shall be regarded as infringing the privilege of either House of Parliament.

Under Article 105(2) of the Constitution of India no member of Parliament shall be liable to any proceedings in any court in respect of anything said by him in Parliament,[45] or in any committee thereof. The Article further provides that no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings. There is a similar provision in Article 194(2) applying to the Legislatures of States. The privilege under these Articles does not extend to the publication in a private newspaper of a speech made by a member within the four walls of the House, which contains defamatory matter and which is published at the instigation of such a member.[46] No privilege under these Articles can be obtained in respect of a publication not under the authority of Parliament or Legislature.[47]

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42. 3 & 4 Vic., c. 9.
43. *Stockdale v. Hansard*, (1837) 2 Mood & Rob 9.
44. (2000) 2 All ER 224 (HL).
45. *Tejkiran Jain v. Sanjiva Reddy*, AIR 1970 SC 1573 : (1970) 2 SCC 272.
46. *Suresh Chandra v. Punit Goola*, (1951) 55 CWN 745.
47. *C.K. Daphtary v. O.P. Gupta*, AIR 1971 SC 1132 : (1971) 1 SCC 625 : 1971 CrLJ 844; *Dr. Jagdish Chandra Ghosh v. Hari Sadan*, AIR 1961 SC 613 : 1961 CrLJ 743 : (1961) 3 SCR 486.

Judicial Proceedings

No action of libel or slander lies whether against Judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceedings, before any court recognized by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed.[48] The ground of this rule is public policy or in other words, public interest in administration of justice.[49] It is applicable to all kinds of Courts of Justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorised inquiry which, though not before a court of Justice, is before a tribunal which has similar attributes,[50] *e.g.,* military tribunal.[51] The cases show that, provided the tribunal is one recognised by law there is no single element the presence or absence of which will be conclusive in showing whether it has attributes sufficiently similar to those of a court of law to create absolute privilege.[52] It is, however, not essential that the tribunal itself should have power finally to determine the issue before it, and absolute privilege may apply if the inquiry by the tribunal is a step leading directly to, or is a major influence on the final determination of that issue by the authority appointing the tribunal.[53] The enquiry held by a person appointed by the Minister under the Education (Scotland) Act, 1946, for reporting to the Minister whether the dismissal of a teacher by the education authority was reasonably justifiable, was held to be absolutely privileged.[54] Any step which is essentially a step in a judicial or *quasi*-judicial proceeding would be immune from liability for defamation as it gives rise to an occasion for absolute privilege.[55] The proceedings held before the Disciplinary Committee set up under Solicitors Act, 1957, are judicial proceedings and absolute privilege attaches to the publication of the findings and order of the Committee although the hearing was in private and only the findings and order were pronounced in public.[56] But it does not apply to Courts discharging administrative duties only, *e.g., court* of Referee constituted under the Unemployment Insurance Act, 1920.[57] Communications made to such Courts are not absolutely privileged. In cases like these the defendant has a

48. *Royal Aquarium, etc. v. Parkinson*, (1892) 1 QB 431, 451 : 61 LJQB 409: 40 WR 450; *Taylor v. Serious Fraud Office*, (1998) 4 All ER 801, pp. 807, 808 (HL).
49. *Taylor v. Serious Fraud Office, supra.*
50. *Royal Aquarium, etc. v. Parkinson*, (1892) 1 QB 431, 442, 451 : 61 LJQB 409. 40 WR 450, followed in *Barratt v. Keorns*, (1905) 1 KB 504; *Trapp v. Mackie*, (1979) 1 All ER 489 : (1979) 1 WLR 377 (HL); *e.g.*, a statement made before an officer exercising jurisdiction under the Madras Estates Land Act is absolutely privileged: *Duraiswami Thevan v. Lakshmanan Chettiar*, (1932) 38 Mad LW 240.
51. *Copartnership Farms v. Harvey Smith*, (1918) 2 KB 405.
52. *Trapp v. Mackie*, (1979) 1 All ER 489 : (1979) 1 WLR 377 (HL).
53. *Trapp v. Mackie*, (1979) 1 All ER 489 : (1979) 1 WLR 377 (HL).
54. *Trapp v. Mackie*, (1979) 1 All ER 489 : (1979) 1 WLR 377 (HL).
See further, *Hasselblad (G.B.) Ltd. v. Orbinson*, (1985) 1 All ER 173 : (1985) QB 475 (CA); the proceedings of the Commission of the European Communities constituted under the E.E.C. Treaty do not attract absolute privilege as the procedure followed by the Commission is not like judicial procedure but administrative in nature.
55. *T. Gopalankutty v. M. Sankunni*, AIR 1971 Kerala 180, (FB).
56. *Addis v. Crocker*, (1961) 1 QB 11 : (1960) 2 All ER 629.
57. *Collins v. Henry Whiteway & Co.*, (1927) 2 KB 378. See, *O'Connor v. Waldron*, (1935) AC 76, where the Commissioner performed certain administrative functions under a statute similar to a Court. A *Mahalkari* holding an inquiry into an alleged misconduct of a police patel is not acting in a judicial capacity and the statements made to him are not absolutely privileged : *Gangappagouda v. Bassayya*, (1942) 45 Bom LR 215; ILR (1943) Bom 178. This case is followed in *Marotl Sadashiv v. Godabai*, (1958) 61 Bom LR 143; AIR 1959 Bom 443; ILR (1959) Bom 405, where it is held that only a qualified privilege attaches to defamatory statement made before police officers in the course of a regular investigation under the Criminal Procedure Code, 1898. In *Smith v. National Meter Co. Ltd.*, (1945) 1 KB 143 similar view is taken of proceedings before a medical referee.

right of qualified privilege and the onus is on him to prove the privilege.[58] The doctrine of absolute privilege does not extend to an inquiry held by a superior officer of a bank into the conduct of a Bank Manager of a branch of the bank.[59]

The court has no common law power to order postponement or non-publication of a report of open court proceedings.[60]

Complaints made to the Bar Council in England relating to conduct of a member of the Bar are entitled only to a qualified privilege as that body has no judicial or *quasi*-judicial function. Absolute privilege would, however, attach to disciplinary proceedings before the Benches of an Inn of court whose disciplinary powers are derived from the Judges and are subject to an appeal to the Judges.[61]

All the documents necessary to the conduct of a case, such as pleadings, affidavits, and instructions to counsel are also absolutely privileged. Documents given to the other party on discovery or as otherwise required by law in civil and criminal proceedings, whether used or unused at the trial, are privileged.[62] But documents which do not have any immediate link with possible judicial proceedings do not qualify for absolute privilege.[63]

Judge.—Whatever act is done by a Judge or Magistrate while acting judicially is absolutely protected unless he was acting knowingly or recklessly outside his jurisdiction.[64]

Coroner.—A Coroner holding an inquest is not liable to an action for words falsely and maliciously spoken by him in his address to the jury.[65]

Receiver.—The Official Receiver has a statutory duty to inquire in a judicial way into certain matters, and in performing that duty he is acting in a judicial capacity. The report made by such an officer is absolutely privileged.[66]

Juror.—Every observation of a juror is absolutely privileged if connected with the matter in issue,[67] so is any presentment by a grand jury.[68]

Advocate.—No action lies against an advocate for defamatory words spoken with reference to, and in the course of, an inquiry before a judicial tribunal, although they are uttered by the advocate maliciously, and not with the object of supporting the case of his client, and are uttered without any justification or even excuse and from personal ill-will or anger towards the person defamed arising out of a previously existing cause, and are irrelevant to every issue of fact which is contested before the tribunal.[69]

The reason for the rule is that a counsel, who is not malicious and who is acting *bona fide*, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed

58. *Bhairo Mahto v. Rajkishore Singh*, (1936) 17 PLT 816.
59. *Purshottam Lal v. Prem Shanker*, AIR 1966 All 377.
60. *Independent Publishing Co. Ltd. v. Attorney General of Trinidad and Tobago*, (2005) 1 All ER 499 (PC).
61. *Lincon v. Daniels*, (1961) 3 All ER 740 : (1962) QB 237; *Marrinan v. Vibrat*, (1962) 3 All ER 380 : (1963) 1 QB 528.
62. *Taylor v. Serious Fraud Office*, (1998) 4 All ER 801 (HL).
63. *Waple v. Surrey County Council*, (1998) 1 All ER 624 (CA).
64. See, Chapter V, title (2) 'Judicial Acts'.
65. *Thomas v. Churton*, (1962) 2 B & S 475; *Yates v. Lansing*, (1772) 5 Johns 283.
66. *Bottomley v. Brougham*, (1908) 1 KB 584 : 24 TLR 262.
67. *The King v. Skinner*, (1772) Lofft, 55.
68. *Little v. Pomeroy*, (1873) Ir R CL 50.
69. *Munster v. Lamb*, (1883) 11 QBD 588 : 49 LT 592.

with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.[70]

Counsel.—Counsel's words are absolutely privileged, although he may have exceeded his instructions.[71]

The Madras High Court has laid down that an advocate cannot be proceeded against either civilly or criminally for words uttered in his office as advocate.[72] He has, according to the Bombay High Court, fullest liberty of speech in the course of a trial before a judicial tribunal so long as his language is justified by his instructions, or by the evidence, or by the proceedings on the record. The mere fact that his words are defamatory, or that they are calculated to hurt the feelings of another, or that they ultimately turn out to be absolutely devoid of all solid foundation, would not make him responsible, nor render him liable in any civil or criminal proceedings.[73] The Patna High Court has adopted the same view as the Madras and the Bombay High Courts.[74] The Allahabad High Court has held likewise.[75] It has also held that if a pleader makes a defamatory remark during the examination of a witness by the opponent's pleader which is entirely uncalled for and cannot be regarded as being either in furtherance of the interests of his client or in the discharge of his professional duty towards his client, he will be liable.[76]

Solicitors.—Solicitors acting as advocates have the same privilege as counsel.[77]

Party.—Defamatory statements by a party in open court conducting his own cause are also absolutely privileged; and no action will lie, no matter how false or malicious or irrelevant to the matter in issue the words complained of may have been.[78] The privilege of parties is confined to what they do or say in the conduct of the case.[79]

The Madras High Court has applied the rule of absolute immunity to an accused person in respect of questions put by him in good faith for the purpose of defending himself.[80] The Calcutta High Court in a Full Bench case does not expressly decide this point but lays down that there is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience, applicable in such circumstances, should be identical with the corresponding relevant rules of the common law of England; and that a small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules embodied in the Indian Penal Code.[81]

The Lahore High Court has laid down that remark made by a party to a suit wholly irrelevant to the matter under inquiry and uncalled for by any question of the court is not privileged.[82]

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70. PER BRETT, M.R., in *Munster v. Lamb*, (1883) 11 QBD 588, 604.
71. *The Queen v. Kierman*, (1855) 5 Ir CLR 171.
72. *Sullivan v. Norton*, (1886) ILR 10 Mad 28, (FB). See, *Shiva Kumari Debi v. Becharam Lahiri*, (1921) 25 CWN 835.
73. *Bhaishankar v. L.M. Wadia*, (1899) 2 Bom LR 3 (FB).
74. *Maharaj Kumar Jagat Mohon Nath Sah Deo v. Kalipada Ghosh*, (1922) ILR 1 Pat 371.
75. *Sheodatt Sharma v. Ram Swarup Sastry*, ILR (1945) All 702.
76. *Rahim Bakhsh v. Bachcha Lal*, (1928) ILR 51 All 509.
77. *Mackay v. Ford*, (1860) 5 H & N 792.
78. *Royal Aquarium, etc. v. Parkinson*, (1892) 1 QB 431, 451 : 61 LJQB 409 : 66 LT 513; *Hodgson v. Scarlett*, (1818) 1 B & Ald 232, (244).
79. *Seaman v. Netherclift*, (1876) 1 CPD 540, (545).
80. *Pachaiperumal Chettiar v. Dasi Thangam*, (1908) ILR 31 Mad 400.
81. *Satish Chandra Chakravarti v. Ram Dayal De*, (1920) ILR 48 Cal 388 (FB).
82. *Jiwan Mal v. Lachhman Dass*, (1926) 27 PLR 351.

Witness and Investigators.—No action lies against a witness for what he says or writes in giving evidence before a court of Justice.[83] The rule is based on public policy which requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The preliminary examination of a witness by a solicitor in preparing the proof for trial is within the same privilege as that which he would have if he had said the same thing in his sworn testimony in Court.[84] But the privilege does not extend to a wholly irrelevant answer given by a witness which is not provoked by any question.[85]

The question of privilege in the context of investigation of crime was examined by the House of Lords in *Taylor v. Serious Fraud Office*.[86] It was held that potential witnesses and those investigating a crime or assisting in a criminal enquiry were protected by absolute immunity from suit as public interest required that all persons involved in a criminal investigation should be able to communicate freely. The test was whether the statement or conduct in respect of which immunity was sought could fairly be said to be part of the process of investigating a crime or possible crime with a view to prosecution or possible prosecution. The immunity applies to documents disclosed to defence as required by law. But statements which were wholly extraneous to investigation and irrelevant and gratuitous libels were not protected.[87] Although, the immunity has been extended to proofs of evidence and to prevent witnesses from being sued for conspiracy to give false evidence, the immunity did not extend to fabrication of evidence, such as the forging of a suspect's signature to a confession, the writing down by a police officer in his notebook of words which the suspect had not said or the planting of drugs on a suspect.[88] Thus, the immunity would apply to an officer, who not claiming to have made a note, falsely stated in the witness box that the suspect made a verbal confession; but the immunity would not apply to a police officer, who in order to support the evidence he would give in court, fabricated a note containing an admission which the suspect had not made.[89] These principles have been extended to an investigation by a financial regulator.[90]

The Privy Council has decided that witnesses cannot be sued in a civil court for damages, in respect of evidence given by them upon oath in judicial proceedings. The ground of this principle is "that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."[91]

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83. *Dawkins v. Lord Rokeby*, (1875) LR 7 HL 744; *Seaman v. Netherclift*, (1876) 1 CPD 540 (545).
84. *Watson v. M'Ewan : Watson v. Jones*, (1905) AC 480. Statements made by a potential witness as a preliminary to going into the witness-box are privileged; *Sanjivi Reddy v. Koneri Reddi*, (1925) ILR 49 Mad 315. Statements made to a police-officer with a view to their being repeated before the Magistrate are privileged: ; *Sanjivi Reddy v. Koneri Reddi*, (1925) ILR 49 Mad 315.
85. *Seaman v. Netherclift*, (1876) 2 CPD 53 :46 LJCP 128.
86. (1998) 4 All ER 801 (HL). Followed in *Westcott v. Westcott*, (2009) 1 All ER 727 (C.A.) oral and written complaint to police for investigating a crime is protected by absolute privilege.
87. (1998) 4 All ER 801 (HL).
88. *Darker v. Chief Constable of the West Midlands Police*,(2000) 4 All ER 193 (HL).
89. *Darker v. Chief Constable of the West Midlands Police*,(2000) 4 All ER 193 (HL).
90. *Mahon v. Rahn*, (2000) 4 All ER 41 (2000) 1 WLR 2150 (CA).
91. *Baboo Gunnesh Dutt Singh v. Mugneeram Chowdhry*, (1872) 11 Beng LR 321 (328) (PC); *Chidambara v. Thirumani*, (1886) ILR 10 Mad 87; *Nathji Muleshwar v. Lalbhai*, (1889) ILR 14 Bom 97. See, *Rasool Bhai v. Lall Khan*, ILR 1939 Ran 479, where *Baboo Gunnesh Dutt Singh's* case has been commented on.

Similarly, the Bombay High Court has held that no action lies against a witness in respect of words spoken by him in the witness-box although they are false.[1] A criminal prosecution will lie for perjury if the evidence given is intentionally false.

The Calcutta and the Allahabad High Courts and the former Chief Court of the Punjab laid down that statements made by witnesses are protected only if they are relevant to the inquiry.[2] The Madras High Court has also held that statements made by a witness are entitled not to an absolute but only to a qualified privilege.[3]

The former Nagpur High Court had held that there is no absolute but only a qualified privilege in respect of the statement a witness is compelled to make from the witness-box. The rule of English law has not been incorporated in Indian statute law.[4]

No action lies against a person for what he states in answer to questions put to him by a police-officer conducting an investigation under the provisions of the Criminal Procedure Code.[5] Statement given by a witness as a preliminary to his examination in court is equally privileged.[6]

Affidavits, pleadings, etc.—No action lies against a man for a statement made by him in an affidavit in the course of a judicial proceeding, even though it be alleged to have been made falsely and maliciously, and without any reasonable or probable cause.[7] The same principle applies even though the person scandalized is not a party to the cause.[8] But this privilege does not extend to affidavits containing scandalous matter.[9] The court may order scandalous matter in an affidavit to be expunged.[10]

No action for libel lies for any statement in the pleadings.[11]

Indian Law.—The Bombay,[12] the Madras, the Allahabad and the Patna High Courts have laid down that no action for libel lies for any statement in pleadings. There is no difference between evidence given in the box and the evidence on affidavit in that they are both absolutely privileged.[13] Similarly, a defamatory statement in a complaint

1. *Templeton v. Laurie*, (1900) 2 Bom LR 244; ILR 25 Bom 230.
2. *Bhikumber Singh v. Becharam Sircar*, (1888) ILR 15 Cal 264; *Girwar Singh v. Siraman Singh*, (1905) ILR 32 Cal 1060; *Dawan Singh v. Mahip Singh*, (1888) ILR 10 All 425; *Tulshi Ram v. Harbans*, (1885) 5 AWN 301; *Babu Prasad v. Muda Mal*, (1913) 11 ALJR 193; *Mohun Lall v. Captain Levinge*, (1868) PR No. 39 of 1868; *Ali Khan v. Malik Yaran Khan*, (1879) PR No. 16 of 1878; *Kundan v. Ramji Das*, (1879) PR No. 146 of 1878; *Rajindra Kishore v. Durga Sahi*, AIR 1967 All 476.
3. *Peddabba Reddi v. Varada Reddi*, (1928) ILR 52 Mad 432, dissenting from *Manjaya v. Sesha Setti*, (1888) ILR 11 Mad 477, decided under the Penal Code.
4. *Hittu v. Sheolal*, (1947) ILR Nag 899.
5. *Methuram Dass v. Jaggannath Dass*, (1901) ILR 28 Cal 794. *K. Ramdas v. P. Samu Pillai*, (1969) 1 MLJ 338. *Maroti Sadasiv v. Godabai Narayanrao*, AIR 1959 Bom 443. The former Chief Court of Lower Burma held that where the investigation by the police was not into an offence absolute privilege could not be claimed. Statements made in answer to questions asked by a police-officer making general inquiries as to the names of bad characters with a view to ultimate action under the preventive sections of the Code of Criminal Procedure are privileged but not absolutely privileged: *Lu Gale v. Po Thein*, (1912) 7 LBR 64.
6. *Sanjeev Reddi v. Koneri Reddi*, (1926) ILR 49 Mad 315.
7. *Revis v. Smith*, (1856) 18 CB NS 126; *Govind Ramchandra v. Gangadhar Mahadeo*, (1943) 46 Bom LR 417: ILR 1944 Bom 222.
8. *Henderson v. Broomhead*, (1859) 4 H & N 569.
9. *Rex v. Salisbury*, (1699) 1 Ld Raym 341.
10. *Christie v. Christie*, (1873) LR 8 Ch 499.
11. *McCabe v. Joynt*, (1901) 2 IR 115.
12. *Nathji Muleshwar v. Lalbhai Ravidat*, (1889) 14 Bom 97. In this case the application containing defamatory matter was made with the object of having other persons joined as parties to the suit.
13. *Adivaramma v. Ramachandra Reddy*, (1909) 21 MLJ 85 : (1910) MWN 155; *Hanumantha Row v. Seetaramayya*, (1942) 1 MLJ 247, (1941) 55 LW 111; *Hindustan Gilt Jewel Works v. Gangayya*, ILR (1943) Mad 685. See also, the observations of the same High Court in *Hinde v. Baudry*, (1876) ILR 2 Mad 13.

to a Magistrate[14] or a petition to a Magistrate to take action under section 107, Criminal Procedure Code,[15] or a complaint to a police-officer,[16] or a defamatory statement made in an information given to the police of a cognizable offence[17] is absolutely privileged. A person presenting a petition to a criminal court is not liable in a civil suit for damages in respect of statements made therein which may be defamatory of the person complained against.[18] Such statements are absolutely privileged.[19] The Rangoon High Court has held likewise.[20]

The Calcutta High Court, however, is of opinion that a defamatory statement made in pleadings is not absolutely privileged.[21] If a statement in an affidavit is wholly irrelevant to the inquiry to which the affidavit related, the person making it would be liable for defamation.[22]

Military and Naval Proceedings.—Proceedings of naval and military tribunals are absolutely privileged. Statements made before a naval or military court of Inquiry by a military man are protected.[23] Reports made in the course of military or naval duty, such as adverse opinions expressed by one officer of the conduct of another, are absolutely privileged, even if made maliciously and without reasonable or probable cause.[24]

State Proceedings.—For reasons of public policy, absolute protection is given to every communication relating to State matters made by one minister to another, or to the Crown.[25] It is not competent to a civil court to inquire whether or not he acted maliciously in making it.[26] A report by the High Commissioner of Australia in the

14. *Re Muthusami Naidu*, (1912) ILR 37 Mad 110; *Ramhirat Kamkar v. Biseswar Nath*, (1932) ILR 11 Pat 693; *Brijlal Prasad v. Mahant Laldas*, ILR (1940) Nag 48; *Vattappa Kone v. Muthukaruppan Servai*, (1941) 1 MLJ 200 : 53 LW 238 : (1941) MWN 226. The former Judicial Commissioner's Court of Upper Burma held likewise: *Maung Myo v. Maung Kywet E*, (1918) 3 UBR (1917-1920) 88.
15. *Sanjivi Reddy v. Koneri Reddi*, (1926) ILR 49 Mad 315. Repetition of the statement contained in the petition before a police-officer to whom the Magistrate referred the complaint for inquiry and report is also absolutely privileged.
16. *Bapalal & Co. v. Krishnaswami*, ILR 1941 Mad 332. *Bapalal's* case is dissented from in *Surendra Nath v. Bageshwari Prasad*, AIR 1961 Pat 164, ILR 40 Pat 84, where it is held that a defamatory statement contained in a petition filed before the Superintendent of Police enjoyed at best only a qualified privilege as the Superintendent of Police is merely an administrative machinery for inquiring whether an offence has been committed and he cannot, therefore, be said to be acting in the course of judicial proceeding. (There is a divergence of judicial opinion in the High Courts in India on this point.) See also, *Lachhman v. Pyarchand*, AIR 1959 Raj 169 : (1959) RLW 222 : ILR (1959) 9 Raj 498, where it is held that a defamatory statement made by an aggrieved party in his report or complaint to the police is absolutely privileged. See, *T. G. Nair v. Meleparath Sankunni*, AIR 1971 Ker 280; *V. Narayana v. E. Subbanna*, AIR 1975 Karn 162.
17. *Bira Gareri v. Dulhin Somaria*, AIR 1962 Pat 229 : (1962) 1 Cr LJ 737. Contra. *Satish Chandra Mullick v. Jagat Chandra Dutta*, AIR 1974 Cal 266 (qualified privilege).
18. *Chunni Lal v. Narsingh Das*, (1917) ILR 40 All 341, (FB) overruling *Abdul Hakim v. Tej Chandar Mukarji*, (1881) ILR 3 All 815.
19. *Ramhirat Kamkar v. Biseswar Nath*, (1932) ILR 11 Pat 693.
20. *Ma Mya Shwe v. Maung Maung*, (1924) ILR 2 Ran 333.
21. *Augada Ram Shaha v. Nemai Chand Shaha*, (1896) ILR 23 Cal 867; *H. P. Sandyal v. Bhaba Sundari Debi*, (1910) 15 CWN 995 : 14 CLJ 31; *Shibnath v. Sat Cowree deb*, (1865) 3 WR 198. In a later case, however, though the point was not necessary for decision MOOKERJEE J., said that in civil suits parties ought to enjoy the same absolute privilege as under the English law; BEACHCROFT, J., expressed *contra*; *C.H. Crowdy v. L.O. Reilly*, (1912) 17 CWN 554 : 17 CLJ 105.
22. *Giribala Dassi v. Pran Krishto Ghosh*, (1903) 8 CWN 292. In Oudh the view of the Calcutta High Court was followed : *Dalpat Singh v. Amarpal Singh*, (1918) 21 OC 321.
23. *Dawkins v. Lord Rokeby*, (1875) LR 7 HL 744; *Copartnership Farms v. Harvey-Smith*, (1918) 2 KB 405.
24. *Dawkins v. Lord Paulet*, (1869) LR 5 QB 94.
25. *Chatterton v. Secretary of State for India in Council*, (1895) 2 QB 189 (194); *State v. Griffith*, (1869) LR 2 PC 420.
26. *Chattarton v. Secretary of State for India in Council, supra.*

United Kingdom to the Prime Minister of Australia is absolutely privileged.[27] A communication may be absolutely privileged as an act of State although it relates to commercial matters.[28]

There is a difference of opinion whether an official publication, *e.g.*, a Government Resolution, is absolutely privileged or enjoys merely a qualified privilege.[29] According to the Madras High Court it is absolutely privileged.[30]

Communications relating to State matters are not confined to cases where the Secretaries of State or Under-Secretaries of State are communicating with one another. State matters mean public matters, particularly matters connected with the administration of justice, and a State Officer must include a police officer whose duty it is to make enquiries and investigations into allegations of commission of criminal offences. Report made by a police officer to a Magistrate under section 202, Criminal Procedure Code, falls within the category of State matters and is absolutely privileged.[31]

The court will refrain from enquiring the merits of an internal document of a foreign embassy particularly when the law of nations as reflected in Article 24 of the Viena Convention on diplomatic relations required embassy documents to be treated as inviolable and thus absolutely privileged.[32]

The limits of privilege under this head are, however, a bit uncertain. No one would advocate that the absolute privilege should extend to all communications between all officers of the State, but it is not possible to say that it should be restricted to communications between ministers or officers at the top. As observed by WINFIELD: "Care should be taken not to extend absolute privilege further than can be shown to be really necessary. It is no less in the interest of the State that justice should be done to the citizen than that the machinery of Government should be able to work without fear of legal action."[33]

6(iii)(c) Qualified Privilege

The law presumes or implies malice in all cases of defamatory words; this presumption may be rebutted by showing that the words were uttered on a privileged occasion. If a communication is privileged, the privilege will cover all incidental publications which are made in normal course of business such as dictation to a typist.[34] Malice in law, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion. In such a case, in order to make a libel actionable, the burden of proving actual or express malice is always on the plaintiff. Malice in that sense means making use of a privileged occasion for an indirect and improper motive. Such malice can be proved in a variety of ways, *inter alia* (i) by showing that the writer did not honestly believe in the truth of the allegations, or that he believed them to be false; (ii) or that the writer is moved by hatred or dislike, or a desire to injure the subject of libel and is merely using the privileged occasion to defame; and (iii) by showing that out of anger, prejudice or wrong motive, the writer

27. *M. Issac & Sons Ltd. v. Cook*, (1925) 2 KB 391 : 134 LT 286 : 41 TLR 267.
28. *M. Issac & Sons Ltd. v. Cook*, (1925) 2 KB 391 : 134 LT 286 : 41 TLR 267.
29. *Jehangir v. Secretary of State*, (1902) 5 Bom LR 30 : (1903) ILR 27 Bom 189 : (1904) 6 Bom LR 131.
30. *Ross v. Secretary of State*, (1913) ILR 37 Mad 55.
31. *Beni Nadho Prasad v. Wajid Ali*, ILR (1937) All 390.
32. *Fayed v. Al-Tajir*, (1987) 2 All ER 396 (CA).
33. WINFIELD & JOLOWICZ, Tort, 12th edition, p. 337 and *Merricks v. Nott Bower*, (1965) 1 QB 57. See further, text and footnote 31, p. 297, *ante*.
34. *Osborn v. Boulter*, (1930) 2 KB 226 : 143 LT 460 : 99 LJKB 556 ; *Bryanstan Finance Co. Ltd. v. Devries*, (1975) 2 All ER 609 (CA). See also title 3(iv) 'Publication', text and footnote 64, p. 283, *ante*.

casts aspersions, reckless whether they are true or false.[35] Lack of honest belief is destructive of privilege and reckless publication of defamatory matter without considering or caring whether it be true or not comes in the same category; but if the defendant honestly believed in the truth of his allegations, the protection of privilege is not lost simply because he leaped to his conclusions on inadequate material or because he believed in the truth of the allegations on account of gross and unreasoning prejudice, although these factors along with other material may be used for holding that the dominant motive in publishing the statement was personal spite or some other improper motive taking away the protection of privilege in spite of the defendant's belief in the truth of the allegations.[36]

The defendant has to prove that the occasion is privileged. If the defendant proves it, the burden of showing 'actual malice' or 'malice in fact' is cast upon the plaintiff, but unless the defendant does so, the plaintiff is not called upon to prove 'actual malice'.[37] To prove malice, extrinsic evidence of malice is not necessary.

The words of the libel and the circumstances attending its publication may themselves afford evidence of malice.[38]

The following are the cases of qualified privilege:

(i) When the circumstances are such that the defendant is under a duty *of making a communication to a third person who has a corresponding interest in receiving it; or where the defendant has an interest to protect and the third person has a duty to protect that interest.*

A communication, injurious to the character of another made *bona fide* from a sense of duty, legal, moral, or social, and reasonably necessary for the due discharge of such duty, and made with a belief in its truth, is privileged.[39] There must in fact be an interest or duty in the person to whom the libel is published. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty;[40] the person must have an interest in the matter communicated.[41] A privileged occasion in the present context is "an occasion when 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."[42] The principle is that "either there must be interest in the recipient and a duty to communicate in the speaker, or an interest to be protected in the speaker and

35. *Rustom K. Karanjia v. Thackersey*, (1969) 72 Bom LR 94; *Horrocks v. Lowe*, (1975) 1 All ER 662 (669, 670) : (1974) 2 WLR 282 (HL). In *Radhakrishna Nair v. Chathunni*, AIR 2003 Ker 108, p. 110 the whole of the paragraph is quoted.
36. *Horrocks v. Lowe*, (1975) 1 All ER 662 (669, 670) : (1974) 2 WLR 282 (HL).
37. *Hebditch v. Macllwaine*, (1894) 2 QB 54 : 63 LJQB 587 : 70 LT 626; *Stuart v. Bell*, (1891) 2 QB 341; *Clark v. Molyneux*, (1877) 3 QBD 237; *Royal Aquarium, etc. v. Parkinson*, (1892) 1 QB 431 (434). *Dickson v. Earl of Wilton*, (1859) 1 F & F 419; *Jackson v. Hopperton*, (1864) 16 CBNS 829.
38. *Mati Lal Raha v. Indra Nath Bannerjee*, (1909) ILR 36 Cal 907.
39. *Dawkins v. Lord Paulet*, (1869) LR 5 QB 94 (102) *Harrison v. Bush*, (1856) 5 El & B 344. Report made by Municipal members in respect of the conduct of a Municipal employee was held to be made on a privileged occasion: *Prem Narain v. Jogdamba Sahai*, (1925) ILR 47 All 859.
40. *Hebditch v. Macllwaine*, (1894) 2 QB 54 : 63 LJQB 587 : 70 LT 626; *Beach v. Freeson*, (1971) 2 All ER 854 : (1972) 1 QB 14. *Adam v. Ward*, (1917) AC 309 : 33 TLR 277.
41. *Watt v. Longsdon*, (1930) 1 KB 130.
42. *Adam v. Ward*, (1917) AC 309 (HL), p. 334 : 33 TLR 277 (LORD ATKINSON); *Watt v. Longsdon*, (1930) 1 KB 130; *White v. J. and F. Stone (Lighting and Radio) Ltd.*, (1939) 2 KB 827; *Tushar Kanti Ghose v. Bina Bhowmick*, (1952) 57 CWN 378.

a duty to protect it in the recipient.[43] But the privilege is restricted to the communication that is relevant to the duty or interest and does not extend to irrelevant matters.[44] But the test of irrelevant matter is not whether it is logically relevant but whether in all the circumstances, it can be inferred that the defendant either did not believe it to be true, or though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite or for some other improper motive.[45] Such communications are protected for the common convenience and welfare of society.[46] The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognises that they have a duty to perform or an interest to protect in doing so.[47] Therefore, what is published in good faith in matter of these kinds is published on a privileged occasion and is not actionable even though it may be defamatory and turn out to be untrue.[48] The principles relating to qualified privilege "are stated at a very high level of abstraction and generality. The difficulty lies in applying the law to the circumstances of the particular case under consideration. Concepts which are expressed as 'public or private duty, whether legal or moral' and 'the common convenience and welfare of society' are evidently difficult of application. When it is recognised, as it must be that the circumstances that constitute a privileged occasion can themselves never be categorised, it is clear that in order to apply the principles a court must make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading upto and surrounding the publication".[49] In this case the respondent published a newsletter known as the 'Occupational Health and Safety Bulleton'. It dealt only with matters relating to occupational health and safety matters and its subscribers were also only those who were responsible for these matter. Because of this there existed a duty or interest between maker and recipient. In one of its bulletons the respondent published an article discussing litigation involving a company controlled by the appellant. The article erroneously reported that the appellant (as opposed to the company) had been found to have contravened the Trade Practices Act, 1974. Having regard to all the circumstances of the case the respondent was given the benefit of qualified privilege.

A letter written by the creditor of a junior officer to his commanding officer to secure payment of a debt is written on a privileged occasion.[50] A public officer may send to his superior a report, pertinent to a matter which it is his duty to investigate, even though the report contains defamatory statements regarding an individual. Such a report is confidential and is privileged.[51] The mere fact that the superior officer never asked his opinion with regard to the subject of the communication does not destroy the privilege.[52] Similarly, an order containing defamatory statements regarding a person sent by a superior officer to his subordinate officer in the course

43. *Watt v. Longsdon*, (1930) 1 KB 130 : 45 TLR 619 : 73 SJ 544 (SRUTTAN L. J.); WEIR Case Book on Tort, 5th edition, p. 450.
44. *Adam v. Ward*, (1917) AC 309 HL, p. 340; *Surendra Nath v. Bageshwari Prasad*, AIR 1961 Pat 164.
45. *Horrocks v. Lowe*, (1974) 1 All ER 662 (670, 671) : (1974) 2 WLR 282 : (1975) AC 135 : 118 SJ 149 (HL).
46. *Toogood v. Spyring*, (1834) 1 Cr. M & R 181, 193.
47. *Horrocks v. Lowe*, (1974) 1 All ER 662 (668, 669) : (1975) AC 135 : 118 SJ 149 : (1974) 2 WLR 282 (HL).
48. *Horrocks v. Lowe*, (1974) 1 All ER 662 (668, 669) : (1975) AC 135 : 118 SJ 149 : (1974) 2 WLR 282 (HL).
49. *Bashford v. Information Australia (Newsletters) Py. Ltd.*, (2004) 78 ALJR 346, pp. 348, 349.
50. *Winstanley v. Bampton*, (1943) 1 KB 319.
51. *G.T.Thomas v. E.M. Simmons*, (1898) 4 Burma LR 152; *Jusab v. Morrison*, (1912) 15 Bom LR 249; *Kunwar Radha Krishen v. H.S. Bates*, (1951) ALJ 268.
52. *Narasimha v. Balvant*, (1903) 5 Bom LR 664; ILR 27 Bom 585.

of his official duty is privileged.[53] The defendant in his capacity as a Union leader and as a member of the governing council of a hospital emphasising in a newspaper report, inaction of the Government in not enquiring into charges of misappropriation without naming the plaintiff was held entitled to qualified privilege.[54]

Character is given to a *servant* for his benefit as well as for the benefit of the public. If the master wantonly and capriciously volunteers to make a statement injurious to the servant, or makes such statement out of malice, the statement is not privileged.[55] If bad character is deserved, the master is not liable.[56] If a person, thinking of dealing with another in any matter of business, asks a question about his character from someone who has means of knowledge, it is for the interests of society that the question should be answered; and if answered *bona fide* and without malice, the answer is a privileged communication.[57] If a person or an association carrying on the business of obtaining information regarding the character of other persons and selling such information for profit communicates information injurious to the plaintiff, he or it will be liable.[58] But the privilege may exist when the association does not conduct its business purely for gain, its members are themselves interested in trade and control is exercised over the person who procures the information.[59]

Communications made in cases of confidential relationship.—A confidential relationship exists, for instance, between husband and wife, father and son,[60] guardian and ward,[61] master and servant,[62] principal and agent, solicitor and client,[63] partners or even intimate friends.[64] In these cases there exists between the parties such a confidential relation as to throw on the defendant the duty of protecting the interest of the person concerned. If a lawyer *bona fide* acts in his professional capacity on the instructions of his client he will have the protection of qualified privilege.[65] The privilege of solicitor and client has been generally dealt with as qualified privilege.[66]

53. *Govindan Nair v. Achutha Menon*, (1915) ILR 39 Mad 433.
54. *Radhakrishna Nair v. Chathunni*, AIR 2003 Ker 108.
55. *Gardner v. Slade*, (1849) 13 QB 796; *Rogers v. Clifton*, (1803) 3 B & P 587; *Toogood v. Spyring*, (1834) 1 Cr M & R 181.
56. *Weatherston v. Hawkins*, (1786) 1 TR 110, *Somerville v. Hawkins*, (1851) 10 CB 583; *Dixon v. Parsons*, (1858) 1 F & F 24.
57. *Walter v. Loch*, (1881) 7 QBD 619, 622. See, *Beatson v. Skene*, (1860) 29 LJ Ex. 430; *Cowles v. Potts*, (1865) 34 LJ QB 247; *London Assn. for Protection of Trade v. Greenlands Ltd.*, (1916) 2 AC 15 : 114 LT 434 (HL).
58. *Macintosh v. Dun*, (1908) AC 390 (PC).
59. *London Association for portection of trade v. Greenlands Ltd.*, (1916) 2 AC 15 (26, 27) : 114 LT 434 (HL) (LORD BUCKMASTER).
60. *Peacock v. Reynal*, (1612) 2 B & G 151.
61. *Aberdein v. Macleoy*, (1893) 9 TLR 539.
62. *Scarll v. Dixon*, (1864) 4 F & F 250; *Boxius v. Goblet Freres*, (1894) 1 QB 842 : 70 LT 368 : 42 WR 392; *Baker v. Carrick*, (1894) 1 QB 838; *Edmondson v. Birch & Co. Limited, and Horner*, (1907) 1 KB 371. See, *Leishman v. Holland*, (1890) ILR 14 Mad 51; *Thomas Whitehead Mills v. Lawrence Meitchell*, (1865) Bourke 18.
63. *Wright v. Woodgate*, (1835) 2 Cr M & R 573.
64. A communication from a clergyman in charge of a mission to a lady attached to his staff intimating his disapproval of her proposed marriage and containing imputations affecting the moral character of the person whom she was about to marry is a privileged communication, and not actionable unless malice is shown : *X v. Z*, (1907) PR No. 83 of 1908.
65. *Tarapada Majumdar v. K.B. Ghosh & Co.*, AIR 1979 Cal 68 : (1979) 83 Cal WN 96.
66. *Minter v. Priest*, (1930) AC 558 : 143 LT 57 : 46 TLR 301. The case of *More v. Weaver*, (1928) 2 KB 520 : 44 TLR 710, which laid down that communication between a solicitor and a client is absolutely privileged, requires reconsideration.

Where a husband and his father made false allegations regarding the former's wife to a vakil who communicated the allegations to the wife's father, it was held that the communication though made to their legal adviser was not absolutely privileged as it was false and made from an improper motive and that they were liable in damages *Balammal v. Palandi Naidu*, (1938) 2 MLJ 340 : (1937) MWN 1108 : (1937) 46 Mad LW 932.

A confidential communication between a solicitor and client comes under qualified privilege because the communication is supposed to have been made in the protection of self-interest or by reason of common interest existing between the party communicating and the party communicated to. But where a communication is made to a solicitor in connection with a judicial proceeding, or in connection with a necessary step preliminary thereto, or with reference to an act incidental to the proper initiation thereof, the communication is absolutely privileged.[67]

Where the defendant has a duty or interest which entitles him to speak and the person or authority to whom he so speaks is also under a corresponding duty or interest in that connection, the occasion is a privileged one, and though the complaint made may be *per se* defamatory, it would be protected even if it be made falsely or erroneously so long as it is not made out of malice or from improper motive.[68] The plaintiffs who were solicitors practising in partnership brought an action against the defendant who was a member of Parliament claiming damages for libel. The defendant had sent a letter to the Secretary of Law Society in which he set out complaints made by one of his constituents concerning the conduct of the plaintiffs whom he had consulted professionally. The defendant did not dispute that the letter was defamatory but successfully claimed that its publication to the Law Society was protected by qualified privilege because the defendant who was member of Parliament had an interest to receive from his constituent a complaint about the conduct of the solicitors acting in relation to their office in the defendant's constituency and had a consequential interest or duty in passing the complaint to the Law Society which had a corresponding duty or interest in receiving it.[69] So a circular in good faith and believing the allegations to be correct issued by the Bar Council regarding the conduct of some barristers to all its constituents was held to be protected by qualified privilege even though the Bar Council had not taken steps to verify the correctness of the allegations.[70] But lack of reciprocity is destructive of this kind of privilege. For example, although a wife may be interested in receiving information about the moral conduct of her husband it is not the duty of even a friend to communicate to the wife all that he hears about the husband's conduct and if the information communicated to the wife is defamatory and not true, the husband can sue the informer for defamation who cannot plead the defence of qualified privilege for lack of reciprocity.[71] It is for the judge to decide whether in the circumstances of the case, a moral or social duty to communicate existed and this be must do, as best as possible, having regard to the people of ordinary intelligence and moral principle in general.[72]

Even *newspapers* cannot claim protection of qualified privilege simply by showing that they gave information on a matter of public interest; to claim the privilege it must further be shown that there was a duty in giving out that information to the public.[73] For the purpose of this defence, the factors relating to the conduct and decisions of the publisher or journalist are to be considered objectively in the light of the matters known to the defendant at the time of publication and are not to be judged

67. *Lilley v. Roney*, (1892) 61 LJQB 727. *Bottomley v. Brougham*, (1908) 1 KB 584, 588, 589, followed in *Balammal v. Palandi Naidu*, (1937) 46 Mad LW 932 : (1937) MWN 1108 : (1938) 2 MLJ 340, where the defendant's vakil wrote a letter to the plaintiffs containing a malicious defamatory statement concerning the plaintiffs, *viz.* "Your daughter ran away with one M from her husband clandestinely and was staying with him for two days."
68. *Ramdas v. Raja*, (1959) RLW 247.
69. *Beach v. Freeson*, (1971) 2 All ER 854 : (1972) 1 QB 14 : (1971) 2 WLR 805.
70. *Kearns v. General Council of the Bar*, (2003) 2 All ER 534 (CA).
71. *Watt v. Longsdon*, (1930) 1 KB 130 : 98 LJKB 711 : 45 TLR 619 (CA).
72. *Stuart v. Bell*, (1891) 2 QB 341, 350; *Watt v. Longsdon*, (1930) 1 KB 130 (CA).
73. *London Artists Ltd. v. Littler*, (1968) 1 WLR 607; *R.K. Karanjia v. Thackersey*, AIR 1970 Bom 424 (429).

with the benefit of hindsight on matters not known to him at the time of publication.[74] Further guidance, in the matter of qualified privilege of newspapers for deciding whether there had been a duty to publish defamatory words to the world at large and whether to newspaper was justified in maintaining web archives, was given by the court of Appeal in *Loutchansky v. Times Newspapers Ltd., (No. 2)*.[75]

Volunteered information.—Where a person is so situated that it becomes right in the interest of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them it is a privileged communication,[76] *e.g.*, communication by the secretary of a charity organization society to a stranger as to the deserts of an applicant to such stranger for charity,[77] or publication of the minutes of a Medical Council that a certain practitioner is guilty of infamous conduct,[78] or communication by a member of a caste to a meeting of the caste,[79] or communication of a resolution by a secretary[80] or headman[81] of a caste to members of the caste, or by the secretary of one section of a caste to secretaries of other sections of the caste,[82] or publication of the decision of the stewards of the Jockey Club in the Racing Calendar that a trainer was warned off a particular race because a horse trained by him was doped, but not in any other newspaper.[83]

Information as to crime or misconduct of others.—When it comes to the knowledge of any one that a crime has been committed, a duty is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of the crime; and, if he states only what he knows and honestly believes he cannot be subjected to an action for damages merely because it turns out that the person as to whom he has given the information is, after all, not guilty of the crime.[84] Under the Criminal Procedure Code (Act V of 1898) a duty was cast on every person to give information of the commission of certain offences to the nearest Magistrate or police officer (section 44). A written communication to the Commissioner of Police, mentioning certain grievances, which if genuine, the Commissioner would be a fit

74. *Loutchansky v. Times Newspapers Ltd.*, (2001) 4 All ER 115 : (2001) EWCA Civ 536 : (2001) 3 WLR 404 (CA).
75. (2002) 1 All ER 652 (CA).
76. *Davies v. Snead*, (1870) LR 5 QB 608 (611). Presence of other persons does not destroy the privilege : *Pittard v. Oliver*, (1891) 1 QB 474.
77. *Waller v. Loch*, (1881) 7 QBD 619.
78. *Allbutt v. General Council of Medical Education and Registration*, (1889) 23 QBD 400 : 61 LT 585.
79. *Keshavlal v. Bai Girja*, (1899) 1 Bom LR 478, ILR 24 Bom 13. Where the defendant alleged before members of a caste that the plaintiff had committed adultery with a woman of low caste, it was held that the defendant was within his right in making the statement : *Daulat Singh v. Prem Singh*, (1938) ALJR 638. Where a libellous communication is made regarding a member of a caste, the mere fact that the person making such communication is a member of the caste will not itself suffice to make the communication privileged : *Cooppoosami Chetty v. Durabsami Chetty*, (1909) ILR 33 Mad 67.
80. *Raghunath Damodhar v. Janardhan Gopal*, (1891) ILR 15 Bom 599.
81. *Natu v. Keshavji*, (1901) ILR 26 Bom 174 : 3 Bom LR 718; *Gobind Das v. Bishambhur Das*, (1917) 44 IA 192 : 19 Bom LR 707.
82. *Gobind Das v. Bishambhur Das*, (1917) 44 IA 192 : 19 Bom LR 707. The Privy Council held in this case that the occasion of the publication of such a resolution was privileged even if the resolution had been passed under circumstances which rendered it irregular (though it was not so in that particular case). See, *Aditram v. Hargoyan*, (1904) 6 Bom LR 684. Where there was clearest evidence of ill-will between plaintiff and defendant and the defendant imputed conduct to the plaintiff which was considered bad or very improper by the members of the community to which the plaintiff belonged, it was held that the defendant was liable : *Narsingh Das v. Sada Ram*, (1919) ILR 41 All 329.
83. *Chapman v. Ellesmere (Lord)*, (1932) 2 KB 431 : 146 LT 538 : 48 TLR 309.
84. *Lightbody v. Gordon*, 9 SC. SC 934; *Padmore v. Lawrence*, (1840) 11 A & E 380; *Kine v. Sewell*, (1838) 3 M & W 297, 302. Statement contained in a report of an alleged offence made to the police enjoy qualified privilege: *Majju v. Lachman Prasad*, (1924) ILR 46 All 671 (FB); *Sajjad Husain v. Mul Chand*, (1925) ILR 2 OWN 822.

person to remedy but containing passages admittedly defamatory of the plaintiff, is not absolutely privileged.[85]

(ii) Communications made in self-protection

A. Statements necessary to protect defendant's own interests.—A statement made by a person in the conduct of his own affairs, in matters where his interest is concerned, is privileged.[86]

Any one, in the transaction of business with another, has a right to use language *bona fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another.[87]

The defendants in a printed monthly circular issued to their servants stated they had dismissed the plaintiff for gross neglect of duty. It was held that the occasion was privileged, in the absence of malice or abuse of authority, as it was clearly in the interest of the defendants that their servants should know that gross misconduct would be followed by dismissal.[88] A, a shopkeeper, says to B, who manages his business: "Sell nothing to Z unless he pays you ready money for I have no opinion of his honesty." Here A is protected if he has made the information in good faith for protection of his interest.[89]

An apology published in mitigation of a libel against A which contains a defamatory statement about B and which could have been avoided without affecting the quality of apology is not privileged against B even though it was not entirely irrelevant but the solicitors joining in the publication would be protected even against B.[90]

B. Statements provoked by plaintiff.—A man has a right to defend his character against false aspersions. If the defendant makes any statement *bona fide* in answer to the attack made on him by the plaintiff and for the sole purpose of defending himself from such an attack, then the occasion is privileged.[91] But the statement must not be irrelevant.[92]

The privilege may be lost if the extent of publication is excessive, *e.g.*, in a matter of purely local or private importance, it is not necessary to write to the *Times* or to advertise. In such a case, the extent of publication given to the announcement is evidence of malice.[93] But where the plaintiff has previously attacked the defendant in newspapers[94] or in public, and the latter retaliates by publishing in the papers in

85. *Mayr v. Rivaz*, (1943) ILR 1 Cal 250.
86. *Toogood v. Spyring*, (1834) 1 Cr M & R 181; *Leslie Rogers v. Hajee Fakir Muhammad Sait*, (1918) 35 MLJ 673.
87. *Tuson v. Evans*, (1840) 12 A & E 733, 736; *Queen-Empress v. E.M. Slater*, (1890) ILR 15 Bom 351; *Abdul Hakim v. Tej Chandar Mukarji*, (1881) ILR 3 All 815. *Hinde v. Baudry*, (1876) ILR 2 Mad 13.
88. *Hunt v. G.N. Ry. Co.*, (1891) 2 QB 189 : 60 LJQB 498; *Shaik Ameenooddeen v. Bibee Khyroonnissa*, (1873) 20 WR 60; *Mirza Ekhal Bahadoor v. R. Solano*, (1865) 2 WR 163; *Venkata Narasimha v. Kotayya*, (1889) ILR 12 Mad 374.
89. Illustration (a) to ninth exception of section 499, IPC.
90. *Watts v. Times Newspapers Ltd.*, (1996) 1 All ER 152 (CA).
91. *O'Donoghue v. Hussey*, (1871) Ir. R. 5 CL 124; *Coward v. Wellington*, (1836) 7 C & P 531, 536; *Amrita Nath Mitter v. Abhoy Charan Ghose*, (1904) ILR 32 Cal 318.
92. *Amrita Nath Mitter v. Abhoy Charan Ghose*, *sup.*
93. *Capital & Counties Bank v. Henty*, (1882) 7 App Cas 741 : 47 LT 662 : 31 WR 157. At a heated quarrel at an election meeting plaintiff called defendant "a rowdy and a suspect", and the defendant retorted by saying that the plaintiff was a "drunkard". After the election the defendant repeated that the plaintiff was a drunkard. It was held that the defendant was not liable for the use of the word at the meeting but liable for subsequent use of it: *Subbaraidu v. Sreenivasa Charyulu*, (1926) 52 MLJ 87.
94. *Coward v. Wellington*, (1836) 7 C & P 531, 536.

self-defence a statement of the case from his point of view, and in so doing makes a defamatory statement concerning the plaintiff, such statement is privileged, if made *bona fide*.[1]

Statements invited by plaintiff.—A letter written by the defendant as an answer to a letter sent by the plaintiff with an intention of obtaining such answer is not actionable even if it contains defamatory statements.[2]

(iii) Protection of common interest

Every communication made *bona fide*, upon any subject-matter in which the party communicating has an interest, is privileged if made to a person having a corresponding interest,[3] or to a person honestly believing to have a duty to protect that interest.[4] But the privilege will be lost if the statement is made to an unnecessarily large number of persons and thus spread broadcast.[5]

A communication made *bona fide* to a lady by her son-in-law,[6] or by her brother,[7] as to the character of her intended husband: a letter written by a solicitor on behalf of his client to a third person,[8] a letter written by the husband to the relations of his divorced wife explaining his conduct,[9] are privileged communications made in the protection of common interest.

One B, the foreign manager of a company which carried on business abroad, wrote to the defendant, who was a director of the company in England, a letter containing gross charges of immorality, drunkenness and dishonesty on the part of the plaintiff who was the managing director of the company abroad. Without obtaining any corroboration of the allegations in B's letter and without communicating with the plaintiff, the defendant showed B's letter to the chairman of the board of directors, and then to the plaintiff's wife who was an old friend of his. The allegations in B's letter were unfounded, but the defendant believed them to be true. It was held that the publication to the chairman was made upon a privileged occasion as there was community of interest as to the affairs of the company, but that the publication to the plaintiff's wife was not so for there was neither a community of interest with her nor was a duty to communicate to her.[10]

(iv) Communications made to persons in public position

Such communications must be for public good. Information given for the purpose of redressing grievances, or securing public morals is privileged, for instance,

1. *Laughton v. Bishop of Sodor and Man*, (1872) LR 4 PC 495; *Koenig v. Ritchie*, (1862) 3 F & F 413; *Regina v. Veley*, (1867) 4 F & F 1117. See, *The Englishman, Ltd. v. The Hon'ble Antonio Arrivabene*, (1930) 35 CWN 271, 52 CLJ 345, where the plaintiff's complaint about an interview was published along with the editor's note as to the reliability of the reporter who took the interview.
2. *King v. Waring*, (1803) 5 Esp 13.
3. *Harrison v. Bush*, (1856) 5 E & B 344; *Watt v. Longsdon*, (1930) 1 KB 130 : 45 TLR 619 : 73 SJ 544; *De Buse v. McCarthy*, (1942) 1 KB 156 : 58 TLR 83 : (1942) 1 All ER 19; *Venkata Narasimha v. Kotayya*, (1889) ILR 12 Mad 374; *Mati Lal Raha v. Indra Nath Bannerjee*, (1909) ILR 36 Cal 907.
4. *Ravunni Menon v. Neelakandan Nambudri*, (1934) MWN 345.
5. *Duncombe v. Daniell*, (1837) 8 C & P 222.
6. *Todd v. Hawkins*, (1837) 8 C & P 88.
7. *Admas v. Coleridge*, (1884) 1 TLR 84.
8. *Quartz Hill Consolidated Gold Mining Co. v. Beall*, (1882) 20 Ch D 501 (509); *Baker v. Carrick*, (1894) 1 QB 838 : 70 LT 366. If such letter contains a statement of independent and extraneous matter unconnected with and not relevant to the purposes of the letter the privilege will be lost : *M'Keogh v. O'Brien Moran*, (1927) IR 348.
9. *C. Bodycote v. C.W. McMorran*, (1898) 4 Burma LR 212.
10. *Watt v. Longsdon*, (1930) 1 KB 130 : 45 TLT 619 : 73 SJ 541. See also, text & footnotes 41, 42, p. 307.

a complaint to the Home Secretary about a Magistrate,[11] or to the Postmaster-General about a postmaster,[12] or to a Bishop about a clergyman,[13] or to a member of Parliament by a constituent to bring to the notice of a Minister improper conduct of a public official.[14] The person to whom the information is given must be competent to deal with the subject-matter,[15] otherwise there can be no privilege.[16]

(v) Fair Reports

Fair reports of (1) judicial proceedings; (2) Parliamentary proceedings; (3) *quasi*-judicial and other similar proceedings; and (4) proceedings of public meetings, are treated as privileged communications.

By virtue of the Defamation Act, 1952, the publication in a newspaper of any report or matter as is mentioned in the Schedule to that Act shall be privileged unless the publication is proved to be made with malice. Further, nothing in the section is to be construed as protecting the publication of any matter which is not of public concern and the publication of which is not for the public benefit.[17]

Judicial proceedings.—A fair, substantial, *bona fide*, impartial, and correct report of proceedings in any court of Justice open to the public[18] is privileged, except where the matters given in evidence are (1) of a grossly scandalous, blasphemous, seditious or immoral tendency,[19] or (2) expressly prohibited by an order of the Court,[20] or (3) by statute,[21] for it is no advantage to the public, or public justice, that such matters should be detailed. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of a court of Justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings.[22] The privilege relating to newspaper reports of judicial proceedings extends to the statements contained in counsel's speeches and there is no rule of law that a newspaper, before publishing the report of proceedings, is bound to verify whether the statements made in the court by a counsel, solicitor or a witness are accurate.[23]

The report should be confined to what takes place in the court and the two things, report and comment, should be kept separate.[24] The reporter ought not to mix up with the report comments of his own. If any comments are made they should not be made as a part of the report. It is not necessary that the report should be verbatim; it must

11. *Harrison v. Bush*, (1856) 5 E & B 344.
12. *Woodward v. Lander*, (1834) 6 C & P 548.
13. *James v. Boston*, (1845) 2 C & K 4.
14. *Rex v. Rule*, (1937) 30 Cox 398.
15. *Bindeshwari Prasad Tiwari v. Hanuman Prasad Tiwari*, (1923) 22 ALJR 65; *Ghulam Rasool v. Ibrahim Beg*, (1933) 11 OWN 122.
16. *Blagg v. Sturt*, (1846) 10 QB 899.
17. 15 & 16 Geo. VI & I, Eli. II c. 66, section 7(1). For construction of the Act see *Tasikata v. Newspaper Publishing Plc.*, (1997) 1 All ER 655 (CA).
18. *Chapman v. Ellesmere*, (1932) 2 KB 431 (475) : 146 LT 538 : 76 SJ 248.
19. *Steele v. Brannan*, (1872) LR 7 CP 261 (268); *The King v. Carlile*, (1819) 3 B & Ald 167. See, to the same effect section 3 of the Law of Libel Amendment Act, 1888 (51 & 52 Vic., c. 64).
20. *Brook v. Evans*, (1860) 29 LJ Ch 616.
21. The Judicial Proceedings (Regulation of Reports) Act, 1926, 16 & 17 Geo V., c. 61.
22. *The King v. J. Wright*, (1799) 8 TR 293, 298; *M.G. Perera v. Andrew Vincent Perris*, AIR 1949 PC 106 : (1949) AC 1 (PC).
23. *Burnett and Hallamshire Fuel Limited v. Sheffield Telegraph and Star Limited*, (1960) 2 All ER 157 : (1960) 1 WLR 502 : 104 SJ 388.
24. *Andrews v. Chapman*, (1853) 3 C & K 286. A report of a libellous speech of counsel without the evidence by which it was supported is not a fair report : *Kane v. Mulvaney*, (1866) Ir. R. 2 CL 402. No comment is allowed until the proceedings terminate : *Lewis v. Levy*, (1858) 27 LJ QB 282.

be substantially a fair account of what took place. It is sufficient to publish a fair abstract.[25] The report must not be one-sided, or highly coloured.[26] Damages may be recovered for a grossly exaggerated and libellous title.

Reports of *ex parte* proceedings are also privileged.[27] A fair and accurate report of the judgment in an action, published *bona fide* and without malice, is privileged, although not accompanied by any report of the evidence given at the trial.[28] A fair and accurate contemporaneous report of judicial proceedings before a foreign tribunal published by an English newspaper without malice is privileged if it relates to a matter of legitimate and proper interest to the English public.[29]

The privilege given by the common law to report of proceedings before a court of Justice open to the public does not extend to a proceeding before a domestic tribunal, such as the stewards of the Jockey club, at which the public are not entitled to be present.[30]

During the hearing of a libel action counsel for the plaintiff criticized the behaviour of a person D. The plaintiff, who was the only witness in the case, in his evidence also commented adversely upon D's behaviour. Thereupon D said to the Judge: 'May I make an application?…I want to contradict the many lies that have been told in this Court'. That intervention was reported in five newspapers and the plaintiff brought actions for libel against them alleging that the reports were defamatory of him. It was held that the application which D made to the court was made in the course of judicial proceedings and that as the report was fair and accurate it was protected.[31]

Parliamentary Proceedings.—A fair and accurate report of any proceedings or debate in either House of Parliament, or in any committee thereof, is privileged; even though it contains matter defamatory of an individual.[32] Such publication is privileged on the principle that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.[33] The privilege will apply to a "Parliamentary Sketch" *i.e.*, a summary of proceedings published by a reporter.[34]

If the subject of a debate is of public interest, legitimate criticism could be fully made in a newspaper.[35]

In India under the Parliamentary Proceedings (Protection and Publication) Act, 1956[36] a person is not liable to any civil or criminal proceedings in respect of the publication in a newspaper[37] of a substantially true report of any proceedings of either House of Parliament unless the publication is proved to have been made with malice. The protection is not applicable if the publication is not for the public good.[38] This Act also applies to Parliamentary proceedings broadcast by wireless telegraphy.

25. *Milissich v. Lloyds*, (1877) 46 LJCP 404.
26. *Stiles v. Nokes*, (1806) 7 East 493.
27. *Ussil v. Hales*, (1878) 3 CPD 319, *Kimber v. The Press Association*, (1893) 1 QB 65 ; 67 LT 515. See, *M'Gregor v. Thwaites*; (1824) 3 B & C 24.
28. *Macdougall v. Knight*, (1890) 25 QBD 1.
29. *Webb v. Times Publishing Co. Ltd.*, (1960) 2 All ER 789 : (1960) 2 QB 535 : (1960) 3 WLR 352.
30. *Chapman v. Ellesmere (Lord)*, (1932) 2 KB 431 : 146 LT 538 : 76 SJ 248.
31. *Farmer v. Hyde*, (1937) 1 KB 728 : 156 LT 403 : 53 TLR 495.
32. *Goffin v. Donnelly*, (1881) 6 QBD 307; *Lala Lajpat Rai v. The "Englishman" Ltd.*, (1909) 13 CWN 895; (1910) 14 CWN 713.
33. *M.G. Perera v. Andrew-Vincent Perris*, AIR 1949 PC 106.
34. *Cook v. Alexander*, (1973) 3 All ER 1037 (CA), p. 1042.
35. *Wason v. Walter*, (1868) LR 4 QB 73. See, *Mangena v. Wright*, (1909) 2 KB 958.
36. *Vide* Act No. XXIV of 1956.
37. *C.K. Daphthary v. O.P. Gupta*, AIR 1971 SC 1132 (1147, 1148) (every pamphlet or booklet is not a newspaper).
38. *C.K. Daphthary v. O.P. Gupta*, AIR 1971 SC 1132.

Quasi-judicial and other proceedings.—Publication of true, accurate and *bona fide* proceedings of *quasi*-judicial bodies is privileged.[39] Speeches made at the meetings of local or any other boards are privileged. The privilege is not lost even if outsiders are present.[40] But the publication of such speeches in newspapers will not be privileged if they contain matters not of public interest.[41]

Proceedings of public meetings and press conference.—A report in a newspaper of the proceedings of a public meeting is privileged, provided it is (1) fair, (2) accurate, (3) not blasphemous, and (4) not indecent. The privilege may be rebutted by showing (1) that the report was published maliciously; or (2) that the defendant has refused or neglected on request to insert in the same newspaper a reasonable letter by way of contradiction or explanation of such report. If the meeting be not necessarily or properly a public one, there is no privilege. A press conference has been held to be a public meeting and a report referring to contents of a press release distributed but not read aloud has been held to be protected by the qualified privilege.[42]

This privilege is statutory and is given by the Law of Libel Amendment Act;[43] at common law there was no such privilege.

By virtue of the Defamation Act, 1952, a defamatory statement published by or on behalf of a candidate in any election to a local government authority or to Parliament shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the person by whom it is published is qualified to vote at the election.[44]

6(iv) Consent: Express or implied

It is a defence that the plaintiff has expressly or impliedly consented to the publication complained of where, for example, in a case of slander the aggrieved party had invited the defendant to repeat the words complained of before witnesses.[45]

6(v) Apology

The defence is provided by the Libel Act, 1843,[46] and the Defamation Act, 1952.[47]

Where there is an apology and an acceptance thereof the defendant can resist the plaintiff's suit for damages for defamation. The publication of a contradiction and expression of regret by itself is not tantamount to an apology.[48]

6(vi) Amends

By the Defamation Act, 1996 one more defence of 'Amends' has been added in the English Law.[49] A party without serving a defence in defamation proceeding, may offer to make amends. An offer to make amends is an offer (a) to make a suitable

39. *Allbutt v. General Council of Medical Education and Registration*, (1889) 23 QBD 400 : 58 LJQB 606 : 61 LT 585.
40. *Pittard v. Oliver*, (1891) 1 QB 474.
41. *Purcell v. Sowler*, (1877) 1 CPD 785.
42. *McCartan Turkington Breen (a firm) v. Times Newspapers Ltd.*, (2000) 4 All ER 913 (HL).
43. 51&52 Vic., c. 64, section 4.
44. 15&16 Geo. VI&I, Eliz II, c. 66, section 10.
45. SALMOND & HEUSTON, Law of Torts, 18th edition, p. 176.
46. 6&7 Vic. Ch 96, section 2. Every such defence must be accompanied by a payment of money into Court by way of amends (Libel Act, 1845, section 2 : 8&9 Vict. C. 75).
47. 15&16 Geo. VI&I, Eliz. II, Ch 66, section 4.
48. *K.P. Narayanan v. Mahendrasingh*, ILR 1956 Nag 439.
49. See Hepple, Howarth & Matthews Tort (Cases and Materials), 5th edition, Butterworths (2000), pp. 991 to 993.

correction of the statement complained of and a sufficient apology to the aggrieved party, (b) to publish the correction and the apology in a manner that is reasonable and practicable in the circumstances, and (c) to pay to the aggrieved party such compensation (if any), and such costs, as may be agreed or determined to be payable. The party accepting the offer may not bring or continue defamation proceedings and may insist on enforcing the offer and to that end may take the steps as prescribed in the Act.

7. REMEDIES FOR DEFAMATION

As to the remedies for defamation a suit for damages may be brought. The publication of defamatory statements may be restrained by injunction either under section 38 or 39 of the Specific Relief Act, 1963.[50]

In a suit for damages for defamation the law requires that the plaint ought to allege the publication of defamatory statement, set out the actual words used and also state that they were published or spoken to some named individuals and specify the time and place when and where they were published.[51] However, in a subsequent decision the Madras High Court[52] relying on two English Decisions, namely, *D.D.S.A v. Times Newspapers*[53] and *S & K Holdings v. Throgmorton Publications*[54] has held that in a suit for defamation, there is no law to the effect that defamatory versions should be re-produced verbatim in the plaint relating to all cases without exception whatsoever. The requirement of pleading an *innuendo* has already been discussed.[55]

Who can sue.—The publication of defamation can seldom give a right of action to anyone but the person defamed.[56] The fact that a defamatory statement has caused damage to other persons does not entitle them to sue.[57] Such damage is considered to be too remote.[58] Thus a brother cannot sue for slander of his sister,[59] nor a father for defaming his daughter,[60] nor the heir and nearest relation of a deceased person for defamatory words spoken of the deceased.[61]

According to the Madras High Court a husband cannot, therefore, maintain a suit for defamatory words imputing unchastity to his wife. Otherwise the slanderer might be liable to as many actions as there are near relations of the person defamed.[62] But the Calcutta High Court permits the husband to sue where unchastity is imputed to his wife.[63]

50. See text and footnotes 84 to 86, p. 320, *infra*.
51. *Krishnarao v. Firm Radhakisan Ramsahai*, ILR 1956 Nag 236. But, see, *Dainik Bhaskar v. Madhusudan Bhaskar*, AIR 1991 MP 162, p. 168.
52. *Dhyanapeta Charitable Trust v. Nakkheeran Publications* (2010) 5 CTC 283.
53. 1972 (3) All ER 417 (419) CA.
54. 1972 (3) All ER 497 (500) CA.
55. See, title 3(iii)(b), p. 273, *supra*.
56. *Subbaiyar v. Krishnaiyar*, (1878) ILR 1 Mad 383; *Brahmanna v. Ramakrishnama*, (1894) ILR 17 Mad 250; *Oodai v. Bhowanee*, (1866) 1 Agra HC 264; *Daya v. Param Sukh*, (1888) ILR 11 All 104. If such a person is not *sui juris* then a suit can be brought by his guardian or next friend : *Daya v. Param Sukh*, (1888) ILR 11 All 104. In a suit for libel defamatory of a firm all the partners should be joined as plaintiffs: *Mati Lal Raha v. Indra Nath Bannerjee*, (1909) ILR 36 Cal 907.
57. *Luckumsey Rowji v. Hurtun Nursey*, (1881) ILR 5 Bom 580.
58. *Ashley v. Harrison*, (1793) Peake 194, 256. In this case the proprietor of a public amusement brought an action against a man for a libel on one of his performers by reason whereof she was deterred from appearing on the stage, but it was dismissed.
59. *Subbaiyar v. Krishanaiyar, sup.*
60. *Daya v. Param Sukh*, (1888) ILR 11 All 104.
61. *Luckumsey Rowji v. Hurtun Nursey, sup.*
62. *Brahmanna v. Ramakrishnama*, (1894) ILR 18 Mad 250.
63. *Sukan Teli v. Bipal Teli*, (1906) 4 CLJ 388.

CHAPTER XV

TORT TO REALTY OR IMMOVABLE PROPERTY

SYNOPSIS

1. INTRODUCTION

Torts affecting immovable property arise either by disturbance or usurpation of the right to hold or possess it, whether such disturbance or usurpation be present or in expectation (*e.g.*, trespass, dispossession); or by actual physical damage to the property (*e.g.*, waste); or by interference with, or impairing of, the enjoyment of it (*e.g.*, nuisance).

2. TRESPASS TO LAND

2(A) General

Trespass, in its widest sense, signifies any transgression or offence against the law of nature, of society, or of the country, whether relating to a man's person or to his

property. But the most obvious acts of trespass are—(1) trespass *quare clausum fregit* "because he (the defendant) broke or entered into the close" or land of the plaintiff; and (2) trespass *de bonis asportatis*, wrongful taking of goods or chattels. Here we are concerned with the former, *i.e.*, trespass to land.

Trespass to land is also an offence under the Indian Penal Code (section 441) provided the requisite intent is present.

To constitute the wrong of trespass neither force, nor unlawful intention, nor actual damage, nor the breaking of an enclosure is necessary. "Every invasion of private property, be it ever so minute, is a trespass."[1]

Trespass may be committed (1) by entering upon the land of the plaintiff, or (2) by remaining there, or (3) by doing an act affecting the sole possession of the plaintiff, in each case without justification.

(1) Entry is essential to constitute a trespass.

A man is not liable for a trespass committed involuntarily, but he is liable if the entry is intentional, even though made under a mistake, *e.g.*, if, in mowing in his own land, a man inadvertently allows his blade to cut through into his neighbour's field, he is guilty of a trespass.[2] Notwithstanding the decision of Court of Appeal in *Letang v. Cooper*,[3] approving *Fowler v. Lanning*,[4] which lays down that intention is a necessary element to constitute trespass to person,[5] it is still the law that an entry upon another's land constitutes trespass to land whether or not the entrant knows that he is trespassing.[6] If the defendant consciously enters upon a land believing it to be his own but which turns out to be of the plaintiff, he is liable for trespass. But a person is not liable if the entry is involuntary, *e.g.*, when he is thrown upon the land by someone else.[7] In such a situation, there is no act of entry at all by the defendant. It is also possible that the defendant may successfully plead inevitable accident in his defence.[8]

The presumption is that he who owns the surface of land owns all the underlying strata. So an entry, beneath the surface at whatever depth, is an actionable trespass at the instance of the owner of surface.[9] But it is possible that the underlying strata may be in possession of a different person, *e.g.*, when mining rights are held by a person who is not in possession of the surface. So if the surface of land is in possession of A and the subsoil in possession of B, entry on the surface will be trespass against A and entry in the subsoil will be trespass against B, *e.g.*, a tunnel dug from the adjoining land;[10] and in case of a vertical hole dug on the land that would be trespass both against A and B.

1. *Entick v. Carrington*, (1765) 19 St Tr 1066. Plaintiff in possession of Government land and planting trees. Trees cut by Kerala State Electricity Board. Board without any claim or title held liable for damages for cutting trees. *The Secretary K.S.E.B. v. M. V. Abraham*, AIR 2007 Ker 12 : (2006) 4 KLT 770. See also, *Laxmi Ram Pawar v. Sitabai Balu Dhotre* (2011) 1 SCC 356.
2. *Basely v. Clarkson*, (1682) 3 Lev 37.
3. (1965) 1 QB 232 : (1964) 3 WLR 573.
4. (1959) 1 QB 426 : (1959) 2 WLR 241.
5. See, Chapter XI Trespass to Person, Title 1, Introduction, p. 245.
6. *Conway v. George Wimpey & Co. Ltd.*, (1951) 2 KB 266, pp. 273, 274 : (1951) 1 TLR 587; *Joliffe v. Willmett & Co.*, (1971) 1 All ER 478 : 114 SJ 119.
7. *Smith v. Stone*, (1647) Style 65.
8. *Mann v. Saulnier*, (1959) 19 DLR (2d) 130, p. 132.
9. *Corbett v. Hill*, (1870) LR 9 Eq 671, p. 673; *Willcox v. Kettel*, (1937) 1 All ER 227.
10. *Cox v. Glee*, (1848) 5 CB 533.

If a person, who has a limited right of entry upon land, exceeds that right, he is a trespasser. If a man uses the land over which there is a right of way, for any purpose, lawful or unlawful, other than that of passing and re-passing, he is a trespasser.[11]

The Government may be sued by the owner of the land for damages for alleged trespass before title to the property is validly acquired under the scheme of the Land Acquisition Act, 1894. An irregular or illegal entry upon land before declaration under section 6 of the Act or before possession is taken by the Collector, will furnish a cause of action for a separate suit for damages.[12]

If a servant of a licensee under an Electricity Act enters on the consumer's premises in spite of objection, the licensee and the servant become liable for damages for trespass.[13]

Excess of ordinary user of highway amounts to trespass.—The plaintiff was possessed of land which was crossed by a highway. A trainer of race-horses had agreed with the plaintiff for the use of some of his land for the training and trial of race-horses. A view of the land so used could be obtained from the highway on the plaintiff's land. The defendant, a proprietor of a publication which gave accounts of the doings of race-horses in training, walked backwards and forwards on a portion of the highway abutting on the plaintiff's land about fifteen yards in length for an hour and a half watching and taking notes of the trials of race-horses on the plaintiff's land. In an action for trespass it was held that the defendant had exceeded the ordinary and reasonable user of a highway as such to which the public were entitled and was liable for trespass.[14] Public streets, including pavements, are primarily dedicated for public use for the purpose of passage and cannot be used for private residence;[15] or for carrying on private trade or business;[16] or as a prayer ground by a certain community.[17] The municipal corporation or the municipality concerned has in such cases statutory power to remove the obstruction which will amount to trespass.[18]

(2) If a person who has lawfully entered on the land of another and remains there after his right of entry has ceased, he commits trespass. A licensee whose licence has been terminated or is extinguished by expiry can be sued as a trespasser if he does not vacate after request and lapse of a reasonable time.[19]

(3) Every interference with the land of another, *e.g.*, throwing stones or materials over a neighbour's land, is deemed constructive entry and amounts to trespass. Deliberate placement of matter, *e.g.*, jettisoning of oil, in such circumstances, as will carry it to the land of the plaintiff by natural forces, may constitute trespass.[20] The matter may not be tangible; it may be gas[21] or invisible fumes.[22]

11. *Dovaston v. Payne*, (1795) 2 HBI 527; *Harrison v. Duke of Rutland*, (1893) 1 QB 142.
12. *Latino Andre v. Union Govt.*, AIR 1968 Goa 132.
13. *Akola Electric Supply Co. Ltd. v. Gulbai*, (1951) NLJ 44.
14. *Kickman v. Maisey*, (1900) 1 QB 752.
15. *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545 : AIR 1986 SC 180.
16. *Bombay Hawkers Union v. Bombay Municipal Corporation*, (1985) 3 SCC 528 : AIR 1985 SC 1206.
17. *Dr. P. Navinkumar v. Municipal Corporation for Greater Bombay*, AIR 1989 Bom 88.
18. See cases in footnotes 15 to 17, *supra* and *Municipal Corporation Delhi v. Gurnam Kaur*, AIR 1989 SC 38 : (1989) 1 SCC 101.
19. *Minister of Health v. Bellotti*, (1944) KB 298; *Canadian Pacific Ry. v. Gaud*, (1949) 2 KB 239, pp. 249, 254, 255 : 93 SJ 45; *R. v. Jones*, (1976) 1 WLR 672 : (1976) 3 WLR 54; *Antra Rajya Bus Adda Samachar Patra Vikreta Pbhokta Co-Operative Store Society Ltd. v. Govt. of NCT of Delhi*, (2010) 175 DLT 336; See further, *D.H. Maniar v. Waman Laxman Kudav*, (1976) 4 SCC 118, and *Puran Singh Sahni v. Sundari Bhagwandas Kripalani*, (1991) 2 SCC 180.
20. *Southpart Corporation v. Esso Petroleum*, (1954) 2 QB 182, 240.
21. *McDonald v. Associate Fuels*, (1954) 3 DLR 775.
22. *Martin v. Reynolds Metal Co.*, (1959) 221 Ore 86.

A trespass may be committed by driving a nail into a person's wall,[23] or by placing anything against his wall,[24] or by shooting over his land,[25] or by placing anything above and overhanging his land,[26] or by planting trees in his land,[27] or placing any chattel upon his land,[28] or causing any physical object or noxious substance[29] to cross the boundary of his land. But trespass of the nature described above must be distinguished from private nuisance which resembles trespass. The distinction is important for trespass is actionable *per se* whereas nuisance is actionable only on proof of damage. The distinction lies in the nature of the injury whether it is direct or consequential. If the injury is direct, it is trespass; whereas, if the injury to the plaintiff is consequential it is a case of nuisance. If a person throws stones on the neighbour's land, it is trespass.[30] If a person plants a tree on his land the roots of which after some years undermine the foundation of the neighbour's building, it is nuisance.[31] Discharge of filthy water on plaintiff's land from a spout in defendant's house is trespass.[32]

2(B) Aerial Trespass

The owner of land is entitled to the column of air space above the surface *ad infinitum*. The ordinary rule of law is that whoever has got the *solum*—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth. An ordinary proprietor of land can cut and remove a wire placed at any height above his land.[33] At least in modern times, this is an overstatement. The correct view is that the owner's right to air and space above his land is restricted to such height as is necessary for the ordinary use and enjoyment of his land and the structures on it.[34] If the rule were as used to be stated earlier, it would lead to the absurdity of a trespass at common law being committed by a satellite every time it passes over a suburban garden.[35] If a man were to erect a building overhanging the land of another, he would commit trespass and an action would lie against him.[36]

Advertising sign.—An advertising sign erected by the defendants projected into the airspace above the plaintiff's single-storey shop. In an action for a mandatory injunction to remove the sign on the ground of trespass, the defendants alleged, *inter alia*, that an invasion of superincumbent airspace did not amount to a trespass, but only to nuisance, and that, in the facts, no nuisance existed. It was held that the projection into plaintiff's airspace was a trespass and not a mere nuisance, and it was

23. *Lawrence v. Obee*, (1815) 1 Stark 22.
24. *Gregory v. Piper*, (1829) 9 B & C 591.
25. *Pickering v. Rudd*, (1815) 1 Stark, 56, 58; *Paul v. Summerhayes*, (1878) 4 QBD 9.
26. *Corbett v. Hill*, (1870) LR 9 Eq 671. The projecting of a cornice over another's land amounts to trespass: *Ramasubbier v. Shenbagaratnam*, (1926) 25 MLW 154.
27. *Muhammad Shafi v. Bindeshri Saran Singh*, (1923) ILR 46 All 52. The owner of land can sue for removal of trees and for recovery of possession of the land at any time within twelve years.
28. *Turner v. Thorne*, (1959) 21 DLR (2d) 29.
29. *McDonald v. Associated Fuels*, (1954) 3 DLR 775.
30. But if stones are allowed to fall on the plaintiff's land from a dilapidated construction on the defendant's land it is nuisance. See *Mann v. Saulnier*, (1959) 19 DLR (2d) 130, p. 132.
31. *Masters v. London Borough of Brent*, (1978) 2 All ER 664 : (1979) QB 841.
32. *Abdul Gani v. Sadu Ram and others*, (1978) ILR 28 Raj 42.
33. *Wandsworth Board of Works v. United Telephone Co.*, (1884) 13 QBD 904, 927.
34. *Bernstein of Leigh (Baron) v. Skyviews & General Ltd.*, (1977) 2 All ER 902 : (1978) QB 479 : (1977) 3 WLR 136.
35. *Bernstein of Leigh (Baron) v. Skyviews & General Ltd.*, (1977) 2 All ER 902 : (1978) QB 479 : (1977) 3 WLR 136.
36. *Ambadas v. Dattatraya*, (1944) NLJ 467.

a proper case in which to grant a mandatory injunction.[37] It has, however, been held that where the injury to the plaintiff is trivial, no injunction will be granted.[38]

An aircraft passing at a height which does not affect the owner in the enjoyment of his land and structures does not commit any trespass. Statutes have also been enacted to clarify this law.[39] Under the Civil Aviation Act, 1949,[40] no action shall lie in respect of trespass by reason only of the flight of aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or of the ordinary incidents of such flight so long as certain provisions of the Act or any orders made thereunder are observed. It is also provided that where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft. The Act does not apply to aircrafts in the service of Her Majesty.

Indian statute-law-Aerial trespass or nuisance.—There is also the Indian Aircraft Act,[41] section 17 of which provides that no suit shall be brought in respect of trespass or nuisance, by reason only of the flight of aircraft over any property at a height above the ground which having regard to wind, weather, and all the circumstances of the case is reasonable, or by reason only of the ordinary incidents of such flight. But whoever wilfully flies so as to cause damage to person or property may be punished with imprisonment for six months or a fine of Rs. 1,000 or with both.

2(C) Continuing Trespass

Every continuance of a trespass is a fresh trespass, and an action may be brought in respect of it. The continuing of a trespass from day to day is considered in law a separate trespass on each day. If a man throws a heap of stones, or builds a wall, or plants posts of rails, on his neighbour's land, and there leaves them, an action will lie against him for the trespass; and the right to sue will continue from day to day, till the encumbrance is removed. An action may be brought for the original trespass in placing the encumbrance on the land, and another action for continuing the things so erected. A recovery of damages in the first action, by way of satisfaction, does not operate as purchase of the right to continue the injury.[42] A new occupier entering upon premises on which there is a continuing trespass has a cause of action in trespass in respect of it.[43] But the principle that every continuing of trespass is a fresh trespass has no application when there is a complete ouster. Where the wrongful act amounts to ouster or dispossession of the plaintiff, the resulting injury is complete on the date of the ouster or dispossession and so there would be no scope for applying the principle of continuing wrong or continuing trespass.[44]

37. *Kelson v. Imperial Tobacco Co. Ltd.*, (1957) 2 QB 334 : (1957) 2 WLR 1007 : (1975) 2 All ER 343.
38. *Armstrong v. Shepphard & Short Ltd.*, (1959) 2 All ER 651, (1959) 2 QB 384.
39. *Bernstein of Leigh (Baron) v. Skyviews & General Ltd.*, (1977) 2 All ER 902 : (1978) QB 479.
40. 12, 13 & 14 Geo VI, ch 57.
41. Act XXII of 1934.
42. *Holmes v. Wilson*, (1839) 10 Ad & E 503.
43. *Konskier v. B. Goodman Ltd.*, (1928) 1 KB 421 : 44 TLR 91 : 138 LT 481.
44. *Balkrishna Savalram Pujari Waghmare v. Dyaneshwar Maharaj Sansthan*, AIR 1959 SC 798 (807). (Case under section 23. Limitation Act, 1908). For dispossession see title 4.

2(D) Trespass by Joint-owners

Joint-tenants or tenants-in-common can only sue one another in trespass for acts done by one inconsistent with the rights of the other.[45] Such acts are, for example, destruction of a building,[46] or chattel, carrying away of soil,[47] or expulsion of the other,[48] or his servant off the land or from the house held in common.[49]

A court will not interfere where a tenant-in-common, acts reasonably for the purpose of enjoying the property held in common in any way in which an owner can enjoy such property without injury to his co-sharer, but the case is different where there has been a direct infringement of a clear and distinct right.[50]

Where a joint-owner or co-sharer has erected a building on joint land the court can order its demolition.[51] But where the act complained of is not proved to be destructive of or detrimental to the enjoyment of the joint property, the court will refuse to order its demolition.[52] Where a co-sharer makes construction upon common land, it is not necessary for a co-sharer, who has not acquiesced in such construction, to prove special damage.[53]

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45. *Jacobs v. Seward*, (1872) LR 5 HL 464. See *Mahesh Narain v. Nowbat Pathak*, (1905) ILR 32 Cal 837; *Balaram Guria v. Shyama Charan Mandal*, (1920) 24 CWN 1057; *Harsukh Rai v. Darshan Singh*, (1931) 33 PLR 93.
46. *Cresswell v. Hedges*, (1862) 31 L 3 Ex 497.
47. *Wilkinson v. Haygarth*, (1846) 12 QB 837.
48. *Punjab National Bank Ltd., Sheikhpura v. Pars Ram*, (1940) ILR 22 Lah 246.
49. *Murray v. Hall*, (1849) 7 CB 441.
50. *Gopee Kishen v. Hem Chunder*, (1870) 13 WR 322. The Court accordingly granted an injunction preventing a tenant-in-common from erecting a building on the common property without the consent of his co-sharers (*Dirgpaul v. Bhondo Rai*, (1867) 2 Agra HC 341; *Mehdee Hossein Khan v. Aujud Ali*, (1874) 6 NWP 259; *Gooroo Dass Dhur v. Bejoy Gobinda*, (1868) 1 Beng LR (ACJ) 108 : 10 WR 171; *Holloway v. Sheikh Wahed Ali*, (1871) 12 Beng LR 191n, : 16 WR 140; *Sheopersad Singh v. Leela Singh*, (1873) 12 Beng LR 188 : 20 WR 160; *Shadi v. Anup Singh*, (1889) ILR 12 All 436 (FB) *Najju Khan v. Imtiaz-ud-din*, (1895) ILR 18 All 115; *Muhammad Ali Jan v. Faiz Baksh*, (1896) ILR 18 All 361: or from erecting a *nowbuthkhana* or a scaffolding supporting a platform (*Rajendro Lall Gossami v. Shama Churn Lahori*, (1879) ILR 5 Cal 188); or from erecting an overhanging structure over a joint lane (*Hans Raj v. Jagat Singh*, (1937) 39 PLR 875); or from planting indigo (*Stalkartt v. Gopal Panday*, (1873) 12 Beng LR 197 : 20 WR 168; *Lloyd v. Sogra*, (1876) 25 WR 313; *Debee Pershad v. Gujadur*, (1876) 25 WR 374; *Holloway v. Muddon Mohan*, (1882) ILR 8 Cal 446; or *Ijmali lands* (*Crowdee v. Bhekhdari Singh*, (1871) 8 Beng LR (Appx) 45; *Crowdy v. Inder Roy*, (1872) 18 WR 408; *Hunooman Singh v. Crowdie*, (1875) 23 WR 428; *Watson & Co. v. Ramchand Dutt*, (1890) ILR 18 Cal 10).
51. *Gooroo Dass Dhur v. Bejoy Gobinda*, (1868) 1 Beng LR (ACJ) 138; *Bissambur Shaha v. Shib Chunder*, (1874) 22 WR 286; *Rajendro Lall Gossami v. Shama Churn Lahori, sup.; Shadi v. Anup Singh, sup., Kankayya v. Narasimhulu*, (1895) ILR 18 Mad 38.
52. *Lala Biswambharlal v. Rajaram*, (1869) 3 Beng LR (Appx) 67 : 13 WR 337n, where a joint-owner was allowed to erect a wall upon the joint property without the consent of the co-owner as there was no evidence of injury to the co-owner. Similarly, the Court did not, under like conditions, interfere to prevent a joint-owner from erecting a hut or challa [*Nobin Chandra Mitter v. Mahes Chandra Mitter*, (1869) 3 Beng LR (Appx) 111]; or from erecting a building [*Dwarkanath v. Goopeenath*, (1871) 12 Beng LR 189n, 16 WR 10; *Massin Mollah v. Panjoo Ghoramee*, (1874) 21 WR 373; *Doorga Lall v. Lalla Hulwant*, (1876) 25 WR 306; *Nocury Lall Chukerbutty v. Bindabun Chunder Chuckerbutty*, (1882) ILR 8 Cal 708; *Paras Ram v. Sherjit*, (1887) ILR 9 All 661]; or from building a jute factory on lands which were agricultural and horticultural (*The Shamnugger Jute Factory Co. v. Ram Narain Chatterjee*, (1886) ILR 14 Cal 189); or from planting a garden (*Sree Chand v. Nim Chand*, (1870) 5 Beng LR (Appx) 25 : 13 WR 337); or from excavating a tank in agricultural lands (*Joy Chunder Rukhit v. Bippro Churn Rukhit*, (1886) ILR 14 Cal 236); or from digging a tank and building a school-room and manufacturing bricks (*Mohima Chunder v. Madhub Chunder*, (1875) 24 WR 80).
53. *Ram Bahadur Pal v. Ram Shanker*, (1905) 2 ALJR 455 (FB). But see *Ananda Chandra Sen v. Parbati Nath Sen*, (1906) 4 CLJ 198, where it is said that substantial injury should be proved by the plaintiff.

2(E) Trespass by Animals

Trespass by a man's cattle is dealt with similar to trespass committed by himself. If a man's cattle, sheep, or poultry, or any animal in which the law gives him a valuable property trespass on another's close, the owner of the animal is responsible for the trespass and consequential damage, unless he can show that his neighbour was bound to fence and had failed so to do.[54] But if no such duty exists, the owner of cattle is liable for their trespass even upon unenclosed land,[55] and for all naturally resulting damage.[56]

Distinction is also drawn between animals which from their natural tendency to stray and thereby do real damage, require to be and usually are restrained, and a dog which is not usually confined.[57] Owners of dogs and cats are not responsible for their trespass.[58] Liability for cattle trespass is strict, *i.e.* independent of any negligence. But this rule has no application to straying of cattle upon a highway.

An owner or occupier of land adjoining an ordinary highway is not bound to fence it so as to prevent harmless animals like sheep,[59] or horses,[60] or dogs[61] from straying upon the highway unless they are known to be of vicious habit. For injury caused by horses or cattle to property on or adjoining a highway the owner is not liable in the absence of negligence or of wilful intention on his part.[62] But a person who brings an animal on the highway must take reasonable care to prevent it from doing damage thereon.[63] "Users of the highway, including cyclists and motorists must be prepared to meet from time to time a stray horse or a cow just as they must expect to encounter a herd of cattle in the care of a driver. An underlying principle of the law of the highway is that all those lawfully using the highway, or land adjacent to it, must show mutual respect and forbearance. The motorists must put up with the farmer's cattle; the farmer must endure the motorist. It is commonly part of a man's legal duty to his neighbourhood to tolerate the untoward results of the neighbour's lawful acts."[64] Where a person, responsible for the organisation of a riding event in a Gymkhana adjacent to the highway, is in direct control of an animal with no known vicious or mischievous propensities, which makes a rapid dash for the highway through an unattended exit, as a reaction of its saddle and rider being displaced during such event, the activity in which the animal is engaged may be relied on as a special circumstance displacing the general principle relating to the absence of duty to prevent the straying of domestic animals on to the highway.[65]

In India the law relating to trespass by cattle is contained in the Cattle Trespass Act, 1871 (I of 1871).[66]

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54. *Ellis v. Loftus Iron Co.*, (1874) LR 10 CP 10, 23; *Sagril v. Melivard*, (1443) YB 21 Hen VI p. 33; *Cox v. Burbidge*, (1863) 13 CBNS 430.
55. *Bayle v. Tamlyn*, (1827) 6 B & C 329; *Moidin Kutti v. Koman Nair*, (1912) 12 MLTS 538.
56. *Sreehuree Roy v. James Hill*, (1868) 9 WR 156; See also, *Baburao v. State of Maharashtra* (2012) 3 AIR Bom R 171 : (2012) 4 Mah LJ 431.
57. *Cox v. Burbidge*, (1863) 13 CBNS 430, p. 440 (WILLES, J.)
58. *Buckle v. Holmes*, (1926) 2 KB 125 : 42 TLR 369.
59. *Heath's Garage Ltd. v. Hodges*, (1916) 2 KB 370.
60. *Deen v. Davies*, (1935) 2 KB 282 : 51 TLR 398.
61. *Ellis v. Johnstone*, (1963) 1 All ER 286.
62. *Gayler & Pope Ltd. v. B. Davies & Sons Ltd.*, (1924) 2 KB 75 : 40 TLR 591; *Brackenborough v. Spalding U.D.C.*, (1942) AC 310, (321).
63. *Deen v. Davies*, (1935) 2 KB 282 : 51 TLR 398.
64. *Searle v. Wallbank*, (1947) All ER 12 : (1947) AC 341 : 176 LT 104 (HL).
65. *Batlivale v. West*, (1970) 1 All ER 332.
66. See text and footnotes 6 and 7, p. 382, *infra*.

In England the Animals Act, 1971, has swept away the common law rules relating to cattle trespass. Section 4 of the Act lays down that the owner of trespassing livestock is strictly liable for any damage done when it strays on to someone else's land and causes damage there. Although the liability is strict, it is necessary that there be proof of damage or alternatively there must be expenses incurred by the owner or occupier of land either in keeping the livestock until it can be returned to its owner or under the right of detention created by section 7 of the Act. The immunity for damage ensuing from straying of cattle on to the highway has been abolished in England by the Animals Act, 1971 and the question of liability is to be decided on ordinary principles of negligence. Still it is not obligatory for adjacent owners of land to fence their land to prevent straying of cattle on to the highway if the land is in area where fencing is not customary.

Injury by horse.—Where the defendant's horse injured the plaintiff's mare by biting and kicking her through an iron fence, belonging to the defendant, which separated the defendant's land from the plaintiff's, it was held that there was a trespass by the act of the defendant's horse for which the defendant was liable apart from any question of negligence.[67] The defendant's cattle without any negligence on his part escaped on to the plaintiff's land. The plaintiff while trying to protect her garden suffered personal injuries when one of them knocked her down. The defendant was held liable for the plaintiff's personal injuries as being damage naturally resulting from trespass of cattle.[68]

Injury by mare.—The plaintiff was riding his motor bicycle along the highway when a mare jumped over a hedge bordering the highway, descended on the motor bicycle, and injured the plaintiff. The animal was unbroken, over five years old, and had a propensity to stray, but she had not a dangerous nature. It was held that the occupier of land bordering the highway was under no duty to prevent his animals from straying on the highway unless they were dangerous (as *e.g.*, owing to their frolicsome behaviour) or mischievous; the fact that the mare had a special proclivity towards straying did not impose such a duty on the defendant, and therefore, he was under no liability to the plaintiff.[69]

Similar result followed in a case where a motor-car was involved in an accident resulting in damage to the car when the driver lost control of the vehicle as one of the unattended sheep on the highway suddenly jumped and ran in front of the car.[70] But there is a distinction between the liability for damage caused by domestic animals which strayed on to the highway and damage caused by animals which had been brought on to the highway. In the latter class of cases, the person bringing the animal on to the highway can be made liable on the ground of negligence in not taking proper care to control the animal. So when the defendant let out a large dog on the street without a lead, he was held liable to the plaintiff who suffered personal injury and whose van was damaged as the dog getting excited collided with the van.[71] Similarly, when a pony and a cart belonging to the defendant were left unattended he was held liable to the plaintiff who was bitten by the pony.[72]

67. *Ellis v. Leftus Iron Co.*, (1874) LR 10 CP 10.
68. *Wormald v. Cole*, (1954) 1 All ER 683 : (1954) 2 WLR 613.
69. *Brock v. Richards*, (1951) 1 All ER 261 : (1951) 1 KB 529 : (1959) 1 TLR 69.
70. *Heaths Garage Ltd. v. Hodges*, (1916) 2 KB 370.
71. *Gomberg v. Smith*, (1963) 1 QB 25 : (1962) 2 WLR 749 : (1962) 1 All ER 725; *Ellis v. Johnstone*, (1963) 2 QB 8. Similarly, when a dog is let out on a lead which is long and loose and this results in injury, the defendant is liable. See *Pitcher v. Martin*, (1937) 3 All ER 918 : 53 TLR 903.
72. *Aldham v. United Dairies Ltd.*, (1940) 1 KB 507.

Damage by diseased cattle.—Where cattle affected with a contagious disorder trespassed upon an adjoining pasture and infected other cattle there with the disease, it was held that the owner of the trespassing beasts was responsible for the damage arising from the spread of the disease, as well as for the injury to the grass and herbage.[73]

Injury by pigeons.—The plaintiff was a breeder of racing pigeons, and the defendant was a farmer. Some of the plaintiff's pigeons settled on the defendant's crop of peas, and did damage. The defendant, without firing a scaring shot, shot four of them and wounded a fifth. It was held that the plaintiff was entitled to maintain an action for damages.[74]

Straying of sheep.—The defendants' sheep strayed from L. Moor, on which the defendants had the right to pasture them, over land belonging to the M. Corporation and thence along a road from which they gained access to the plaintiff's land situate about a mile distant from L. Moor. In an action by the plaintiff in respect of the damage done by the trespassing sheep, it was held that it was the defendants' duty to see that the sheep did not escape, and that they were liable to the plaintiff.[75]

Straying of cow.—In order to protect his potato crop from trespassing pigs the defendant laid traps and left some openings in the hedge near the traps. Plaintiff's cow strayed into the land and fell into the trap and was killed. In a claim for damages it was held that the owner of the property will not be liable in damages to the owner of the trespassing animal for injury to the animal merely because he had taken no precautions to protect the trespassing animal against injury. It cannot be said that the defendant lured the cow into the trap, and therefore became liable.[76]

2(F) Remedies

The person whose land is trespassed upon may—

(1) bring an action for trespass against the wrong-doer; or

(2) forcibly defend his possession against a trespasser; or

(3) forcibly eject him.

2(F)(i) Action for Trespass

To maintain an action for trespass, the plaintiff must prove that he was in possession, either actual or constructive, at the time of trespass.[77] Any possession is a legal possession against a wrong-doer.[78]

A party having a right to the land acquires by entry the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land.[79] When once there is an entry by the person having title, the court looks to the date when the title accrued, and considers

73. *Anderson v. Buckton*, (1815) 1 Str. 192.
74. *Hamps v. Darby*, (1948) 2 KB 311 : (1948) 2 All ER 474.
75. *Sutcliffe v. Holmes*, (1946) 2 All ER 599 : (1947) KB 147 : 62 TLR 733.
76. *Herbert Richard Farrington v. Munisami*, (1949) 2 MLJ 143 : 62 MLW 493 : (1949) MWN 472.
77. *Wallis v. Hands*, (1893) 2 Ch 75 : 68 LT 428; *Midnapur Zamindari Co. Ltd. v. Ram Kanai Singh Deo Darpa Saha*, (1925) ILR 5 Pat 80.
78. *Graham v. Peat*, (1801) 1 East 244; *Harker v. Birbeck*, (1764) 3 Burr 1556; *Catteris v. Cowper*, (1812) 4 Taunt 547.
79. *Butcher v. Butcher*, (1827) 7 B & C 399, 402.

him in possession from that time.[80] Upon his entry his possession relates back to the date at which his legal right to enter first accrued, and he can maintain an action for trespass committed prior to his entry.[81]

An apprehended trespass furnishes no ground of action for trespass[82] but the court may grant declaratory decree or injunction.[83] When a person, who is *prima facie* liable to another, on being sued by him, sets up a defence that the paramount title is vested in a third person, he is said to set up the *jus tertii* (right of a third person). The general rule is that a wrong-doer cannot set up the *jus tertii,* the right of possession outstanding in some third person, as against the fact of possession in the plaintiff.[84] If the defendant justifies his trespass on the ground that his act was committed by the authority of the true owner, and thereby sets up *jus tertii,* such authority is traversable by the plaintiff, in which case the defendant must prove that such authority was given in fact.[85]

Indian Law[86]

The foundation of trespass is the doing of an illegal act, forcibly and without legal authority, as against the property of another. The illegality and the wrongfulness of the act must be established by proof.[87] The rightful person is entitled to possession irrespective of the fact whether the property has changed hands from one trespasser to another or from trespasser himself to his successors-in-title, provided the suit is within limitation.[88] One co-sharer can maintain an action for ejectment against a trespasser without joining other co-sharers.[89] Anyone of several joint-tenants of land may sue to eject a trespasser. The consent of one joint-tenant to the possession of a trespasser does not make him the less a trespasser with regard to other joint-tenants.[90]

The law of England that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interests does not apply to landlords in India.[91]

2(F)(ii) Defence of Property

The person in possession may use force to keep out a trespasser; but, if the trespasser has succeeded in obtaining possession, the rightful owner must appeal to the law for assistance.

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80. *Anderson v. Radcliffe*, (1860) 29 LJQB 128.
81. *Barnett v. Earl of Guildford*, (1855) 11 Ex 19.
82. *Parum Sookh v. Seeta Ram*, (1867) 2 Agra HC 119; *Gibbon v. Abdur Rahman Khan*, (1869) 3 Beng LR (ACJ) 411; *Poorun Chand v. Pareshnath*, (1869) 12 WR 82.
83. *Ismail Ariff v. Mahamad Ghouse*, (1893) 20 IA 99 (PC).
84. *Nicholls v. Ely Beet Sugar Factory*, (1931) 2 Ch 84: 145 LT 113.
85. *Graham v. Peat*, (1801) 1 East 244; *Chambers v. Donaldson*, (1809) 11 East 65. See *Somiammal v. Vellaya Sethurayan*, (1914) 29 MLJ 233.
86. See further title 4 'Dispossession' , p. 389.
87. *Danai Das v. Govinda Gedi*, (1916) 1 PLJ 533; *Norendra v. Bhusan*, (1920) 31 CLJ 495.
88. *Inder Nath v. Nand Ram*, (1952) ILR 2 Raj 919.
89. *Mohammed Bux v. Gani Mohammed*, (1953) ILR 4 Raj 191.
90. *Teeluk Rai v. Ramjus Rai*, (1873) 5 NWP 182; *Lutchmun v. Dabee*, (1868) 3 Agra HC 264; *Ghunshyam v. Runjeet*, (1865) 4 WR (Act X) 39; contra, *Luchmun v. Seami*, (1866) 5 WR (Act X) 93.
91. *Venkatachalam Chetty v. Andiappan Ambalam*, (1879) ILR 2 Mad 232; *Dheermoney v. Croft*, (1865) 3 WR (SC REF) 20; *Monindro v. Muneeruddeen Biswas*, (1873) 20 WR 230 : 11 Beng LR (Appx) 40; *Ram Chandra Jana v. Jiban Chandra*, (1868) 1 Beng LR (ACJ) 203. In a suit for possession by one trespasser on Government land against another, the one who has paid Government revenue on the land has a better title than the one who has never paid any revenue : *Tun Aung v. Ma Htee*, (1918) 12 BLT 263.

2(F)(iii) Expulsion of Trespasser

A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to prove his title, if he can, without delay, reinstate himself in his former possession.[92] The rightful owner of property is entitled to use force in ejecting a trespasser so long as he does him no personal injury.[93] He must not resort to violence.[94] The right of expulsion is, however, not available when the trespasser has been successful in accomplishing his possession to the knowledge of the true owner who must then resort to the remedies available under the law.[95]

2(F)(iv) Distress Damage Feasant

Distress damage feasant is a remedy by which, if cattle or other things be on a man's land encumbering it or otherwise doing damage there, he may summarily seize them, without legal process, and retain them impounded as a pledge for the redress of the injury he has sustained.[96] Anything animate, or inanimate, which is wrongfully there on the land of another and is doing damage, may be distrained for such damage. For instance, greyhounds or ferrets chasing and killing rabbits in a warren may be distrained *damage feasant*. A locomotive was distrained where it was used on a railway line of a company without a certificate of the company as required by a statute.[97] This right is founded on the principle of recompense which justifies a person in retaining that which occasions injury to his property till amends be made by the owner. The right does not give any right of sale. It can be exercised only by a person who has a sufficient possession of land to entitle him to maintain an action of trespass. The distress must be taken at the time the damage is done; for, if the damage was done yesterday, and the distress taken today, that would be illegal.[98] If, therefore, a man coming to distrain beasts *damage feasant* sees the beasts on his ground, and the owner of the beasts, or his servants, chases them out to prevent the distress, he cannot distrain them.

For *damage feasant* one may even distrain in the night; but a distress for rent can be made during day only.

The plaintiff's heifer strayed on to a railway line abutting on the farms of both the plaintiff and the defendant, and the defendant, in the interest of public safety and that of the plaintiff, drove it into a stubble field. In the night it escaped from that field and strayed into one of the defendant's fields, in which he kept a herd of T.T. Cattle. The defendant thereupon impounded the heifer in one of his own barns. When the plaintiff's servants called to collect the heifer, the defendant demanded "two pounds for 'salvage' and one shilling per day keep" as a condition of releasing the animal. The plaintiff did not pay the amount demanded, nor did he tender any sum. The defendant continued to detain the heifer which died some days later, though fed and watered by him. The court inferred that the defendant had suffered damage as the

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92. *Browne v. Dawson*, (1840) 12 Ad & E 624, 629.
93. *Scott v. Mathew Brown & Co.*, (1885) 51 LT 746; *Hemmings v. Stoke Poges Golf Club*, (1920) 1 KB 720 : 36 TLR 77 : 122 LT 479 (CA); *Sitaram v. Jaswantsingh*, (1951) NLJ 477.
94. *Edwick v. Hawkes*, (1881) 18 Ch D 199.
95. *Ram Rattan v. State of Uttar Pradesh*, AIR 1977 SC 619 : (1977) 1 SCC 188 : 1977 SCC (Cri) 85; *Krishna Ram Mahale v. Mrs. Shobha Venkat Rao*, AIR 1989 SC 2097, p. 2100 : (1989) 4 SCC 131.
96. BULLEN, p. 227. The remedy of distress damage feasant in respect of animals is now abolished by section 7 of the Animals Act, 1971 which substitutes a right to seize, detain and sell livestock which has strayed on to one's land and which is not then in the control of any other person.
97. *Ambergate v. Midland Ry.*, (1853) 2 El & Bl 793 : 23 LJQB 17.
98. *Wormer v. Biggs*, (1845) 2 C & K 31.

result of the straying of the plaintiff's heifer. The plaintiff claimed damages for wrongful conversion of the heifer. It was held that the defendant had a right of distress *damage feasant*, and was entitled to a lien on the heifer in respect of the damage sustained until compensation for such damage and a proper sum in respect of the keep of the heifer was paid or tendered, that it was the duty of the plaintiff to estimate the proper amount of compensation and to tender that amount to the defendant, and, therefore the plaintiff's claim failed.[1]

The right of distress though usually exercised in respect of cattle is by no means limited to them and can be exercised even in respect of inanimate objects which are wrongfully on the land. The distress is not rendered wrongful because the occupier claims an excessive amount as damages. The law casts the duty upon the wrong-doer to estimate the damage according to his own judgment and tender it before the distress can be rendered wrongful.[2] The remedy still survives in England in respect of inanimate objects.[3] But the remedy is available to distrain in order to recover compensation for actual damage suffered. Thus a car parked unauthorisedly which has caused no actual damage cannot be distrained by the landowner.[4] But when a driver parks a vehicle on a land displaying signs that unauthorised vehicles would be immobilised and a fee would be charged for their release, the landowner would be entitled to recover the fee from the driver before releasing the vehicle on the ground that the driver had impliedly consented to that risk.[5]

It may be doubted if in India the right of distress *damage feasant* would be held to exist, except under express law. But there is a special enactment, namely the Cattle Trespass Act,[6] which contains special provisions regarding the impounding of cattle taken trespassing and doing damage.

The Act enables a person on whose land cattle trespass and do damage[7] to take them to a cattle pound within 24 hours of the seizure; there is no right of further detention or sale. The owner can take back his cattle from the pound on payment of the pound fees to the pound-keeper; he is not bound to pay any compensation for release of the cattle to the person on whose land they were trespassing who can only sue for compensation. It is a possible view to take that the remedy of distress *damage feasant* is impliedly taken away by the provisions of the Act.

2(G) Defences

2(G)(i) Exercise of Easement and Prescription

A defendant may plead that he was justified by reason of prescription, as by showing a right of common, or right of way over the land; or that his right of way was wrongfully obstructed by the plaintiff, and the trespass was necessary to avoid it.[8]

1. *Sorrel v. Paget*, (1949) 2 All ER 609 : (1950) 1 KB 252 : 65 TLR 295.
2. *Sheolal v. Amakabai*, ILR (1955) Nag 710.
3. *Arthur v. Anker*, (1996) 3 All ER 783 (CA), p. 789.
4. *Arthur v. Anker*, (1996) 3 All ER 783, pp. 789 to 791.
5. *Arthur v. Anker*, (1996) 3 All ER 783, p. 788.
6. Act I of 1871.
7. See *Chokat Ahir v. Suraj Singh*, AIR 1940 Pat 299; *Faiyazkhan v. Rex*, AIR 1949 All 180; *Krishna Sahu v. Chaitan Das*, AIR 1966 Orissa 191. There is a controversy whether cattle which have left the land after trespass can be seized : see *Birdha v. State*, AIR 1959 Raj 124; *Kali Gator Sura v. State*, AIR 1966 Gujarat 221.
8. *Marshall v. The Ulleswater Company*, (1871) LR 7 QB 166; *Bourke v. Davis*, (1899) 44 Ch 110.

2(G)(ii) Leave and Licence

A licence only makes an action lawful which without it would be unlawful.[9] It may be expressed or implied, such as entry into a shop or a public house. If the defendant relies upon a plea of leave and licence, he must prove, either an express permission from the plaintiff to the defendant to come upon the land, or circumstances from which such permission may fairly be implied.[10]

A licence granted for a specific period may imply a contract not to revoke arbitrarily before the expiry of the period and the court may prevent premature revocation by an injunction. Generally speaking, such a case arises when the licence is granted for a specific period for a specific purpose.[11] Where the plaintiff, who had purchased a ticket for a seat at a cinema show, was forcibly turned out of his seat by the manager under a mistaken impression that he had not paid for his ticket, it was held that the plaintiff was entitled to recover substantial damages.[12] This case establishes (a) that the purchaser of a ticket for a seat at a theatre has a right to enter and stay and witness the whole performance provided that he behaves properly and complies with the rules of the management; and (b) that the licence granted by the sale of the ticket includes a contract not to revoke the licence arbitrarily.[13] A bare licence normally even though for a specific period may be revoked at any time and the defendant cannot plead such a licence after it is revoked in an action for trespass though he may be able to sue the plaintiff for damages for breach of contract.[14] If a licence is coupled with a transfer of property or if the licensee acting upon the licence has made a permanent construction, it becomes irrevocable[15] and can be successfully pleaded in an action for trespass.

2(G)(iii) Authority of Law

Entry under a legal process is justifiable.[16] *Semayne's* case[17] which is a leading authority on this subject, lays down the following points:—

1. That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.

2. When any house is recovered by any real action, the sheriff may break the house and deliver the seisin or possession to the defendant or plaintiff.

3. In all cases, when the King is a party, the *sheriff* may break the other party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But, before he breaks it, he ought to signify the cause of his coming, and to make request to open the door.

9. *Thomas v. Sorrell*, (1674) Vaug 330.
10. *Ditcham v. Bond*, (1814) 3 Camp 524. As to licences see the Easements Act, 1882, Sections 52-64.
11. *Winter Garden Theatre Ltd. v. Millenium Productions Ltd.*, (1948) AC 173 : 63 TLR 579 : (1947) All ER 331 (HL).
12. *Hurst v. Picture Theatres Limited*, (1915) 1 KB 1 : 111 LT 973 : 30 TLR 642 approved in *Winter Garden* case, *supra*.
13. *Said v. Butt*, (1920) 3 KB 497.
14. *Thompson v. Park*, (1944) KB 408.
15. Section 60, Easements Act, 1882; See *Chevalier I.I. Ivyappan v. Dharmodayam Co.*, AIR 1966 SC 1017 : (1963) 1 SCR 85.
16. *Growther v. Ramsbottan*, (1798) 7 TR 654.
17. (1604) 5 Coke 91, 1 Sm. LC 104. Considered in *Plenty v. Dillon*, (1991) 91 Australian Law Journal 231 (HC Australia) where it is held that a police officer has no right under the law of South Australia, whether common law or statutory, to enter private property in order to serve a summons without the consent of the person in or entitled to possession of the land and without any implied leave or licence.

4. In all cases when the door is open the *sheriff* may enter the house, and do execution, at the suit of any subject, either of the body, or of the goods. But it is not lawful for the *sheriff* at the suit of a common person to break the defendant's house, *etc.*, to execute any process at the suit of any subject.

5. The house of any one is only a privilege for himself and his family and his goods and does not extend to protect any person who flies to his house, or the goods of any other which are brought there.

An officer[18] cannot break the outer door without a demand; but after he has entered the house in which the person or the goods of the defendant are contained he may break open any door within the house without any further demand. If the officer is forcibly ejected, after he has peaceably obtained entrance by the outer door, he may break open the door to re-enter.[19]

In *Semayne v. Gresham*, two men, B and G, lived together in a house at Blackfriars as joint-tenants. B contracted heavy debts; and one of the largest and pressing of his creditors was *Semayne*, to whom he "acknowledged a recognizance in the nature of a Statute staple". In these circumstances B died, and by right of survivorship, the ownership of the house became vested in G. In that house were "diverse goods" of B, and to these, in virtue of the Statute staple, *Semayne* not unreasonably considered himself entitled. Accordingly, he instructed the sheriffs of London to do the best for him and these persons, armed with a proper writ, set off for Blackfriars. But when they came to the house, G, who had come to know of this, shut the door in their faces, "whereby they could not come and extend the same goods," disturbing the execution. In an action brought by *Semayne* it was held that G had done nothing wrong in locking the front door, and that, even when the King is a party, the house holder must be requested to open the door before the sheriff can break his way in.[20]

Indian Law

As regards the first point, established in *Semayne's* case, there is little doubt that the law in India is in accordance with the law laid down there. If a bailiff breaks the doors of a third person, in order to execute a decree against a judgment-debtor, he is a trespasser if it turns out that the person or goods of the debtor are not in the house.[21] A Nazar or sheriff cannot break open a defendant's dwelling-house to execute civil process against his person or goods if the outer door is closed and locked, even when he finds that the defendant has absconded to evade such execution. The privilege extends to a man's dwelling-house, or out-house or any office annexed to the dwelling-house, but not to a building standing at a distance from the dwelling-house and not forming part and parcel of it,[22] nor to his workshop.[23]

18. *Hutchison v. Birch*, (1812) 4 Taunt 619, *Ratcliffe v. Burton*, (1802) 3 B & P 223, commented upon; *Lee v. Gansel*, (1774) 1 Cowp 1; *Lloyd v. Sandilands*, (1818) 8 Taunt 250.
19. *Eagleton v. Gutteridge*, (1843) 11 M & W 465; *Pugh v. Griffith*, (1838) 7 A & E 827; *Aga Kurboolie Mahomed v. The Queen*, (1843) 4 MPC 239.
20. *Semayne v. Gresham*, (1604) Coke Vol. III BK. V. f. 91.
21. PER MELVILL, J., in *Dadabhai Narsidas v. The Sub-Collector of Broach*, (1870) 7 BHC (ACJ) 82 (85).
22. *Bai Kuwar v. Venidas Gangarm*, (1871) 8 BHC (ACJ) 127; *Sodamini Dasi v. Jageswar Sur*, (1870) 5 Beng LR (Appx) 27; *Damodar Parsotam v. Ishwar Jetha*, (1878) ILR 3 Bom 89.
23. *Hodder v. Williams*, (1895) 2 QB 663.

2(G)(iv) Acts of Necessity

Entry on the land of another person, without his consent, is justifiable on the ground of necessity, *e.g.*, putting out fire[24] for public safety, defence of the realm, *etc.*

2(G)(v) Self-defence

A trespass may be excused as having been done in self-defence, or in defence of man's goods, chattels, or animals.

2(G)(vi) Re-entry on Land

A person who is wrongfully dispossessed of land may retake possession of it if he can do so peaceably and without the use of force. He will not be liable in an action for trespass to land.[25] Even if he enters forcibly he is not liable.[26] Statute 5, Rich. II, c. 7 created forcible entry an offence under it. But so far as the civil rights of the parties are concerned the possession of a rightful owner gained by forcible entry is lawful as between the parties. If an owner of landed property finds a trespasser on his premises, he may enter the premises and turn the trespasser out, using no more force than is necessary to expel him, without having to pay damages for the force used.[27] He may be punished for breach of the peace but he is not liable civilly.

Indian Law

Under the Specific Relief Act,[28] and in the States of Maharashtra and Gujarat under the Bombay Mamlatdars' Courts Act[29] if one in possession of immovable property is dispossessed, otherwise than by due course of law, he may, within six months, sue to recover possession without reference to any title set up by another, which is left to be determined in a separate action.

The Indian Legislature has provided for the summary removal of any one who dispossesses another, whether peaceably or not, but otherwise than by due course of law; but subject to such provisions there is no reason for holding that the rightful owner so dispossessing the other is a trespasser, and may not rely for the support of his possession on the title vested in him, as he clearly may do by English law.[30] So far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect his possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force.[31] But if the trespasser gets into 'settled possession' the rightful owner cannot evict the trespasser by taking the law in his own hands or even

24. *Cope v. Sharpe*, (No.2) (1912) 1 KB 496 : 28 TLR 157 : 106 LT 56.
25. *Taunton v. Costar*, (1797) 7 TR 431; *Browne v. Dawson*, (1840) 12 A & E 624; *Delaney v. Fox*, (1856) 1 CBNS 166; *Jones v. Foley*, (1891) 1 QB 730.
26. *Turner v. Meymott*, (1823) 1 Bing 158; *Davision v.Wilson*, (1848) 11 QB 890; *Wright v. Burroughs*, (1846) 3 CB 685.
27. *Hemmings v. Stoke Poges Golf Club*, (1920) 1 KB 720, 738 : 122 LT 479 : 36 TLR 77, overruling *Newton v. Harland*, (1840) 1 Man & G 644; *Beddal v. Maitland*, (1881) 17 Ch D 174; *Edwick v. Hawkes*, (1381) 18 Ch D 199.
28. XLVII of 1963, section 6. See further p. 391, *infra*.
29. Bom Act II of 1906, section 5.
30. Per SARGENT, C.J., in *Bandu v. Naba*, (1890) ILR 15 Bom 238, 241; *Lillu v. Annaji Parashram*, (1881) ILR 5 Bom 387; *Hillaya v. Narayanappa*, (1911) 13 Bom LR 1200; ILR 36 Bom 185.
31. *Rame Gowda v. M. Vardappa Naidu*, (2004) 1 SCC 769, p. 775 : AIR 2004 SC 4609.

disturb his possession.[32] The Supreme Court has laid down the following tests for determining as to when a trespasser can be said to be in 'settled possession':

"(i) The trespasser must be in actual possession of the property over a sufficiently long period;

(ii) The possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of the possession of the trespasser would, however, be a matter to be decided on facts and circumstances of each case;

(iii) The process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced by the owner; and

(iv) One of the usual tests to determine the quality of settled possession in the case of culturable land would be whether or not the trespasser, after having taken possession had grown any crop. If the crop had been grown by the trespasser, then even the "true owner", has no right to destroy the crop grown by the trespasser and take forcible possession.[33]

2(G)(vii) Re-taking of Goods and Chattels

If a person takes away the goods of another upon his own land, he gives to the owner of them an implied license to enter for the purpose of recaption.[34] Similarly, if the goods are on the land of another in pursuance of a felonious act of third person, the entry will be justifiable.[35] But it will be otherwise, if the goods or chattels are on the land of another owing to some negligent or wrongful act of the owner himself.[36]

2(G)(viii) Abating a Nuisance

Abatement, that is removal of the nuisance by the party injured, must be—

(1) peaceable;

(2) without danger to life or limb; and

(3) after notice to remove the same, if it is necessary to enter another's land to abate a nuisance, or where the nuisance is a dwelling-house in actual occupation or a common, unless it is unsafe to wait.

Thus the occupier of land may cut off the overhanging branches of his neighbour's trees, or sever roots which have spread from these trees into his own land.[37] But he cannot cut the branches if the trees stand on the land of both parties.[38]

Under the Indian Easements Act the dominant owner cannot himself abate a wrongful obstruction of an easement.[39]

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32. *Rame Gowda v. M. Vardappa Naidu*, (2004) 1 SCC 769, p. 775 : AIR 2004 SC 4609; Followed in *Subramanya Swamy Temple, Ratnagiri v. V. Kanna Gounder*, (2009) 3 SCC 306 para 13 : (2008) 7 JT 323.
33. *Puran Singh v. State of Punjab*, (1975) 4 SCC 518, p. 527 : AIR 1975 SC 1674; *Rama Gowda v. M. Vardappa*, (2004) 1 SCC 769, p. 776.
34. *Patrick v. Colerick*, (1838) 3 M & W 483; Viner's Abridg., Trespass, (1)a.
35. *Anthony v. Haney*, (1832) 8 Bing 186.
36. *Anthony v. Haney*, (1832) 8 Bing 186.
37. *Lemmon v. Webb*, (1895) AC 1 : 11 TLR 81 : 71 LT 647; *Smith v. Giddy*, (1904) 2 KB 448; *Hari Krishna Joshi v. Shankar Vithal*, (1894) ILR 19 Bom 420; *Vishnu v. Vasudeo*, (1918) 20 Bom LR 826; ILR 43 Bom 164; *Putraya v. Krishna Gota*, (1934) 40 MLW 639; *Arumugha Goundan v. Rangaswami Goundan*, (1938) 47 MLW 324. See Ch. XXI, Nuisance, Remedies.
38. *Someshwar v. Chunilal*, (1919) 22 Bom LR 790; ILR 44 Bom 605.
39. Section 36 (Act V of 1882).

Penetration of roots of trees in another's land.—Where the roots of trees originally planted by defendants in their own land had penetrated into plaintiff's land wherefrom fresh trees had sprung up and the defendants cut and removed such trees from plaintiff's land, it was held that where the roots of a tree extended into the lands of both owners and the tree derived its nourishment from soils of both, it became the common property of both though it might actually stand on the land of one of them and consequently the plaintiff was entitled to half of the value of the trees cut and removed by the defendants.[40]

2(H) Damages

In an action for injury to land, the measure of damages is the diminished value of the property[41] or of the plaintiff's interest in it, and not the sum which it would take to restore it to its original state.[42] The same act may give rise to different injuries; the tenant may sue for the injuries to his possession and the landlord for the injuries to his reversion.[43] Damages vary according to a party's interest in land.[44] The claim for damages includes not merely damages for unlawful entry but also damages for the mischief which the trespasser commits after entry.[45]

Acts of insult and malice are matters of aggravation, for which substantial damages would be given.[46] The owner out of possession can sue the trespasser for *mesne* profits without suing for possession.[47] Damages awardable against a wilful trespasser ought not to be less than the amount which the trespasser would have had to pay for the use and occupation of land.[48]

3. TRESPASS *AB INITIO*

When entry, authority or license, is given to any one by law, and he abuses it, he becomes a trespasser *ab initio*, that is, the authority or justification is not only determined, but treated as if it had never existed. His misconduct relates back so as to make his original act tortious. The rule rests upon this—that the subsequent illegality shows the party to have contemplated an illegality all along so that the whole becomes a trespass. In *Chick Fashions (West Wales) Ltd. v. Jones*,[49] LORD DENNING, M.R. and SALMON, L.J. have expressed doubt whether today a man can be made a trespasser *ab initio* by the doctrine of relation back. But in *Cinnamond v. British Airports Authority*,[50] LORD DENNING, M.R. referred to the doctrine with approval.

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40. *Raghunath Patnaik v. Dullabha Behera*, ILR 1951 Cut 522.
41. See *Withwham v. Westminster Brymbo Coal & Coke Co.*, (1896) 2 Ch 538.
42. *Nalder v. Ilford Corporation*, (1951) 1 KB 822 : 114 JP 594 : (1950) 2 All ER 903. But see Chapter IX title 1(D)(vii) text and footnotes 53 to 56, pp. 228, 229.
43. *Jafferson v. Jafferson*, (1683) 3 Lev 130. See *Beramji v. The Secretary of State for India*, (1887) PJ 205.
44. *Burma Railways Co. Ltd. v. Maung Hla Tin*, (1927) ILR 5 Ran 813. In this case the Court held that a lessee from Government, who has only grazing and cultivation rights over a piece of land and is not entitled to extract any minerals or earth therefrom, cannot claim the value of any earth removed, and can only claim damages for deprivation of the use of part of the surface of the earth *i.e.* the diminution in the value of his land.
45. *Panna Lal Ghose v. The Adjai Coal Co. Ltd.*, (1926) 31 CWN 82.
46. *Sreehuree Roy v. James Hill*, (1868) 9 WR 156; *Ramaswami Chettiar v. Suppiah Chettiar*, (1935) 69 MLJ 98 : 42 MLW 404 : (1935) MWN 868. If defendant persists in fighting when he knows or ought to know that he is wrong, the Court will grant substantial damages : *Soha Lal v. Amba Prasad*, (1922) 20 ALJR 888.
47. *Dyamoyee Dayee v. Madhoo Soodun*, (1865) 3 WR 147.
48. *Ramaswami Nayakar v. Meenakshisundaram Chettiar*, (1924) 47 MLJ 922.
49. (1968) 2 QB 299 : (1968) 1 All ER 229 : (1968) 2 WLR 201.
50. (1980) 2 All ER 368 (CA) p. 373.

In the leading case of *Six Carpenters*[51] it is said: "The law gives authority to enter into a common inn or tavern; so to the lord to distrain; to the owner of the ground to distrain *damage feasant*; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like..... But if he who enters into the inn or tavern doth a trespass, as if he carries away any thing; or if the lord who distrains for rent, or the owner for *damage feasant*, works or kills the distress; or if he who enters to see waste, breaks the house, or stays there all night; or if the commoner cuts down a tree; in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be trespasser *ab initio*."

Where authority is not given by law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*. The reason of the difference being that, in the case of a general authority, or licence of law, the law adjudges by the subsequent act the intention with which the trespasser entered; but when the party gives an authority or licence himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or licence. Besides, when the authority is conferred by an individual it can be limited or recalled at will, whereas the rights given by law require to be strictly protected.

The act by which a person is to be deemed a trespasser *ab initio* must of itself be a trespass.[52]

The leading case of *Six Carpenters*[53] lays down three points—

(1) That if a man abuse an authority given to him by law, he becomes a trespasser *ab initio*.

(2) That in an action of trespass, if the authority be pleaded, the subsequent abuse may be replied.

(3) That a mere non-feasance does not account to such an abuse as renders a man trespasser *ab initio*.

The Calcutta High Court has held that where there is an authority given by law for doing an act, then an abuse may (not necessarily must) turn the act into a trespass *ab initio*. If a police officer, whilst lawfully conducting a search, assaults some person on the premises, his entry on the premises does not necessarily become unlawful from the outset.[54] Similarly if police officers enter the premises for a lawful arrest and afterwards seize books, papers, and money which could not be lawfully seized, they do not become trespassers *ab initio*.[55]

Refusal to pay for wine in tavern.—In the *Six Carpenters*' case, six carpenters entered a tavern, "and did there buy and drink a quart of wine, and then paid for the same." They then gave a further order for another "quart of wine and a pennyworth of bread, amounting to 8d." This order was also fulfilled, but for the second supply the men refused to pay. The question was whether this non-payment made their

51. (1610) Co. Rep. vol. IV, Bk. VIII, f. 146 (a), (b); Smith's Leading Cases, Vol I, 13th edition, p. 134. Referred to in *Cinnamond v. British Airports Authority*, (1980) 2 All ER 368 (CA) p. 373 : (1980) 1 WLR 582.
52. *Shortland v. Govett*, (1826) 5 B & C 485.
53. (1610) 8 Coke 146a : 1 Sm L.C. 134.
54. *Brojendra Kissore Ray Choudhuri v. M.A. Luffeman*, (1908) 12 CWN 982, following *Smith v. Egginton*, (1837) 7 Ad & El 167.
55. *Candian Pacific Wine Co. v. Tuley*, (1921) 2 AC 417; *Elias v. Pasmore*, (1934) 2 KB 164 : 150 LT 438 : 50 TLR 196.

original entry into the tavern unlawful. The court held that the men did not become trespasser *ab initio*, because there was a mere non-feasance in refusing to pay.[56]

But as already seen, the case lays down the basic principle that when an entry, authority or licence is given to anyone by the law, and he abuses it, he shall be a trespasser *ab initio* from the very beginning. This principle of *Six Carpenters*' case was applied in *Cinnamond v. British Airport Authority*[57] which was a case relating to six car-hire drivers. The car drivers had their own cars. They often went to the London Heathrow Airport. They were in touch with hotels in Central London. When a passenger wanted a car to take him to the Airport, the hotel telephoned one of these car-drivers and he took the passenger to the Airport. These car-drivers hung about the Airport and sought to get passengers to hire them for the drive back to London. They thus got ahead of the licensed taxi drivers who are in the feeder parks waiting to be hired. LORD DENNING on these facts observed: "When one of these car-hire drivers picks up a passenger at a London hotel and drives to the Airport, he has a right to enter so as to drop the passenger and luggage. But the driver has no right whatever to hang about there so as to 'tout' for a return fare. By so doing he is abusing the right which is given to him by the law, and that automatically makes him a trespasser from the beginning."[58]

Unlawful seizure of documents.—In order to effect the arrest of a person, the defendants, police-officers, entered the plaintiff's premises. While there they seized and carried away documents found on the premises. Amongst the documents there were some which constituted evidence on the trial of the person arrested but there were others which did not so constitute and were subsequently returned. In an action for trespass it was held that the defendants were only trespassers *ab initio* as to the documents that were seized and returned, but were not liable for any damages in respect to the entry on the premises for the purpose of arrest.[59]

Seizure of goods not within description of warrant.—In another case it was held that where a constable entered a house by virtue of a search warrant for stolen goods, he could seize not only the goods which he reasonably believed to be covered by the warrant but also any other goods which he believed on reasonable grounds to have been stolen and to be material evidence on a charge of stealing or receiving against the person in possession of them or anyone associated with him.[60]

4. DISPOSSESSION

4(A) Meaning of

Dispossession or ouster is wrongfully taking possession of land from its rightful owner. Every trespass does not amount to dispossession. The word 'dispossession' applies only to cases where the person in enjoyment of land has, by the act of some person, been deprived altogether of his dominion over the land itself, or the receipt of its profits.[61] In order to constitute dispossession there must in every case be positive acts, which can be referred only to the intention of acquiring exclusive control.[62] But it is not correct to say that a person who has no present use of his land but has future

56. *Six Carpenters*' case (1610) 1 Sm LC 134.
57. (1980) 2 All ER 368 : (1980) 1 WLR 582 : 124 SJ 221 (CA).
58. (1980) 2 All ER 368 , pp. 372, 373.
59. *Elias v. Pasmore*, (1934) 2 KB 164 : 150 LT 438 : 50 TL 196.
60. *Chick Fashions (West Wales) Ltd. v. Jones*, (1968) 2 QB 299 : (1968) 1 All ER 229.
61. *Gobind Lall Seal v. Debendronath Mullick*, (1880) ILR 6 Cal 311.
62. P & W 85; *Sundara Sastrial v. Govinda Mandaroyan*, (1908) 19 MLJ 309.

plans for its use cannot be said to be dispossessed by a squatter until the squatter's possession substantially interferes with his future plans. The fact that the true owner has no immediate use of land is a factor to be taken into account whether the acts of user by the squatter establish actual possession coupled with the animus to exclude the world at large including the true owner.[63] A true owner can be said to be dispossessed when the trespasser acquires 'settled possession'.[64] Possession implies a right and a fact. It involves power of control and intention to control. The test for determining whether a person is in possession is whether he is in general control of it.[65] Section 6 is not restricted to cases where a person is dispossessed from actual physical possession. It will also apply where symbolical possession delivered by due process of law is sought to be set at naught forthwith.[66]

4(B) Remedy

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

Possession is good against all the world except the person who can show a good title.[67] It is sufficient if the plaintiff proves a better right than the defendant's, even though it is inferior to that of some third person.[68] It will thus appear that the possession of a wrong-doer is not a legal possession against the person ousted; and the latter, on proving possession and ouster can succeed in ejectment against the wrong-doer. But there are English authorities conflicting with this view which lay down that possession alone is not sufficient in ejectment (as it is in trespass) to maintain the action; but such possession is *prima facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee.[69] This presumption cannot be rebutted merely by showing that the plaintiff did not derive his possession from any person who had title.[70]

It has been held that a licensee having right to occupation under the license, but who was not put in occupation as trespassers were on the land, was entitled to claim possession against them.[71]

There can be no doubt that *jus tertii* cannot be set up at all as a defence in following cases:—

(1) *Landlord and tenant.*—The landlord need not prove his title but only the termination of the tenancy. Neither a tenant nor any one claiming under him can dispute the landlord's title.[72]

(2) *Licensor and Licensee.*—Licensees cannot dispute the title of the persons who licensed them. There is no distinction between the case of a tenant and that of a common licensee.[73]

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63. *Buckingham Shire County Council v. Moran*, (1989) 2 All ER 225 (CA).
64. See pp. 385, 386 text and footnotes 31 to 33.
65. *Sudhir Jaggi v. Sunil Akash Sinha Choudhry*, (2004) 7 SCC 515, p. 520 : AIR 2005 SC 1243.
66. *Kumar Kalyan Prasad v. Kulanand Vairk*, AIR 1985 Pat 374, pp. 375, 376 approved in *Sudhir Jaggi's* case *supra*, footnote 67.
67. *Asher v. Whitlock*, (1865) LR 1 QB 1, 5; *Perry v. Clissold*, (1907) AC 73; *Allen v. Rivington*, (1617) 2 Saund 111 : (1969) 2 WLR 1399; *Allen v. Roughly*, (1955) 94 CLR 98; *Ocean Estates Ltd. v. Pinder*, (1969) 2 AC 19 (25).
68. *Davison v. Gent*, (1857) 1 H & N 744.
69. PER PATTERSON, J., in *Doe dem. Carter v. Barnard*, (1849) 13 QB 945 (953); *Vide also Nagle v. Shea*, (1874) 8 Ir. CLR 224, (1875) 9 Ir. CLR 389; *Doe dem Crisp v. Barber*, (1788) 2 TR 749. See *Bala v. Abai*, (1909) 11 Bom LR 1093; *Sitaram v. Sadhu*, (1913) 16 Bom LR 132 : ILR 38 Bom 240.
70. *Doe dem. Smith v. Webber*, (1834) 1 A & E 119; *Doe dem. Hughes v. Dyeball*, (1829) Mood & Mal 346.
71. *Dutton v. Manchester Airport Plc.*, (1999) 2 All ER 675 : (2000) QB 133 : (1999) 3 WLR 524 (CA).
72. Vide also the Indian Evidence Act, section 116.
73. Indian Evidence Act, section 116.

In India, section 6 of the Specific Relief Act, 1963 enables a person who is dispossessed otherwise in due course of law to sue within six months for recovery of possession irrespective of any question of title. In a suit under this section, the defendant cannot set up his title to retain possession and even a person in wrongful possession can sue the real owner who has dispossessed him otherwise in due course of law. For example, a tenant whose tenancy has come to an end, if forcibly evicted, can sue under section 6 his landlord for recovery of possession.[74] A licensee in possession can also sue under section 6 if forcibly evicted by the owner.[75] Apart from section 6, a person dispossessed can sue under section 5 of the Specific Relief Act on the basis of his title to recover possession. Title under section 5 includes possessory title which is valid against everyone except the real owner. So a person in possession on being dispossessed can sue everyone except the real owner on the basis of his prior possession within 12 years of the date of suit (12 years being the period of limitation for a suit under section 5) and the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third party.[76]

The Privy Council laid down in a case in which the plaintiff was a purchaser in possession and the defendant had no title at all, that lawful possession of land is a sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree and injunction restraining the wrong-doer.[77] The Privy Council had also held that the plaintiff in an action for ejectment must recover by the strength of his own title and not the weakness of his adversary.[78] But these decisions do not militate against the view that a person having prior possession can sue every one except the real owner to recover possession for possessory title is a good title against all except the owner.[79] A person recovering possession on the basis of possessory title against a wrong-doer really succeeds on the strength of his own title and not on the weakness of the defendant's title. It appears to be settled law that a person who has been in long continuous possession can protect the same by seeking an injunction against any person in the world other than the true owner; and even the owner of the property can get back his possession only by resorting to due process of law.[80] It has however been held that a suit based on title for permanent injunction, plaintiff claiming to be

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74. *Yeshwantsingh v. Jagdish Singh*, AIR 1968 SC 620 (1968) 2 SCR 203 : 1969 Mh LJ 496 (case under section 326; *Qanan Mal Gwalior* which was in *Pari materia* with section 6, Specific Relief Act, 1963); *M. Chocklingam v. Manichava Sagam*, AIR 1974 SC 104. *State of U.P. v. Maharaja Dharmendra Pd. Singh*, AIR 1989 SC 997, p. 1004; *Anamallai Club v. Govt. of Tamil Nadu*, AIR 1997 SC 3650, pp. 3651-3653 : (1997) 3 SCC 169; *Sukhdeo Sable v. Assistant Charity Commissioner*, (2004) 3 SCC 137, p. 150 (para 24). For nature of possession of a tenant after expiry of lease see *R.V. Bhupal Prasad v. State of Andhra Pradesh*, (1995) 5 SCC 698: (1995) 5 SCALE 41 : AIR 1996 SC 140.
75. *Krishna Ram Mahale v. Mrs. Shobha Venkat Rao*, AIR 1989 SC 2097, p. 2101 : (1989) 4 SCC 131; *East India Hotels Ltd. v. Syndicate Bank*, (1991) 6 JT 112 : (1992) Supp. 2 SCC 29.
76. *Somnath Berman v. Dr. S.P. Raju*, AIR 1970 SC 846 (849, 852) (approving *Narayana Row v. Dharmachar*, (1903) ILR 26 Mad 514; *Yeshwant v. Vasudeo*, (1884) ILR 8 Bom 371; *Umrao Singh v. Ramji Das*, (1914) ILR 36 All 51; *Subodh Gopal Bose v. Prince of Bihar*, AIR 1950 Pat 222 and overruling contrary view of the Calcutta High Court in *Debi Churn Boldo v. Issur Chunder Manjee*, (1883) ILR 9 Cal 39 and other cases); *Nair Service Society Ltd. v. K.C. Alexander*, AIR 1968 SC 1165 : (1968) 3 SCR 163; *Biharilal v. Smt. Bhuridevi*, AIR 1997 SC 1879, pp. 1883, 1884 : (1997) 2 SCC 279; *Ramesh Chandra Ardawatiya v. Anil Panjwani*, AIR 2003 SC 2508, p. 2521 : (2003) 7 SCC 350. See further *Rama Gowda v. Vardappa Naidu*, (2004) 1 SCC 769 : AIR 2004 SC 4609.
77. *Ismail Ariff v. Mohomed Ghouse*, (1893) ILR 20 Cal 834; *Sunder v. Parbati*, (1889) ILR 12 All 51 : 16 IA 186.
78. *Jowala Buksh v. Dharum Singh*, (1866) 10 MIA 511; *Thakur Basant Singh v. Mahabir Pershad*, (1913) 15 Bom LR 525 (530) : 40 IA 86.
79. *Somnath Berman v. Dr. S.P. Raju*, AIR 1970 SC 846 (849) : (1969) 3 SCC 129.
80. *Prataprai N. Kothari v. John Braganza*, AIR 1999 SC 1666 p. 1668 (para 11) : (1999) 4 SCC 403.

in possession, can be decreed only on basis of title.[81] But in *Rame Gowda v. M. Varadappa Naidu*,[82] where the suit for permanent injunction was based on title and possession and the defendant had also claimed title, the suit was decreed on the basis of possession of the plaintiff. In this case none of the parties had succeeded in proving title and the trial court had left the question of title open. It was observed that it was still open to the defendant to bring a suit on the basis of title to evict the plaintiff.[83]

The position in regard to suits for prohibitory injunction relating to immovable property was summarized by the Supreme Court in *Anathula Sudhakar v. P. Bucchi Reddy*[84] as follows:

"(*a*) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(*b*) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(*c*) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar*[85]). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(*d*) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases are exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for

81. *Nagar Palika Jind v. Jagat Singh*, AIR 1995 SC 1377 : (1995) 2 SCALE 512 : (1995) 3 SCC 426; *Mahadeo Savlaram Shelke v. Pune Municipal Corporation*, (1995) 3 SCC 33; *Sopan Sukhdeo Sable v. Assistant charity Commissioners*, (2004) 3 SCC 137, pp. 150, 151 : AIR 2004 SC 1801, pp. 1807, 1808.
82. (2004) 1 SCC 769 : AIR 2004 SC 4609.
83. (2004) 1 SCC 769, p. 777 (para 11).
84. (2008) 4 SCC 594 : AIR 2008 SC 2033, (para 23 of SCC).
85. (2005) 6 SCC 202.

declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

In this case the property in suit was open land. The plaintiff claimed to be owner in possession having purchased it and sued for permanent injunction as defendant was interfering with his possession. The defendant also claimed to be in possession as owner having purchased it from a different person and complained that plaintiff was interfering with his possession and had filed a false suit. The documentary evidence showed prima facie the defendant's possession following title. There was no issue raised in the suit on the question of title and the plaintiff had not claimed any declaration of title. The Supreme Court observed that the plaintiff ought to have amended the plaint to convert the suit for declaration of title. The court dismissed the suit but left open the plaintiff to file a suit for declaration of title and consequential relief observing that the finding in this suit will not be construed as expression of opinion barring such a suit if filed.

Adverse possession for 12 years extinguishes the title of the owner. When there are successive squatters, the second squatter may acquire title by adverse possession, even though he was not in possession for 12 years, provided the first squatter abandoned his claim to possession in favour of the second squatter and the possession of both the squatters taken together exceeded 12 years.[86]

4(C) Defences

The defences to suits under section 5 of the Specific Relief Act, 1963 are mainly two-fold:—(1) that the defendant has a better title than the plaintiff; and (2) prescription, that is, the defendant having held the immovable property or enjoyed the interest for twelve years and upwards, the plaintiff's title has thereby become extinguished and the defendant has acquired a good title.[87] In a suit under section 6 of the Act, the defendant can plead that the plaintiff was not in possession within six months of the date of suit or that the plaintiff was dispossessed in due course of law.

4(D) Damages

The trespasser who enters on another person's land and cultivates thereon does not thereby become entitled to the produce or profits.[88] The plaintiff can recover as damages *mesne profits* which mean the profits which the defendant actually received or might have received by ordinary diligence during the period of dispossession together with interest on such profits but do not include profits due to improvement made by the defendant.[89] The normal measure of *mesne profits* is, therefore, the value of the user of land to the person in wrongful possession.[90] Even if the plaintiff did not suffer any actual loss by being deprived of the use of his property, or the trespasser did not derive any actual benefit from the use of the property, the plaintiff was entitled to recover reasonable rent for the period he was deprived of the use of

86. *Mount Cormel Investment Ltd. v. Peter Thurlow Ltd.*, (1988) 3 All ER 129 : (1988) 1 WLR 1078 (CA).
87. *Nair Service Society Ltd. v. K.C. Alexander*, AIR 1968 SC 1165 : (1968) 3 SCR 163.
88. *Maung Kye v. Maung Tha Han*, ILR (1924) 2 Ran 488.
89. Section 2(12), Civil Procedure Code, 1908; *Harry v. Bhagu*, (1930) 57 IA 105; *Fatehchand v. Balkrishan Dass*, AIR 1963 SC 1405 : (1964) 1 SCR 515; *Mahant Narayan Dassji v. Tripathi Devasthanam*, AIR 1965 SC 1231.
90. *Mount Carmel Investment Ltd. v. Peter Thurlow Ltd.*, (1983) 3 All ER 129 (CA).

his property by the trespasser.[1] Extinguishment of title by adverse possession also extinguishes any claim for *mesne profits* including a claim for any period prior to extinguishment of title.[2]

5. INJURIES TO REVERSION

A reversioner is a person who has a lawful interest in land but not its present possession, *e.g.*, a landlord. Injuries to reversionary interests are done either by strangers or by tenants. Injuries of the second kind are known as waste.

Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrong-doer.[3] He may sue for trespass, disturbance of servitudes or nuisance, if the reversionary interest is affected, that is when the effect of the injuries is permanent. Obstruction of an incorporeal right, as of way,[4] air, light,[5] water,[6] *etc.* may be an injury to the reversion. There must be some injury of a permanent character to the land to enable a reversioner to support an action against a third person.[7] But if the injury is of a temporary nature the occupier of the land may bring an action, *e.g.*, bare trespass unaccompanied by any physical injury to the land.

A suit for damages by a person who has a reversionary interest in movable property is maintainable when by reason of trespass or other illegal act of the defendant he has been deprived permanently of the benefit of his reversionary interest.[8]

6. WASTE

Waste is a spoil or destruction of houses, gardens, trees or other corporeal hereditaments, to the disherision of him who hath the remainder or reversion. Whatever does a lasting damage to the freehold is waste.[9] Some act or omission on the part of the tenant or any person in possession prejudicial to inheritance is essential upon which to ground an action for waste. The law relating to waste is more properly a branch of the law of property.[10]

Indian law.—A tenant holding under a lease of a permanent character has no power to make excavations of such a character as to cause substantial damage to the property demised.[11] But a grant of a permanent tenure, when the subject-matter of the

1. *Inverugie Investment Ltd. v. Hackett*, (1995) 3 All ER 841 : (1995) 1 WLR 731 (PC).
2. *Fatehchand v. Balkrishan Das*, AIR 1963 SC 1405 : (1964) 1 SCR 515.
3. *Bedingfield v. Onslow*, (1797) 3 Lev 209.
4. *Kidgill v. Moor*, (1850) 9 CB 364.
5. *Metropolitan Association for Improving the Dwellings of the Industrious Classes v. Peth*, (1858) 27 LJ CP 330.
6. *Greenslade v. Halliday*, (1830) 6 Bing 379.
7. *Baxter v. Taylor*, (1832) 4 B & Ad. 72; *Rust v. Victoria Graving Dock Co., and London and St.Katharine Dock Col.*, (1887) 36 Ch D 113; *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch 287, 318 : 43 WR 238.
8. *Patta Kumari v. Nirmal Kumar*, (1947) 51 CWN 544.
9. BLACKSTONE, Vol. II, p. 281; *Doe dem Grubb v. Earl of Brulington*, (1833) 5 B & A 507, 517; *Jones v. Chappell*, (1875) LR 20 Eq 539; *Tucker v. Linger*, (1882) 21 Ch D 18, 8 App Cas 508; *West Ham Central Charity Board v. East London Waterworks Co.*, (1900) 1 Ch 624; *Simmons v. Norton*, (1831) 7 Bing 640; *City of London v. Greyme*, (1608) Cro Jac 181.
10. See section 108 of Transfer of Property Act.
11. *Girish Chandra Chando v. Sirish Chandra Das*, (1904) 9 CWN 255.

grant is agricultural land, conveys to the grantee all the underground right, unless there is express reservation to the contrary.[12]

Action.—An action for waste must generally be brought by the person next entitled in remainder; and if the latter has only a life-estate, he is entitled to such damages as are commensurate with the injury done to his life-estate. It is no answer to such an action to say that the value of property is enhanced by the changes made. The lessor is entitled to have the premises kept in the state in which he demised them.

In India actions for waste were generally maintained by reversioners against Hindu widows.[13] After the Hindu Succession Act (XXV of 1956), such actions will not lie against Hindu widows who become full owners under section 14 of the Act.

Damages and injunction.—In an action for waste the actual damage sustained may be recovered and an injunction obtained against the recurrence of the mischief.[14]

7. WRONGS TO EASEMENTS AND SIMILAR RIGHTS

7(A) General

An easement is a right which the owner of a property has to compel the owner of another property to permit something to be done, or to refrain from doing something on the servient tenement for the benefit of the dominant tenement, *e.g.*, right to light, a right of way. The property in respect of which an easement is enjoyed is called the dominant tenement, and its owner, dominant owner, and that over which the right is exercised is called the servient tenement, and its owner servient owner. An easement is a right not naturally belonging to land, but becoming appurtenant thereto by some method of acquisition. Every landowner has, however, certain 'natural rights' attached to the land, as rights of property not requiring any acquisition, *e.g.*, right of support for land, right to water.

Easements are distinguished from 'natural rights' inasmuch as the former are founded upon (1) prescription sanctioned by statute, (2) express grant, or (3) implied grant evidenced by immemorial user;[15] whereas the latter are incidental to the possession of immovable property. An easement is also to be distinguished from a customary easement which is not an easement in the strict sense. A customary easement arises in favour of an indeterminate class of persons such as residents of a locality or members of a certain community, and it must satisfy all the tests which a local custom for recognition by courts must satisfy.[16] The most ordinary instances of easements are the rights of air or light, of way, and of artificial watercourses.

When an easement has once been acquired, it will stand upon the same footing as natural right of property. Any material disturbance of a right of easement or a natural right; or in other words, any act done without lawful justification, which causes substantial damage by disturbing these rights, by a stranger or owner of the servient tenement amounts to a tort and is actionable at the instance of the occupier or owner of the dominant tenement and is redressable by an award of damages to compensate

12. *Sriram Chukrabutty v. Kumar Hari Narain Sinha Deo Bahadur*, (1905) 10 CWN 425.
13. *Budhun v. Fuzloor*, (1868) 9 WR 362; *Maharani v. Nanda Lal*, (1868) 1 Beng LR (ACJ) 27 : 10 WR 73; *Gobindmani v. Shamlal*, (1864) Beng LR (Sup Vol) 48; *Shama Soonduree v. Jumoona*, (1875) 24 WR 86; *Hurrydass v. Shreemutty*, (1856) 6 MIA 433; *Loll Soonder Doss v. Hury Kishen Doss*, (1862) Marsh 113, *Subnom, Hurrykishen Doss v. Loll Soonder Doss*, (1862) 1 Hay 339.
14. *Meux v. Cobley*, (1892) 2 Ch 253.
15. *State of Bihar v. Subodh Gopal Bose*, AIR 1968 SC 281 : (1968) 1 SCR 313. For immemorial use, see *Patneedi Rudrayya v. Velugubantla Venkayya*, AIR 1961 SC 1821 : (1962) 1 SCR 836.
16. *State of Bihar v. Subodh Gopal Bose, supra.*

the injury and/or by an issue of injunction to prevent repetition.[17] The action is not in trespass but in nuisance for the person entitled to an easement or a natural right is not in possession of the servient tenement and he is only entitled to its use or benefit depending upon the nature of the right.[18] Even a person in *de facto* possession of the dominant tenement and thereby in enjoyment of easements and natural rights appurtenant to that land can maintain an action against strangers (persons other than the owner or lawful occupier of servient tenement) and they cannot plead in defence that some person other than the plaintiff is the rightful owner of the dominant tenement.[19] But if the suit is against the true owner of the servient tenement the legal position is not clear but it appears that a distinction in this context is drawn between natural rights and rights acquired by prescription. If the suit by the person in *de facto* possession of the dominant tenement is in respect of a natural right, the owner of the servient tenement cannot successfully resist the suit by pleading that someone else is the owner of the dominant tenement but if the suit relates to a right acquired by prescription, it can be resisted by pleading that it is not the plaintiff but a third person, who acquired the right, the infringement of which is complained of in the suit.[19] If the owner of a land is in enjoyment of a benefit from an adjoining land which is yet to mature into an easement, he cannot complain of any infringement of any right as against the owner of the adjoining land but there is some authority that he can do so against strangers.[19]

The important *natural rights* and easements, the invasion of which is treated as wrong, are discussed below.

7(B) Right to Support

7(B)(i) Support of Land by Adjacent Land

Support of land by land may be either:—

(a) The lateral support of land by adjacent land, or

(b) The vertical support of the surface by the subsoil, where the property in the two is distinct.

(*a*) *Lateral Support.*—Every proprietor of land is entitled to such an amount of lateral support from the adjoining land of his neighbour as is necessary to sustain his own land in its natural state, not being weighted by walls or buildings.[20] This is a natural right.[21] Such a right is not an easement but a right of property.[22] The natural right does not extend to the additional support from a neighbour's soil necessary for the maintenance of building; for one landowner cannot, by altering the natural condition of his land, or by erecting buildings thereon, deprive his neighbour of the privilege of using his land as he might have done before.[23] But a right of support in extension of the natural right may be acquired by prescription or grant.

17. See section 33, Easements Act, 1882; *Chapsibhai Dhanji Bhai Daud v. Purshottom*, AIR 1971 SC 1878, (1885, 1886) : (1971) 2 SCC 205.
18. *Pain & Co. v. St. Neots Gas Co.*, (1939) 3 All ER 812 (823).
19. SALMOND & HEUSTON, Torts, 18th edition., p.72.
20. *Humphries v. Brogden*, (1850) 12 QB 739 (744) *Hunt v. Peake*, (1860) 29 LJ Ch 785; *Backhouse v. Bonomi*, (1861) 9 HLC 503; *Rasiklal v. Savailal*, (1954) 57 Bom LR 239.
21. *Rowbotham v. Wilson*, (1857) 8 E & B 123.
22. *Backhouse v. Bonomi, sup; Tamluk Trading & Manufacturing Co. Ltd., v. Nabadwipchandra Nandi*, (1931) ILR 59 Cal 363.
23. *Wyatt v. Harrison*, (1832) 3 B & Ad 871; *Partridge v. Scott*, (1838) 3 M & W 220; *Bengal Provincial Rly. Co. Ltd. v. Rajanee Kanta De*, (1935) ILR 63 Cal 441; *Panchanan Mandal v. Smt. Swelata Roy Mandal*, AIR 1980 Cal 325; *M.L. Mathew v. K.R. Gopalkrishnan*, AIR 1991 Kerala 248, p. 250.

In *Smith v. Thackerah*,[24] A dug a well near B's land, which sank, in consequence, and a building erected on it within twenty years fell, and it was proved that, if the building had not been on B's land, the land would still have sunk, but the damage to B would have been inappreciable; it was held that B had no right of action against A. But if the sinking of land, whether any building on it stood or not, would have caused appreciable damage B would have been liable for the entire injury done to both land and building.[25]

The subsidence of plaintiff's land attributable to either the acts or default of the defendant is itself an interference with the plaintiff's enjoyment of his own property, and as such constitutes the cause of action.[26] Every fresh subsidence of the plaintiff's land though resulting from the same excavation by the defendant of his land, gives rise to a fresh cause of action.[27] The court will interfere by injunction to prevent irreparable damage to land when anything is done by the owner of the adjacent land in his own land so as to let the former land slip or go down or subside even if no actual damage is sustained by the former land.[28] If damages are claimed, the right of support must be shown to have been infringed, and this infringement takes place as soon as and not until damage is sustained in consequence of the withdrawal of the support.[29]

(*b*) *Vertical support.*—There is a right of support of land by subjacent land, when the surface and subsoil are vested in different owners. The owner of the surface is entitled to common law right to the support of the subjacent strata, so that the owner of the subsoil and minerals cannot lawfully remove them, without leaving support sufficient to maintain the surface in its natural state.[30] If the owner of the land grants the subsoil, reserving the surface to himself, he impliedly grants reasonable means of access to the subsoil, and the grantee would have a right to go upon and dig through the surface, to enable him to reach the subsoil, if he had no other means of access thereto. But the owner of the subsoil may maintain an action against the owner of the surface, if he digs holes into the subsoil to a greater extent than is reasonably necessary for the proper and fair use, cultivation and enjoyment, of the surface; or if he removes so much of the surface that the mines below are flooded.[31]

The owner of the surface has no right of action until some actual damage has been sustained by him.[32] Proof of pecuniary loss is not necessary if actual subsidence is proved.[33] Whenever a fresh subsidence occurs, although proceeding from the original act or omission, a new cause of action accrues in respect of the damage done thereby, and the period of limitation begins to run afresh.[34]

24. *Smith v. Thackerah*, (1866) LR 1 CP 564. See *Corporation of Birmigham v. Allen*, (1877) 6 Ch D 294; *Greenwell v. Law Beechburn Coal Co.*, (1897) 2 QB 165.
25. See text and footnote 36, p. 398, *infra*.
26. *Backhouse v. Bonomi*, (1861) 9 HLC 503; *Mitchell v. Darley Main Colliery Co.*, (1884) 14 QBD 125 (140), *Attorney-General v. Conduit Colliery Company*, (1895) 1 QB 301 (311). In *Smith v. Thackerah*, (1866) LRCP 564, however, it has been held that the infringement of the right of support does not give rise to a cause of action unless there is appreciable damage. See to the same effect, A. *Minus v. E. Davey*, ILR (1932) 11 Ran 47.
27. *Darley Main Colliery Co. v. Mitchell*, (1886) 11 AC 127 : 54 LT 882 : 2 TLR 301.
28. *Tamluk Trading and Manufacturing Co. Ltd. v. Nabadwipchandra Nandi*, (1931) ILR 59 Cal 363.
29. *Prasanna Deb Raikat v. The Darjeeling Himalayan Railway Co. Ltd.*, (1935) 61 CLJ 503.
30. *Humphries v. Brogden*, (1850) 12 QB 739; *Backhouse v. Bonomi*, (1861) 9 HLC 503; *Ambalal Khora v. The Bihar Hosiery Mills Ltd.*, ILR (1937) 16 Pat 545.
31. *Cox v. Glue*, (1848) 5 CB 533.
32. *Backhouse v. Bonomi, sup*; Act V of 1882, section 34.
33. *Attorney-General v. Conduit Colliery Company*, (1895) 1 QB 301, 311.
34. *Darley Main Colliery Co. v. Mitchell*, (1886) 11 App Cas 127 : 54 LT 882 : 2 TLR 301.

7(B)(ii) Support of Buildings by Land

Support of buildings by land may be either:—

(a) The support of buildings laterally by adjacent soil; or

(b) the support of buildings vertically by subjacent soil.

The natural right to support exists in respect of land only, and not in respect of buildings, but a right to support for buildings both from adjacent and subjacent land may be acquired by—

(1) *Grant*, which may be (a) express, or (b) implied, *e.g.*, where a man has granted part of his land for building.[35]

Thus, if land not granted expressly for building purposes is weighted with buildings, the owner of the surface has no right to additional support necessary for the maintenance of the buildings until he has acquired the right; so that if the owner of the subsoil in working mines leaves sufficient support for the surface, but the land sinks in consequence of the weight of the buildings, that have been placed upon it, the owner of the subsoil is not responsible for the damage done.[36] But if the weight of the building has in no way caused the sinking of the land, and the land would have fallen in, whether the building had been erected on it or not, the building on the land becomes quite immaterial, and the defendant is responsible for damages to the extent of the injury done both to building and land.[37]

(2) *Prescription.* A building which has *de facto* enjoyed, under the circumstances and conditions required by the law of prescription (*viz.* openly and without concealment), support for more than twenty years, has the same right as an ancient house would have had.[38] Though the right of support to a building is not a common law right and must be acquired, yet when it is acquired the right of the owner of the building to support it is precisely the same as that of the owner of land to support for it.[39]

In *Dalton v. Angus*[40] two dwelling-houses adjoined, built independently, but each on the extremity of its owner's soil, and having lateral support from the soil on which the other rested. This having continued for more than twenty years, one of the houses (plaintiffs') was converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly and without deception or concealment. More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The house was pulled down, and the soil under it

35. *Rigby v. Bennett*, (1882) 21 Ch D 599.
36. *Backhouse v. Bonomi*, (1861) 9 HLC 503 : 34 LJQB 181 : 4 LT 754.
37. *Brown v. Robins*, (1859) 4 H & N 186.
38. *Dalton v. Angus*, (1881) 6 App Cas 740 : 44 LT 884.
39. *Backhouse v. Bonomi*, (1861) 9 HLC 503 34 LJQB 181 : 4 LT 754.
40. *Dalton v. Angus*, (1881) 6 App Cas 740 : 44 LT 884. S owned a house, which had stood for sixteen years only on a piece of land adjoining M's land. M, for the purpose of building a house on his said land, laid the foundations. S's land then gave way, thereby causing injury to his house. For this injury he sued M for damages, alleging negligence on the part of M in sinking the foundations of his house. On the evidence the Court found that the ultimate cause of the collapse of the ground under S's house was one which was beyond the reach of M. It was held that, at the highest, S had against M a natural right of support to his land, but no right whatever in respect of the building imposed on it, unless and until they had been there for twenty years, and that the only damages which S could claim would be in respect of the infringement of the right to support of his land : *S.D. Shaikh Yacoob v. Maung Ohn Ghine*, (1901) 8 Burma LR 1. See also *Bauribandhu v. Sagar*, AIR 1966 Ori 86.

excavated to a depth of several feet, and the plaintiff's stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory. It was held that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury.

7(B)(iii) Support of Buildings by Buildings

The right to support for one building from an adjoining building is not a natural right. It may, however, arise in different ways,[41] *e.g.*, grant,[42] prescription, or both houses having been built by the same owner.[43]

The mere fact of contiguity of buildings imposes an obligation on the owners to use due care and skill in removing one building so as not to damage the other, even though no right to support has been acquired.[44]

If one man builds two or more houses, each needing the support of the other, and then if he sells one, it is presumed that he reserves for himself and grants to the buyer, the right of mutual support; and so, if he sells several such houses to several persons at different times, each has the same right of support, having regard to the priority of titles.[45]

Three contiguous houses in a street visibly leaned out of the perpendicular and towards the west for upwards of thirty years A's house leaning on C's house which was leaning on B' section On the expiration of a lease to a tenant, B took down his house, the effect of which, by removing the support, was to cause C's house to fall down, and C's house falling, A's house fell. It was held that the fall of A's house did not give him a right of action against B, for A had not either a natural or an acquired right to have his house supported by B's through the intermediate house.[46] But this decision may require reconsideration. The act of B in pulling down his house was wrongful as by that act he deprived C of his right to have his house supported by B's house. The natural and foreseeable consequence of this wrongful act was not only that C's house fell down but also that A's house which was supported by C's house fell down. Therefore, B should have been held liable to both C and A, *i.e.* for the entirety of the foreseeable damage directly arising out of his wrongful act.

Damage is necessary to give a right of action.[47] The right established in *Dalton v. Angus*[48] *viz.* a right of support for an ancient building by the adjacent land equally applies to support enjoyed from an adjacent building, even though both the buildings were erected by different owners.[49] But a right to shelter as distinguished from a right of support cannot be acquired as an easement. So if A pulls down his house and thereby exposes B's house to weather, B has no cause of action.[50]

41. *Solomon v. Vintners' Co.*, (1859) 4 H & N 585, 598.
42. *Partridge v. Scott*, (1838) 3 M & W 220.
43. *Peyton v. The Mayor, etc., of London*, (1829) 9 B & C 725, 736.
44. *Dodd v. Holme*, (1834) 1 A & E 493; *Bond v. Nottingham Corporation*, (1940) 1 Ch 429.
45. *Richards v. Rose*, (1854) 9 Ex 218; *Howarth v. Armstrong*, (1897) 77 LT 61.
46. *Solomon v. Vintners Co.*, (1859) 4 H & N 585, 598.
47. *Backhouse v. Bonomi*, (1861) 9 HLC 503. See Act V of 1882, section 34. See *Corporation of Birmingham v. Allen*, (1877) 6 Ch D 284; *N. Ramakrishna Iyer v. Seetharama Iyer*, (1912) MWN 1117.
48. See footnote 40, p. 398.
49. *Lemaitre v. Davis*, (1881) 19 Ch D 281.
50. *Phipps v. Pears*, (1965) 1 QB 76, p. 83 (LORD DONNING, M.R.).

7(B)(iv) Support of Land and Buildings by Water

An owner of land has no right at common law to the support of subterranean water. The right of vertical support does not extend to have the support of underground water which may be in the soil, so as to prevent the adjoining owner from draining his soil, if for any reason it becomes necessary or convenient for him to do so, the presence of the water in the soil being an accidental circumstance, the continuance of which the landowner has no right to count upon.[51]

Support by water.—Some cottages were built on land of a wet and spongy character, the land not having been properly drained; the adjoining land was sold for the purpose of erecting a church, and on excavation for the foundations, the water was drawn from the spongy land, the surface subsided and the cottages were cracked and injured. It was held that there was nothing at common law to prevent the owner of land from draining his soil if it was necessary or convenient for him to do so, though he might, by grant, express or implied, oblige himself to suffer the underground water to remain.[52]

Support by running silt.—Where the plaintiff's land was supported, not by a stratum of water, but by a bed of wet sand or "running silt", and the defendants caused the subsidence of the plaintiff's land by withdrawing this support, it was held that they were liable.[53] The decision in the former case was held not applicable as it dealt only with support by water.

7(C) Riparian Rights in Natural Watercourses and Streams

A riparian right arises from the right of access to a stream which landowners on its banks have by the law of nature.[54] It is distinguished from easement or acquired right (derived by grant, covenant, prescription or statute), which a riparian proprietor may have in a stream, either natural or artificial. Those whose land abut on, and is part of, the bank of a river or stream, whether tidal or non-tidal, are called riparian owners. Riparian owners have the same natural riparian rights in public navigable and tidal rivers as in private streams.[55] The right of a riparian owner on the banks of a tidal navigable river exists *jure naturae*, but it is essential to its existence that his land should be in contact with the flow of the stream at least at the times of ordinary high tides.[56]

Natural watercourses or streams.—'A natural stream' is a stream arising at its source from natural causes and flowing in a natural channel.[57] Every landowner has a natural right to the uninterrupted flow, without diminution, deterioration in quality, or alteration, of the water of natural surface streams which pass to his lands in defined channels, and to transmit the water to the land of other persons in its

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51. *Elliot v. N.E. Ry.*, (1863) 10 HLC 333; *Popplewell v. Hodkinson*, (1869) LR 4 Ex 248. *Long Brook Properties Ltd. v. Surrey County Council*, (1970) 1 WLR 161.
52. *Popplewell v. Hodkinson*, (1869) LR 4 Ex 248.
53. *Jordeson v. Sutton Southcoats and Drypool Gas Co.*, (1899) 2 Ch D 217. See *Trinidad Asphalt Co. v. Ambard*, (1899) AC 594.
54. *Appa Rao v. Seetharmayya*, ILR (1939) Mad 45.
55. *Lyon v. Fishmongers' Co.*, (1876) 1 App Cas 662.
56. *Dawood Hashim Esoof v. C. Tuck Sein*, (1931) ILR 9 Ran 122 : 33 Bom LR 897 (PC).
57. *M' Nab v. Robertson*, (1897) AC 129. See *Gopalan Krishna Yachendrulu Varu v. Secretary of State*, (1914) 16 MLT 597. Watercourse' also denotes the stream itself as it flows in a channel : *Collins v. Ten Broeke*, (1896) PR No. 71 of 1896; *Secretary of State for India in Council v. Rajah Shivrama Prasad*, ILR (1943) Mad 846.

accustomed course.[58] This right belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself. Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions that—

(1) the use is reasonable;[59]

(2) it is required for their purposes as owners of the land; and

(3) it does not destroy or render useless, or materially diminish, or affect the application of, the water by riparian owners below the stream in the exercise either of natural right or their right of easement, if any.[60]

Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back or exhaust it, so as to deprive other riparian owners of the like use.[61] But an upper riparian owner has no *locus standi* to complain if the lower riparian owner puts up a bund across the natural stream for the purpose of diverting the water to irrigate his lands.[62]

It is not necessary that a natural stream must flow continuously throughout the year, and must at every single point of its course flow through a clearly defined channel. Even if such a stream does not flow continuously throughout the year it will be regarded as a natural stream.[63]

If the rights of a riparian proprietor are interfered with, he may maintain an action against the wrong-doer, even though he may not be able to prove that he has suffered any actual loss.[64]

As between riparian owners the law established in England is that diversion of water for riparian purposes is not actionable without proof of injury, but diversion for non-riparian purposes is actionable without proof of such injury.

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58. *Mason v. Hill*, (1833) 5 B & Ad 1; *John Young & Co. v. Bankier D. Co.*, (1893) AC 691; *Debi Pershad Singh v. Joynath Singh*, (1897) ILR 24 Cal 865 : 24 IA 60; *Maung Bya v. Maung Kyi Nyo*, (1925) 52 IA 385 : 27 Bom LR 1427; *Khushalbhai v. Secretary of State*, (1925) 28 Bom LR 614; *Tihali Pachya v. Ram Kisan*, (1944) NLJ 374.
59. The standard of reasonableness applies to the volume of water that he can divert to the purpose for which he can utilise is as also to the mode or method that he may adopt for impounding and channelling such water: *State of Bombay v. Laxman*, (1959) 62 Bom LR 106.
60. *Perumal v. Ramasami*, (1887) ILR 11 Mad 16; *Sheikh Monoour v. Kanhya Lal*, (1865) 3 WR 218; *Athur Ali Khan v. Sekundar Ali Khan*, (1865) 4 WR 28; *Sardowan v. Hurbuns*, (1869) 11 WR 254; *Narayan v. Keshav*, (1898) ILR 23 Bom 506; *Waman v. Changu*, (1904) 8 Bom LR 87. *Dinkar v. Narayan*, (1905) 7 Bom LR 265; ILR 29 Bom 357; *Maung Hmin Gyaung v. Maung Shwe Min*, (1883) SJLB 233; *Tha E. v. Lon Ma Gale*, (1904) 3 LBR 23; *Baldeo Singh v. Jugal Kishore*, (1911) ILR 33 All 619; *Wazeera v. Sipadar Khan*, (1867) PR No. 33 of 1867; *Murli v. Hanuman Prasad*, (1936) ILR 58 All 981; *Apparao v. Seetharamayya*, ILR (1939) Mad 45; *Kantha Chowdhary v. Dhannu Naikow*, ILR (1974) Cuttack 973; *Titlagarh Paper Mills Co. Ltd. v. State of Orissa*, ILR (1975) Cuttack 1095. *A Arivudai Nambi v. State of Tamil Nadu*, AIR 1990 Mad 240, p. 242. See also illustrations (f) to (j) to section 7 of the Indian Easements Act, 1882.
61. *Narayan v. Keshav*, (1898) ILR 23 Bom 506; *Babu Chumroo Singh v. Mullick Khyrut*, (1872) 18 WR 525; *Heeranund v. Mussamut Khubeeroonissa*, (1870) 15 WR 516; *Mahadu v. Narayan*, (1904) 6 Bom LR 291; *Belbhadar Pershad Singh v. Sheikh Barkat Ali*, (1906) 11 CWN 85 : 4 CLJ 370; *Krishna Dayal (Mahantha) v. Bhawani Koer*, (1917) 3 PLW 5; *Jagannadhraju v. Rajah of Vizianagram*, ILR (1937) Mad 510 (FB); *State of Bombay v. Laxman*, (1959) 62 Bom LR 106. See further *Patneedi Rudrayya v. Velugubantla Venkayya*, AIR 1961 SC 1821 : (1962) 1 SCR 836 (A reparian owner may protect himself from extraordinary floods but still he cannot impede the flow of the stream along its natural course.)
62. *Dr. K. Anantha Bhat v. K.M. Ganapathy Bhatta*, AIR 1981 Ker 102.
63. *Ramsewak v. Ramgir*, (1953) ILR 32 Pat 937.
64. *Wood v. Waud*, (1849) 3 Ex 748; *Shunkur v. Gurbhoo*, (1871) 15 WR 216; *Kaw La v. Maung Ke*, (1916) 8 LBR 556; *Appa Rao v. Seetharamayya*, ILR (1939) Mad 45.

A dam had been in existence across a river for upwards of two hundred and eighty years, and during all that time the villages of D and P had received an equal supply of water from separate sluices in the dam. The Government authorities, being of opinion that D required less water than P, reduced the size of the D sluice, and consequently the amount of water flowing to the D village. The inhabitants of D challenged the action of the Government. It was held that the Government had no such right of interference.[65]

Where a riparian owner for the protection of his own land erects a wall along the side of the river to prevent flooding and many years afterwards pulls down part of the wall in connection with building operations, with the result that a neighbour's property is damaged by flood, the neighbour has no right to the protection of the wall and cannot therefore maintain an action for damages on the ground of a negligence, nuisance, or on the principle of *Rylands v. Fletcher*.[66]

7(D) Artificial Watercourses

An artificial stream' is one arising by human agency, or flowing in an artificial channel. The right to artificial watercourses, as against the party creating them, depends upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created.[67] If it is *permanent* in its character, a right to the uninterrupted flow of the water may be acquired by prescription or grant against both the originator of the stream and also against any person over whose land the water flows.[68] If it is of a *temporary* character, no right could be acquired by prescription, because the temporary nature of the stream precludes a presumption of a grant of a permanent right.[69]

There is no right to tap an artificial watercourse unless by grant or prescription.[70] But a right of easement may be acquired in the surplus water of a tank flowing through a defined channel, whether natural or artificial.[71]

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65. *The First Assistant Collector of Nasik v. Shamji Dasrath Patil*, (1878) ILR 7 Bom 209. See *Debi Pershad Singh v. Joynath Singh*, (1897) ILR 24 Cal 865 : 24 IA 60 (PC), See *Venkatchalam Chattiar v. Zamindar of Sivaganga*, (1903) ILR 27 Mad 409.
66. *Thomas and Evens Ld. v. Mid-Rhondda Co-operative Society Ld.*, (1941) 1 KB 381.
67. *Wood v. Waud*, (1849) 3 Ex 748, 776, 777; *Whitmores (Edenbridge) Ltd. v. Stanford*, (1909) 1 Ch 427; *Greatrex v. Hayward*, (1853) 8 Ex 291; *Yesu Sakharam v. Ladu Nana*, (1926) ILR 51 Bom 243 : 29 Bom LR 291; *Raman Niar v. Parameswaran Nambudri*, (1934) 40 MLW 629 : (1935) MWN 990.
Indian cases.—Water falling on A's land was collected in a reservoir there and used to flow on B's land. It was held that B had no right to the use of the water, and that A was entitled to erect on his own land a *bund* to prevent the water flowing on to B's land: *Bunsee Sahoo v. Kalee Pershad*, (1869) 13 WR 414; *Ramessur Pershad Narain Sing v. Koonj Behari Pattuk*, (1878) ILR 4 Cal 633 : 6 IA 33. An interference by the defendants with the plaintiff's right as ryotwari landholder to the supply of water from a Government channel for the irrigation of his lands gives rise to a cause of action against the defendants: *Rama Odayan v. Subramania Aiyar*, (1907) ILR 31 Mad 171.
68. *Sutcliffe v. Booth*, (1863) 32 LJ QB 136; *Holker v. Porrit*, (1875) LR 10 Ex 59; *Bailey & Co v. Clark, Son and Morland*, (1902) 1 Ch 649. See *Bhoop Narain Singh v. Kazee Syud Keramut Ali*, (1866) 6 WR 99. See *Ram Kirpal Singh v. Hamuman Singh*, (1920) 6 PLJ 6 which deals with right where a natural stream flowed in an artificial channel. The widening a little and deepening a little, and trimming a little of an existing ancient fresh-water natural watercourse does not convert it into a canal: *Maung Bya v. Maung Kyi Nyo*, (1925) 52 IA 385 : 27 Bom LR 1427.
69. *Arkwright v. Gell*, (1839) 5 M & W 203; *Burrows v. Lang*, (1901) 2 Ch 502.
70. *Run Bahadoor v. Poodhee*, (1864) WR (Gap No.) 319; *Buddun Thakor v. Mohunt Shunker Doss*, (1864) WR (Gap. No.) 106; (1864) WR (Gap. No.) 106; *Bipin Behari Ghatak v. Ramnath Ghatak*, (1928) ILR 56 Cal 161.
71. *Rayappan v. Virabhadra*, (1884) ILR 7 Mad 530.

7(E) Surface Water

The chief characteristic of surface water is its inability to maintain its identity and existence as a water-body,[72] *e.g.*, rain water or water from a spring which does not flow in a stream and spreads over the strata of earth. Water which does not flow in a defined channel belongs to the owner of the land on which it is collected.[73] Every landowner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire.[74] No right of easement to surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise can be acquired.[74] *"Stream"* connotes the idea that the body of water flows through a defined channel having a bed and banks on both the sides.[74] A flow of excess rain water, though in a body and in one direction spread over a very large area in width without any bed or having any banks within which the flow is confined, cannot be treated as a stream.[74] The owner of a land may instead of retaining allow the surface water coming to his land to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing.[75] The owner of the lower land may acquire by prescription, as an easement restricting this natural right, the right to prevent the natural flow of water from the higher land on to his own.[76] The owner of the upper land is, however, not entitled to do anything that will throw on the lower land water which would not have naturally gone there.[77]

An owner of land on a lower level, to which surface water from adjacent land on a high level naturally flows, is not entitled to deal with his lands so as to obstruct the flow of water from the higher land. This principle applies to all lands whether situate in the country or in towns.[78] It also makes little difference to this principle that the water happens to be not merely rain water but also flood water to which the higher land is subjected periodically.[79] These cases[80] appear to follow the rule of civil law applied in *Gibbons v. Lenjestey*[81] by the Privy Council in an appeal from Guernsey which is not the common law and is not applied by English Courts.[82] The fact that

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72. *Adinarayana v. Ramudu*, (1912) ILR 37 Mad 304.
73. *Muhammadons of Lonar v. Hindus of Lonar*, ILR (1948) Nag 698.
74. *Narsoo v. Madanlal & Others*, AIR 1975 MP 185.
75. *Mussammat Sarban v. Phudo Sahu*, (1922) ILR 2 Pat 110; *Robinson & Maniyam v. Ayya*, (1872) 7 MHC 37; *Perumal v. Ramasami*, (1887) ILR 11 Mad 16; *Adinarayana v. Ramudu*, (1912) ILR 37 Mad 304; *Nagarethna Mudaliar v. Sami Pillai*, (1935) ILR 59 Mad 979; *Natabar Sasmal v. Krishna Chandra Bera*, (1941) 74 CLJ 95.
76. *U Po Thet v. A.L.S.P.P.L. Chettyar Firm*, ILR (1936) 14 Ran 544; *Natabar Sasmal v. Krishna Chandra Bera, supra*.
77. *Sankarappa Naicker v. Rani Nachiar*, (1913) 25 MLJ 276; *Gopala Krishna Yachendrula Varu v. Secretary of State*, (1914) 16 MLT 597; *Bhagirathi v. Suraj Mal*, (1914) 12 ALJR 684; *Moksodali v. Ma Hli*, (1923) ILR 1 Ran 427; *Ma Hli v. Moksodali*, (1924) ILR 2 Ran 450; *Sitaram Motiram v. Keshav*, (1945) 48 Bom LR 404 : ILR (1946) Bom 475. See also *Satyabadi v. Kasinath*, AIR 1964 Orissa 41, where the defendant whose land was at a higher level than the plaintiff's land diverted or interfered with the normal flow of water in a drainage channel by putting a pipe and thereby brought water which inundated and damaged the plaintiff's land and crops.; See further, *Lakshmanan v. G. Ayyasamy*, (2011) 2 LW 24 :(2011) 2 CTC 181: (2011) 6 Mad LJ 544.
78. *Sheikh Hussain Sahib v. Subbayya*, (1925) ILR 49 Mad 441 (FB), following *Gibbons v. Lenfestey*, (1915) 113 LTNS 55 : AIR 1915 PC 165 : (1915) 84 LJ PC 158; *Kaosal v. Kodu*, ILR (1945) Nag 750; See further *Chandrabhan Singh v. Shital Prasad Chhedi Lal*, 1983 MPLJ 729 (lower landowner not bound to drain out water from his land which comes from upper land unless right acquired by easement.)
79. *Patneedi Rudrayya v. Velugubantla Venkayya*, AIR 1961 SC 1821 : (1962) 1 SCR 836.
80. Cases in footnotes 78 and 79.
81. *Supra*, footnote 78.
82. *Palmer v. Bowman*, (2000) 1 All ER 22 : (2000) 1 WLR 842 (CA); *Home Brewery Plc v. William Davies & Co.*, (1987) 1 All ER 637 : (1987) QB 339 : (1987) 2 WLR 117 (QBD).

the water collected and discharged from the dominant tenement flows over the surface of the servient tenement without a definite channel for its carriage cannot prevent the acquisition of an easement.[83]

7(F) Subterranean Water

In this class come—

(a) Subterranean streams the courses of which are known and clearly defined.

(b) Subterranean streams the courses of which are undefined; and percolating water the course of which is underground, undefined and unknown.

The right to an underground stream flowing in a known and definite channel is a right *ex natura*, and an incident to the land itself, as a beneficial adjunct to it.[84]

If the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterranean course, and then emerge again, the owner of the soil under which the stream flowed could maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground.[85]

Where a man digs a pond on his land which by percolation obstructs and diminishes the water flowing in a defined channel through another's land adjoining the pond, there is an actionable wrong and the owner of the pond can be directed to erect such construction as would prevent such abstraction by percolation.[86]

The principles which apply to flowing water in defined streams are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no natural right to the uninterrupted flow of such streams.[87] Such a right cannot also be acquired by prescription.[88] A landowner has, therefore, the right to appropriate water percolating in no defined channel through the strata beneath his land; and no action will lie against him for so doing, even if he thereby intercepts, abstracts or diverts, water which would otherwise pass to or remain under the land of another.[89] But he is not entitled to pollute water flowing beneath another's land.[90] He can also be restrained from drawing off the subterranean water on the adjoining land, if in so doing he draws off water which had once flowed in a defined surface channel.[91]

Stream drying up owing to construction of well on adjoining property.—A landowner and a millowner who had for above sixty years enjoyed the use of a stream which was chiefly supplied by percolating underground water, lost the use of

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83. *Munshi Misser v. Bhimraj Ram*, (1913) ILR 40 Cal 458 (FB).
84. *Wood v. Waud*, (1849) 3 Ex 748.
85. *Dickinson v. Grand Junction Canal Co.*, (1852) 7 Ex 282, 300, 301; *Dudden v. Guardians of Clutton Union*, (1857) 1 H & N 627. See *Babaji Ramling v. Appa Vithavja*, (1923) 25 Bom LR 789.
86. *Keshava Bhatta v. Krishna Bhatta*, (1944) 59 MLW 94.
87. *Acton v. Blundell*, (1843) 12 M & W 324.
88. It has been held that right to irrigate plaintiff's land from defendants well cannot be acquired by prescription on the reasoning that well water is underground water; *Het Singh v. Anar Singh*, AIR 1982 All 468. But it has been held that such a right can be acquired from presumed grant on the basis of immemorial user. *Girdhari Singh v. Gokul*, AIR 1976 Raj 10.
89. *Chasemore v. Richards*, (1859) 7 HLC 349 : 7 WR 685; *Mayor etc. of Bradford v. Pickles*, (1895) AC 587; *M'Nab v. Robertson*, (1897) AC 129; *Stephens v. Anglian Water Authority*, (1987) 3 All ER 379 (C.A.). See further Chapter (1) text and footnotes 6 to 10, pp. 16, 17.
90. *Ballard v. Tomlison*, (1885) 29 Ch D 115.
91. *Grand Junction Canal Co. v. Shugar*, (1871) LR 6 Ch App Cas 483, 488.

the stream after an adjoining owner had dug, on his own ground an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title as landowners to the use of water. In an action brought by the landowner it was held that the principles which regulate the rights of owners of land in respect to water flowing in known and defined channels, whether upon or below the surface of the ground do not apply to underground water which merely percolates through the strata in no known channels and the plaintiff had no right of action.[1]

7(F1) Pollution of Water, Air and Environment

The interpretation of the fundamental right to life in Article 21 of the Constitution to include enjoyment of Pollution free environment has given new dimension to this topic.[2]

Relevant in this context are also Articles 48A and 51A of the Constitution. Article 48A requires that the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Under Article 51A it is the duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living animals.[3] The Declaration of the 1972 Stockholm Conference on 'Human Environment' which is referred to as the 'magna carta' of our environment provides that the natural resources of the earth including air, water, land flora and fauna should be protected. This necessitates that "development and environment must go hand in hand. In other words there should not be development at the cost of environment and vice versa, but there should be development while taking due care ensuring the protection of environment".[4] The Development has to be what is known as 'sustainable development' which is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[5]

Although a riparian owner has a right to make reasonable use of water of a stream,[6] he has no right to pollute the water.[7] Even subterranean water cannot be polluted.[8] Pollution here means altering the natural quality of water whereby it is rendered less fit for any purpose for which in its natural state it is capable of being used.[9] Pollution gives rise to a cause of action in nuisance without proof of actual damage.[10] Injunctions can be granted against factories and municipalities restraining them from discharging untreated refuse or sewage into a stream.[11] Section 24 of the Water (Prevention and Control of Pollution) Act, 1974 prohibits the use of any stream or well for disposal of polluting matter. It provides that subject to the provisions of the said Act, no person shall knowingly cause or permit any poisonous, noxious or polluting matter to enter, whether directly or indirectly, into any stream or well; or no

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1. *Chasemore v. Richards*, (1859) 7 HLC 349 : 7 WR 685.
2. *Noise Pollution In Re*, (2005) 5 SCC 733, (para 10) : AIR 2005 SC 3136; *T.N. Godavarman Thirumulpad (87) v. Union of India*, (2006) 1 SCC 1 para 77 : AIR 2005 SC 4256. See also, *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 12 SCC 739.
3. *Godavarman Thirumulpad v. Union of India*, (1996) 5 SCC 281 : (1996) 4 JT 263; *Essar Oil Ltd. v. Halar Utkarsh Samiti*, (2004) 2 SCC 392 : AIR 2004 SC 1834; *Karnataka Industrial Areas Development Board v. C. Kenchappa*, (2006) 6 SCC 371 pp. 381, 382 : AIR 2006 SC 2038.
4. *Indian Council for Enviro-Legal Action v. Union of India*, *supra* para (1).
5. *Karnataka Industrial Areas Development v. C. Kenchappa*, *supra* page 391, 392 para 103.
6. See title 7(c) *supra*.
7. *Wood v. Wand*, (1849) 3 Exch. 748.
8. *Ballard v. Tomlinson*, (1885) 29 Ch D 115. See text and footnote 35, p. 409, *infra*.
9. *Pakkle v. V.P. Aiyasami*, AIR 1969 Mad 351.
10. *Pakkle v. V.P. Aiyasami*, AIR 1969 Mad 351.
11. *Hulley v. Silversprings etc. Co. Ltd.*, (1922) 2 Ch. 268; *Pride of Derby and Derbyshire Angling Association v. British Calanese Ltd.*, 1953 Ch. 149 : (1953) 1 All ER 179 : (1953) 2 WLR 58.

person shall knowingly cause or permit to enter into any stream any other matter which may tend either directly or indirectly in combination with similar matters to impede the proper flow of the water of the stream in a manner leading or likely to lead to substantial aggravation of pollution due to other causes or of its consequences. Stream is defined by section 2(i) of the Act to include river, watercourse whether flowing or for the time being dry, inland water whether natural or artificial, subterranean waters, sea or tidal waters. By Act 44 of 1978 the restriction on discharging effluents into a stream was extended to discharges into sewers and on land. To implement the decisions taken at the United Nations Conference on the Human Environment in so far as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property a Comprehensive Act the Environment Protection Act 1986 was enacted by Parliament. Section 2(a) of the Act widely defines environment to include water, air and land. Section 2(a) of the Air (Prevention and Control of Pollution) Act, 1981 defines 'air pollutant' in wide terms to mean 'any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment'.

Sections 3 and 5 confer very wide powers to the Central Government to take measures to protect and improve environment and to issue necessary direction to any person, officer or authority. The Supreme Court in a Public Interest Litigation under Article 32 of the Constitution restrained tanneries of Kanpur from discharging effluent in the river Ganga without setting up primary treatment plant;[12] and also directed the municipal Board, Kanpur to take steps for construction of sewage treatment works and to take other steps for prevention of pollution of the river.[13] In *Indian Council For Environmental Action v. Union of India*[14] compensation of Rs. 28.34 lakhs was allowed to farmers from the State of Andhra Pradesh as their crops got damaged being irrigated by subsoil water drawn from a stream which was polluted from the untreated effluents of 22 industries owned by private persons. The basis of the liability of the State has not been clarified. Impliedly the liability would be on the basis of violation of right to life under Article 21 for failure to take action against the industries for not installing effluent treatment plants. And in *Indian Council for Enviro Legal Action v. Union of India*[15] the Supreme Court in a petition under Article 32 issued directions to the Central Government to exercise its powers under sections 3 and 5 of the Environment (Protection) Act, 1986 to take remedial measures to restore the soil, water sources and the environment in general of the affected area to its original condition and to recover the cost of the same from polluting chemical industries which were required to close down. The villagers were further allowed to sue for damages in civil court on the Mehta principle. The court

12. *M.C. Mehta v. Union of India*, AIR 1988 SC 1037. See further *Raju Ranjan Singh v. State of Bihar*, AIR 1992 Pat 86; *Dr K.C. Malhotra v. State of Madhya Pradesh*, AIR 1994 MP 48.
13. *M.C. Mehta v. Union of India*, AIR 1988 SC 1115 : (1988) 1 SCC 471.
14. (1995) 6 SCALE 578 (2). Later the court allowed additional compensation of about Rs. 47 lakhs; see (1996) 4 SCALE (SP) 36.
15. (1996) 2 SCALE 44, p. 69 : AIR 1996 SC 1446 : (1996) 3 SCC 212. Relied and affirmed in *Indian Council for Enviro-Legal Action v. Union of India* (2011) 8 SCC 161; See further, p. 52, footnote 50 *ante*. Also see *Vellore Citizens Welfare Forum v. Union of India*, (1996) 6 SCALE 194 pp. 209 to 211 : (1996) 5 SCC 647 for direction to Central Government under the Environment (Protection) Act, 1986 for preventing pollution by Tanneries and other polluting industries in Tamil Nadu. The court ruled for "sustainable development" as a balancing concept between ecology and development which requires conformity with two basic principles, *viz*: "The precautionary" principle and the "Polluter pays" principle. See further on the same lines *M.C. Mehta v. Kamal Nath*, 1996 (9) SCALE 141, pp. 160, 161; S. *Jagannath v. Union of India*, (1996) 9 SCALE 167 : AIR 1997 SC 811 : (1997) 2 SCC 87

also applied the "Polluter pays principle" which demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause pollution or produce the goods which cause pollution. Further strides in Environment Protection jurisprudence have been made in *M.C. Mehta v. Kamal Nath*[16] and *S. Jagan-nath v. Union of India*.[17] In *Kamalnath* the court (KULDIP SINGH, J.) made the public trust doctrine the law of the land and ruled: "The state is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running, waters, airs, forests and ecologically fragile lands. The state as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."[18] The court set aside the lease of ecologically fragile land situated on the bank of the river Beas to a Motel and directed the Himachal Pradesh State Government to take over the area and restore it to its original natural conditions. The court also directed the Motel to pay compensation by way of cost for restitution of the environment and ecology of the area. In *Jagannath*[19] the court directed the Central Government to constitute an Authority under section 3(3) of the Environment (Protection) Act, 1986 and confer on the said authority the necessary powers to protect the ecologically fragile coastal areas, sea shore, water front and other coastal areas and specially to deal with the situation created by the shrimp culture industry in the coastal areas. The court also directed demolition of all such industries in the coastal regulation zone and the implementation of the 'Precautionary' principle and the 'Polluter Pays' principle. The industries which were directed to be closed were held liable for payment of compensation under two heads, namely, for reversing the ecology and for payment to individuals for the loss suffered. Principle of Sustainable Development, precautionary principle and polluter pays principle were also applied in protecting Taj and residents in the area from emissions generated by coke/coal consuming industries.[20] These principles were further explained in detail in *A.P. Pollution Control Board v. Prof. M. V. Nayudu (Retd.)*[21] and *K.M. Chinappa v. Union of India*.[22] The *Chinappa* case explains the meaning of environment and importance of its protection. The Supreme Court by various orders issued from time to time has issued directions for replacing Diesel Vehicles by CNG Vehicles for controlling air pollution by emissions from vehicles.[23] The Supreme Court issued detailed directions relating to fire crackers, loud speakers and Vehicular noise for controlling noise pollution.[24] The court had in an earlier case observed that noise pollution cannot be tolerated even if such noise was a direct result of and was connected with religious activities.[25] The Central Government has framed the Noise Pollution (Regulation and

16. (1996) 9 SCALE 141. Affirmed in *M.C. Mehta v. Kamalnath*, JT 2000 (7) SC 19 : AIR 2000 SC 1997 : (2000) 6 SCC 213 except regarding imposition of fine in addition to compensation to the State Government for cost of restoration.
17. (1996) 9 SCALE 167 : AIR 1997 SC 811 : (1997) 2 SCC 87.
18. (1996) 9 SCALE 141, pp. 160, 161.
19. (1996) 9 SCALE 167, pp. 214, 215 : AIR 1997 SC 811 pp. 848, 849, 850 : (1997) 2 SCC 87.
20. *M.C. Mehta v. UOI*, (1997) 1 SCALE 61, pp. 91 to 93 : AIR 1997 SC 734, pp. 760 to 762. See further *Fomento Resorts and Hotels Limited v. Minguel Martins*, (2009) 3 SCC 571 paras 51 to 65 : (2009) 1 JT 470 (Public Trust doctrine restated and earlier cases referred. The appellant was required to demolish the obstruction erected which obstructed approach of the general public to a Beach in Goa). See also, *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 12 SCC 737; *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 12 SCC 764.
21. JT 1998 (1) SC 162, pp. 173 to 183 : AIR 1999 SC 812, pp. 819 to 823.
22. AIR 2003 SC 724, pp. 736 to 738 : (2002) 10 SCC 606.
23. *M.C. Mehta v. Union of India*, (2002) 4 SCC 356 : AIR 2002 SC 1696.
24. *Noise Pollution (v.) In re*, (2005) 5 SCC 733 : AIR 2005 SC 3136.
25. *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Asso.*, (2000) 7 SCC 282 : AIR 2000 SC 2773.

Control) Rules, 2000 which provides for silence zones viz. an area comprising not less than 100 metres around hospitals, educational institutions and courts and restricts the use of loudspeaker or a public address system except after obtaining written permission[26] of the competent authority. Interference by the court in respect of noise pollution is premised on the basis that a citizen has certain rights being 'necessity of silence', 'necessity of sleep', 'peace during sleep' and 'rest' which are biological necessities essential for health and constitute human right.[27] Courts have also issued directions for preventing air pollution and regulating stone crushing industries.[28] The doctrine of public trust has been applied to Municipal corporations in the context of section 114 of the U.P. Nagar Palika Adhiniyam, 1959 which makes it an obligatory duty of the corporation to maintain public places, parks and plant trees. It was held in this case that by allowing construction of under ground shopping complex in a park, the corporation violated not only section 114 but also the public trust doctrine. Directions were issued for demolition of the construction and restoration of the park.[29] But damages cannot be allowed simply on the ground that the industrial units have violated the standards prescribed by the Pollution Board. It has further to be shown that the violation of the standards has caused damage to environment.[30] "Compensation to be awarded must have some broad correlation not only with the magnitude and capacity of the enterprise but also with the harm caused by it. In a given case the percentage of the turnover itself may be a proper measure because the method to be adopted in awarding damages on the basis of 'polluter to pay' principle has got to be practical, simple and easy in application".[31] The court in this connection referred to the principle of strict liability and damages recoverable under the *Mehta* Rule.[32]

With the object of protecting the benefits arising to mankind from forests, whenever forestland is permitted to be diverted for non-forest development activities, the user agencies are required to pay for compensatory afforestation as also net present value (NPV) of forest land diverted for non-forestry purposes. The underlying principle for recovery of NPV is that plantations raised could never adequately compensate for the loss of natural forests as the plantations require more time to mature and even then they are a poor choice for natural forest. The Supreme Court gave detailed direction in these matters in *Godavarman* case.[33] Another case[34] in relation to concept of 'sustainable development' relates to the protection of Kolleru lake which is one of the longest shallow fresh water lakes in Asia located between the delta of Krishna and Godawari rivers in the State of Andhra Pradesh.

26. *Farhad K. Wadia v. Union of India*, (2009) 2 SCC 442 paras 16, 17 : (2008) 12 JT 534 P&H.
27. *Farhad K. Wadia v. Union of India*, (2009) 2 SCC 442, para 22.
28. *Ishwar Singh v. State of Haryana*, AIR 1996 P&H 30; *Obayya Pujary v. Member Secretary, Karnataka State Pollution Control Board*, AIR 1999 Kant. 157.
29. *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu*, (1999) 5 JT 42 pp. 86, 87 : AIR 1999 SC 2468 : (1999) 6 SCC 464.
30. *Deepak Nitrite v. State of Gujarat*, (2004) 6 SCC 402 : AIR 2004 SC 3407.
31. *Deepak Nitrite v. State of Gujarat*, (2004) 6 SCC 402, p. 407 (para 6).
32. *M.C. Mehta v. Union of India*, (1987) 1 SCC 395. See p. 502, *post*.
33. *T.N. Godavarman Thirumulpad (87) v. Union of India*, (2006) 1 SCC 1 : AIR 2005 SC 4256.
34. *T.N. Godavarman Thirumulpad v. Union of India*, (2006) 5 SCC 47 : (2006) 4 JT 454. The doctrine of public trust does not exactly prohibit the alienation of property held as a public trust but it needs a high degree of judicial probity of a Governmental action which restricts the use of property held for public benefit. *Intellectuals Forum Tirupathi v. State of A.P.*, (2006) 3 SCC 549 : AIR 2006 SC 1350; *Susetha v. State of Tamil Nadu*, (2006) 6 SCC 543 : AIR 2006 SC 2893. The doctrine of Sustainable Development, Public Trust etc. also considered in the context of balancing the need for development for providing shelter and the need for conservation of natural resources in this case for public tanks in Tirupathi. *Intellectuals Forum, Tirupathi v. State of A.P.*, (2006) 3 SCC 549 : AIR 2006 SC 1350.

The lake extends over 901 sq. km. and 308 sq.m. having been declared as wildlife sanctuary. The lake is a wetland ecosystem of international importance and has been so declared in the 1971 Convention of Rarusar (Iran) to which India is a signatory. It was decided in the Convention that encroachments in the lake would not be tolerated. By a notification issued under section 26A of the Wild Life Protection Act 1972 aquaculture in the form of any tank was prohibited in the area declared as sanctuary. Directions were issued for implementation of the said notification and for demolition of all fish tanks within the sanctuary and for prohibiting use or transportation of inputs for pisciculture in the said sanctuary. These directions were upheld by the court.

Polluting neighbour's well by turning sewage into one's own.—A and B, two neighbours, each possessed a deep well on his own land. A turned sewage into his well, in consequence whereof the well of B being at a lower level became polluted by underground percolation; it was held that an action lay by B against A. There is a considerable difference between intercepting water in which no property exists, and sending a new, foreign and deleterious substance on to another's property. The immediate *damnum*, namely, the pollution of the water might be possibly no *damnum*, but allowing sewage to escape into another's property is of itself an *injuria* which needs no *damnum*.[35]

Polluting tank water by laying salt pans.—The plaintiff-villagers, who had a right to use the water of a tank belonging to the Government for bathing, drinking and other purposes from time immemorial, sued the defendants to restrain them from laying salt pans in a portion of the bed of the tank as the water would thereby become saltish. It was also found that the water in the tank-bed had become saltish due to the existence of salt pans of these persons all round the bed of the tank. It was held that the villagers were entitled to the grant of an injunction against the defendants as they possessed a common right over the water of the tank and any interference of that right gave them a cause of action even though the interference was not in respect of the land belonging to the plaintiffs and that it was no defence to the action that people other than the defendants had already done something which had the effect of making the water saltish.[36]

7(G) Right to Access of Air

An owner or occupier of land or building has no natural right to free passage of air to his tenement over adjoining open land. He has no natural right to prevent his neighbour from using his land in such a way as to obstruct that free passage of air. A right to the general passage of air not flowing in any defined channel may be the subject of express grant but is not capable of being claimed as an easement by prescription, or by a lost grant. Thus no action will lie for the obstruction of the passage of wind to an old mill,[37] or chimney.[38] But a right to air through a particular aperture in a house or building on the dominant tenement can be acquired by prescription as an easement[39] or by express grant.

35. *Ballard v. Tomlinson*, (1885) 29 Ch D 115. See further *Cambridge Water Co. Ltd. v. Eastern Countries Leather plc*, (1994) 1 All ER 53 : (1994) 2 AC 264 : (1994) 2 WLR 53 (HL) discussed at p. 489, *post*.
36. *Pakkle v. V.P. Aiyasami*, AIR 1969 Mad 351.
37. *Webb v. Bird*, (1863) 13 CB NS 841.
38. *Bryant v. Lefever*, (1879) 4 CPD 172.
39. *Cable v. Bryant*, (1908) 1 Ch 259; *Bass v. Gregory*, (1890) 25 QBD 481; *Hall v. Lichfild Brewery Co.*, (1880) 49 LJ Ch 655. See *Chasty v. Ackland*, (1897) AC 155.

Indian law.—Access and use of air to and for any building may be acquired under the Indian Easements Act,[40] if it has been peaceably enjoyed therewith, without interruption, for twenty years. The right to air is co-extensive with the right to light.[41] The owner of house cannot by prescription claim to be entitled to the free and uninterrupted passage of a current of wind. He can claim no more air than what is sufficient for sanitary purposes.[42] There is no right as a right to the uninterrupted flow of south breeze as such.[43] There is no easement for free access of wind.[44] In this country a man who has enjoyed a right to air, more or less pure and free will be reasonably protected against any interference.[45] The conditions here are different from those existing in England, so far as air is concerned. In England more light is needed than here: whereas more air is needed here than in England.[46]

Infringement.—The right to the purity of air is not violated unless the annoyance is such as to interfere materially with the ordinary comfort of human existence.[47] It is only in rare and special cases involving danger to health, or at the least something very nearly approaching it, that the court would be justified in interfering on the ground of diminution of air.[48]

But under the Indian law where the easement disturbed is a right to the free passage of air to the opening in a house, damage is substantial if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.[49] The Calcutta High Court has held that obstruction in cases not governed by the Easements Act must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for ordinary purpose of habitation or business.[50]

7(H) Right of Access to Light

At common law the owner of land has not any right to light. Any one may build upon his own land regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and buildings of another person.[51] The right to light is acquired as an easement in augmentation of the ordinary rights incident to the ownership and enjoyment of land.

The right to light is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant

40. Act V of 1882, section 15.
41. *Delhi and London Bank Ld. v. Hem Lall Dutt*, (1887) ILR 14 Cal 839; *Pranjivandas Harjivandas v. Mayaram Samaldas*, (1862) 1 BHC 148. Easement of light and air through windows opened in a joint wall cannot be acquired by prescription: *Rajubhai v. Lalbhai*, (1925) 28 Bom LR 1000.
42. *Barrow v. Archer*, (1864) 2 Hyde 125.
43. *Delhi and London Bank, Ld. v. Hem Lall Dutt*, (1887) ILR 14 Cal 839.
44. *Sarojini v. Krishna*, (1922) 36 CLJ 406.
45. *Framji v. Framji*, (1904) 7 Bom LR 73; (1905) 7 Bom LR 825; ILR 30 Bom 319.
46. *Framji v. Framji, Ibid*. English decisions are not of much avail as the conditions in the two countries differ.
47. Per LORD ROMILY M.R. in *Crump v. Lombert*, (1867) LR 3 Eq 409, 413.
48. Per LORD SELBOURNE in City of *London Brewery Co. v. Tenant*, (1873) LR 9 Ch 212 (221); *Dent v. Auction Mart Co.*, (1866) LR 2 Eq 238.
49. Expl. III to section 33 of the Indian Easements Act, V of 1882; *Chapsibhai Dhanji Bhai Dand v. Purshottam*, AIR 1971 SC 1878 (1886) : (1971) 2 SCC 205.
50. *Delhi and London Bank Ltd. v. Hem Lall Dutt*, (1887) ILR 14 Cal 839.
51. *Tapling v. Jones*, (1865) 11 HLC 290. Independently of an easement right, the right to receive light across another's land is not a natural incident of property. Unless and until such a right of easement has been acquired no amount or mode of obstruction is actionable : *Rashid Allidina v. Jivan Das Khemji*, ILR (1942) 1 Cal 488.

tenement. It is in truth no more than a right to be protected against a particular form of nuisance, and an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written consent cannot be sustained unless the obstruction amounts to an actionable nuisance.[52]

An owner of ancient lights is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house, if it is a warehouse, a shop, or other place of business.[53]

The right to light is a negative easement and may be acquired—

(1) By grant or covenant, express or implied.[54]

(2) By prescription under the Prescription Act[55] in England, and the Indian Easements Act[56] in India. These Acts necessitate an enjoyment without interruption for a full period of twenty years to confer the right. But the dominant owner does not by his easement obtain a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and surroundings.[57] A right to light by prescription to a room in a residential house is not to be measured by the use to which the room has been put in the past.[58]

(3) By reservation on the sale of the servient tenement. If a vendor of land desires to reserve any right in the nature of an easement for the benefit of his adjacent land which he is not parting with, he must do it by express words in the deed of conveyance, except in the case of easement of necessity.[59]

Under the English law the rights to light and air are acquired differently. The right to light is acquired under the Prescription Act, whereas the right to air is acquired at common law. The Indian Easements Act places light and air on the same footing.[60]

No alteration in the dominant tenement will destroy the right to light so long as the owner of the tenement can show that he is using through the new apertures in the wall of the new building the same, or a substantial part of the same, light which passed through old apertures into the old building.[61] The real test is identity of light,

52. *Colls v. Home and Colonial Stores Ltd.*, (1904) AC 179, 186, 212. See *Paul v. Robinson*, (1914) 41 IA 180 : 16 Bom LR 803, followed in *Balthazar v. M.A. Patail*, (1917) 11 BLT 109; *Haji Abdulla Harsoon v. Municipal Corporation, Karachi*, ILR 1941 Karachi 381; *Devidas v. Birsingh*, ILR 1945 Nag 948.
53. *Colls v. Home and Colonial Stores Ltd., Ibid*., p. 186.
54. *Corbett v. Jones*, (1892) 3 Ch 137.
55. St 2 & 3 Will IV, c. 71, section 3. The English Statute is only concerned with the mode of proof: *Colls v. Home and Colonial Stores, supra*, p. 186.
56. Act V of 1882, section 15.
57. PER LORD LOREBURN in *Jolly v. Kind*, (1907) AC 1, 2. See *Higgins v. Betts*, (1905) 2 Ch 210; *Vir Bhan v. Ramjidas*, (1909) PLR No. 33 of 1909; *Bhimaji v. Yeshwant*, (1929) 31 Bom LR 771.
58. *Price v. Hilditch*, (1930) 1 Ch 500.
59. *Ray v. Hazeldine*, (1904) 2 Ch 17; *Wheeldon v. Burrows*, (1879) 12 Ch D 31; *Elliot v. Bhoobun Mohun Bannerjee*, (1873) 12 Beng LR 406; *Sarubai v. Bapu*, ILR (1878) 2 Bom 660.
60. *Delhi and London Bank Ld. v. Hem Lall Dutt*, (1887) ILR 14 Cal 839; *Elliot v. Bhoobun Mohun*
No action lies for restraining defendant from erecting a building so that its shadow may not fall on plaintiff's blind wall : *Hakim Malani Mal v. V.E. Earle (Mrs.)*, (1931) ILR 12 Lah 736.
61. *Scott v. Pape*, (1886) 31 Ch D 554; *Pendarves v. Monro*, (1892) 1 Ch 611. See *Lai Hariganga v. Trikamlal Kedareshwar*, (1902) 4 Bom LR 34 : ILR 26 Bom 374; *Framji v. Framji*, (1904) 7 Bom LR 73 : ILR 30 Bom 319.

and not identity of aperture, or entrance for the light. It makes no difference that the new window or aperture is at a much higher level than the old window.[62]

Light for special purpose.—The right to a special amount of light necessary for a particular business cannot be acquired by twenty years' enjoyment to the knowledge of the owner of the servient tenement.[63] In measuring the quantum of light to which the owner of the dominant tenement is entitled, the purpose for which he desires to use, or uses, the light should be disregarded, and it does not either enlarge or diminish the easement which he has acquired.[64]

Infringement.—There must be a substantial deprivation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and, in the case of business premises, to prevent the plaintiff from carrying on his business as beneficially as before.[65] To determine whether a nuisance has been proved, the existing state of things must be considered, but subject to the qualification that light and air coming from other sources, to which a right has not been acquired by grant or prescription, ought not to be taken into account.[66] Where a room in a building receives light through windows on different sides which are ancient lights, the owner of land on either side as a general rule can build only to such a height as, if a building of like height were erected on the other side, would not deprive the room of so much light as to cause a nuisance.[67]

Indian law.—No damage is substantial unless it materially diminishes the value of the dominant heritage, or interferes materially with physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.[68] In considering the sufficiency of light, the light coming from other quarters should be considered.[69] The extent of a prescriptive right to the passage of light and air through a certain window

62. *Andrews v. Waite*, (1907) 2 Ch 500. No alteration of a building, which would not involve the loss of a right to light when indefeasibly acquired, will, if made during the currency of the statutory period, prevent the acquisition of the right.
63. *Amber v. Gordon*, (1905) 1 KB 417.
64. PER BRAY J. in *Amber v. Gordon*, p. 424; See also the judgment of LORD HALSBURY and LORD DAVEY in *Colls v. Home and Colonial Stores*, (1904) AC 179, 203. The case of *Lanfranchi v. Mackenzie*, (1867) LR 4 Eq 421—which was overruled in *Warren v. Brown, infra*, which in its turn is overruled in *Coll's* case—is referred to in the judgment of BRAY, J., but not that of *Lazarus v. Artistic Photographic Co.*, (1897) 2 Ch 214. The former laid down that to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to ancient window, open, uninterrupted, and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shown for a period of twenty years. The latter ruled that a person who is in the present enjoyment of an access of light to his premises for a special or extraordinary purpose, such as photography, may obtain an injunction against interference with it, though he may not have been in the enjoyment of it for that special or extraordinary purpose for full statutory period of twenty years.
65. *Colls v. Home and Colonial Stores, Ltd.*, (1904) AC 179, overruling *Warren v. Brown*,(1902) 1 KB 15, followed in *Framji v. Framji*, (1904) 7 Bom LR 73, ILR 30 Bom 319; *Chhotalal Mohanlal v. Lallubhai Surchand*, (1904) 6 Bom LR 633; ILR 29 Bom 157; *Vir Bhan v. Ramjidas*, (1909) PR No. 8 of 1907; *Rattan Chand v. Lal Chand*, (1933) ILR 15 Lah 320; *Bahri Rahla Ram v. Shiv Ram*, (1934) 37 PLR 34; *Wali Mohd. v. Batuk*, (1936) ALJR 712.
66. *Colls v. Home and Colonial Stores Ltd.*, (1904) AC 179, 210; *Jolly v. Kine*, (1907) AC 1, 7; *Kine v. Jolly*, (1905) 1 Ch 480, 497.
67. *Sheffield Masonic Hall Co. v. Sheffield Corporation*, (1932) 2 Ch 17.
68. Explanations I and II to section 33 of the Indian Easements Act, V of 1882. See *Kadarbhai v. Rahimbhai*, (1889) ILR 13 Bom 674; *Dhunjibhoy v. Lisboa*, (1888) ILR 13 Bom 252; *Ghanasham v. Moroba*, (1894) ILR 18 Bom 474; *Sultan Nawaz Jung v. Rustomji*, (1896) ILR 20 Bom 704 : (1899) 2 Bom LR 518, (1900) ILR 24 Bom 156 (PC); *Chhotalal Mohanlal v. Lallubhai Surchand*, (1904) ILR 29 Bom 157 : 6 Bom LR 633; *Framji Shapurji v. Framji Edulji*, (1905) 7 Bom LR 73; 352, 825 : ILR 30 Bom 319, followed in *Bapuji N. Kothare v. Parmanandas*, (1907) 9 Bom LR 335.
69. *Mohammad Zaman Khan v. Umar Hayat Khan*, (1936) 38 PLR 1003.

is provided for by section 28(c) of the Indian Easements Act. An easement of light to a window only gives a right to have buildings that obstruct it removed so as to allow the access of sufficient light to the window.[70] In cases not governed by the Easements Act the principle laid down in *Bagram's* case will apply *viz.*, "The only amount of light (for dwelling-house) which can be claimed by prescription or by length of enjoyment, without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house."[71] It is not enough that the light is less than before, but the test is whether the obstruction complained of is a nuisance.[72]

The 45-degrees rule.—It was supposed for some years that a building did not constitute a material obstruction in the eye of the law, or at the least it was so presumed, if its elevation subtended an angle not exceeding 45 degrees at the base of the light alleged to be obstructed, or, as it was sometimes put, left 45 degrees of light of the plaintiff (that is, in other words, when opposite to ancient lights a wall is built not higher than the distance between that wall and the ancient lights).

The House of Lords has observed that this rule is not a rule of law, and is not applicable to every case, but that it may properly be used as *prima facie* evidence.[73] It is generally speaking, a fair working rule to consider that no substantial injury is done to a person where an angle of 45 degrees is left to him, especially if there is good light from other directions as well.[74] Light from other quarters cannot be disregarded.[75]

Indian cases also hold that the "45-degrees rule" is not a positive rule of law, but is a circumstance, which the court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory.[76]

In *Colls v. Home and Colonial Stores Ltd.*,[77] the respondents were the lessees of a building in a street in which they carried on their business. Colls (appellant) proposed to build on land on the opposite side of the street a building forty-two feet high, which the respondents believed would obstruct their light, and they brought an action against Colls for an injunction. It was found that the proposed building would not materially interfere with the access of light to any windows of the respondents except two windows on the ground floor. These windows were two out of five windows facing the street in a room used by the respondents as an office for clerks and the respondents' premises would still be sufficiently lighted for all ordinary purposes of occupancy as a place of business. It was held that no action lay as the buildings of the appellant had not so materially interfered with the light previously enjoyed by the plaintiffs as to amount to a nuisance.

70. *Bala v. Maharu*, (1895) ILR 20 Bom 788. See *Ratanji v. Edulji*, (1871) 8 BHC (OCJ) 181.
71. *John George Bagram v. Khettrananth Karjormah*, (1869) 3 Beng LR (OCJ) 18; *Modhoosoodum v. Bissanauth*, (1875) 15 Beng LR 361; *Delhi and London Bank Ld. v. Hem Lall Dutt*, (1887) ILR 14 Cal 839.
72. *John Alexander Anderson v. Hardut Roy Chamaria*, (1905) 9 CWN 543. See *Paul v. Robson*, (1914) 41 IA 180: 16 Bom LR 803.
73. PER LORD DAVEY in *Colls v. Home and Colonial Stores Ltd.*, (1904) AC 179, 204.
74. PER LORD LINDLEY in *Colls v. Home and Colonial Stores Ltd., sup*; p. 210; COTTON LJ in *Ecclesiastical Commissioners for England v. King*, (1880) 14 Ch D 213, 228; *Parker v. First Avenue Hotel Co.*, (1883) 24 Ch D 282.
75. *Colls v. Home & Col. Stores Ltd., supra*, p. 211; *James, v. C., in Dyers' Co, v. King* (1870) LR 9 Eq 438.
76. *Delhi and London Bank Ld. v. Hem Lall Dutt*, (1887) ILR 14 Cal 839; *Dhunjibhoy v. Lisboa*, (1888) 13 Bom 252; *Bala v. Maharu*, (1895) ILR 20 Bom 788; *Framji v. Framji*, (1904) 7 Bom LR 73, ILR 30 Bom 319 *Chhotalal Mohanlal v. Lallubhai Surchand*, (1904) ILR 29 Bom 157 : 6 Bom LR 633.
77. *Colls v. Home and Colonial Stores, Ltd.* (1904) AC 179.

Opening new windows.—Where a person, who has a right to light from a certain window, opens a new window, or enlarges the old one, the owner of an adjoining house has a right to obstruct the new or enlarged opening, if he can do so without obstructing the old, but if he cannot obstruct the new without obstructing the old, he must submit to the burden.[78]

Remedy.—In cases of infringement of light an injunction may be granted to prevent the obstruction. Injunction will be granted, if, for instance, the injury cannot fairly be compensated by money, if the defendant has acted in a high-handed manner, if he has endeavoured to steal a march upon the plaintiff or to evade jurisdiction of the court. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, the court ought to incline to damages rather than to an injunction.[79]

In cases of light, "Court ought not to interfere by way of injunction when obstruction of light is very slight and where the injury sustained is trifling, except in rare and exceptional cases...and where the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless it is stopped, in such a case, inasmuch as the only compensation, which could be given to the plaintiff, would be to compel the defendant to purchase his property out and out, the court will not, in the exercise of its discretion compel the plaintiff to sell his property to the defendants' by refusing to grant him an injunction and awarding him damages on that basis...Between these two extremes, where the injury to the plaintiff would be less serious, where the court considers the property may still remain with the plaintiff and be substantially useful to him as it was before, and where the injury is one of a nature that can be compensated by money, the courts are vested with a discretion to withhold or grant an injunction, having regard to all the circumstances of the particular case before them."[80] In India the court has a discretion: It *may*, not *shall*, issue an injunction where the injury is such that pecuniary compensation would not afford adequate relief.[81]

In some cases a mandatory injunction will also be granted. Court will grant such injunction where a man, who has a right to light and air which is obstructed by his neighbour's building, brings his suit and applies for an injunction as soon as he can after the commencement of the building, or after it has become apparent that the intended building will interfere with his light and air.[82] But the court should be satisfied that a substantial loss of comfort has been caused and not a mere fanciful or visionary loss.[83]

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78. *Provabutty Dabee v. Mahendra Lall Bose*, (1881) ILR 7 Cal 453; *Lallu v. Padamsi*, (1889) PJ 310.
79. PER LORD MACNAGHTEN in *Colls v. Home and Colonial Stores Ltd.*, (1904) AC 179, p. 193. As to measure of damages, see *Griffith v. Richards Clay & Sons Ltd.*, (1912) 2 Ch 291. See *Ankerson v. Connelly*, (1907) 1 Ch 678; *Litchfield Speer v. Queen Anne's Gate Syndicate (No. 2) Ltd.*, (1919) 1 Ch 407.
80. PER FARRAN, J., in *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, (1894) ILR 18 Bom 474, 488, 489. Injunction will be granted where the light required is for a special purpose : *Yaro v. Sanaullah*, (1897) ILR 19 All 259.
81. *Mohamed Auzam Ismail v. Jaganath Jamnadas*, ILR (1925) 3 Ran 230; *Poozundaung Bazaar Co. Ltd. v. Ellerman's Arracan Rice and Trading Co. Ltd.*, (1934) ILR 12 Ran 200.
82. *Dent v. Auction Mart Co.*, (1866) LR 2 Eq. 238; *Aynsley v. Glover*, (1875) LR 18 Eq 544; *Smith v. Smith*, (1875) LR 20 Eq 500; *Krehl v. Burrell*, (1878) 7 Ch D 551; *Greenwood v. Hornsey*, (1886) 33 Ch D 471; *Syud Mahomed v. Syed Jafur*, (1865) 4 WR 23; *Jamnadas v. Atmaram*, (1877) ILR 2 Bom 133; *Nandikishore v. Bhagubhai*, (1883) ILR 8 Bom 95; *Kadarbhai v. Rahimbhai*, (1889) ILR 13 Bom 674; *Bala v. Maharu*, (1895) ILR 20 Bom 788; *Chhotalal Mohanlal v. Lallubhai Surchand*, (1904) ILR 29 Bom 157, 160 : 6 Bom LR 633; *Kripa Ram v. Gurbaksh*, (1893) PR No. 2 of 1892; *Thakar Das v. S. Abdul Hamid*, (1920) 2 LLJ 701.
83. *Dhannu Mal v. Bhagwan Das*, (1902) PLR No. 138 of 1902; *Abdulla v. Beg Mahomed*, (1903) 5 Bom LR 446; *Muthu Krishna Ayyar v. Somalinga Muninagandrien*, (1911) ILR 36 Mad 11.

If plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, and has waited till the building has been finished, and then asks the court to have it removed, a mandatory injunction will not generally be granted.[84]

7(1) Right of Way

A right of way is a right to pass over the soil of another person uninterruptedly. Rights of way do not fall under the denomination of natural rights. They are discontinuous easements, and may be acquired in the same way as the other easements are acquired.

There are two classes of rights of way.[85]

(1) Public rights of way which exist for the benefit of all people. They are called highway. Their origin is in dedication express or implied.

(2) Private rights of way. These (a) are vested in particular individuals or the owners of particular tenements; their origin is grant or prescription; or (b) belong to certain classes of persons, or certain portions of the public, such as the tenants of a manor, or the inhabitants of a parish or village,[86] their origin is custom.

A right of way may be created by express grant, or by immemorial custom or necessity,[87] or by prescription,[88] or by statute or through private dedication.[89] Simply because the user of land without permission of the owner was a criminal offence it does not prevent in the acquiring of the right of way by prescription if the user continued for the statutory period.[90]

As to the nature of rights of way, they may be general in their character or in other words usable for all purposes and at all times,[91] or the right to use them may be

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84. *Isenberg v. The East I.H.E. Co.*, (1863) 3 De G J & S 263; *Curriers Co. v. Corbett*, (1865) 2 Dr & Sm 355; *Durrell v. Pritchard*, (1865) LR 1 Ch 244; *City of London Brewery Co. v. Tenant*, (1873) LR 9 Ch 212; *Lady Stanley of Alderley v. Earl of Sherwsbury*, (1875) LR 19 Eq 616; *Benode Commmaree Dossee v. Soundaminey Dossee*, (1889) ILR 16 Cal 252; *Beharee Sahoo v. Mt. Ajnas Kunwar*, (1866) 6 WR 86; *Dhunjibhoy Cowasji Umrigar v. Lisboa*, (1888) ILR 13 Bom 252; *Ghanasham Nilkant Nadkarni v. Moroba*, (1894) ILR 18 Bom 474; *Sultan Nawaz v. Rustomji*, (1896) ILR 20 Bom 704, on appeal, (1899) 2 Bom LR 518 ; ILR 24 Bom 156 : 26 IA 184; *Bhimaji v. Yeshwant*, (1929) 31 Bom LR 771.
85. *Chuni Lall v. Ram Kishen Sahu*, (1888) ILR 15 Cal 460, (FB); *Maung Tha Zan v. U San Win*, (1903) 2 LBR 134. See *Kali Charan Naskar v. Ram Kumar Sardar*, (1912) 17 CWN 73; *Prannath Kundu v. Emperor*, (1929) ILR 57 Cal 526; *Bissessar Pathak v. Harbans Lal*, (1936) 17 PLT 842.
86. *Choudhury Bibhuti Narayan Singh v. Maharaja Guru Mahadeb Asram Prasad Sahi Bahadur*, (1939) ILR 19 Pat 208.
87. *Imambundee v. Sheo Dyal*, (1870) 14 WR 199; *Bhugwan v. Shaikh Khosal*, (1867) 7 WR 271; *Nubeen v. Bhoobun*, (1871) 15 WR 526; *Oomui Shah v. Rumzan*, (1868) 10 WR 363; *Municipality of City of Poona v. Vaman Rajaram Gholap*, (1894) ILR 19 Bom 797; *Charu Surnokar v. Dokouri Chunder Thakoor*, (1882) ILR 8 Cal 956; *Hari v. Ramachandra*, (1903) 5 Bom LR 650. See *Vibudapriya Thirthaswamy v. Esoof Sahib*, (1910) ILR 35 Mad 28, as to dedication of way as a highway, see *Muhammad Rustom Ali v. Municipal Committee of Karnal*, (1919) 22 Bom LR 563 : 47 IA 25.
88. *Ram Gunga v. Gobind Chunder*, (1871) 16 WR 284; *Savalgiapa v. Basvanapa*, (1873) 10 BHC 399; *Joy Doorga v. Juggernath Roy*, (1871) 15 WR 295; *Heera Lall v. Purmessur Kooer*, (1871) 15 WR 401; *Mohim Chunder v. Chundee Churn*, (1868) 10 WR 452; *Gopee v. Bhoobun*, (1875) 23 WR 401; *Shan Bagdee v. Fukeer Chand Bagdee*, (1866) 6 WR 222. Whether non-user amounts to abandonment, see *S.A. Cristopher v. J.A. Cohen*, (1924) ILR 2 Ran 534.
89. *Satyanarayana v. Murarilal*, ILR (1954) Hyd 46.
90. *Bakewell Management Ltd. v. Brandwood*, (2004) 2 All ER 305 (HL).
91. *Raj Manick Singh v. Rattun Bose*, (1870) 15 WR 46; *Lokenath v. Monmohun*, (1873) 20 WR 293. General right of way includes way for sweepers: *Maneklal v. Maneklal*, (1932) 34 Bom LR 1150 : ILR 57 Bom 186.

limited to particular purposes, *e.g.*, for sweepers,[1] or to certain times.[2] Thus, a right of way may be limited to agricultural purposes only—and the existence of such a right is not itself sufficient evidence of general right for all purposes—as to carry lime or stone from a newly opened quarry,[3] or it may be limited to the purpose of driving cattle,[4] or carriages,[5] or of the passage of boats,[6] or it may be a horseway or merely a way for foot passengers,[7] or the right of user may be limited to such times as a gate is open,[8] or to certain hours of the day, or when the crop are off the land. A right of way acquired by prescription for agricultural purposes can be used for other purposes provided that the burden on the servient tenement is not increased by such user.[9] When a right of way is granted by conveyance for access and use of a particular land, it cannot be extended and utilised for cultivation of another adjoining land.[10]

Public right of way.—Public right of way exists over highways or navigable rivers. A highway is a road over which the public at large possess a right of way. The highway may cover not merely the metalled portion but also the side lands.[11] A public highway must lead from one public place to another.[12] The public have the right to the free use of any portion of the highway.[13] The ownership of a highway is in the owners of the land adjoining the highway on either side or those who own the subsoil. But by statute the ownership is vested in municipal bodies. The vesting of a highway or a public street in a municipality is only for management and maintenance; the vesting of the highway or street also includes so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the highway or the street.[14] Every person who occupies land adjoining a highway has a private right of access to the highway from his land and *vice versa*.[15] This right of access is different from the right of passage over it. The former is a

1. *Jadulal Mullick v. Gopalchandra Mukerji*, (1886) ILR 13 Cal 136; *Esubai v. Damodar Ishwardas*, (1891) ILR 16 Bom 552; *Soloji v. Pandoji*, (1875) PJ 172; *Ramachandra v. Anant*, (1925) 28 Bom LR 601.
2. *Ramsoonder Burral v. Woomakant Chukerbutty*, (1864) 1 WR 217; *Oomar Shah v. Ramzan Ali*, (1868) 10 WR 363.
3. *Jackson v. Stacey*, (1816) Holt NP 455.
4. *Joy Doorga v. Juggernath Roy*, (1871) 15 WR 295; *Mahomed v. Sefatoolah*, (1874) 22 WR 340.
5. *Ranchordass Amthabhai v. Maneklal Gordhandas*, (1890) ILR 17 Bom 648, Carriageway may be used for mechanically propelled vehicles: *Lock v. Abrecester, Ld.*, (1939) 1 Ch 861.
6. *Koylash Chunder Ghose v. Sonatun Chung Barooe*, (1881) ILR 7 Cal 132; *Doorga Churn Dhur v. Kally Coomar Sen*, (1881) ILR 7 Cal 145.
7. *Ballard v. Dyson*, (1808) 1 Taunt. 279; *Goluck Chunder v. Tarinee Churn*, (1865) 4 WR 49; *Hamid Hossein v. C. Gervian*, (1871) 15 WR 496; *Tarneechurn v. Tarneechurn*, (1866) 1 Ind Jur NS 6; *Ranchordass v. Maneklal, sup; Wutzler v. Sharpe*, (1893) ILR 15 All 270; *Municipality of City of Poona v. Vaman Rajaram Gholap*, (1894) ILR 19 Bom 797; *Naran v. Lallubhai*, (1900) 2 Bom LR 116.
8. *Raghupati v. Bapuji*, (1874) PJ 3.
9. *Manchersha v. Virjivalavdas*, (1926) 28 Bom LR 1158 : ILR 50 Bom 635.
10. *Peacock v. Custins*, (2001) 2 All ER 827 (CA).
11. *Municipal Board, Mangalore v. Mahadeo Maharaj*, AIR 1965 SC 1147 : (1965) 2 SCR 242.
12. *Attorney-General v. Antrobus*, (1905) 2 Ch 188; *Turner v. Spooner*, (1861) 30 LJ Ch 801, 803; *Jatindranath Barat v. Corporation of Calcutta*, (1930) ILR 58 Cal 1124 (1125). A *cul de sac* may be a public highway, but its dedication will not be presumed from mere public user without evidence of expenditure for repairs, lighting and other matters by the public authority. See also *Samarrendra Nath Saha Roy v. Harendra Kumar Saha*, (1934) 39 CWN 303.
13. *Harvey v. Truro Rural Council*, (1903) 2 Ch 638; *Emperor v. Vadilal Devchand*, (1931) 33 Bom LR 663.
14. *Municipal Board, Mangalore v. Mahadeo Maharaj*, AIR 1965 SC 1147 : (1965) 2 SCR 242.
15. *Rose v. Groves*, (1843) 5 M & G 613; *Metropolitan Board of Works v. McCarthy*, (1874) LR 7 HL 243; *Fritz v. Hobson*, (1880) 14 Ch D 542; Trees spontaneously growing on a public highway belong to the owner of the soil, that is proprietors of adjacent land, and not to the local authority; *Maharaja of Pittapuram v. Chairman, Municipal Council Coconada*, (1936) MWN 959.

private right,[16] the latter, a public right. The right over a public highway cannot be limited to any class or section of the public. An attempt to dedicate a highway to a limited portion of the public is no dedication at all.[17] The right to use a thoroughfare should be exercised in a reasonable manner without any wanton disregard of the legal rights of others or a riotous demonstration to provoke animosities.[18] But subject to control of appropriate authorities and public order, a citizen has a right to take processions through a public street[19] and even to hold a public meeting at a proper time and place on such a street.[20] Any wrongful interference with a right of way constitutes a nuisance.

Infringement and right of action.—A person commits a wrong who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily, or by otherwise preventing the free use of it. With regard to private rights of way they do not require a permanent obstruction to give rise to a right of action. Thus, the padlocking of a gate is sufficient.[21] Permitting carts or wagons to remain stationary in a passage in the course of loading and unloading, so as to obstruct the person who has a right of way will give rise to an action.[22] Proof of special damage is not essential.[23] Thus in the case of a village pathway no question of special damage arises.[24]

As regards public right of way the Municipality and the owner of the subsoil can maintain an action in trespass against a member of the public who acts in excess of his right.[25] But no action by a private individual will lie for obstruction to a public way without proving that he has sustained particular and substantial and direct damage beyond the general inconvenience and injury to the public,[26] *e.g.*, obstruction rendering necessary for a person to go by a longer route.[27] Such special damage must differ not merely in degree but in kind from that sustained by the rest of the public. Special damage means damage of a special character, that is, damage affecting the plaintiff individually or damage peculiar to himself, his trade or calling.[28] The Privy Council ruling in *Manzur Hasan v. Muhammad Zaman*,[29] has, however, led to some

16. *Lyon v. Wardens of Fishmongers Co.*, (1876) 46 LJ CH 69; *Hanuman Prasad v. Raghunath Prasad*, (1924) ILR 46 All 573.
17. *Subbaya Nadan v. Aiyavoo Reddi*, (1917) MWN 70.
18. *Muhammad Jalil Khan v. Ram Nath Katua*, (1930) ILR 53 All 484.
19. *Manzur Hasan v. Muhammad Zaman*, AIR 1925 PC 36; *Shaikh Piru Bux v. Kalandi Pati*, AIR 1970 SC 1885 : (1969) 2 SCR 563.
20. *Himmatlal v. Police Commissioner, Ahmedabad*, AIR 1973 SC 87 : (1973) 1 SCC 227.
21. *Kidgil v. Moor*, (1850) 9 CB 364.
22. *Thorpe v. Brumfit*, (1873) LR 8 Ch 650.
23. *Baij Nath Singh v. Tetai Chowdhary*, (1901) 6 CWN 197.
24. *Harish v. Pran Nath*, (1923) 39 CLJ 347. See *Ramghulam Khatik v. Ramkhelavan Ram*, (1936) ILR 16 Pat 190, which holds that a resident of a village can sue for removal of an obstruction to a village path or to well without alleging any special damage.
25. *Municipal Board, Mangalore v. Mahadeoji Maharaj*, AIR 1965 SC 1147 : (1965) 2 SCR 242. A municipality has statutory power of removal of obstruction; See text and footnotes 15 to 18, p. 373.
26. *Vanderpant v. Mayfair Hotel Co.*, (1930) 1 Ch 138 : 142 LT 198; *Winterbottom v. Lord Derby*, (1867) LR 2 Ex. 316.
27. *Harihar Das v. Chandra Kumar Guha*, (1918) 23 CWN 91; *Ram Chandra v. Joti Prasad*, (1910) ILR 33 All 287.
28. *Batiram Kolita v. Sibram Das*, (1920) 25 CWN 95. See the judgment of MALIK, J., in *Mandakinee Debee v. Basantakumaree Debee*, (1933) ILR 60 Cal 1003, 1007.
29. (1924) 52 IA 61; ILR 47 All 151; 27 Bom LR 170 (PC). See *Baroda Prasad Mostafi v. Gora Chand Mostafi*, (1869) 3 Beng LR (ACJ) 295; 12 WR 160; *Raj Lukhee Debia v. Chunder Kant*, (1870) 14 WR 173; *Bhageeruth v. Gokool*, (1872), 18 WR 58 *Bhageeruth v. Chundee Churn*, (1874) 22 WR 462; *Parbati Charan Mukhopadhya v. Kali Nath Muhypopaddhya*, (1870) 6 Beng LR (Appx.) 73; *Ramtarak v. Dinanath*, (1871) 7 Beng LR 184; 24 WR 414n; *Raj Koomar Singh v. Sahebzada Roy*, (1877) ILR 3 Cal 20 (FB) *Abzul Miah v. Nasir Mahommed*, (1895) ILR 22 Cal 551; **(Footnote No. 29 Contd.)**

difference of opinion. The Lahore[30] and the Madras[31] High Courts have held, referring to the Privy Council ruling in *Manzur Hasan's* case, that any individual member of the public has the right to maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proving special damage. The Patna[32] High Court has dissented from this view holding that the Privy Council case was limited to the question of conducting religious processions through streets and public highways and not to the question whether an action with regard to a public nuisance could be maintained without proof of special damage. It has, however, subsequently held that a person in the immediate neighbourhood and entitled to use a public thoroughfare has a special cause of action irrespective of whether he has proved special damage or not. Where a structure containing a platform and a privy is erected in a narrow public way, a person living on its opposite side may be deemed to have suffered loss without proof of such loss.[33] It has further laid down that the doctrine of special damage, which is based on the principle of English common law that there can be no private action for a public wrong, has two limitations; first, it applies only to cases regarding public right in the full sense, and secondly an invasion of special rights will provide a cause of action without proof of special damage, for in such a case the law will presume damage. It is by reason of these limitations that the doctrine has been held not to apply to cases of *quasi*-public right, such as village roads. While, therefore, it is necessary to prove special damage in cases where the plaintiff sues merely as a member of the public in respect of a public right in the full sense, it is not necessary to prove it in the case of *quasi*-public rights where the plaintiff sues as a member of the limited class whose special rights have been infringed.[34] The Calcutta High Court has expressed the same view as the Patna High Court.[35] The former Chief Court of Oudh held that no suit for obstructing

(Footnote No. 29 Contd.)
Mohamed Abdul Hafiz v. Latif Hossein, (1897) ILR 24 Cal 524; *Raj Narain Mitter v. Ekadasi Bag*, (1899) ILR 27 Cal 793; *Mahomed Alum v. Dilbar Khan*, (1900) 5 CWN 285. *Adamson v. Arumugam*, (1886) ILR 9 Mad 463; *Siddeswara v. Krishna*, (1890) ILR 14 Mad 177; *Khaji Sayyad Hussain Sahib v. Narasimhappa*, (1912) 23 MLJ 539; *Ganapathy Muppen v. Subba Nayakkan*, (1918) MWN 547. *Karim Baksh v. Budha*, (1876) ILR 1 All 249; *Fazal Haq v. Maha Chand*, (1878) ILR 1 All 557; *Nathu v. Jagram Das*, (1881) 1 AWN 3; *Khandhi v. Kamta*, (1881) 1 AWN 98; *Tafazzul Husain v. Fazal Imam*, (1881) 1 AWN 103; *Rampal Rai v. Raghunandan Prasad*, (1888) 8 AWN 205; *Tota v. Sardul Singh*, (1888) 8 AWN 213. *Nur Ali v. Ram Gopal*, (1877) PR No. 10 of 1878; *Maluk Singh v. Bela Singh*, (1882) PR No. 134 of 1882; *Beli Ram v. Kaku*, (1888) PR No. 39 of 1886; *Chajju Mal v. Ganda Mal*, (1894) PR No. 4 of 1895; *Jawand Singh v. Sardar Indar Singh*, (1901) PR No. 64 of 1901. *Muhammad Din Mian v. Mussammat Atirajo Kuer*, (1931) ILR 10 Pat 568; This case follows *Satku Valad Kadi Sausare v. Ibrahim Aga Valad Mirza Aga*, (1877) ILR 2 Bom 457, which is overruled by the Privy Council in *Manzur Hasan v. Muhammad Zaman*, (1924) ILR 47 All 151: 27 Bom LR 170: 52 IA 61 (PC). The principle laid down in the above cases has no application when the plaintiff sues in respect of an interference with his private rights of property; *Sheonarayan v. Dindayal*, (1930) 27 NLR 213.

30. *Municipal Committee, Delhi v. Mohammad Ibrahim*, (1934) ILR 16 Lah 517.
31. *Munusami v. Kuppusami*, ILR 1939 Mad 870. But see *Bhuloganatham Pillai v. Rajagopala Pillai*, (1941) 2 MLJ 105; 53 MLW 728; (1941) MWN 637, which without deciding the applicability of the rule of English law requiring proof of special damage held that where the defendant had built a wall across a public highway near the plaintiff's house, the plaintiff was entitled to sue as the wall would interfere with the enjoyment of his house and therefore there would be special damage.
32. *Ramghulam Khatik v. Ramkhelawan Ram*, ILR (1936) 16 Pat 190.
33. *Pahlad Maharaj v. Gauri Dut Marwari*, (1937) 18 PLT 737; *Dasrath Mahto v. Narain Mahto*, (1941) 22 PLT 111.
34. *Chaudhury Bibhuti Narayan Singh v. Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur*, (1939) ILR 19 Pat 208.
35. *Surendra Kumar Basu v. Dist. Board of Nadia*, (1942) ILR 1 Cal 533. View of MALIK, J. in *Mandakinee Debee v. Basanta Kumaree Debee*, (1933) ILR 60 Cal 1003, Approved. View of JACK, J., in this case and of NASIM ALI, J., in *Beer Bikramkishore Manikya v. Chairman, Comilla Municipality*, (1935) ILR 62 Cal 692, held *Obiter*.

a public thoroughfare can be maintained in a civil court without proof of special injury.[36] The Madras High Court has, in a Full Bench case, laid down that a person or body of persons who claim, a right to go in procession along a public way can bring a suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. An order of a Magistrate forbidding a person or body of persons from using a highway for the purpose of processions invests the person or persons interdicted with a cause of action, if they allege it to be an infringement of their legal rights, and no special damage need be alleged or proved.[37] This view has been upheld by the Privy Council.[38] The Supreme Court[39] has accepted the view of the Privy Council and has extended[40] it to cover the right to hold meetings at a suitable time and place on a public street. Members of a religious body possess the right to conduct a religious procession along a public highway and a suit lies against a person preventing the regular conduct or progress of such procession.[41] But if an obstruction is caused by something being done under statutory authority no action lies. For example, if overhead electric wires laid under statutory authority cause obstruction to a *tazia* procession, no action will lie.[42] The Madras High Court has further held that it is the inherent right of every member of the public to take out a procession whether it be religious, social or political, along public streets and pathways so long as the rights of others to use the public pathways similarly are not infringed. There is no reason why a distinction should be made between a religious procession and a funeral procession in this respect.[43] The Allahabad and the Nagpur High Courts have held likewise.[44] The Bombay High Court has laid down that a citizen or a community or a section of a community has an inherent right to conduct a non-religious procession along a public road. He has also the right to file a declaratory suit without proof of special damage. Any such inherent right is subject to the right of other citizens also to use the highway in a lawful manner and also subject to any orders issued by the State for the purpose of preventing breaches of the public peace and for maintaining law and order. The question whether a procession has a right to play music or not is always a question of fact. It would depend upon whether music is an appropriate observance of the particular procession.[45]

The House of Lords has held: "the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the

36. *Sita Ram v. Puttu Lal*, (1937) ILR 13 Luck 444.
37. *Velan Pokkiri Jaragan v. Subbayan Samban*, (1981) ILR 42 Mad 271 (FB).
38. *Manzurkhan v. Muhammad Zaman*, (1924) 52 IA 61.
39. *Shaikh Pilu Bux v. Kalandi Pati*, AIR 1970 SC 1885 : (1969) 2 SCR 563.
40. *Himatlal v. Police Commr., Ahmedabad*, AIR 1973 SC 87 : (1973) 1 SCC 22. But there is no right to use a public street for residence, business or as a prayer ground. See text and footnotes 15 to 19, p. 373, *supra*.
41. *Manzur Hasan v. Muhammad Zaman*, (1924) 52 IA 61; ILR 47 All 151 : 27 Bom LR 170, Overruling *Satku Valad Kadir Sausare v. Ibrarim Agera valad Mirza Aga*, (1877) ILR 2 Bom 457; *Kazi Sujaudin v. Madhavadas*, (1893) ILR 18 Bom 693; *Virupaxappa v. Sheriff Sab*, (1909) 11 Bom LR 372. See *Basalingappa Parappa v. Dharmappa Basappa*, (1910) ILR 34 Bom 571: 12 Bom LR 586; *Muhammad Jalil Khan v. Ram Nath Katua*, (1930) ILR 53 All 484; *Janki Prasad v. Karamat Hussain*, (1931) ALJR 624; *Muhammad Umar v. Jugal Kishore*, ILR (1944) All 259; *Haidar Husain v. Ali Muhammad*, ILR (1945) All 3. *Jaffar Husain Khan Sahib v. Krishnan Servai*, (1929) 58 MLJ 703: 31 LW 845. A religious festival on a public highway stands on the same footing as a religious procession: *Murugappa Mudali v. Kuppuswami Mudali*, (1938) 2 MLJ 375 : 48 MLW 267 : (1938) MWN 839.
42. *Martin & Co. v. Syed Faiyaz Husain*, (1943) 47 Bom LR 575: 71 IA 25.
43. *Palvannam Pillai v. Ganapathy Ayyar*, (1952) 1 MLJ 552 : 65 LW 338.
44. *Muhammad Jalil Khan v. Ram Nath Katua*, (1930) ILR 53 All 484; *Mohamudkhan v. King-Emperor*, (1948) NLJ 340.
45. *Chandu Sajan Patil v. Nyahalchand*, (1948) 52 Bom LR 214 (FB).

highway by unreasonably impending the primary right of the public to pass and re-pass; within these qualifications there is a public right of peaceful assembly on the highway."[46]

In subsequent years this right of user of highway has been misused in India by harmful agitations bandhs etc. causing destruction of public and private property sometime personal injury and death. The Supreme Court in *Destruction of Public and Private Properties in Re. v. State of Andhra Pradesh*[47] took suo motu notice of this menace and issued certain guidelines to be observed until they are substituted by statutory provisions. The guidelines are:

"**12.** To effectuate the modalities for preventive action and adding teeth to the enquiry/investigation, the following guidelines are to be observed:

As soon as there is a demonstration organized:

(I) The organizer shall meet the police to review and revise the route to be taken and to lay down conditions for a peaceful march or protest;

(II) All weapons, including knives, lathis and the like shall be prohibited.

(III) An undertaking is to be provided by the organizers to ensure a peaceful march with marshal's at each relevant junction;

(IV) The police and the State Government shall ensure videography of such protests to the maximum extent possible;

(V) The person-in-charge to supervise the demonstration shall be SP (if the situation is confined to the district) and the highest police officer in the State, where the situation stretches beyond one district;

(VI) In the event that demonstrations turn violent, the officer-in-charge shall ensure that the events are videographed through private operators and also request such further information from the media and others on the incidents in question;

(VII) The police shall immediately inform the State Government with reports on the events, including damage, if any, caused by the police; and

(VIII) The State Government shall prepare a report on the police reports and other information that may be available to it and shall file a petition including its report in the High Court or the Supreme Court as the case may be for the Court in question to take suo motu action.

15. In the absence of legislation the following guidelines are to be adopted to assess damages:

(I) Wherever a mass destruction to property takes place due to protests or thereof, the High Court may issue suo motu action and set up a machinery to investigate the damage caused and to award compensation related thereto.

(II) Where there is more than one State involved, such action may be taken by the Supreme Court.

(III) In each case, the High Court or the Supreme Court, as the case may be, appoint a sitting or retired High Court Judge or a sitting or retired District Judge as a Claims Commissioner to estimate the damages and investigate liability.

(IV) An assessor may be appointed to assist the Claims Commissioner.

(V) The Claims Commissioner and the assessor may seek instructions from the High Court or the Supreme Court as the case may be, to summon the existing video or other recordings from private and public sources to pinpoint the damage and establish nexus with the perpetrators of the damage.

(VI) The principles of absolute liability shall apply once the nexus with the event that precipitated the damage is established.

(VII) The liability will be borne by the actual perpetrators of the crime as well as the organizers of the event giving rise to the liability – to be shared, as finally determined by the High Court or the Supreme Court as the case may be.

(VIII) Exemplary damages may be awarded to an extent not greater than twice the amount of the damages liable to be paid.

(IX) Damages shall be assessed for:

(a) damages to public property;

(b) damages to private property;

(c) damages causing injury or death to a person or persons; and

(d) cost of the actions by the authorities and police to take preventive and other actions.

(X) The Claims Commissioner will make a report to the High Court or the Supreme Court which will determine the liability after hearing the parties."

Where the access to the plaintiff's premises was obstructed by reason of the assembling of a crowd at the defendant's theatre and the formation of a queue in front of his premises;[48] and where horses and wagons were kept standing for an unreasonable time in the highway opposite a man's house, so that the access of customers was obstructed, the house was darkened, and the people in it were annoyed by bad smells,[49] it was held that an action lay as particular, direct and substantial' damage was caused to plaintiff.

7(J) Right of Privacy and Confidentiality

A right to undisturbed privacy is not recognised by the English law.[50] It is quite true that the opening of a new window looking into the grounds of another may not

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46. *Director of Public Prosecution v. Jones* (1999) 2 All ER 257 (HL) p. 265(d), Lord Lane L.C.
47. (2009) 5 SCC 212 : AIR 2009 SC 2266 : 2009 CrLJ 2807.
48. *Lyons Sons & Co. v. Gulliver*, (1914) 1 Ch 631 : 110 LT 384 : 30 TLR 75.
49. *Benjamin v. Storr*, (1874) LR 9 CP 400. The diversion of traffic or custom from a man's door by an obstruction of a highway, whereby his business is interrupted, and his profits diminished, seems to be too remote a damage to give him a right of private action: *Ricket v. Directors & c. of Metropolitan Ry.*, (1867) LR 2 HL 175; unless indeed the obstruction is such as materially to impede the immediate access to the plaintiff's place of business more than any other man's and amounts to something like blocking up his doorway : *Fritz v. Hobson*, (1880) 14 Ch D 542; *Wilkes v. Hungerford Market Co.*, (1835) 2 Bing NC 281.
50. PER BLACKBURN, J., in *Jones v. Tapling*, (1862) 12 CBNS 826 (842). See further *R. v. Brown*, (1996) 1 All ER 545, p. 556 : (1996) AC 543 (HL). (The common law does not know a general right of privacy and Parliament has been reluctant to enact one. But there has been some legislation to deal with particular aspects of the problem. The Data Protection Act, 1984 is one such statute. **(Footnote No. 50 Contd.)**

only annoy that neighbour, but may often affect the value of the property. But the law of England considers that no injury. However, if interference with privacy is of such a nature as to amount to a recognised tort, resort to that tort action may be taken to prevent the interference.[51] For example, harassment by persistent telephone calls may amount to a nuisance,[52] and installation of a secret eavesdropping device may amount to trespass.[53] The courts have also recognised that an obligation of confidence can arise out of particular relationships apart from contract; and breach of confidentiality can be prevented by restraining by injunction publication of confidential information to the detriment of the plaintiff.[54] The basis of the jurisdiction is the equitable principle of confidence. The particular relationships which give rise to an obligation of confidence may be professional, commercial, matrimonial or even political.

The relationship of doctor and patient gives rise to right of confidentiality and the doctor is under a duty not to disclose the secrets of a patient that have been learnt by him in the course of his professional work.[55] But there is no breach of this duty when the disclosure is made to save a person from a serious and identifiable risk of infection from the patient.[55] Thus hospital authorities were not held to be liable for breach of confidentiality or for violating the right of privacy of a patient who was HIV(+) in disclosing that information to the party whom the patient was intending to marry and who was ignorant of that fact.[55] A company wished to collect data on the prescribing habits of general practitioners and to that end it sought to persuade doctors and pharmacists to disclose prescription information without revealing the identity of patients. On objection being taken by the Department of Health it was held on judicial review that the disclosure of anonymous information by doctors and pharmacists would not constitute breach of duty of confidence to patients as their identity was protected and they had no proprietorial claim to the prescription.[56] The principle emerging from the case is that in a case involving personal confidence, the disclosure of information by a confident would not constitute a breach of confidence provided that the confider's identity is protected and it was immaterial that the disclosed information was not in the public domain.[56]

Solicitors and Accountants also owe continuing professional duty to a former client to preserve the confidentiality of information imparted during the subsistence of that relationship and not to misuse it. Therefore, if a firm of accountants providing litigation support service, in possession of confidential information of a former client, proposes to act for another client, having an adverse interest in a matter where

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(Footnote No. 50 Contd.)
Enacted to give effect to European convention, the Act prevents misuse of information regarding individuals recorded in a computer readable form); *R v. Khan*, (1996) 3 All ER 289 (HL) (In this case opinion on the question of right of privacy was not expressed. It was, however, held that tape recorded conversation recorded in an electronic device installed in a private house without the knowledge of the owner occupier was admissible in a criminal trial).

51. Halsbury's Laws of England, 4th edition, Vol. 45, p. 631, para 1383.
52. Halsbury *supra*; *Motherwell v. Motherwell*, (1976) 73 DLR (3d) 62 (Alta App. Div.). Followed in *Khorasandijian v. Bush*, (1993) 3 All ER 669 : (1993) QB 727 : (1993) 3 WLR 476 (CA). Not approved by the House of Lords to the extent that if the person harassed is neither the owner nor having right to exclusive possession he cannot maintain an action in nuisance; *Hunter v. Canary Wharf Ltd.*, (1997) 2 All ER 426 : (1997) AC 655 (HL). See further p. 602 title Private Nuisance.
53. Halsbury *supra*. But using a telescopic camera to photograph activities in plaintiff's bedroom is neither nuisance nor trespass.
54. *Attorney General v. Guardian Newspapers Ltd. (No. 2)*, (1988) 3 All ER 545 (HL), p. 639 : (1988) 3 WLR 776.
55. *Mr. X v. Hospital Z*, AIR 1999 SC 495 : (1998) 7 JT 626 : (1998) 8 SCC 296.
56. *R v. Department of Health* exp. *Source information Ltd.*, (2000) 1 All ER 786 : (2001) QB 424 : (2000) 2 WLR 940 (CA).

that information may be relevant, injunction can be granted to restrain the firm from doing so.[57] But the duty of confidentiality may be overridden by a higher duty. Thus if the auditors of a company discovered that a senior employee was defrauding the company on a massive scale, there would normally be a duty to report the discovery immediately to the management. And, if the auditors suspected that the management might be involved in or condoning fraud a duty may arise to report directly to a third party without the management's knowledge or consent. The duty to report in such a situation will override the duty of confidentiality.[58]

In *Institute of Chartered Accountants of India v. Shaunak H. Satya*,[59] the Supreme court dealt with the question of right to information on the one hand and confidentiality on the other. An application under the Right to Information Act, 2005 was filed against the Institute of Chartered Accountants of India requiring it to supply "instructions and solutions of questions" issued to examiners and moderators in connection with evaluation of answer scripts. It was observed that the information was received by the Institute under a fiduciary relationship. It was thus held that "...anything given and taken in confidence expecting confidentiality to be maintained will be information available to a person in fiduciary relationship. As a consequence, it has to be held that the instructions and solutions to questions communicated by the examining body to the examiners, Head Examiners and moderators, are information available to such persons in their fiduciary relationship and therefore exempted from disclosure under section 8(1)(d) of the RTI Act."

In case of business affairs,[60] the detriment to the confider, in a case of breach of confidence, say by an employee, is clear. In matrimonial affairs, the breach may be only an invasion of personal privacy *e.g.*, revelation of marital confidences. In cases where confidential information is disclosed by a servant of the Crown, injunction can be granted only when the disclosure affects public interest. So, when the information has already been published by others and has become known to the public, no injunction can be granted. But a person or newspaper deriving the information from the servant and publishing it at a time when it was not publicly known and thereby deriving profit cannot be allowed to benefit by its own wrong and must account for the profits to the Crown.[61]

The right of Privacy in the sense of being let alone by governmental interference is a developing concept. Article 8 of the European Convention on Human Rights defines this right as follows: "(1) Every one has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the

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57. *Prince Jefri Bolkiah v. KPMG (a firm)*, (1999) 1 All ER 517 (HL).
58. *Sasea Finance Ltd. v. KPMG*, (2000) 1 All ER 676 : (2000) BCC 989 (CA).
59. (2011) 8 SCC 781; See also, *Central Board of Secondary Education v. Aditya Bandopadhyay*, (2011) 8 SCC 497; See also, *Secretary General, Supreme Court of India v. Subhash Chandra Agrawal*, AIR 2010 Del 159 : (2010) 166 DLT 305 : ILR (2010) Del 1.
60. *Sasea Finance Ltd. v. KPMG*, (2000) 1 All ER 676 : (2000) BCC 989 (CA).; See also, *Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh* (2010) 7 Mah LJ 48 : (2010) 5 AIR Bom R 573.
61. *Sasea Finance Ltd. v. KPMG*, (2000) 1 All ER 676 : (2000) BCC 989 (CA). For injunction to prevent confidentiality see further, *Lord Advocate v. The Scotsmen*, (1990) 1 AC 812 (HL); Alan Paradoe Q.C., 'Injunctions to protect official secrets in the United Kingdom, 3 Law and Justice (1996) pp. 116-120.

rights and freedoms of others."[62] The European Convention on Human Rights has been enforced in England by the Human Rights Act, 1998. The Act was enforced from 2nd October, 2000 and is not retrospective.[63] Therefore, persons suffering invasion of privacy, when as visitors to prison, they were strip-searched and suffered distress and humiliation could not complain invasion of privacy.[64] The convention in Article 10 also guarantees the right to freedom of expression. In an action for restraining a publication which allegedly infringes right to privacy of the claimant the court may be required to balance these two conflicting rights. The Court of Appeal in A.V.B. (a company)[65] formulated guidelines for the courts to be observed before grant of an interim injunction restraining publication. In this case the claimant for injunction was a noted footballer who had extra-marital relations with two women who both sold their stories to a national newspaper. The claimant sought an injunction to prevent publication of the stories so that his wife may not know about his adultery. The trial judge granted the interim injunction which was vacated in appeal by the court of appeal. In doing so and in holding that the balance lay in favour of right of expression the court took into account the factors that the claimant was a noted footballer in whom the media and a section of the public would be interested that the confidentiality of sexual relations outside marriage was not of that importance as the confidentiality between married persons and that as the women had chosen to disclose the relationship it further affected the claimant's right for protection of the in formation.

The question of privacy/confidentiality in the light of Articles 8 and 10 of the convention was considered by the House of Lords in *Campbell v. Mirror Group Newspapers Ltd.*[66] The convention rights are generally enforceable in disputes between individuals and public authorities but the values enshrined in Articles 8 and 10 have given new breadth and strength to the action for breach of confidence between individuals or between an individual and a non-Government body.[67] The tort of breach of confidence now does not require the need for existence of initial confidential relationship between the parties. Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.[68] The essence of the tort is misuse of information about a person's private life. In this case the claimant Miss. Campbell was a celebrated fashion model well known nationally and internationally. On February 1, 2001 the defendant newspaper Daily Mirror carried an article about Miss. Campbell. The information contained in the article consisted of the following five matters: (1) The fact that Miss. Campbell was a drug addict, (2) The fact that she was receiving treatment for her addiction; (3) The fact that the treatment which she was receiving was provided by Narcotics Anonymous (NA); (4) Details of the treatment—for how long, how frequently and at what times of day she had been receiving it, the nature of it and extent of her commitment to the process; and (5) A visual portrayal by means of photographs, covertly taken of her when she was

62. *Govind v. State of M.P.*, (1975) 2 SCC 148, p. 157 : AIR 1975 SC 1348.
63. *R v. Kansal (No. 2)*, (2002) 1 All ER 257 (HL); *R v. Lambert*, (2001) 3 All ER 577 (HL); *Wilson v. First County Trust Ltd.*, (2003) 4 All ER 97 (HL).
64. *Wainwright v. Home Office*, (2003) 2 All ER 943 (CA) : (2003) 4 All ER 969 (HL).
65. *A v. B*, (a company) (2002) 2 All ER 545 (CA).
It is said that celebrities have a 'right of publicity" (as different from 'right for publicity') to protect the commercial interest of 'celebrities' identity on the reasoning that the celebrity has an interest in the unauthorised exploitation of his identity : Subhashini Narsimhan and Thriyambak J. Kannan, 'Right of Publicity, Is it Encompassed in the Right of Privacy' (2005) 5 SCC J-5.
66. (2004) 2 All ER 995 (HL).
67. (2004) 2 All ER 995 pp. 1002, 1003, 1018.
68. (2004) 2 All ER 995, pp. 1002, 1003, 1032.

leaving the place where treatment had been taking place. The claimant accepted that the newspaper had been entitled in public interest to publish matters 1 and 2 or in other words to disclose the information that she was a drug addict and was receiving treatment for her addiction as she had previously falsely and publicly stated that unlike many others in the fashion business she was not a drug addict. She, however, brought proceedings for breach of confidence and compensation by adding matters 3, 4 and 5 that is with respect to the additional information and photograph published relating to her attendance at N.A. The claim was allowed by the trial judge but was dismissed by the Court of Appeal. The House of Lords by a majority of 3 against 2 (but without any substantial difference on the question of application of principles)[69] allowed the appeal and restored the judgment of the trial judge. The factors that influenced the court were: It was well-known that persons who were addicted to the taking of illegal drugs could benefit from meetings at which they discussed and faced up to the addiction. The private nature of the meetings encouraged addicts to attend them in the belief that they could do so anonymously. The assurance of privacy was essential part of this exercise and the treatment was at risk if the details of the treatment which were obviously private were made public. There was thus potential for the disclosure of the implementation by publication to cause harm to the claimant, disrupt her treatment and was expected to be offensive and distressing to her. On the other hand there were no political or democratic values at stake, nor was there any pressing social need in support of the publication. Thus, balancing the right of privacy of the claimant against the right of the media to impart information to the public, the balance lay in favour of the claimant. Although the High Court of Australia is not inclined to recognize the tort of privacy as recognized in USA (*Australia Broadcasting Corporation v. Lenah Game Meats Pty. Ltd.*, (2001) 76 ALJR 1) the test laid down by Gleeson C.J. in this case for determining whether the information is private or public has been quoted by English Courts and also by the House of Lords in this case.[70] The relevant passage in Gleeson C.J.'s judgment reads as follows:

> "An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary, sensibilities is in many circumstances a useful practical test of what is private."

After quoting the above passage Lord Hope in *Campbell's* case expressed himself as follows:[71]

> "The test which GLEESON C.J. has identified is useful in cases where there is room for doubt, especially where the information relates to an activity or course of conduct such as the slaughtering methods that were in issue in that case. But it is important not to lose sight of the remarks which preceded it. The test is not

69. (2004) 2 All ER 995, p. 1007 (para 36).
70. (2004) 2 All ER 995, pp. 1019, 1032.
71. (2004) 2 All ER 995, p. 1020.

needed where the information can easily be identified as private. It is also important to bear in mind its source, and the guidance which the source offers as to whether the information is public or private. It is taken from the definition of the privacy tort in the United States, where the right of privacy is invaded if the matter which is publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public: *Restatement of the Law of Torts (Second)*, (1977) p. 383, Article 652D. The reference to a person of ordinary sensibilities is, as Gleeson CJ acknowledged in his footnote (at 13), a quotation from William, L Prosser Privacy, (1960) 48 Calif LR 383. As Dean Prosser put it (pp. 396-397), the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities, who must expect some reporting of his daily activities. The law of privacy is not intended for the protection of the unduly sensitive."

In the task of balancing right to respect for private and family life with right to freedom of expression in deciding whether the court should restrain publication of a particular matter or allow its publication, the following four propositions have been deduced from the decision of the House of Lords in *Campbell v. Mirror Group Newspaper Ltd.*[72] These propositions called as "balancing test" are: (1) Neither of the rights has as such precedence over the other; (2) Where the values under the two are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (3) The justification for interfering with or restricting each right must be taken into account. (4) The proportionality tests must be applied to each. *In res' (a child) (identification: restriction on publication)*[73] where the balancing test was culled out the question related to the newspapers' right to publish proceedings of a criminal case disclosing identity of mother, who was being held for murder of her child and the identity of the deceased child against the right of another child to prohibit publication of information relating to his identification. The court allowed publication of the proceedings of the trial including the names and photographs of the parents and the deceased child except proceedings of a court sitting in private.

The magazine *OK* contracted for the exclusive right to publish photographs of a celebrity wedding at which all other photographers would be forbidden. The rival magazine *Hello* published photographs which it knew to have been surreptitiously taken by an unauthorized photographer pretending to be a waiter or guest. *OK* claimed damages against *Hello* for breach of confidence. The information in question, namely the photographs, was capable of being protected because it was of commercial value over which the celebrity couple had sufficient control to enable them to impose an obligation of confidence. There was no reason of public policy why the law of confidence should not protect information of this form and subject-matter. Accordingly *OK* was held entitled to bring proceedings for breach of an obligation to itself and claim damages against *Hello.*[74]

In India, the right to Privacy in the above sense, although not in terms guaranteed, has been reasoned out of the provisions of Article 21 and other provisions of the Constitution relating to fundamental rights; but its precise limits have yet to be established.[75] It has in this context been held that police surveillance of a person, by

72. *Supra* footnote 66.
73. (2004) 4 All ER 683, p. 692 (para 14) (HL). See further for interlocutory injunction affecting right of expression *Cream Holdings Ltd. v. Banerjee*, (2004) 4 All ER 617.
74. *OBG Ltd. v. Allan*, (2007) 4 All ER 545 (H.L.).
75. *Kharaksingh v. State of U.P.*, AIR 1963 SC 1295 : (1964) 1 SCR 332; *Govind v. State of MP*, (1975) 2 SCC 148 : AIR 1975 SC 1348; *Malak Singh v. State of P&H*, (1981) 1 SCC 420.

domiciliary visits and other acts, to be valid must be supported by law and must be unobtrusive and reasonable for the purpose of prevention of crime by potential offenders.[76] Telephone tapping also violates right to privacy under Article 21 unless it is according to the procedure established by law which lays down proper safeguards.[77]

In *R. Rajgopal v. State of Tamil Nadu*[78] the Supreme Court reaffirmed that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country under Article 21. It is a right to be let alone!"[79] The court elaborated this right in words: "A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education"[80] The court further observed: "None can publish anything concerning the above matters without his consent—whether truthful or otherwise or whether laudatory or critical. If he does so he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position would be different if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."[81] The above observations would go to indicate that right of privacy whether against Government or private persons flows from Articles 21 which does not appear to be correct. Article 21 is a guarantee against the State and its instrumentalities as defined in Article 12 but not against private persons. (See footnote 50, p. 52). The right of privacy against private persons in terms stated by the court can be availed of by statutory modification or extension of the Law of Torts as has been done in the United States.[82] This has been pointed out by Soli J. Sorabji who feels that extension of the common law is the tacit basis of the court's holding.[83] *Rajgopal's* case also points out that once a matter becomes a matter of public records, including court records, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others subject to decency in respect of females[84] and possibly also to what may be necessary for protection of children.[85] The law relating to right to privacy was again reviewed in District Registrar and *Collector Hyderabad v. Canara Bank*[86] in which foreign and Indian cases along with relevant international conventions were referred and the right of privacy was held to arise from Article 21 and also from Article 19(1)(a) and (d) of the Constitution.[87] It was also held that right to privacy deals with 'persons and not places'.[88] It was further held that legislative provision relating to search, seizure and inspection of documents by a public officer or his delegate without proper justification and reasonable

76. *Kharaksingh v. State of U.P.*, AIR 1963 SC 1295 : (1964) 1 SCR 332. See further *State of Maharashtra v. Madhukar Narayan Mardikar*, AIR 1991 SC 207, p. 211; AIR 1991 Journal 113; AIR 1992 Journal 104.
77. *Peoples Union for Civil Liberties v. The Union of India*, (1996) 9 SCALE 318 : AIR 1997 SC 568 : (1997) 1 SCC 301 (Safeguards laid down for exercise of power under section 5(2) of the Indian Telegraph Act).
78. (1994) 6 JT 514; AIR 1995 SC 264 p. 276 : (1994) 6 SCC 632.
79. (1994) 6 JT 514p. 529; AIR p. 276.
80. (1994) 6 JT 514; AIR 1995 SC 264 p. 276 : (1994) 6 SCC 632.
81. (1994) 6 JT 514; AIR 1995 SC 264 p. 276 : (1994) 6 SCC 632.; *Mr. X v. Hospital*, Z AIR 1999 SC 495, p. 501 : (1999) 8 SCC 296.
82. In America the relevant tort is identified as 'invasion of privacy by publication of private facts'. The tort is also emerging in New Zealand. In Canada it is a statutory tort. See in this context Paton—Simpson 'Private Circles and Public Squares' : Invasion of Privacy by the Publication of Private facts' (1998) 61 Modern Law Review 318.
83. Privacy and Defamation, SC defines parameters, Indian Express Nov. 12, 1994.
84. *R. Rajgopal v. State of Tamil Nadu*, AIR 1995 SC 264 p. 276 : (1994) 6 JT 514 p. 529 : (1994) 6 SCC 632.
85. *R. v. Central Independant Television Plc*, (1994) 3 All ER 641 (CA).
86. AIR 2005 SC 186 : (2005) 1 SCC 496.
87. AIR 2005 SC 186 : (2005) 1 SCC 496, (paras 38, 39).
88. AIR 2005 SC 186 : (2005) 1 SCC 496 (para 52).

safeguards will be held invalid.[1] Reference in this case was also made to Articles 17 and 19 of the International Covenant on Civil and Political Rights which is enforced in India by the Protection of Human Rights Act, 1993. These articles in this covenant deal with right to privacy and right to freedom of expression and correspond to Articles 8 and 10 of the European Convention which have been interpreted by the House of Lords in *Campbell v. M.G.N. Ltd.*,[2] discussed above.

Customary right.—Indian law further recognises a right to privacy to protect females from observation. This right to privacy may be acquired by virtue of a local custom or grant or special permission.[3] The right of privacy does not arise from prescription but is a creation of custom. It is limited to particular apartments secluded from general observation.[4] Such an easement, founded as it is on the oriental custom of secluding females, is of much importance in India. The Law Commissioners who framed the Indian Easements Act have also recognized it.

The Bombay High Court has held that in accordance with the usage of Gujarat, an invasion of privacy is an actionable wrong, and that a man may not open new doors or windows in his house, or make any new apertures, or enlarge old ones, in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation, and so intrude upon his privacy.[5] The recognition of a right of privacy in Gujarat and Saurashtra means nothing more than that such a right is not unknown in this area. It does not suggest that everyone in this area is entitled to rely on such custom without showing that such a right has been acquired by him by enjoyment of it for a sufficient time and further that it is not oppressive. What time of enjoyment will be sufficient to give right of privacy will depend upon many relevant circumstances like people and nature of locality and the degree of civilization within it.[6] This right of action is not altered by the fact that a public road runs between the dominant and the servient tenements.[7] But, where a window opened by the defendant commanded a view, not of the plaintiff's private apartments, but of an open courtyard outside his house, it was held that there had been no invasion of the plaintiff's privacy which would entitle him to have the window closed.[8] In a case from Dharwar the Bombay High Court decided that to establish such an exceptional privilege, as was customary in the towns of Gujarat, evidence of the most satisfactory character was necessary.[9]

In Bengal this right has been recognised.[10] It is supposed to have been based upon prescription or grant, or express local usage.[11] Privacy is not an inherent right of property like a right to ancient light and air.[12]

1. AIR 2005 SC 186 : (2005) 1 SCC 496 (paras 52 to 58).
2. Footnote 66, p. 424, *supra*.
3. The Indian Easements Act, section 18, ill (b); *Kesho Sahu v. Mussammat Muktakiman*, (1930) ILR 10 Pat 280.
4. *Nathubhai v. Chhaganlal*, (1900) 2 Bom LR 454.
5. *Manishankar Hargovan v. Trikam Narsi*, (1867) 5 BHC (ACJ) 42. This decision is doubted in *Mulia Bhana v. Sundar Dana*, (1913) 15 Bom LR 876 : ILR 38 Bom 1, but is followed in *Maneklal Motilal v. Mohan Lal Narottamdas*, (1919) ILR 44 Bom 496 : 22 Bom LR 226 and *Bhajgovind Chunilal v. Harilal Gordhandas*, (1941) 44 Bom LR 401.
6. *Mochi Pitamber Samji v. Doshi Hemchand Dahyabhai*, ILR (1949) 2 Sau 60.
7. *Kuvarji Premchand v. Bai Javer*, (1869) 6 BHC (ACJ) 143; *Jamiluddin v. Abdul Majeed*, (1915) 13 ALJR 361; *Fazal Haq v. Fazal Haq*, (1927) 26 ALJR 49; *Cheddi Ram v. Gokal Chand*, (1928) ILR 50 All 706; *Sardar Husain v. Ahmad Husain*, (1928) 5 OWN 538.
8. *Keshav Harkha v. Ganpat Hirachand*, (1871) 8 BHCR (ACJ) 87.
9. *Shrinivas Udpirav v. Reid*, (1872) 9 BHCR 266.
10. *Prasannakumar Datta v. Secretary of State for India in Council*, (1933) ILR 61 Cal 245 (251).
11. *Sreenath Dutt v. Nand Kishore Bose*, (1866) 5 WR 208; *Ramlal v. Mahes Baboo*, (1868) 5 Beng LR 677n; *Mahomed Abdul Rahim v. Birju Sahoo*, (1870) 5 Beng LR 676; *Kalee Pershad v. Ram Pershad*, (1872) 18 WR 14; *Sri Narain Chowdhry v. Jodoo Nath Chowdhary*, (1900) 5 CWN 147; *Sarojini v. Krishna*, (1922) 36 CLJ 406.

The Patna High Court has also held that the right to privacy is not an inherent right of a party and can arise only by express usage, by grant or by special permission.[13]

The Madras High Court is of opinion that the invasion of privacy by opening windows is not treated by the law as a wrong for which any remedy is given.[14] A right of privacy is not an actionable wrong unless such a right has been in enjoyment by the plaintiff as a custom.[15] The person whose privacy is so invaded has it in his power to build on his own ground so as to shut out the view from the offending window.[16]

The Allahabad High Court is not unanimous on the point that a customary right of privacy exists everywhere in the Uttar Pradesh or that every individual is entitled to rely on such a custom. A substantial interference with such a right, where it exists, affords such owners good cause of action.[17] But the custom of privacy should not be carried to an oppressive length.[18] The customary right of privacy is confined to the protection of *pardanashin* women and to those parts of the house, which are ordinarily occupied by females, and which have been so occupied and used for a period sufficiently long to establish a right of privacy. It cannot be extended to all apartments of a house whether occupied by males or females, which at any time have not been overlooked.[19] The customary right of privacy can be said to exist only in respect of the inner courtyard.[20] Further, the right to privacy being a customary right, it is always open to the court to see whether the custom is, in the circumstances, reasonable and whether it has ceased to be enforceable by desuetude.[20] The right of privacy is a right which attaches to property and is not dependent on the religion of the owner thereof.[21]

The former Chief Court of Punjab was of opinion that a right of privacy existed in Punjab, and, if opening of new windows invaded such a right, an action might be brought.[22] There is no inherent right of privacy attaching to any property and this is specially so in a town, and such a right must be acquired by usage or by grant.[23] The fact that the occupant of a house can from its roof look into his neighbour's house or yard does not empower him to open such window as he pleases.[24]

The former Chief Court of Oudh adopted the earlier view of the Allahabad High Court.[25]

As regards Madhya Pradesh, it has been held that the right of privacy cannot be acquired as an easement but can be acquired by virtue of a local custom which must be strictly proved.[26]

12. *Sheikh Golam Ali v. Kazi Mahomed Zahur Alum*, (1870) 6 Beng LR (Appx) 76.
13. *Kesho Sahu v. Musammat Muktakiman*, (1930) ILR 10 Pat 280.
14. *Komathi v. Gurunada*, (1866) 3 MHC 141; *Sayyad Azuf v. Ameerubibi*, (1894) ILR 18 Mad 163.
15. *S. Ramalingam Pillai v. Dhanalakshmi Ammal*, (1984) 1 MLJ 253.
16. *Sayyad Azuf v. Ameerubibi*, (1894) ILR 18 Mad 163.
17. *Gokal Parsad v. Radho*, (1888) ILR 10 All 358, (387) *Lachman Prasad v. Jamna Prasad*, (1887) ILR 10 All 162; *Abdul Rahman v. Baghwan Das*, (1907) ILR 29 All 582. *Gokal Prasad v. Radho* is doubted in *Bhagwan Das v. Zumurrad Husain*, (1929) 51 All 986; *Subhaga v. Janki*, (1926) 29 OC 136.
18. *Bhagwan Das v. Zumurrad Husain*, *supra*.
19. *Bholan Lal v. Altaf Hussain*, ILR (1945) All 607.
20. *Diwan Singh v. Inderjeet*, AIR 1981 All 342.
21. *Abdul Rahman v. D. Emile*; *D. Emile v. Abdul Rahman*, (1893) ILR 16 All 69.
22. *Nanuck Chand v. Lalla*, (1869) PR No. 21 of 1869: *Gohree v. Jaintee*, (1869) PR No. 91 of 1869; *Shibdyal v. Golab*, (1876) PR No. 96 of 1876; *Yasin v. Gokul Chand*, (1882) PR No. 19 of 1882.
23. *Hafiz Ulla v. Mohd. Hussain*, (1936) 40 PLR 483.
24. *Nihal Chand v. Maula*, (1903) PLR No. 108 of 1903.
25. *Sangam Madho v. Ram Narain*, (1929) ILR 5 Luck 372; *Maharaj Kumar Mohmad Mohomed Hasan Khan v. Hafiz Abdul Haq*., (1944) ILR 20 Luck 82; *Jaroo v. Srinath Byas*, (1948) OWN 388.
26. *Abirchand Gulabchand Jain v. Mahik Ramnarain Tailor*, 1978 MPLJ 204.

For an infringement of this right a suit can be instituted by the owner of the building[27] or even by a lessee.[28] But the customary right of privacy must be pleaded and proved.[29] In the absence of such a right a person cannot restrain his neighbour from opening new windows; but he can block the windows by raising his own wall.[30]

7(K) Right of Prospect

The law does not recognise a view or prospect from a house as a right in the nature of an easement which can belong to anybody as of right and no period of enjoyment will give a person a right of action against another who on his land erects a structure or plants trees which obstruct the view or prospect.[31]

7(L) Profits a Prendre

7(L)(i) General

Profits a prendre is a right to take from the servient tenement some part of the soil of that tenement, or some part of its natural produce, or animals *ferae naturae* existing upon it. It is a right to take something off the land of another person.[32] The right of depasturing cattle on another's land; the right to cut therefrom and carry away turf or wood for burning within one's dwelling house; the right to dig for and carry away stone, slate, coal and minerals; the right to shoot and sport over another's land, and carry away and consume the game killed; or the right to fish in the water of an estate or of a manor, and carry away and consume the fish taken, are all denominated as *profits a prendre* in English law, but they fall into the category of easements according to Indian law.[33] A *profits a prendre* on another's soil cannot be acquired by custom, however, ancient, uniform and clear the exercise of that custom may have been; and an unlimited *profits a prendre* on another's soil cannot be claimed by prescription.[34] The usually accepted classes of *profits a prendre* are described below.

7(L)(ii) Right of Common

Right of common is a right which one person, who is not the owner, has of taking some part of the natural produce of land belonging to another.

27. *Gokal Prasad v. Radho*, (1888) ILR 10 All 358 (387). As to the form of decree in such suits, see *Sheonath Rai v. Ali Husain*, (1904) 1 ALJR 118.
28. *Kundan v. Bidhi Chand*, (1906) ILR 29 All 64.
29. *Anguri (Smt.) v. Jiwan Dass*, AIR 1988 SC 2024, p. 2026 : (1988) 4 SCC 189.
30. *Anguri (Smt.) v. Jiwan Dass*, AIR 1988 SC 2024, p. 2026 : (1988) 4 SCC 189.
31. *Campbell v. Paddington Corporation*, (1911) 1 KB 869, 876 : 104 LT 394 : 27 TLR 232; *Att-Gen. v. Doughty*, (1752) 2 Ves Sen 453. The plaintiffs, certain worshippers of St. Jacob's Church, brought a suit for removing certain obstructions made by defendants on a part of the public road in front of their church, on the ground of obstruction of the plaintiff's view of a *curusady*. It was held that the suit was not maintainable : *Kurusu Koshtha v. Sawarimuthu*, (1910) 20 MLJ 367. See to the same effect, *Sarojini v. Krishna*, (1922) 36 CLJ 406. A person has no cause of action where an obstruction to the view of his building or place of business does not affect his right of access or does not otherwise cause damage to his building or business : *Gopalakrishna v. Narasimham*, AIR 1958 AP 586.
32. *Sutherland (Duke) v. Heathcote*, (1892) 1 Ch 475.
33. *Sundrabai v. Jayawant*, (1898) ILR 23 Bom 397; *State of Bihar v. Subodh Gopal Bose*, AIR 1968 SC 281 : (1968) 1 SCR 313. But a *profits a prendre* in gross for example a right exercisable by an indeterminate body of persons to take something from the land of others, but not for the beneficial enjoyment of a dominant tenement is not an easement; *State of Bihar v. Subodh Gopal Bose, supra*.
34. *Vasudeo v. Collector of Thana*, (1879) PJ 274; *Vaman v. Collector of Thana*, (1869) 6 BHC (ACJ) 191; *Lloyd v. Jones*, (1848) 17 LJCP 206; *Bailey v. Stevens*, (1862) 31 LJCP 226.

Right of pasture is recognised in England as well as in India. This right, in its widest sense, comprises all vegetable products that may be eaten by cattle or human beings such as grass, nuts, leaves, *etc.*[35]

Right of fishery which a person might possess in any piece of water is not a right to the fish living in such water at any time, for fish, like other *farae naturae*, cannot, except in certain instances, be in the possession or dominion of any man until it is actually captured, but it is simply a right to catch them. This right may exist either in connection with, or independently of, the ownership of the soil, over which water stands or flows. In England, the right of the Crown to grant several fisheries in a river is restricted by two conditions, *viz.* (1) the river must be both tidal and navigable, and (2) the grant must be proved or presumed to have been made not later than the reign of King Hanry II.[36] A person commits a wrong when he fishes in another's fishery, whether he takes fish or not; or when he disturbs, or drives away,[37] or destroys, the fish in a fishery; or diverts the water to an unreasonable extent; or pollutes a several fishery and damages the fish.[38]

Indian law.—Right of fishery is considered as *profits a prendre* in English law, but is regarded as easement under the Indian Easements Act. Private rights of fishery in public waters may be acquired either by a grant from the Government or by prescription from which a grant may be presumed.[39] But no grant can be presumed in favour of a fluctuating and unascertained body of persons such as all fishermen residing in adjoining villages, but such a right may be acquired under custom.[40] In India the Government can grant several fisheries as an incorporeal right to a private individual in non-navigable rivers or in any land-locked water apart from the right to the subjacent soil to such grantee.[41] A common of fishery is the liberty of fishing in another man's water in common with the owner of the soil and perhaps also with others who may have the same right. Several or free fishery is an exclusive right to fish in a given place, and may exist either with or without property in the soil. Several or free fishery can be acquired either by grant or prescription.[42] The right of the public to fish in the sea is common and is not the subject of property. Members of the public exercising the common right to fish in the sea should exercise that right in a fair and reasonable manner and not so as to impede others from doing the same.[43] The Bombay High Court has ruled that a summary action under section 9 of the Specific Relief Act, 1877,[44] for restitution of possession of an exclusive fishery, whether such fishery be territorial or a right in *alieno solo*, may be entertained

35. *Commissioners of Sewers v. Glasse*, (1874) LR 19 Eq 134. See *Bholanath Nundi v. Midanapore Zemindary Co. Ltd.*, (1904) 31 IA 75 : ILR 31 Cal 503; *Gorijala Pitchi Naidu v. Vellur Veeriah*, (1909) ILR 34 Mad 58.
36. *Prabha Bati Saheba v. Secretary of State for India in Council*, (1940) ILR 2 Cal 529.
37. *Fitzgerald v. Firbank*, (1897) 2 CH 96.
38. *Nicholls v. Ely Beet Sugar Factory*, (1931) 2 CH 84 : 145 LT 113. The defendant cannot set up a *Jus tertii* in such action.
39. *Hori Das Mal v. Mohomed Jaki*, (1885) ILR 11 Cal 434, (FB); *Satcowri Ghosh Mondal v. Secretary of State for India*, (1894) ILR 22 Cal, 252; *Arjun Kaibarata v. Monoranjan De Bhumik*, (1933) ILR 61 Cal 45; *Viresa v. Tatayya*, (1885) 8 ILR Mad 467; *Lakshman v. Ramji*, (1920) 23 Bom LR 939. See *Maung Tan Gin v. Maung Hmon*, (1898) PJLR 71. As to whether exclusive right of fishery in a tidal navigable river can be acquired under section 26 of the Indian Limitation Act, there is a difference of opinion; See *Viresa v. Tatayya, supra*, and *Abhoy Charan Jalia v. Dwarka Nath Mahto*, (1911) ILR 39 Cal 53. Such a right can be acquired by prescription: *Chandranath Das v. Pushkarchandra Das*, (1935) ILR 62 Cal 800.
40. *Braja Sunder Deb v. Mani Behara*, AIR 1951 SC 247 : 1951 SCR 431.
41. *Prabha Bati Saheba v. Secretary of State for India in Council*, (1940) ILR 2 Cal 529.
42. *Narayan v. Laxmibai*, ILR 1951 Nag 199.
43. *Raoji v. Tukaram*, (1928) ILR 31 Bom LR 329.
44. Act 1 of 1877. (See section 6, Specific Relief Act, 1963).

provided the conditions specified in that section be satisfied.[45] But the Calcutta High Court has held that this form of action does not apply to rights of fishery of the latter kind.[46] This diversity is due to the difference of opinion between the two High Courts, as to the meaning of the phrase "immovable property" used in that section, which makes this form of action perty alone. The Patna High Court has held that an exclusive right of fishery is an interest in immovable property and may be acquired by twelve years' adverse possession involving an ouster of the rightful owner. But a mere right to fish not excluding the rightful owner is a *profits a prendre* and falls within the definition of easement given in section 2(5) of the Indian Limitation Act, 1908 and may be acquired by twenty years' uninterrupted enjoyment.[47]

7(L)(iii) Right of Ferry

A ferry is the exclusive right to carry passengers and goods across a river or arm of the sea from one village to another, or to connect a continuous line of road leading from one township or village to another.[48] A ferry is a highway common to all the people paying the toll[49] usually across a large and deep river.

The right is an incorporeal right.[50] It arises by royal grant or by prescription. The owner of a ferry has not a grant of an exclusive right of carrying passengers and goods across the stream by any means whatever, but only a grant of an exclu- sive right to carry them across by means of a ferry.[51] If a bridge is constructed near a ferry connecting the same highway as the ferry, the owner of the ferry has no remedy for divergence of the traffic.[52]

In India the right of ferry or an interest therein is immovable property within the meaning of the Specific Relief Act, 1877, section 9.[53] The right of establishing a private ferry and levying tolls is recognised here. Twenty years is the shortest period within which such a right of ferry can be established.[54] But in a later case the Calcutta High Court has held that such rights can only be acquired by grant from the Government.[55] The Bombay High Court has adopted this view and held that the right to a ferry franchise cannot be acquired by prescription, but there must be facts proved from which, if there is no direct grant from the Government, it can be implied that such grant was actually made.[56]

45. *Bhundal Panda v. Pandol Pos Patil*, (1887) ILR 12 Bom 221.
46. *Natabar Parue v. Kabir Parue*, (1890) ILR 18 Cal 80; *Fadu Jhala v. Gour Mohun Jhala*, (1892) ILR 19 Cal 544, (FB) *Sitaram v. Petia*, (1916) 14 NLR 35.
47. *Hill & Co. v. Sheoraj Rai*, (1922) ILR 1 Pat 674; *The Secretary of State for India v. The District Board of Tanjore*, (1829) 31 MLW 508.
48. *Newton v. Cubit*, (1862) 12 CBNS 32; *Kirtyanand Singh Bahadur v. Deonandan Prasad*, (1933) 14 PLT 761.
49. *North and South Shields Ferry Co. v. Barker*, (1828) 2 Ex. 136.
50. *Peter v. Kendal*, (1827) 6 B & C 703.
51. PER MELLISH, L.J. in *Hopkins v. G.N.Ry.*, (1877) 2 QBD 224, followed in *Dibden v. Skirrow*, (1907) 1 Ch 437, which does not approve of The *Queen v. Cambrian Ry. Co.*, (1871) LR 6 QB 422, 432, and which is confirmed on appeal. (1907) WN 225.
52. *Hopkins v. G.N.Ry. Co., supra.*
53. *Krishna v. Akilanda*, (1889) ILR 13 Mad 54.
54. *Prameshari Prashad Narain Singh v. Mahomed Syud*, (1881) ILR 6 Cal 608.
55. *Nityahari Roy v. Dunne*, (1891) ILR 18 Cal 652; *The Chairman of the Serajganj Local Board v. Budhiswar Patni*, (1930) ILR 57 Cal 1261. The Allahabad High Court has held that ownership of land on both banks at a spot does not give right to owner to open a ferry there as against the Government grantee, *Dhanpat Pandey v. Pasput Pratap Singh*, 1931 ILR 53 All 764.
56. *Shama v. Gangadhar*, (1922) 24 Bom LR 445; ILR 46 Bom 952.

Infringement.—To create a disturbance of the right of a ferry owner, there must be carrying of passengers and merchandise from point to point in the line of the ferry.[57] Disturbance of the ferry must be proved.[58] If the traffic conveyed by the defendant is different from that dealt with by the plaintiff, there is no disturbance of the plaintiff's ferry.[59]

The plea that the legal ferry is not sufficient for the public convenience does not avail.[60]

7(L)(iv) Right of Market

Originally it was considered a great benefit to towns to give them a fair or market; and this was thought so beneficial that it was thought right, not only to give the fair or market, but also to grant a charter so as to prevent persons from disturbing the market. The right to prevent persons from selling marketable goods on market days in their private houses (though within the town or manor where the market may be held) may be acquired by immemorial enjoyment or prescription.[61]

The Calcutta High Court has held that in Bengal there is no such thing as market franchise or a right to hold a market conferred by grant from the Government, nor can such right be acquired by prescription. The proprietor of an old market has, therefore, no monopoly or privilege which is entitled to protection and no immunity from competition. He has no remedy at law merely because his profits are diminished.[62]

Infringement.—If a man brings his commodities for sale so near a market as to obtain the benefit of it without paying the toll, that is a fraud upon the market, for which an action will lie at the suit of the Lord of the market.[63] Right to hold a market to the exclusion of others is infringed by opening of a rival market. The plaintiff in such a case can recover loss of profits of his market as damages.[64] If no loss is proved he can get only nominal damages and he is not entitled to claim the profits earned by the defendant by holding the rival market.[64]

57. *Makkan Singh v. Secretary of State*, (1877) PR No. 30 of 1877. See *Kishore Lall v. Gokool Monee*, (1871) 16 WR 281; *Narain Singh v. Nurendro*, (1874) 22 WR 296; *Luchmessur Singh v. Leelanund Singh*, (1878) ILR 4 Cal 599; *Ram Sakal v. Nageshar*, (1935) 33 ALJR 444; *Ali Bhai v. Maung Nyun*, (1935) ILR 13 Ran 619.
58. *Hammerton v. Dysart (Earl)*, (1916) AC 57.
59. *Cowes Urban Council v. Southampton, etc., Royal Mail Steam Packet Co.*, (1905) 2 KB 287.
60. *Newton v. Cubitt*, (1859) 5 CBNS 627.
61. *Mosley v. Walker*, (1827) 7 B & C 40. A market without any definite limit may extend to surrounding locality: *Att-Gen. v. Horner*, (1885) 11 App Cas 66.
62. *Hem Chandra Roy Chaudhury v. Krishan Chandra Saha Sardar*, (1920) ILR 47 Cal 1079; *F.D.C. Summer v. Jogendra Kumar*, (1932) 34 Cr LJ 334.
63. *Bridgland v. Shapter*, (1839) 5 M & W 375.
64. *Stoke-on-Trent City Council v. W & J Wass Ltd.*, (1988) 3 All ER 394 : (1988) 1 WLR 1406 : 87 LGR 129 (CA).

CHAPTER XVI

TORTS TO PERSONALITY OR MOVABLE PROPERTY

SYNOPSIS

1. TRESPASS TO GOODS

Trespass to goods is an unlawful disturbance of possession of the goods by seizure or removal or by a direct act causing damage to the goods,[1] for example removing a tyre from a motor-car,[2] scratching the panel of a coach.[3] The plaintiff must at the time of the trespass have the present possession of the goods, either actual or constructive, or a legal right to the immediate possession.[4] As against a wrong-doer any possession is sufficient provided that it is complete and unequivocal. A trespass to goods is actionable *per se* without any proof of actual damage.[5] In the earlier days it was not necessary for the plaintiff to prove intention or negligence in an action for trespass to goods except that in highway accidents negligence was necessary to be proved.[6] But it seems that in subsequent cases[7] dealing with trespass to person which require that intention or negligence must be proved by the plaintiff, the same view is likely to be taken in actions for trespass to goods.[8] But it is still intentional taking actionable as trespass if the defendant honestly but erroneously believes that the goods removed by him belong to him and he is entitled to take possession of them for the act of removal is intentional in relation to the goods.[9]

A person possessed of goods as his property has a good title as against every stranger, and one who takes them from him, having no title in himself is a wrong-doer, and cannot defend himself, by showing that there was title in some third person; for against a wrong-doer possession is title.[10] A plea in defence that the

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1. *Bullen; Grozier v. Cundey*, (1827) 6 B & C 232; *Kirk v. Gregory*, (1876) 1 Ex D 55.
2. *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.*, (1926) 42 TLR 376.
3. *Fouldes v. Willoughby*, (1841) 8 N & W 540, 549.
4. *Johnson v. Diprose*, (1893) 1 QB 512, 515; *Smith v. Milles*, (1786) 1 TR 475.
5. *Leitch & Co. v. Leydon*, (1931) AC 90, p. 106.
6. *Gaylor and Pope v. B. Davies & Sons*, (1924) 2 KB 75 : 131 LT 507.
7. *Fowler v. Lanning*, (1959) 1 QB 426 : (1959) 1 All ER 290; *Letang v. Cooper*, (1964) 2 All ER 929 : (1965) 1 QB 232.
8. SALMOND & HEUSTON, Tort, 18th edition, p. 90; WINFIELD & JOLOWICZ, Tort, 12th edition, pp. 477, 478.
9. See for example *Wilson v. Lombank Ltd.*, (1963) 1 All ER 740 discussed in text and note 18, p. 436.
10. *Jeffries v. G. W. Ry.*, (1856) 5 E & B. 802, 805; *Eastern Construction Co. v. National Trust Co.*, (1914) AC 197.

plaintiff got the chattel under an illegal contract is of no avail if the plaintiff has not to rely on his own illegality.[11] If, however, the plaintiff was not in actual possession of the goods at the time of the trespass, the proving of a *jus tertii* would afford a good defence to the action, even though the defendant acted without the authority of the person entitled to the possession.[12]

A trespasser cannot by his trespass acquire the right of ownership in the property; such a possession cannot deter the real owner from taking back the property from the trespasser.[13]

A joint owner can maintain an action of trespass against his co-owner if the latter has done some act amounting to ouster.[14]

The wrongful attachment by itself amounts to trespass to goods and is actionable. The gist of the action is the wrongful attachment and the plaintiff whose property is wrongfully attached before judgment is entitled to damages even though he has failed to prove special damage.[15] Improper obtaining of injunction which restrains the plaintiff to exercise his lawful rights over his goods may amount to trespass even without proof of malice or want of reasonable or probable cause.[16]

Shooting home-coming pigeons.—The plaintiff, the owner of certain homing and racing pigeons, released them for exercise, and they alighted on the defendant's land and fed on his growing peas. To protect the peas the defendant shot at the birds, killing four and wounding one. In an action by the plaintiff for damages for the destruction of and injury to the pigeons, the defendant contended that there could be no property in homing pigeons, and, even assuming that there could be such a property, the destruction and wounding of the plaintiff's birds were justified. It was held that so long as the birds retained an *animus revertendi* the plaintiff could claim a special property in them, the appropriate form of action for him to take in respect of their destruction or wounding being trespass to goods, that there was evidence to support the finding that the defendant had failed to prove that there were no practicable means other than shooting or stopping the birds doing damage to his crops or that he had acted reasonably in regarding the shooting as necessary to protect the crops, and, therefore, the plaintiff was entitled to succeed.[17]

Taking possession of motor car.—The plaintiff bought a motor-car from a person who had no title to sell it and left it in a garage, where he had monthly credit terms, for repairs. A representative of the defendants, who also had no title to the car thought there was a purported sale of the car to the defendants, took it away and ultimately delivered it to the true owner. The defendants were held liable in trespass to the plaintiff as the plaintiff had not parted with possession of the car while it was in the garage.[18]

A trespassing motorist, who has seen one or more notices giving sufficient warning that trespassing vehicles will be clamped and who has understood their effect, consents to the risk of clamping so that clamping is not itself a trespass to the

11. *Sajan Singh v. Sardar Ali*, (1960) 1 All ER 269 (PC); *Tinsley v. Milligan*, (1993) 3 All ER 65 : (1994) 1 AC 340 : (1993) 3 WLR 126 (HL).
12. *Gadsden v. Barrow*, (1854) 9 Ex 514; *Richards v. Jenkins*, (1886) 17 QBD 544.
13. *Khan Mohamed v. State*, AIR 1967 Raj 37.
14. *Jacobs v. Seward*, (1872) LR 5 HL 464.
15. *Ardul Subhan Sab v. Ramiah*, ILR 1952 Mys 176.
16. *P.A. Jacob v. Nanda Timber Trading Co.*, AIR 1990 Mad 140.
17. *Hamps v. Darby*, (1948) 2 All ER 474 : (1948) 2 KB 311 : 64 TLR 440.
18. *Wilson v. Lombank Limited*, (1963) 1 All ER 740.

vehicle.[19] But in a case where the motorist being in a distressed state of mind failed to see the notice, the act of clamping was held to amount to trespass.[20]

Defence.—The defendant may plead lawful justification when sued for trespass. Lawful title to the goods will be a good defence provided the plaintiff has no right to possession against the owner. If the plaintiff's possession was unauthorised or when his authority to possess had come to an end, the defendant's title to the goods will be a complete defence. But if the plaintiff continues to have right to possess even against the owner, for example, when the plaintiff is a bailee and the bailment still exists, the mere defence that the defendant is the owner will not be enough and the defendant will have to show further that the bailment has been terminated.[21] The defendant if not the owner may plead that he acted on behalf of the owner with his consent. The defendant may again plead authority of law, such as seizure of goods under a legal process or under lawful distress for rent or damage feasant. It may also be pleaded that the plaintiff had created an obstruction say by leaving his cart or horse on the road and the defendant merely removed the obstruction in the exercise of his right of way. It may further be pleaded that the defendant acted in private defence for example that the defendant had to shoot the plaintiff's dog which was attacking the defendant's animal and the shooting was the only reasonable mode of prevention of harm to the animals.[22] Inevitable accident is also a good defence.[23] The predecessors in title of the plaintiffs had laid an electric cable under the land of a County Council without informing them which was damaged in an excavation work done by the contractors of the Council who had no knowledge of the cable. It was held that the defendants were not liable as being wholly without fault.[24]

Remedy.—Formerly, for direct trespass, action of trespass for damages for the injury done could be brought. For indirect injury resulting from the trespass, an action for trespass on the case was the remedy. Now the proper remedy for either is action for damages.

Damages.—In an action for trespass to goods, the damages in general are measured by the value of the goods, or the amount of injury done to them. Special damage resulting from the immediate loss or injury may also be allowed, if not of too remote a nature.[25]

Quarrying stones on another's land.—Where the defendants without leave quarried on the land of the plaintiff and removed a large quantity of stone therefrom, it was held that the plaintiff was entitled to recover by way of damages the value of the stone after it was quarried, and that the defendants were not entitled to a deduction therefrom of the costs they had incurred in quarrying the stone.[26]

2. CONVERSION

2(A) General

A conversion is an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is

19. *Arthur v. Anker*, (1996) 3 All ER 783 : (1997) QB 564 : (1996) 2 WLR 602 (CA).
20. *Vine v. Waltham Land on Borough Council*, (2000) 4 All ER 169 (CA).
21. See *Keenon Bros. Ltd. v. C.I.E.*, (1962) 97 ILTR 54.
22. See *Cresswell v. Sirl*, (1949) 2 All ER 730 : 63 TLR 620 : (1948) 1 KB 241.
23. *National Coal Board v. Evans*, (1951) 2 KB 861 : (1951) 2 TLR 415 : 95 SJ 399.
24. *National Coal Board v. Evans*, (1951) 2 KB 861 : (1951) 2 TLR 415 : 95 SJ 399.
25. *Hughes v. Quentin*, (1838) 8 CP 703; *Gilbertson v. Richardson*, (1848) 5 CB 502.
26. *Dajiba Anandrav v. B.B. & C.I. RY. Co.*, (1869) 6 BHC (ACJ) 235, following *Martin v. Porter*, (1839) 5 M & W 351.

deprived of the use and possession of it.[27] The expression 'wilful interference' in this definition implies the element of intention which refers to the intentional commission of the act constituting conversion. If a person deals with a chattel in a manner which is necessarily inconsistent with the right of the plaintiff, the dealing will be intentional and will amount to conversion even if he honestly believed that he was entitled to do so and he did not know of the right held by the plaintiff. For example, an auctioneer is liable for conversion even though he honestly believed that the goods belonged to the seller and not to the plaintiff. Conversion may be committed in many different ways but the common link in all acts constituting conversion is that they consist in dealings with goods which imply either unjustifiable denial of rights of another in them or assertion of rights inconsistent with the rights of another.[28] Putting it more briefly, "a person who treats goods as if they were his when they are not, is liable to be sued in conversion".[29]

The tort of conversion applies only to chattels and does not extend to cover the appropriation of choses in action.[30]

An act of conversion may be committed—

1. When property is wrongfully taken.
2. When it is wrongfully parted with.
3. When it is wrongfully sold.
4. When it is wrongfully retained.
5. When it is wrongfully destroyed.
6. When there is a denial of the lawful owner's right.

2(B) Conversion by Taking

Anyone who without authority takes possession of another man's goods with the intention of asserting dominion over them is guilty of conversion. The reason is that it is an act inconsistent with the general right of dominion which the owner of the chattel, who is entitled to the use of it at all times and in all places, has in it. A mere taking unaccompanied by an intention to exercise permanent or temporary dominion may be a trespass, but is no conversion.[31]

If there is a wrongful taking, it makes no difference that such an act was done under a mistaken but honest supposition of being lawfully entitled,[32] or with the intention of benefiting the true owner.[33]

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27. SALMOND on Torts, 11th edition., as approved by the Supreme Court in *Dhian Singh v. Union of India*, AIR 1958 SC 274 : 1958 SCR 781. See further: *Chokalingam Chettiar v. National Steamship Co.*, (1957) KLT 1106; *Union of India Representing Bengal Nagpur Railway v. Mohammad Khan*, ILR 1959 Cut 32; *Rooplal v. Union of India*, AIR 1972 J & K 22; *Parmananda Mohanty v. Bira Behera*, AIR 1978 Ori 114; *P.A. Jacob v. Nanda Timber Trading Co.*, AIR 1990 Mad 140.
28. WINFIELD & JOLOWICZ, Tort, 12th edition, p. 479.
29. WEIR, Casebook on Tort, 5th edition, p. 404.
30. *OBG Ltd. v. Allan*, (2007) 4 All ER 545 (H.L.) (The defendants were receivers purportedly appointed under a floating charge which was invalid. In that capacity the defendants took control of the claimant company's assets and undertakings. The House of Lords by majority declined to extend the tort of conversion to cover choses in action and the receivers who had acted honestly were not held liable.)
31. *Fouldes v. Willoughby*, (1841) 8 M & W 50, *Anandi Lal v. Fateh Ali*, (1953) RLW 556; *M.V.G. Sastry v. Radhalakshmi*, ILR 1953 Mys 213.
32. *Kleinwart Sons & Co. v. National D'Escompte de Paris*, (1894) 2 QB 157; *Union Credit Bank v. Mersey Docks, etc.*, (1899) 2 QB 205.
33. *Hiort v, Bott*, (1874) LR 9 Ex 86.

Refusal to deliver property taken from agent.— In *M'Combie v. Davies*[34] the property of another person was taken by assignment from an agent who had no authority to dispose of it, and the person taking it refused to deliver it up to the principal after notice and demand by him. It was held that that amounted to conversion.

Principal ratifying purchase of chattel by agent.—In *Hilbery v. Hatton*[35] it was held that if a principal ratifies the purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of conversion although at the time of the ratification he had no knowledge that the sale was unlawful.

Pledge taking property pledged.—Where a pledgee, having power to sell for default, takes over, as if upon a sale to himself, the property pledged, without the authority of the pledgers, but crediting its value in account with him, he is liable for conversion.[36]

Taking fruit without right.—Where a person lopped the branches of fruit trees overhanging his land and appropriated the fruit, it was held that, as the right to lop the branches did not carry with it the right to pick and appropriate the fruit, he was guilty of conversion and liable to the owner for its value.[37]

2(C) Conversion by Parting with Goods

If a man, who entrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion. The wrongful act is done when he purports to give to the third person along with the mere possession some right over the property itself. Every person is guilty of a conversion, who without lawful justification deprives a person of his goods by delivering them to someone else so as to change the possession.[38] The giver and the receiver will be liable as joint tort-feasors. If a person takes another's horse to ride, and leaves him at an inn, that is a conversion, for though the owner may have the horse back he has to pay for its keeping.[39] Similarly, the hirer of a piano, who sends it to an auctioneer to be sold, is guilty of conversion; and so is the auctioneer who refuses to deliver it up unless the expense incurred be first paid.[40] If a warehouseman mis-delivers goods even by mistakes he will be liable for conversion.[41]

2(D) Conversion by Sale

Any person, who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of conversion.[42] Wrongful sale of goods is conversion.[43] The auctioneer who gets possession of the articles sent to be

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34. *M'Combie v. Davies*, (1805) 6 East 538 : 8 RR 534.
35. *Hilbery v. Hatton*, (1864) 2 H & C 822.
36. *Neckram Dobay v. The Bank of Bengal*, (1891) ILR 19 Cal 322. See *Moyi v. Avuthraman*, (1898) ILR 22 Mad 197.
37. *Mills v. Brooker*, (1919) 1 KB 555 : 121 LT 254 35 TLR 261.
38. *Dhian Singh Sobha Singh v. Union of India*, AIR 1958 SC 274.
39. *Syeds v. Hay*, (1791) 4 TR 260, 264.
40. *Loeschman v. Machin*, (1818) 2 Stark, 311 : 1958 SCR 781.
41. *Devereux v. Barclay*, (1819) 2 B & Ald. 702; *Stephenson v. Hart*, (1828) 4 Bing 476; *Hiort v. Bott*, (1874) LR 9 Ex 86.
42. *Hollins v. Fowler*, (1875) LR 7 HL 757 (795) : 44 LJQB 169.
43. *Edwards v. Hooper*, (1843) 11 M & W 363; *Johnson v. Stear*, (1863) 15 CBNS 330; *Page v. Cowasjee*, (1866) LR 1 PC 127; *Biliter v. Young*, (1856) 6 El & Bl 1.

sold by him, for the purposes of sale, and sells them is liable to the true owner.[44] LORD DENNING said: "When the goods are sold by the intervention of an auctioneer under the hammer or as a result of a provisional bid, then if the seller has no title, the auctioneer is liable in conversion to the owner."[45] But an attempted disposition for example a mere bargain and sale without transfer of possession, *i.e.* delivery is not a conversion.[46] Further if the auctioneer returns the goods to the person from when he received them without selling them in good faith without notice of title of the plaintiff, he is not liable in conversion.[47]

Green tea leaves converted into black tea.—Tea even when dried, shrunk and blackened remains the same tea as plucked or on the shrubs as green leaves. Accordingly a person trespassing into a tea-garden cannot by plucking and changing the green leaves into black tea acquire any right in respect thereof. In such a case the auctioneer who sells the black tea on behalf of the trespasser and pays the price to him is liable to the real owner in damages for conversion, the measure of such damages—where the trespasses were deliberate and criminal—being the actual price at which manufactured tea was sold, without any deduction for the expenses incurred in connection with its manufacture.[48]

Sale of motor car.—The plaintiffs were motor dealers who sold a car priced at £ 625 after obtaining £ 350 to one C on hire-purchase terms making it clear that C was not to sell the car before he paid the balance of the price. C, however, sold the car for £ 410 through the defendants who were auctioneers. C became bankrupt. The car and the purchaser were not traceable. The plaintiffs sued the defendants for conversion and recovered damages of £ 275, the balance of the price that they had to recover from C.[49]

The defendant allowed the plaintiff to leave her motor-car without payment in the yard of the hotel of which he was licensee and tenant. The storage was intended to be for a short time, but the car remained in the yard for several years. It became an obstacle owing to the conversion of the yard into a garage. After unsuccessful efforts to communicate with the plaintiff, as the car was in poor condition, and had suffered from long exposure in the open air, the defendant spent £ 85 in repairs to and renovation of the car to make it saleable. It was then sold at auction for £ 100. The plaintiff sued the defendant for damages for detinue and conversion of the car. It was held that the plaintiff was entitled to damages on the basis of the value of the car on the day of judgment in the action; but that the defendant was entitled to credit for what he had spent to render the car saleable, since the value of the car on the day of judgment included £ 85, the property of the defendant in the shape of work done to and materials supplied for the car.[50]

Conversion of ring by agent selling it to third party who acquires it in good faith.—The plaintiff, the owner of a diamond ring, entrusted it to T, who undertook to try to sell it on his behalf. The plaintiff was to receive £ 550 and T was to receive any surplus of the proceeds. If the ring was not sold within seven days T was to return it to the plaintiff. After the seven days had elapsed, T, representing himself as the owner of the ring, sold it for £ 175 to the defendants, who bought it in good faith and re-sold it. T was subsequently convicted of the larceny of the ring as a bailee. In an action by the plaintiff against the defendants for damages for wrongful conversion

44. *Delaney v. Wallis*, (1883) LR 14 Ir CL 31, 47.
45. *R.H. Willis & Son v. British Car Auctions*, (1978) 2 All ER 392 : (1979) 1 WLR 438 : 246 EG 134 (CA).
46. *Lancashire Waggon Co. v. Fitzhugh*, (1861) 6 H & N 502.
47. *Marcq v. Christie Manson & Woods Ltd.*, (2003) 3 All ER 561 (CA).
48. *Carritt Moran & Co. v. Manmatha*, (1941) ILR 1 Cal 285.
49. *R.H. Willis & Son v. British Car Auctions*, (1978) 2 All ER 392 : (1979) 1 WLR 438 : 246 EG 134 (CA).
50. *Munro v. Willmott*, (1949) 1 KB 295 : 64 TLR 627 : (1948) 2 All ER 983.

of the ring, it was held that, at the time of the sale to the defendants, T was not an agent of the plaintiff to deal with the ring and was not in the position of a person who might be presumed as an agent having authority to sell it, and that, by the sale he converted the ring to his own use; and, therefore, he did not pass any property in it to the defendants, who were thus liable to the plaintiff.[51]

2(E) Conversion by Keeping

Where a man has possession of another's chattel, and refuses to deliver it, this is an assertion of a right inconsistent with his general dominion over it, and the use which at all times, and in all places, he is entitled to make of it, and consequently amounts to an act of conversion.[52]

Demand and refusal.—If the goods of a person are in the possession of another, he should send some one with proper authority to demand and receive them; and if the person in possession refuses to deliver them up, this will be evidence of conversion.[53] A demand and refusal do not in themselves constitute a conversion, but they are evidence of a prior conversion.[54]

An unqualified refusal is always conclusive evidence of a conversion, but a qualified, reasonable, and justifiable refusal is not.[55] A qualified refusal by a railway servant who is doubtful as regards the consignor's title to the goods to be delivered is not conversion. A refusal by a railway clerk to deliver a consignment at a place to which it is not booked does not, therefore, amount to conversion.[56] But, if the defendant refuses to deliver up the goods except upon a certain condition which he has no right to impose, that is tantamount to an absolute refusal. Thus the refusal by a solicitor to give up deeds except on condition, which he had no right to impose, that his charges in respect of business done for his own client should be paid would be evidence of conversion.[57]

Right of finder.—As regards finders, the law is that the finder of a chattel who is not a trespasser acquires a right to keep it against all but the true owner if the chattel had been abandoned or lost and if he took it into his care and control, but this right is subject to the superior right of an occupier of a building to retain chattels attached to that building and also to retain chattels on or in it if he manifests an intention to exercise exclusive control over the building and the things which were on or in it.[58] The same rule applies to articles found in or attached to land which was restated in *Waverley BC v. Fletcher*[59] as follows:

"(1) Where an article is found in or attached to land, as between the owner or lawful possessor of the land and the finder of the article, the owner or lawful possessor of the land has the better title. (2) Where an article is found unattached on land, as between the two, the owner or lawful possessor of the land has a better title

51. *Jerome v. Bentley & Co.*, (1952) 2 All ER 114.
52. *Fouldes v. Willoughby*, (1841) 8 M & W 540, 548.
53. *Thorogood v. Robinson*, (1845) 6 QB 769: 9 Jur 274; *Haryana Cotton Mills Co. Ltd. v. B.B. & C.I. Ry. Co.*, (1927) 28 PLR 665; *Vishwanath Sadashiv v. Bombay Municipality*, (1938) 40 Bom LR 685.
54. *Wilton v. Girdlestone*, (1822) 5 B & Ald. 847; *Smith v. Young*, (1808) 1 Camp 439. See *Vaughan v. Watt*, (1840) 6 M & W 495.
55. *Alexander v. Southey*, (1821) 5 B & Ald 247.
56. *Fazalbhai v. Dominion of India*, ILR 1951 Nag 545.
57. *Davies v. Vernon*, (1844) 6 QB 443. A person having in his possession the goods of another, whom he knows to be the owner, has no right to retain them until he has a written receipt for them: *Barnett v. Crystal Palace Co.*, (1861) 2 F & R 443.
58. *Parker v. British Airways Board*, (1982) 1 All ER 834 : (1982) QB 1004 : (1982) 2 WLR 503 (CA).
59. (1995) 4 All ER 756 : (1996) QB 334 : (1995) 3 WLR 772 (CA).

only if he exercised such manifest control over the land as to indicate an intention to control the land and anything that might be found on it."[60] In *Fletcher's* case[61], the defendant by using a metal detector discovered the presence of an object below the surface and after digging some nine inches found a valuable medieval gold brooch. In a suit by the plaintiff local authority, which owned the public park, it was held, applying the above principle that the local authority had superior right to have the brooch as against the finder.

The plaintiff, a chimney sweeper, had found a very valuable jewel and had taken it to a jeweller to ascertain its value. The jeweller, taking advantage of the boy's simplicity, told him it was worthless and offered him three pence for it, which the lad declined and demanded the jewel back. The jeweller refused to do so; whereupon the boy successfully sued him for it, and for the purpose of assessing damages the court considered the jewel to be of the highest value.[62]

The defendant was the owner of a house which he had never himself occupied. While the house was requisitioned, the plaintiff, a soldier, found in a bed-room loose in a crevice on the top of a window frame, a brooch, the owner of which was unknown. There was no evidence that the defendant had any knowledge of the existence of the brooch before it was found by the plaintiff; but the police to whom the plaintiff handed the brooch to ascertain its owner, delivered it to the defendant who claimed it as being on premises of which he was the owner. It was held that the plaintiff, as finder, was entitled to the possession of the brooch as against all others except its owner.[63]

The plaintiff who was a passenger found a bracelet in the executive lounge at London Airport. The plaintiff handed the bracelet to an employee of the Airlines with a direction that the bracelet be returned to him if it was not claimed by its owner. The owner did not claim the bracelet still the Airlines did not return the bracelet to the plaintiff and instead sold it and kept the proceeds. The plaintiff sued for conversion and was awarded as damages the value of the bracelet. The plaintiff being the finder was held entitled to the bracelet against everyone except the owner, for the Airlines as occupiers of the premises, had shown neither an intention to exercise control over lost chattel in their lounge nor an intention that permission to enter granted to members of the public was on terms that the commonly understood maxim 'finders keepers' would not apply.[64]

Indian Cases.—Two notes were stolen from A, which B (not a *bona fide* holder for valuable consideration) tendered to C in payment of certain articles. C, not knowing B, refused to deal with him, whereupon B brought D, who was known to C, and the purchase was made by him. It was held that the part which B performed in the transaction amounted to a "conversion of the notes to his own use" and that he was liable to A.[65] A refusal to deliver up an idol, whereby the person demanding it was prevented from performing his turn of worship on a specified date was held to give

60. (1995) 4 All ER 756, p. 764.
61. (1995) 4 All ER 756 : (1996) QB 334 : (1995) 3 WLR 772 (CA).
62. *Armory v. Delamirie*, (1721) 1 Str. 505. See *Soonder Monee Chowdhrain v. Bhoobun Mohun Chowdhry*, (1869) 11 WR 536, where in a suit to recover the value of the plundered property the highest value was assumed.
63. *Hannah v. Peel*, (1945) KB 509 : 114 LJKB 533 : 61 TLR 502.
64. *Parker v. British Airways Board*, (1982) 1 All ER 834 : (1982) QB 1004 : (1982) 2 WLR 503 (CA).
65. *Kissorymohun Roy v. Rajanarain Sen*, (1862) 1 Hyde 263. See *Khurshedji Rustomji Colah v. Pestomji Cowasji Bucha*, (1888) ILR 12 Bom 573.

the party aggrieved a right to sue for damages.[66] Refusal or neglect by a railway company to deliver goods after demand made was held to be conversion.[67]

2(F) Conversion by Destruction

Destruction of a chattel belonging to another is an act of conversion, for its effect is to deprive the owner of it altogether. If the entire article is destroyed, as for instance, by burning it, that would be taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use. Taking wine from a cask and filling it with water is a conversion of the whole liquor.[68] So is spinning cotton into yarn or grinding corn into flour if done without the authority of the owner.[69]

2(G) Conversion by Denial of Right

It was said that there may be a conversion of goods even though the defendant has never been in physical possession of them, if his act amounts to an absolute denial and repudiation of the plaintiff's right.[70] The correctness of this view was doubted and it has been overruled by section 11(3) of the Torts (Interference with Goods) Act, 1977 which provides that denial of title is not of itself conversion.

Interference with a chattel in a manner inconsistent with the right of the owner accompanied by a denial of title of the owner amounts to conversion.[71]

Unlawful user of the goods of another in such manner that the goods might be rendered liable to forfeiture by the authorities would also amount to conversion.[72]

Defendant's ignorance of the unauthorised character of his act cannot always be relied upon as a defence.

The payee of a crossed cheque especially endorsed it to the plaintiffs and posted it to them. A stranger, having obtained possession of the cheque in transmission, obliterated the endorsement to the plaintiffs, and having substituted a special endorsement to himself, presented it at the defendants' bank, and requested them to collect it for him. They did so, and handed the proceeds over to him in France. It was held that the defendants were liable to the plaintiffs in an action for conversion for the amount of the cheque.[73]

2(H) Distinction between Trespass and Conversion

(1) Trespass is essentially a wrong to the actual possessor and therefore cannot be committed by a person in possession. Conversion, on the other hand, is a wrong to the person entitled to immediate possession. The actual possessor is frequently, but not always, the person entitled to immediate possession, and sometimes a person

66. *Debendronath Mullick v. Odit Churn Mullick*, (1878) ILR 3 Cal 390; *Eshan Chunder Roy v. Monmohini Dassi*, (1878) ILR 4 Cal 683.
67. *Haryana Cotton Mills Co. Ltd. v. B.B. & C.I. Ry. Co.*, (1927) 28 PLR 665. See further *M.S. Chokkalingam Chettiar v. State of Karnataka*, AIR 1991 Knt. 116 (Non-payment of value of logs purchased by Forest Dept. held to amount to Detention and Conversion. Does not appear to lay down a correct proposition.)
68. *Richardson v. Atkinson*, (1723) 1 Str 576. See *Phillpott v. Kelley*, (1835) 3 A & E 106.
69. *Com. Dig. Action Trover E.*
70. *Oakley v. Lyster*, (1931) 1 KB 148 : 100 LJKB 177 : 144 LTR 363.
71. *Akola Electric Supply Co. Ltd. v. Gulbai*, ILR 1950 Nag 453.
72. *Moorgate Mercantile Company Limited v. Finch*, (1962) 2 All ER 467 : (1962) 1 QB 70 : 106 SJ 284.
73. *Kleinwort, Sons & Co. v. Comptoir National D'Escompte de Paris*, (1894) 2 QB 157.

entitled to immediate possession is allowed to sue in trespass so that the conversion may, but does not necessarily, include trespass.

(2) To damage or meddle with the chattel of another, but without intending to exercise an adverse possession over it, is a trespass. A conversion is a breach made adversely in the continuity of the owner's dominion over his goods though the goods may not be hurt.

(3) The gist of the action, in trespass is the force and direct injury inflicted; in conversion, it is the deprivation of the goods or their use.

If a person snatches my gold ring with a view to steal it, the act amounts to both trespass and conversion. But if a person borrows my ring for his use but later on sells it he will be liable for conversion only.

2(I) Action for Conversion

2(I)(i) Who can Sue?

The plaintiff, at the time of conversion, must either have a right of property in the thing, coupled with possession, or the right of immediate possession thereof.[74] Any possession, however temporary, is sufficient against a wrong-doer, *e.g.* that of a carrier. It has also been seen that a finder of goods will be in a position to sue in conversion everyone except the real owner.[75] Actual possession or an immediate legal right to possession being necessary for enabling a person to sue, a claim for conversion of goods is not maintainable by a person who had merely an equitable interest in them against another who had acquired legal title to the goods as a *bona fide* purchaser for value without notice of the prior equitable claim.[76] But a thief or a receiver of stolen property in possession has a possessory title which is good against all the world except the true owner and so he can sue every other person for conversion.[77]

2(I)(ii) Defences

The justification or defence to an action for conversion are:

1. *Lien*, either general or particular. Demand and refusal are not evidence of conversion where the party has a lien upon the chattel.[78]

2. *Right of stoppage in transit.*—This defence arises out of contract relating to the sale of goods.[79]

3. *Denial of plaintiff's right of property*, where the plaintiff sues relying on his right only,[80] or denial of possession.[81]

Where the plaintiff was in possession of the goods at the time of the conversion, the defendant cannot set up a plea of *jus tertii* (*i.e.* that a third party has superior title). Against a wrong-doer possession is a good title. But where the plaintiff was not in possession but had only the right to possess, the plea of *jus tertii* can be set up by the defendant.

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74. *Gordon v. Harper*, (1796) 7 TR 9.
75. See text and notes 58 to 64, pp. 441, 442.
76. *Mcc Proceeds Inc. v. Lehman Bros. International (Europe)*, (1998) 4 All ER 675 (CA).
77. *Costello v. Chief Constable*, (2001) 3 All ER 150 : (2001) 1 WLR 1437 (CA).
78. *Stancliffe v. Hardwick*, (1835) 2 C M & R 1; *Scarfe v. Morgan*, (1828) 4 M & W 270.
79. See the Indian Sale of Goods Act, 1930, section 50.
80. *Butler v. Hobson*, (1838) 4 Bing NC 290.
81. *Jones v. Brown*, (1856) 25 LJ Ex 345.

4. *Distress.*—Goods are taken under a distress or under an execution.

5. *Sale in market overt.*—According to English law sale of goods in market overt gives a good title to the purchaser. Such a purchaser cannot be sued for conversion if he parts with the goods or refuses to give them up on demand; but the seller can be sued if he has no title.[82] In India this doctrine does not apply, but the case will be governed by ss. 27-30 of the Indian Sale of Goods Act.

2(I)(iii) Damages

The measure of damages is in general the value of the goods at the time of the conversion, where no special damage has been sustained, and the goods have not been tendered and received back after action.[83] This would be the market value of the goods at the time of conversion.[84] When the defendant unlawfully sold shares belonging to the plaintiff and later replaced them by equal number of shares purchased at a lower price, the Privy Council held that the measure of damages was the value of shares on the date of conversion, *i.e.*, sale price less the value of replacement shares.[85] In an action against a shipowner for non-delivery of goods, the measure of damages is the value of the goods at the date of the non-delivery.[86]

If the defendant does not produce the article, the presumption will be that it is of the highest value of an article of that kind.[87] If the goods have been returned, but have fallen in price, the difference in the price at the time of the demand by the plaintiff, and at the time of the return, may be given as damages.[88]

Where damages have to be awarded to the owner of land in respect of the digging up of earth and making bricks out of it, the plaintiff would be entitled not only to the value of the site prejudicially affected, the cost of manuring and levelling it, but also to the net value of the bricks into which the earth has been converted.[89]

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82. *Peer v. Humphrey*, (1835) 2 A & E 495.
83. *Reid v. Fairbanks*, (1853) 13 CB 692; *Taylor v. Mostyn*, (1886) 33 Ch D 226; *Morgan v. Powell*, (1842) 3 QB 278; *W.B. Crizzle v. Olly Kistama*, (1901) 8 Burma LR 43; *Bansidhar v. Sant Lal*, (1887) ILR 10 All 133; *Muhammad Moshin Khan v. Turab Ali Khan*, (1909) 6 ALJR 441. Where there is wrongful conversion of goods by an agent, the measure of damages is not always the highest market value between the date of conversion and that of the trial, but it will depend upon circumstances : *Sarareddi v. Brahmayya*, (1928) 29 MLW 419 : 55 MLJ 586; *Akola Electric Co. Ltd. v. Gulbai*, ILR (1950) Nag 453.
84. *Henderson & Co. v. Williams*, (1895) 1 QB 521, 530; *Motilal v. Lakhmichand*, (1943) NLJ 71; *Hazarimal v. Champalal*, ILR 1943 Nag 272. The defendants had wrongfully converted to their own use a box of indigo belonging to the plaintiff. The plaintiff sued for the recovery of the box and damages. It was held that the measure of damages was the value of the indigo at the time of the wrongful conversion, *minus* its value at the date it was to be returned to the plaintiff, *plus* interest at six per cent for the intervening period : *Azmat Ali v. Maula Baksh*, (1885) 5 AWN 200.
In an action for wrongful conversion of certain timber, the plaintiff claimed to recover as damages the market value of the timber at the town of Rangoon to which it was being conveyed at the time of the conversion. It was held that the cost of carriage to Rangoon from the place where the wrongful conversion occurred must be deducted : *Burmah Trading Corporation v. Mirza Mohomed Ally*, (1878) 5 IA 130 : ILR 4 Cal 116. In an action for damages for the detention of ornaments pledged with the defendant which the defendant wrongfully converted to his own use, the measure of damages was the value of ornaments, less the sum for which they had been pledged: *Hasam Kasam v. Goma Jadhavji*, (1868) 5 BHC (OCJ) 140.
85. *BB MB Finance (Hong Kong) Ltd. v. Eda Holdings Ltd.*, (1991) 2 All ER 129 : (1990) 1 WLR 409 (PC).
86. *The Arpad*, (1934) p. 189.
87. *Armory v. Delamirie*, (1721) 1 Str 505.
88. *Williams v. Archer*, (1847) 5 CB 318. As to measure of damages where plaintiff has special property, see *Brierly v. Krendall*, (1852) 17 QB 937 : 85 RR 736; The Winkfield, (1902) p. 42; *Glenwood Lumber Co. v. Phillips*, (1904) AC 405.
89. *Anantharaman v. Subba Reddi*, (1951) 2 MLJ 419 : 64 MLW 858. See *Ayodhyaramyya v. Venkata Krishnam Naidu*, (1952) MWN 174.

3. DETENTION

Detention is the adverse withholding of the goods of another. The remedy in English law is an action in detinue. It lies for the specific recovery of chattels, wrongfully detained from the person entitled to the possession of them, and also for the damages occasioned by the wrongful detainer. The injury complained of is not the taking, not the misuse and appropriation of the goods, but only the detention. The plaintiff must, as in conversion, have a special and general property, and a right to immediate possession.[90] The plaintiff's object is to recover the specific goods; they must therefore be capable of identification. Detinue, considered as a tort, does not substantially differ from conversion by detention. But the conversion at common law only allowed damages. Detinue stands abolished in England by the Torts (Interference with Goods) Act, 1977 which allows for conversion remedies that were available under common law for detinue. There is no corresponding Act in India. Sections 7 and 8 of the Specific Relief Act, 1963 provide for the recovery of specific movable property at the suit of a person entitled to immediate possession generally when the defendant is an agent or a trustee for the plaintiff; compensation in money would not afford adequate relief; and it would be extremely difficult to ascertain the damage having regard to the special character of the chattel. Thus, these provisions contain reliefs which can be obtained in an action for detinue.[91]

The action for detinue is based upon a wrongful detention of the plaintiff's chattel by the defendant, evidenced by a refusal to deliver it upon demand and the redress claimed is not damages for the wrong but the return of the chattel or its value.[92] So, if a bailee unlawfully or negligently loses or parts with possession he cannot get rid of his contractual liability to restore the bailor's property on the termination of the bailment and if he fails to do so, he may be sued in detinue.[93]

Trespass *de bonis asportatis, i.e.* wrongful taking of goods is wrongful *ab initio*, whilst in detinue possession is acquired rightfully but detention of the goods is wrongful.[94]

Action.—The plaintiff must prove that he is entitled to possession of the goods, and that he demanded the goods from the defendant, but the defendant refused to deliver them and detained them. The detention necessary is an adverse or wrongful detention by the party sued, or by his servants or agents.

Justification.—A lien on the goods by the defendant is a good answer.

Damages.—In an action of detinue the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff, must be assessed as at the date of the verdict or judgment in his favour and not at that of the defendant's refusal to return the goods, and the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason.[95] A successful plaintiff in an action for detinue is entitled to have assessed separately (i) the value of the chattel at the date of assessment and (ii) damages up to that date.[96] The proper measure of damages for wrongful

90. *Bullen, Grozier v. Cundey*, (1827) 6 B&C 232.
91. *Banshi v. Goverdhan*, AIR 1976 MP 125.
92. *Dhian Singh v. Union of India*, AIR 1958 SC 274 : 1958 SCR 781.
93. *Dhian Singh v. Union of India*, AIR 1958 SC 274 : 1958 SCR 781.
94. *State v. Gangadhar*, AIR 1967 Raj 199.
95. *Rosenthal v. Alderton and Sons Ltd.*, (1946) 1 KB 374. This case has been relied on by the Supreme Court in *Dhian Singh v. Union of India*, AIR 1958 SC 274 : 1958 SCR 781.
96. *General and Finance Facilities Limited v. Cooks Cars Limited*, (1963) 2 All ER 314 : (1963) 1 WLR 644 : 107 SJ 294.

detention of property is the difference between the value of the property when seized and its value when restored.[1] In an action for wrongful detention the plaintiff is entitled besides the re-delivery of the chattel or payment of its value in the alternative also to damages for such wrongful detention.[2]

It is the option of the plaintiff to sue the bailee either for wrongful conversion of goods or the wrongful detention thereof having regard to all the circumstances of the case and the bailee cannot be heard to say anything to the contrary; the general rule is that a bailor in the event of the non-delivery of the goods by the bailee on demand is entitled, at his election, to sue the bailee either for wrongful conversion of the goods or the wrongful detention thereof. As a rough test it has been suggested to plaintiff: If market is rising, sue in detinue, if it is falling, sue in conversion. This is the normal rule but the courts have softened its rigour by importing the consideration that the plaintiff should not be allowed to delay his action in order to get the advantage of a rising market.[3]

While the measure of damages for both conversion and detinue was usually the value of the goods at the date when judgment was given, nevertheless, if the bailor knew or ought to have known at an earlier date that the conversion had taken place or was about to take place and took no immediate steps to recover the goods, the measure of damages was the value of the goods at the date of his knowledge, or supposed knowledge and not at the date when judgment was given.[4]

1. *Nundeeram Singh v. Inderchand Dogare*, (1864) Cor 89; *Shaikh Punju v. Shaikh Oodoy*, (1972) 18 WR 337. See *McIvor v. Stainbank*, (1869) 5 MHC 70.
2. *Dhian Singh v. Union of India*, AIR 1958 SC 274 : (1958) SCJ 363 : (1958) SCR 781.
3. *Dhian Singh Sobha Singh v. Union of India*, AIR 1958 SC 274 : (1958) 1 SCR 781 : (1958) 1 MLJ 93.
4. *Sachs v. Miklos*, (1948) 1 All ER 67 : 1948 KB 23 : 64 TLR 181.

CHAPTER XVII

TORTS AFFECTING IMMOVABLE AS WELL AS MOVABLE PROPERTY

SYNOPSIS

1. SLANDER OF TITLE

SLANDER OF TITLE consists of a false, malicious statement in writing, printing, or by word of mouth, injurious to any person's title to property, whether movable or immovable, and causing special damage to such person. Suppose one having an infirm title to property which he is going to sell, or to make the subject of a settlement, and another, moved by spite and malice, discloses what he believes to be a defect, though the information afterwards turns out to be untrue, and injury results to the former, an action would lie, the statement being false and malicious, and injurious to the plaintiff.[1] If lands or chattels are about to be sold by auction and a man declares in the auction room, or elsewhere, that the vendor's title is defective, that the lands are mortgaged, or that the chattels are stolen property, and so deters people from buying, or causes the property to be sold for a less price than it would otherwise have realized, this is a slander upon the title of the owner, and gives him a *prima facie* claim for compensation in damages.[2] A person who goes to intending tenants and dissuades them from taking a building on rent by making false statements as to its habitability and safety is liable in tort if he is actuated by malice, the tort being analogous to slander of title falling within the broad description of injurious falsehoods.[3]

The plaintiff, in order to sustain the action must essentially prove[4]—

(1) That the statement is false.[5] If the statement be true, if there really be the infirmity in the title that is suggested, no action lies. It is for the plaintiff to prove it to be false, not for the defendant to prove it to be true.[6]

(2) That the statement was made *male fide* and is malicious, that is, with intent to injure the plaintiff,[7] or with some indirect or dishonest motive.[8] If the statement is made in the *bona fide* assertion of the defendant's own right, real or supposed, to the

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1. *Pater v. Baker*, (1847) 3 CB 831, 868.
2. *Garrard v. Dickenson*, (1590) 1 Cro. Eliz. 196.
3. *Hargovind v. Kikabhai*, ILR 1938 Nag 348.
4. See *Nemi Chand v. Wallace*, (1907) ILR 34 Cal 495, where the same essentials are laid down.
5. *Brook v. Rawl*, (1849) 4 Ex 521.
6. *Burnett v. Tak*, (1882) 45 LT 743.
7. *Pater v. Baker*, (1847) 3 CB 831, 868; *Halsey v. Brotherhood*, (1881) 19 Ch D 386; *The Royal Baking Powder Co. v. Wright Crossley & Co.*, (1901) 18 RPC 95; *British Railway Traffic and Electric Co. v. C.R.C. Co. and the London County Council*, (1922) 2 KB 260 : 126 LT 602 : 38 TLR 190.
8. *Greers, Limited v. Pearman & Corder Limited*, (1922) 39 RPC 406, 417.

property, no action lies, *e.g.* a *bona fide* notice by a person to prevent a sale on the ground that he has a claim on the estate to be sold.[9]

(3) That the words go to defeat or injure his title to property. The property may be either real or personal; and the plaintiff's interest therein may be either in possession or reversion.

By virtue of the Defamation Act, 1952, in England in an action for slander of title, it shall not be necessary to allege or prove special damage,—

(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

(b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.[10]

Under the Indian law it is necessary to prove special damage.[11]

The medium through which the slander is conveyed, that is, whether it be through words, or writing, or print, is immaterial; though where the slander of title is conveyed in a letter or other publication the damage in consequence is likely to be more serious than where the slander of title is by words only.[12]

An action for *slander of title differs* from an action of *defamation* in several respects:—

(1) The words are not defamatory; they do not disparage the plaintiff's moral character, or his solvency, skill, business capacity, etc., they are merely an attack on something, or on his title to something.

(2) The words are equally actionable whether written or spoken.

(3) There is no presumption that the words are untrue; the *onus* lies on the plaintiff to prove them untrue.

(4) Malice is not presumed; the plaintiff must give some *prima facie* evidence that the defendant acted maliciously, or, at all events, without lawful occasion or reasonable cause.

(5) A right of action for defamatory words dies with the person defamed; but this action survives to an executor to the extent that any damage can be shown to the estate of the deceased.[13]

Claim to silver shares.—The plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in Chancery, to which the plaintiff had demurred. It was held that, without alleging special damage, the plaintiff could not sue the defendant for falsely publishing that the demurrer had been overruled; that the prayer of the petition (for the appointment of a receiver) had been granted, and that persons duly authorized had arrived at the mine.[14]

Using name of another's hotel on coaches.—Where defendants, coach-owners, used the name of a hotel on their coaches and the driver's caps, so as to suggest that

9. *Hargrave v. Le Breton*, (1769) 4 Bur 242; *Blackham v. Pugh*, (1846) 2 CB 611; *Pitt v. Donovan*, (1813) 1 Maul & Sel 639.
10. 15 & 16 Geo VI & I Eliz II, c. 66, section 3.
11. *Mohammad Din v. Sant Ram*, (1938) 40 PLR 158; *Sain Dass v. Ujagar Singh*, ILR (1940) 21 Lah 191.
12. *Malachy v. Soper*, (1836) 3 Bing NC 371 : 3 SC 723 : 2 Hodg. 217.
13. *Hatchard v. Mege*, (1887) 18 QBD 771.
14. *Malachy v. Soper*, (1836) 3 Bing NC 371, 386 : 3 Bing NC 375.

they were authorised and employed by the hotel-keeper to ply between the hotel and the railway station, but the plaintiffs were the coach-owners authorised and employed by the hotel, it was held that the defendants must not falsely hold themselves out as having the patronage of the hotel though they could freely compete with the plaintiffs for the carriage of passengers and goods to the hotel, and could advertise their intention of so doing in any honest way.[15]

Remedy.—The remedies of injunction and declaratory judgment are more appropriate than an action for damages.[16]

Damage.—Special damage sustained must be proved, and that will, in part, be the measure of damages. Special damage may consist in the property having on a sale realised a less price than it otherwise would; or in the owner being put to other unnecessary expenses in consequence.

2. SLANDER OF GOODS

Slander of goods consists of a false statement, disparaging a man's goods, published maliciously and causing him special damage. This is also known as 'trade libel'.

To maintain an action for slander of goods it is necessary to prove—

(1) That the defendant disparaged the plaintiff's goods;

(2) That such disparagement was false;

(3) That it was made maliciously.[17]

By virtue of the Defamation Act, 1952,[18] in England in an action for slander of goods, it shall not be necessary to allege or prove special damage as in the two cases specified in slander of title referred to above.

A statement by a trader that his own goods are superior to those of another trader, even if untrue and the cause of loss to the other trader, gives no cause of action. An allegation that such a statement was made maliciously could not convert a statement *prima facie* lawful into one *prima facie* unlawful.[19]

The plaintiff had for many years carried on the business of an engineer and boiler-maker under the name of Ratcliffe and Sons. The defendant published in his newspaper falsely and maliciously that the plaintiff had ceased to carry on his business and that the firm of Ratcliffe & Sons did not then exist. It was held that the defendant was liable and that evidence of general loss of business was sufficient to support the action.[20]

15. *Marsh v. Billings*, Big LC 59, 7 Cush 322.
16. *R.J. Reuter Co. Ltd. v. Mulhens*, (1954) Ch 50 : (1953) 2 All ER 1160.
17. *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, (1874) LR 9 Ex 218; *White v. Mellin*, (1895) AC 154 : 72 LT 334 : 43 WR 353 : 11 TLR 236; *Wren v. Weild*, (1869) LR 4 QB 730. The precise words complained of must be set out in the statement of claim: *Imperial Tobacco Co. v. Bonnan*, (1927) 46 CLJ 455; See also, *Hindustan Unilever Limited v. Cavincare Private Limited*, ILR (2010) 5 Del 748. For disparagement to be actionable, that is, to bring it within the tort of malicious falsehood it should have the following ingredients: (i) the impugned statement should be untrue; (ii) the statement ought to have been made maliciously, that is, without just cause or excuse; and (iii) lastly, the plaintiff, as a result of the above, ought to have suffered a special damage thereby. [See *Royal Baking Powder Company v. Wright Crossley & Co.*(1901) 18 R.P C. 95 cited with approval in *Dabur India Ltd.v.Colortek Meghalaya Pvt. Ltd.*2009 (42) PTC 88]; See also, *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd.*, ILR (2010) 4 Del 489 : (2010) 167 DLT 278.
18. 15 & 16 Geo. VI & I Eliz. II, c. 66, section 3.
19. *Hubbuck & Sons v. Wilkinson, Heywood & Clark*, (1899) 1 QB 86.
20. *Ratcliffe v. Evans*, (1892) 2 QB 524 : 66 LT 744 : 40 WR 578.

W, the proprietor of Vane's food for infants, etc., bought from Mellin and sold to his customers Mellin's Food. W affixed to the wrappers on Mellin's food a label stating that Vane's food was far more nutritious and healthful than any other. It was not proved that the statement was untrue or that it had caused any damage to the plaintiff. It was held that W's conduct did not amount to a trade libel, but was merely a puff by a rival trader.[21] The plaintiff and the defendant were the owners of newspapers circulating in the same locality, and the defendant published a statement which was untrue, that "the circulation of" his newspaper "is 20 to 1 of any other weekly paper" in the district: and "where others count by the dozen, we count by the hundred." It was held that those statements were not a mere puff but amounted to an untrue disparagement of the plaintiff's newspaper, and were actionable on proof of actual damage.[22]

3. MAINTENANCE AND CHAMPERTY

Maintenance is the officious assistance by money or otherwise proffered by a third person to either party to a suit, in which he himself has no legal interest to enable them to prosecute or defend it.[23] "The essence of the offence is intermeddling with litigation in which the intermeddler has no concern."[24] It is against public policy that litigation should be promoted and supported by those who have no concern in it.

If a person agrees to maintain a suit in which he has no interest, the proceeding is known as maintenance; if he bargains for a share of the result to be ultimately decreed in a suit in consideration of assisting in its maintenance, it is styled champerty.[25] Every champerty (*campipar titio*) is maintenance, but every maintenance is not champerty, for champerty is but a species of maintenance, which is the genus.

The law of maintenance is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defence which they have no right to make. No encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.[26]

An action for damages for maintenance will not lie in the absence of proof of special damage.[27] The success of maintained litigation, whether an action or a defence, is not a bar to the right of action for maintenance.[28]

In two cases the maintenance of a suit is lawful—

(1) Where the person maintaining has an interest in the subject-matter of the action,[29] *e.g.* master for a servant or a servant for a master, and heir, a brother, a son-in-law, a brother-in-law, a landlord defending his tenant in a suit for title. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity

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21. *White v. Mellin*, (1895) AC 154 : 72 LT 334 : 11 TLR 36. Publication of placards containing false statements injurious to trade can be restrained by injunction: *Collard v. Marshall*, (1892) 1 Ch 571.
22. *Lyne v. Nicholls*, (1906) 23 TLR 86.
23. Blackstone, iv, c. 10, section 12. See *Bradlaugh v. Newdegate*, (1883) 11 QBD 1, where several definitions are quoted with approval.
24. PER LORD FINALY, LC., in *Neville v. London 'Express' Newspaper Ltd.*, (1919) AC 368, 382.
25. *Sprye v. Porter*, (1856) 26 LJ QB 64.
26. PER LORD ABINGER, C.B. in *Prosser v. Edmonds*, (1835) 1 Y & C 481.
27. *Neville v. London 'Express' Newspaper, Ltd.*, (1919) AC 368.
28. *Neville v. London 'Express' Newspaper Ltd., supra.*
29. *Guy v. Churchill*, (1889) 40 Ch D 481 : 58 LT Ch 345 : 60 LT 473.

or affinity to the suitor gives to the man who aids him, or the interest arising from the connection of the parties.[30]

(2) Where the maintainer assisted the third person from charitable motives, believing that he was a poor man oppressed by a rich man;[31] or from religious sympathy.[32]

The doctrine as to maintenance of civil suits is not applicable to criminal proceedings. Every member of the public may set the criminal law in motion, and he is not liable unless the prosecution is malicious.[33]

The plaintiff having sat and voted as a member of Parliament, without having made and subscribed the oath appointed by a statute, the defendant, also a member of Parliament, procured C to sue the plaintiff for the penalty imposed by that statute for contravention thereof. C was a person of insufficient means to pay the costs in the event of the action being unsuccessful. After the commencement of the action the defendant gave to C a Bond of indemnity against all costs and expenses he might incur in consequence of the action. It was held that the defendant and C had no common interest in the result of the action for the penalty, that the conduct of the defendant in respect of such action amounted to maintenance, and that the action for maintenance was maintainable.[34]

By Criminal Law Act, 1967, maintenance and champerty have been abolished as crimes and as torts in England. But a champertous agreement is still void for illegality so far as the law of contracts is concerned.

Indian law.—The English law of maintenance and champerty is not in force as specific law in India either in mofussil or in the Presidency-towns.[35] A fair agreement to supply funds to carry on a suit, in consideration of the lender having a share of the property sued for, if recovered, is not to be regarded as necessarily opposed to public policy, or merely, on this ground, void. But in agreements of this kind the questions are:—

(a) Whether the agreement is extortionate and unconscionable, so as to be inequitable against the borrower; or

(b) Whether the agreement has been made, not with the *bona fide* object of assisting a claim, believed to be just, and of obtaining reasonable compensation therefor, but for improper objects, as for the purpose of gambling in litigation, or injuring others, so as to be, for these reasons, contrary to public policy.

In either of these cases, effect is not to be given to the agreement.[36]

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30. PER LORD COLERIDGE C.J. in *Bradlaugh v. Newdegate*, (1883) 11 QBD 1; *Alabaster v. Harness*, (1895) 1 QB 339.
31. *Harris v. Brisco*, (1886) 17 QBD 504.
32. *Holden v. Thompson*, (1907) 2 KB 489.
33. *Grant v. Thompson*, (1895) 72 LT 264 : 18 Cox 100.
34. *Bradlaugh v. Newdegate*, (1883) 11 QBD 1.
35. *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, (1876) 4 IA 23; ILR 2 Cal 233; *Mayor of Lyons v. East India Co.*, (1836) 1 MIA 175; *Raja Rai Bhagvat v. Debi Dayal Sahu*, (1907) 10 Bom LR 230, 249; ILR 35 IA 48; *Baldeo Sahai v. Harbans*, (1911) ILR 33 All 626; *Vasavaya v. Poosapati*, (1924) 26 Bom LR 786 : 52 IA 1; *Viranna v. Ramanamma*, (1928) MWN 5; *Pannalal v. Thansingh*, ILR 1949 Nag 663; *In re "G"* (1954) 56 Bom LR 1220.
36. *Ram Coomar v. Chunder Canto*, (1876) 4 IA 23: ILR 2 Cal 233; *Rajah Mokham, v. Rajah Rup Singh*, (1893) 20 IA 127; ILR 15 All 352; *Raghunath v. Nil Kanth*, (1893) ILR 20 Cal 843; 20 IA 112; *Debi Dayal Sahoo v. Bhan Pertap Singh*, (1903) ILR 31 Cal 433; *Lal Achal Ram v. Raja* **(Footnote No. 36 Contd.)**

To make such agreements void, "there must be something against good policy, and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary."[37] The Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoils of litigation or disturbing the peace of families and carried on from a corrupt or other improper motive.[38]

(Footnote No. 36 Contd.)
Kazim Husain Khan, (1905) 32 IA 113; 9 CWN 477; *Gossain Ramdhan Puri v. Gossain Dalmir Puri*, (1909) 14 CWN 191; *Baldev Sahai v. Harbans*, (1911) ILR 33 All 626; *Dhallu Missar v. Jiwan Singh*, (1893) PR No. 79 of 1894; *Stewart v. Ram Chand*, (1906) PR No. 26 of 1906; *Indar Singh v. Munshi*, (1919) ILR 1 Lah 124; *U Pe Gye v. Maung Thien Shin*, (1923) ILR 1 Ran 565; *Amrita Lal Baisya v. Pratap Chandra Chakrabarty*, (1929) 52 CLJ 492; *Abadi Begam Rani v. Muhammad Khalil Khan*, (1930) ILR 6 Luck 282; *Ramanamma v. Viranna*, (1931) 33 Bom LR 960 (PC); *Kalimuthu v. Mung Tha Din*, (1936) ILR 14 Ran 392; *Bisheshwar Prasad v. Jang Bahadur*, (1936) ILR 12 Luck 339; *Ram Sarup v. Court of Wards*, (1939) 42 Bom LR 307: 67 IA 50.

37. *Fischer v. Kamala Naicker*, (1860) 8 MIA 170, 187; *Gholam v. Walidad*, (1980) PR No. 70 of 1870.
38. *Chedambara Chetty v. Renja Krishna Muthu Vira Puchanja Naicker*, (1874) 13 Beng LR 509; 526, 1 IA 241; *Virbhadra Gowdu v. Guruvenkata Chariu*, (1898) ILR 22 Mad 312; *Gopal v. Gangaram*, (1895) ILR 20 Bom 721; *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*, (1884) ILR 8 Bom 323; *Siva Ramayya v. Ellamma*, (1898) 9 MLJ 17; *Chunilal v. Prabhudas*, (1897) PJ 258; *Debi Dayal Sahoo v. Bhan Pertap Singh*, (1903) ILR 31 Cal 433.

CHAPTER XVIII

TORTS TO INCORPOREAL PERSONAL PROPERTY

INCORPOREAL rights like easements are known to the common law and they have given rise to incorporeal rights like copyright and rights to trade marks and trade names which have also some attributes of property without being property in themselves. Certain statutes have also created rights which in themselves are rights to property *e.g.* patents, copyright, and registered trade marks. They are statutory forms of incorporeal property, created, protected and made terminable by the respective statutes. Their existence and enjoyment are subject to the conditions of the respective statutes. The Patents Act, 1970[1] deals with the rights in patented inventions. The Designs Act, 2000[2] deals with copyright in registered designs. The Copyright Act, 1957[3] deals with copyright in literary, dramatic, musical and artistic works, cinematograph films, records and radio broadcasts. The Trade Marks Act, 1999[4] deals with the rights in the registered trade marks. It is not convenient to deal with the subject of patents, copyright, Trade-mark, Trade-name and Industrial designs or with statutes relating to them in a book on Torts and the reader is referred to treatises specifically dealing with these subjects.

1. (XXXIX of 1970).
2. (Act 16 of 2000).
3. (XIV of 1957).
4. (Act 47 of 1999)

CHAPTER XIX

NEGLIGENCE AND ALLIED TOPICS

SYNOPSIS

1. NEGLIGENCE IN GENERAL

1(A) Meaning of Negligence

Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and

reasonable man would not do.[1] 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 and skill, by which neglect the plaintiff has suffered injury to his person or property.[2] According to Winfield, "negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff".[3] The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) Breach of the said duty; and (3) consequential damage.[4] Cause of action for negligence arises only when damage occurs for damage is a necessary ingredient of this tort.[5] But as damage may occur before it is discovered; it is the occurrence of damage which is the starting point of the cause of action.[6] The above statement of the law has been quoted by the Supreme Court from 24th edition, pp. 241, 242 of this book and approved.[7]

But a contingent liability arising from Negligence is not as such an actionable damage until the contingency occurs.[8] In cases where damage occurs before the victim really knows that he has suffered damage, the law generally allows that the time for a claim would start running from the point the claimant came to know the essence of the act or omission to which the damage was attributable in other words the substance of what ultimately came to be pleaded as his case is negligence.[9]

It must however be understood that a person may be 'responsible' for an act, but at the same time may not be 'negligent'. The Supreme Court in *National Insurance Company Ltd. v. Sinitha*[10] has explained this in the following manner:

> Illustratively, a child who suddenly runs on to a road may be "responsible" for an accident. But was the child negligent? The answer to this question would emerge by unravelling the factual position. A child incapable of fending for himself would certainly not be negligent, even if he suddenly runs on to a road. The person in whose care the child was, at the relevant juncture, would be negligent, in such an eventuality. The driver at the wheels at the time of the accident is responsible for the accident, just because he was driving the vehicle, which was involved in the accident. But considering the limited facts disclosed in the illustration can it be said that he was negligent? Applying the limited facts depicted in the illustration, it would emerge that he may not have been negligent. Negligence is a factual issue and can only be established through cogent evidence.

1. *Blyth v. Birmingham Waterworks Co.*, (1856) 11 Ex 781, 784; *Bridges v. Directors, etc., of N. L. Ry.*, (1873-74) LR 7 HL 213, 232; *Bengal Nagpur Railway Company Limited v. Tara Prasad Maity*, (1926) 48 CLJ 45; *Governor-General in Council v. Mt. Saliman*, (1948) ILR 27 Pat 207. See also, *National Insurance Company Ltd. v. Sinitha & Others*, (2012) 2 SCC 356, para 36; *Ravi Kapur v. State of Rajasthan* (2012) 9 SCC 284; *New India Assurance Co. Ltd. v. Ranni* (2011) 87 ALR 301 : (2011) 6 All LJ 488; *Shriram Education Trust v. Mitaben Anilbhai Patel* (2011) 52 (1) GLR 742 : (2011) 104 AIC (Sum 21) 13; *Shivanand Doddamani (Dr.) v. State of Karnataka*, (2010) 5 Kant LJ 155 : (2010) 4 AIR Kant R 1057: (2010) 94 AIC (Sum 16) 10: (2010) 3 KCCR 1832.
2. *Heaven v. Pender*, (1883) 11 QBD 503; *Swan v. North British Australasian Co.*, (1862) 7 H & N 603; *Swami Nayudu v. Subramania*, (1864) 2 MHC 158; *Nazir Abbas v. Raja Ajam Shah*, ILR 1947 Nag 955; *D & F Estates Ltd. v. Church Commissioners*, (1988) 2 All ER 992 (HL) approving the dissenting opinion of LORD BRANDON *in Junior Books Ltd. v. Veitchi Co. Ltd.*, (1982) 3 All ER 201 (HL), pp. 216 to 218 : (1983) AC 520.
3. WINFIELD AND JOLOWICZ Tort, 12th edition, p. 69 referred to in the *Madhya Pradesh State Road Transport Corporation v. Basantibai*, 1971 ACJ 328 (p. 330) : 1971 MPLJ 706. See further *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*, (1994) 4 SCC 1 : JT 1994 (3) SC 492, p. 502 : 1994 ACJ 902; *Sidhraj Dhadda v. State of Rajasthan*, AIR 1994 Raj 68, pp. 73, 74 (Damage is a necessary element); *Poonam Sharma v. Union of India*, AIR 2003 Del 50, p. 58.
4. *Poonam Verma v. Ashwin Patel*, AIR 1996 SC 2111, p. 2116 : (1996) 4 SCC 332; See also, *Nagrik Sangarsh Samiti v. Union of India*, ILR (2010) 4 Del 293.
5. *Cartlege v. E. Jopling & Sons Ltd.*, (1963) 1 All ER 341 : (1963) 2 WLR 210 : 1963 AC 758 (HL); *Byrne v. Hall Pain & Foster (a firm)*, (1999) 2 All ER 400 (CA), p. 408. *Kishorilal v. Chairman Employees State Insurance Corpn.*, (2007) 4 SCC 579 para 26 : AIR 2007 SC 1819 (This book is referred).
6. *Cartlege v. E. Jopling & Sons Ltd.*, (1963) 1 All ER 341 : (1963) 2 WLR 210 : 1963 AC 758 (HL)
7. *Jocob Mathew v. State of Punjab*, (2005) 6 SCC 1 (paras 10 & 48(1)), pp. 12, 32 : AIR 2005 SC 3180. *Post Graduate Institute of Medical Education and Research v. Jaspal Singh*, (2009) 7 SCC 330 para 15 : (2009) 7 JT 527 (This book is referred).
8. *Law Society v. Sephton & Co.*, (2006) 3 All ER 401 (HL).
9. *Haward v. Fawcetts (a firm)*, (2006) 3 All ER 497 (HL).
10. (2012) 2 SCC 356

Cause of action for negligence accrues when damage that is real damage, as distinct from purely minimal damage, is suffered.[11] A state of anxiety produced by some negligent act or omission but falling short of a clinically recognisable psychiatric illness does not constitute damage sufficient to complete a tortious cause of action. Further, a risk produced by a negligent act or omission of an adverse condition arising at some time in the future does not constitute damage sufficient to complete a tortious cause of action. The victim of the negligence must wait for the event when the risk materialises. The risk of the further disease is not actionable and neither is psychiatric illness caused by contemplation of that risk. But if some physical injury has been caused by the negligence, the victim can recover damages not simply for his injury in its present state but also for the risk that the injury may worsen in the future and for the present ongoing anxiety that may happen. These principles were reaffirmed recently in *Roshwell v. Chemical & Insulating Co. Ltd. Re Pleural Plaque Litigation*.[12] The claimants in the case had been negligently exposed to asbestos in the course of this employment and developed pleural plaque which are areas of fibrous thickening of pleural membrane which surrounds the lungs. They cause neither symptoms nor other asbestos related diseases. But a diagnosis of pleural plaques discloses the presence of in the lungs of asbestos fibres which cause life threatening diseases and may cause the person to contemplate his future with anxiety or even suffer clinical depression. The claims in these cases were rejected by the House of Lords for want of actionable injury.

"The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty."[13] "In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing:"[14]

In the case of *Jacob Mathew*,[15] the Supreme Court pointed out the difference between civil and criminal negligence. "For negligence to amount to an offence, the

11. *Edehomo v. Edehomo*, [2011] 1 WLR 2217.
12. (2007) 4 All ER 1047 (H.L.) paras 2, 65, 66, 67. For comments see Gemma Turton, 'Defining damage by the House of Lords', (2008) 7 Modern Law Reviews 1009.
13. PER LORD MACMILLAN in *Donoghue v. Stevenson*, (1932) AC 562, 618-19 : 48 TLR 494. *Post Graduate Institute of Medical Education and Research v. Jaspal Singh, (Supra)* (para 14).
14. PER LORD WRIGHT in *Lochgelly Iron and Coal Co. v. M. Mullan*, (1934) AC 1, p. 25 : 149 LT 526 : 49 TLR 566; *Poonam Sharma v. Union of India, supra*.
15. (2005) 6 SCC 1. This case has further been clarified and followed in *V.Kishan Rao v. Nikhil Super Speciality Hospital* (2010) 5 SCC 513; See also, *Marghesh K. Parikh v. Dr. Mayur H. Mehta*, (2011) 1 SCC 31; *State of Karnataka v. Kumayian*, ILR 2010 KAR 3555 : (2010) 4 Kant LJ 560 : (2010) 3 AIR Kant R 140.

element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis of prosecution."[16]

1(B) Existence of Duty

1(B)(i) Conditions for Existence of Duty

The existence of a duty situation or a duty to take care is thus essential before a person can be held liable in negligence.[17] Normally the question of 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 recognised.[18] A privilege or liberty of yesterday may become duty of today for the law of negligence is consistently influenced and transformed by social, economic and political considerations.[19]

1(B)(i)(a) Foreseeability and Proximity

The general principle of foreseeability and proximity applicable in solving cases presenting the existence or otherwise of a new duty situation was laid down by LORD ATKIN in the celebrated case of *Donoghue v. Stevenson*[20] in the following words: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be, persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[21] The duty of care is to avoid acts and omissions which one can reasonably foresee would be likely to injure another. This is the principle of foreseeability. But this duty is not owed to everyone who is likely to be injured but only to persons who are so closely and directly affected by one's act that it is reasonable for one to have them in contemplation. This is the principle of proximity "which refers to such a relation between the parties as renders it just and reasonable that liability in negligence may be imposed."[22] In *Donoghue v. Stevenson*,[23] LORD MACMILLAN said: "The conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed."[24]

16. (2005) 6 SCC 1, p. 33 (para 48.5). *Martin F.D'souza v. Mohd. Ishaq*, (2009) 3 SCC 1 paras 43, 44 : AIR 2009 SC 2049. This case has been held to be per incurium *V.Kishan Rao v. Nikhil Super Speciality Hospital* (2010) 5 SCC 513. It has been held that the directions given in Paragraph 106 of the Judgment in D'Souza case is contrary to the Act itself apart from being contrary to the directions issued in the *Jacob Mathew* case (supra), the *Indian medical Association* case (1995) 6 SCC 651 and also in the *J.J.Merchant case* (2002) 6 SCC 635.
17. *Jeet Kumari Poddar v. Chittagang Engineering and Electrical Supply Co. Ltd.*, (1946) ILR 2 Cal 433; *Madhya Pradesh Road Transport Corporation v. Basanti Bai*, 1971 ACJ 328 : 1971 MPLJ 706; *United India Insurance Co. Ltd. v. Union of India* (2011) 4 ALD 465.
18. *Madhya Pradesh Road Transport Corporation v. Basanti Bai, supra; Donoghue v. Stevenson*, (1932) AC 562 : 147 LT 281 (HL); *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, (1964) AC 465 : (1963) 3 WLR 101; *Home Office v. Dorset Yacht Co. Ltd.*, (1970) 2 All ER 294 (HL); *Anns v. London Borough of Merton*, (1977) 2 All ER 492 (HL); *Junior Books Ltd. v. Veitchi Co. Ltd.*, (1982) 3 All ER 201 : 1983 AC 520 (HL).
19. *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*, (1994) 3 JT 492, p. 502 : (1994) 1 SCC 1 : 1994 ACJ 902.
20. 1932 AC 562 : 147 LT 281 : 48 TLR 494 (HL).
21. 1932 AC 562., (p. 580).
22. *Davis v. Radcliffe*, (1990) 2 All ER 536 (PC), p. 540.
23. 1932 AC 562 : 147 LT 281 : 48 TLR 494 (HL).
24. 1932 AC 562, p. 619.

In this case the plaintiff purchased a bottle of ginger beer manufactured by the defendants and suffered from severe gastro-enteritis on consuming a part of the contents of the bottle because it contained the decomposed remains of a snail. On a plea of demurrer, the HOUSE OF LORDS held that the plaintiff's pleading disclosed a relevant cause of action and in holding so, it recognised a new duty described as follows: 'A manufacturer of 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 reasonable care in the preparation or putting up the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care.'[25]

Then in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*,[26] again a new duty was recognised. 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 that 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 the carelessness of others."[27]

The principle of foreseeability and proximity laid down by LORD ATKIN was again affirmed in *Home Office v. Dorset Yacht Co. Ltd.*,[28] in which case, some borstal trainees escaped one night due to the negligence of the Borstal Officers who contrary to orders were in bed. The trainees caused damage to a yacht, the owner of which sued the Home Office for damages. A preliminary issue was raised whether on the facts pleaded, the Home Office or its servants owed any duty of care to the owner of the yacht. It was held that the causing of damage to the yacht by the borstal trainees ought to have been foreseen by the Borstal Officers as likely to occur if they failed to exercise proper control and supervision and, therefore, the officers *prima facie* owed a duty of care to the owner of the yacht. In holding so, LORD REID observed: "There has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *Donoghue v. Stevenson* may be regarded as a milestone, and the well-known passage in LORD ATKIN'S speech should, I think, be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion."[29]

In *Anns v. London Borough of Merton*,[30] which was a case of pure economic loss and was therefore later on overruled, the general principle came to be stated in very wide terms. As will be seen hereinafter, subsequent decisions explained and pointed out various limitations to the general principle stated in this case. But to appreciate how the law developed, it is desirable to notice this case and the general principle stated therein. In this case the plaintiffs were lessees under long leases of certain flats

25. 1932 AC 562 : 147 LT 281 : 48 TLR 494 (HL).
26. (1964) AC 465 : (1963) 3 WLR 101 : (1963) 2 All ER 575 (HL).
27. (1964) AC 465, (p. 536). *Hedley Byrne's* case was explained and applied in *Smith v. Eric S. Bush (a firm)*, (1989) 2 All ER 514 : (1990) 1 AC 831 (HL). For these cases see Chapter XXI, title 3, p. 634.
28. (1970) 2 All ER 294 : (1970) 2 WLR 1140 : (1970) AC 1004 (HL).
29. (1970) 2 All ER 294 : (1970) 2 WLR 1140 : (1970) AC 1004 (HL).
30. (1977) 2 All ER 492 : (1978) AC 728 : (1977) 2 WLR 1024 (HL). *Anns* case was over-ruled by the House of Lords in *Murphy v. Brentwood District Council*, (1990) 2 All ER 908 : (1991) 1 AC 398 (HL).

built in 1962. The owners who were also the builders were the first defendant. The local authority *i.e.* the Borough Council was the other defendant. In 1970, structural movements began to occur resulting in cracks in the walls, sloping of floors etc. The plaintiffs' case was that these were due to the inadequate foundation, there being a depth of two feet six inches only instead of three feet or deeper as shown in the approved plans. As against the local authority the plaintiffs' claim was based on negligence in failing to carry out necessary inspection of the foundation before it was covered up. The local authority was enabled through building bye-laws made under the Public Health Act, 1936 to supervise and control the construction of buildings in their area and in particular the foundations of buildings. The HOUSE OF LORDS held that the Act and the bye-laws did not impose a duty to inspect but conferred a discretionary power but this by itself did not exclude the existence of the common law duty to take care and that the local authority was under a duty to take reasonable care to secure that a builder did not cover in foundations which did not comply with the bye-laws and this duty was owed to owners and occupiers of the building other than the builder who might suffer damage as a result of the construction of inadequate foundations. Accordingly the local authority was held liable to the plaintiffs if it were proved that in failing to carry out an inspection it had not properly exercised its discretion and had failed to exercise reasonable care in its acts or omissions to secure that the bye-laws applicable to foundations were complied with, or that the Inspector having assumed the duty of inspecting the foundation had failed to take reasonable care to ensure that the bye-laws were complied with. In holding so, LORD WILBERFORCE who made the leading speech observed as follows: "Through the trilogy of cases in this House, *Donoghue v. Stevenson*, (1932 AC 562 : 147 LT 281 : 48 TLR 494), *Hedley Byrne & Co. Ltd. v. Haller Partners Ltd.*, (1964 AC 465 : (1963) 3 WLR 101) and *Home Office v. Dorset Yacht Co. Ltd.*, (1970 AC 1004 : (1970) 2 WLR 1140) the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrong-doer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."[31]

I(B)(i)(b) Just and Reasonable : Incremental Development

Anns case before it was finally overruled came up for consideration before the House of Lords and the Privy Council in later cases which have explained the two stage test laid down by LORD WILBERFORCE and pointed out its limitations. In *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*,[32] it was observed that the temptation to treat the aforementioned passage from the speech of LORD WILBERFORCE as being itself of a definitive character should be resisted.[33] It was further laid down that "in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into

31. (1977) 2 All ER 492 (HL), p. 498; See also, *State of Maharashtra v. Dhananjay Laxmanrao Bhagat* (2010) 2 AIR Bom R 583.
32. (1984) 3 All ER 529 : (1985) A 210 : (1984) 3 WLR 953 (HL).
33. (1984) 3 All ER 529, p. 534.

consideration whether it is just and reasonable that it should be so."[34] In that case the plaintiffs were building owners. The approved plan relating to drainage system was not adhered to during the building operation. The local authority became aware of the building owners' non-compliance with the approved plan but took no action. Later the drainage system so constructed was found to have substantially failed and it had to be reconstructed. The building owners sued the local authority alleging that it was in breach of the duty owed to them to ensure that the drainage system being installed complied with the approved plans. Negativing the existence of any duty in favour of the plaintiffs, the HOUSE OF LORDS held that the object of the statutory provisions was to safeguard the occupiers of houses built in the local authority's area and also members of the public generally against dangers to their health which may arise from defective drainage installation and not to safeguard building owners against the loss resulting from their failure to comply with approved plans. It was pointed out that *Anns* case was a case of a subsequent owner occupier and not of a building owner who had himself been responsible in not adhering to the approved plan.[35] *Anns* case was again distinguished by the House of Lords in *Curran v. Northern Ireland Co-ownership Housing Association Ltd.*,[36] In this case the plaintiff's predecessor in title built an extension to a house with the aid of an improvement grant made by the Northern Ireland Housing Executive. The Housing (N.I.) Order, 1976 required the improvement work to be 'executed to the satisfaction of the Executive'. The plaintiffs after purchase of the house, discovered that the extension had been so defectively constructed that it needed to be rebuilt at a considerable cost. In an action for damages against, *inter alia*, the Housing Executive, the plaintiffs alleged that the Executive had been negligent in causing or permitting the extension to be built defectively. The House of Lords accepted the explanation of *Anns* case as given in *Peabody Donation Fund's* case and held that the Housing Executive owed no duty of care to the recipients of improvement grants or their successors essentially for the reason that the Executive had no power of control over building operations once approval for grant was given and so it would be not fair and reasonable to impose a duty of a care on the Executive. The passage from LORD WILBERFORCE'S speech in *Anns*[37] was further explained by the Privy Council in *Yuen Kum-Yen v. Attorney General of Hongkong*.[38] It was observed that the first stage of test in the two stage test laid down by LORD WILBERFORCE was a composite test requiring the presence of foreseeability of harm and close and direct relationship of proximity before a duty of care could be inferred.[39] It was further observed that the second stage of LORD WILBERFORCE'S test which implies policy considerations is one which will rarely have to be applied.[40] In this case it was held by the Privy Council that Commissioner of Deposit taking companies having regulatory power under a Hong Kong Ordinance in regard to refusing or revoking registration did not owe any duty of care to the depositors who lost their deposits as the company was run fraudulently and speculatively. This conclusion was reached on the ground that there was absence of close and direct relationship of proximity between the Commissioner and the

34. (1984) 3 All ER 529 : (1985) A 210 : (1984) 3 WLR 953 (HL).
35. See further; *Investors in Industry Commercial Properties Ltd. v. South Bedforshire DC*, (1986) 1 All ER 787 : (1986) QB 1034 : (1986) 2 WLR 937 (CA). (A local authority owes no duty of care to an original building owner who though not personally careless acts in breach of the building regulations in reliance on professional advice of architects, engineers or contractors.)
36. (1987) 2 All ER 13 : (1987) AC 718 (HL).
37. See text and footnote 29, p. 461, *supra*.
38. (1987) 2 All ER 705 : (1988) AC 175 (PC).
39. (1987) 2 All ER 705 : (1988) AC 175 (PC).
40. (1987) 2 All ER 705 : (1988) AC 175 (PC). See further *Minorities Finance Ltd. v. Arthur Young*, (1989) 2 All ER 105 (The Bank of England was not under a legal obligation to an individual commercial bank to exercise reasonable care and skill in carrying out its function of supervising the operation of commercial banks.)

prospective depositors, although it was reasonably foreseeable that if an uncreditworthy company were to be placed on or allowed to remain on the register, persons who might deposit money with it would be at a risk of losing their money. It may here be mentioned that the Commissioner had no control over the day to day management of the companies and the Ordinance had not instituted a far reaching and stringent supervision system to reasonably warrant an assumption by the depositors that all registered companies were sound and creditworthy.

Yuen Kun-Yen's case was followed by the Privy Council in *Davis v. Radcliffe*.[41] In this case the Treasurer and Finance Board having licensing and regulatory powers over a bank under the Banking Act of 1975 of the Isle of Man were held to owe no duty of care to depositors who lost their deposits on the failure of the bank. LORD GOFF who delivered the judgment of the Privy Council stressed the following points: "(1) Foreseeability of loss or damage provides of itself no sufficient criterion of liability, even when qualified by a recognition that liability for such loss or damage may be excluded on grounds of policy". (2) "It is also necessary to establish what has long been given the label of 'proximity' an expression which refers to such a relation between the parties as renders it just and reasonable that liability in negligence may be imposed on the defendant for loss or damage suffered by the plaintiff by reason of the act or omission of the defendant of which the complaint is made". (3) "It is not desirable, atleast in the present stage of the development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist." (4) "It is considered preferable that the law should develop categories of negligence incrementally and by analogy with decided categories".[42] The decisions in *Yuen Kun-yeu*[43] and *Davis*[44] were followed by the Supreme Court in *Pramod Malhotra v. Union of India*.[45] In this case the Reserve Bank of India (RBI) granted a licence under section 23 of the Banking Regulation Act, 1949 to *Sikkim Banking Ltd.*, (SBL) functioning in Sikkim to open a branch in Delhi in 1997 though an inspection by RBI had found several short comings and deficiencies in its functioning. The depositors in this branch because of the poor financial condition of the Bank were allowed only 9.037% of their deposits under an Amalgamation Scheme by which SBL was amalgamated with Union Bank of India (UBI). The depositors sued for compensation against the RBI for negligence in granting permission to SBL to open the branch in Delhi. The Supreme Court relying upon *Yuen Kun-yeu* and *Davis* held the RBI not liable. The court observed: "The relationship of the RBI with creditor or depositors of SBL is not such that it would be just or reasonable to impose a liability in negligence on RBI."[46] The case thus adopts the incremental approach as approved in *Davis* by the Privy Council and later also by the House of Lords in *Caparo*[47] and *Murphy*.[48]

The composite nature of the first stage of the two stage test laid down in *Anns* was also emphasised in *Hill v. Chief Constable of West Yorkshire*.[49] In this case the facts were that a person named Peter Sutcliffe committed a number of murders and attempted murders of young women. The mother of the last victim before the criminal was apprehended sued the Chief Constable in negligence for damages.

41. (1990) 2 All ER 536 : (1990) 1 WLR 821 : 1990 BCC 472 (PC).
42. (1990) 2 All ER 536, p. 540.
43. See footnote 8.
44. See footnote 41.
45. *Pramod Malhotra v. Union of India*, (2004) 3 SCC 415 : AIR 2004 SC 3338.
46. *Pramod Malhotra v. Union of India*, (2004) 3 SCC 415, p. 428 (para 25).
47. Text and footnote 54, p. 466.
48. Text and footnote 57, p. 466.
49. (1988) 2 All ER 238 : (1989) 2 WLR 1049 : (1989) AC 53 (HL).

Negligence lay, according to the plaintiff, in not apprehending the criminal earlier because of a number of mistakes in the investigation of earlier offences. It was held by the House of Lords that the police did not owe any general duty of care to the individual members of the public to identify and apprehend an unknown criminal even though it may be reasonably foreseeable that harm was likely to be caused to a member of the public if the criminal was not detected and apprehended. It was again laid down that "foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish proximity of relationship"[50] which was lacking in the case. It was further held that public policy also required that there should be no liability. Similar is the case of *Calveley v. Chief Constable of the Merseyside Police*[51] where it was held that a police officer investigating a suspected crime owes no duty of care to the suspect so as to make him liable in negligence, as distinguished from malicious prosecution, nor does he owe any duty of care while investigating charges in a domestic inquiry against another police officer so as to make him liable in negligence, as distinguished from the tort of misfeasance in public office. Public policy, apart from other considerations requires fearless and efficient investigation without the shadow of a potential action for damage for negligence. The House of Lords in *Leigh & Sillavan v. Aliakmon Shipping Co.*,[52] also explained the passage from the speech of LORD WILBERFORCE in *Anns* and made two observations in this context: (1) The passage does not provide a universally applicable test of the existence and scope of duty of care in the law of negligence, and (2) The passage deals with the approach to the question of existence

50. (1988) 2 All ER 238, p. 241.
51. (1989) 1 All ER 1025 (HL). On the ground of public policy, Police have not been held liable in negligence while investigating a crime: *Alexandrou v. Oxford*, (1993) 4 All ER 328 : (1991) 3 Admin LR 675 (CA). *Osman v. Ferguson*, (1993) 4 All ER 344 (CA). Police are also under no duty of care to protect road users or to warn them of hazards discovered by the Police while going about their duties: *Ancell v. McDermott*, (1993) 4 All ER 355 : (1993) RTR 235 (CA). A serviceman owed no duty of care to his fellow serviceman in battle condition: *Mulcahy v. Ministry of Defence*, (1996) 2 All ER 758 (CA) pp. 771, 772. A police inspector who failed to help a woman police constable, while standing nearby, when she was attacked by a woman prisoner was held to be in breach of police duty and the Chief Constable was vicariously held liable in negligence: *Costello v. The Chief Constable of Northumbria Police*, (1999) 1 All ER 550 : (2001) 1 WLR 1437 (CA). Police required to interview a murder suspect considered to be mentally disordered in presence of 'an appropriate adult' was held to owe no legal duty to be protective of the appropriate adult's psychological well-being but was held to be under a duty to provide counselling within a short time after exposure to the trauma undergone as a result of what the appropriate adult heard and witnessed during investigation and interview: *Leach v. Chief Constable of Gloucestershire Constabulary*, (1999) 1 All ER 215 (CA). The crown prosecution service constituted by the prosecution of offences Act, 1985 an independent autonomous agency to review police decision to prosecute and to conduct prosecution on behalf of crown owes no duty of care to those it prosecutes : *Elguzouli-Daf v. Commr. of Police*, (1995) 1 All ER 833 : (1995) QB 335 : (1995) 2 WLR 173 (CA). The Chief Constable has a wide discretion in deploying police force for policing duties having regard to the number of men available to him, his financial resources, the rights of persons in the area and the necessity of balancing the conflicting rights e.g. the right to trade and the right to protest peacefully: *R. v. Chief Constable of Sussex.*, (1999) 1 All ER 129 : (1999) 2 AC 418 : (1998) 3 WLR 1260 (HL). Police Commr. may be held liable for not protecting a police officer from harassment by other police officers : see p. 561. Police owes no duty of care to prevent a person suffering injury in foreseeable attempt to escape from police custody: *Vellino v. Chief Constable of Greater Manchester*, (2002) 3 All ER 78 (CA). When entrusting a police officer with a gun, the police authorities owe to the public at large a duty to take reasonable care to see that this officer is a suitable person to be authorised with a dangerous weapon less by any misuse he inflicts personal injury, whether accidentally or intentionally on others : *The Attorney General v. Craig Hartwell*, (2004) U.K. PC 12. Police do not owe any duty of care to victim of crime: *Brooks v. Metropolitan Police Commissioner*, (2005) 2 All ER 489 (HL). In this case Lord Roger at p. 575 (para 38) said that prosecutors and police officers are under an ethical and professional duty, nevertheless it does not translate into a legal duty and Lord Nicholas said such a duty would cut across the freedom of action the police ought to have when investigating a crime. The principle laid down in Hills case and affirmed in Brooks case was reaffirmed in *Smith v. Chief Constable of Sussex Police*, (2008) 3 All ER 277 (H.L.).
52. (1986) 2 All ER 145 : (1980) AC 785 : (1980) 2 WLR 902 (HL).

and scope of a duty of care in a novel type of factual situation which is not analogous to any factual situation in which such a duty has already been authoritatively held to exist or held not to exist and so the passage cannot be used as a means of reopening issues long settled by past decisions.[53]

In *Caparo Industries plc v. Dickman*,[54] the House of Lords noticed that cases subsequent to *Anns* have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and if so, what is its scope.[55] After referring to the proximity principle which involves fairness, LORD BRIDGE observed: "The concepts of proximity and fairness—are not susceptible of any such precise definition as would be necessary to give to them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of BRENNAN J in the High Court of Australia in *Sutherland Shire Council v. Heyman*, (1985) 60 ALR 1 at 43-44 where he said: "It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories rather than by a massive extension of the *prima facie* duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed".[56] Finally the House of Lords in *Murphy v. Brentwood District Council*[57] confirmed the criticism in later decisions of the generalised principle stated by Lord Wilberforce in *Anns* case and overruled that case as being one purely in the domain of economic loss which aspect is considered later.[58] The decision in *Murphy* reaffirmed that the correct principle is stated by BRENAN J. in the quotation from his judgment extracted above.[59]

The tort of negligence as developed after *Anns* was open to abuse as graphically described by Lord Templeman (with whom other Law Lords agreed) in *C.B.S. Songs Ltd. v. Amstrad Consumer Electronics plc*.[60] as follows:

> "My Lords, it is always easy to draft a proposition which is tailor-made to produce the desired result. Since *Anns. v. Merton London Borough*, (1977) 2 All ER 492 : (1978) AC 728 put the floodgates on the jar, a fashionable plaintiff alleges negligence. The pleading assumes that we are all neighbours now, Pharisees and Samaritans alike, that foreseeability is a reflection of hindsight and that for every mischance in an accident-prone world someone solvent must be liable in damages. In *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*, (1984) 3 All ER 529 : (1985) AC 210 the plaintiffs were the authors of their own misfortune but sought to make the local authority liable for the

53. (1986) 2 All ER 145, pp. 153, 154. (See further for this case text and footnote 15, p. 473, *infra*.)
54. (1990) 1 All ER 568 : (1990) 2 AC 605 : (1990) 2 WLR 358 (HL). (For this case see Chapter XXI, title 4, p. 635).
55. (1990) 1 All ER 568, p. 574.
56. (1990) 1 All ER 568, p. 574.
57. (1990) 2 All ER 908 : (1991) 1 AC 398 : (1990) 3 WLR 414 (HL).
58. See text and footnotes 85 to 93 and 1 to 7 and 8 to 10, pp. 470 to 472.
59. (1985) 60 ALR 1 at 43-44.
60. (1988) 2 All ER 484 (HL).

> consequences. In *Yuen Kun-yeu v. A.G. of Hong Kong*, (1987) 2 All ER 705 : (1988) AC 175 the plaintiff chose to invest in a deposit-taking company which went into liquidation; the plaintiff sough to recover his deposit from the commissioner charged with the public duty of registering deposit-taking companies. In *Rowling v. Takaro Properties Ltd.*, (1988) 1 All ER 163 : (1988) 2 WLR 418 a claim for damages in negligence was made against a minister of the Crown for declining in good faith to exercise in favour of the plaintiff a statutory discretion vested in the minister in the public interest. In *Hill v. Chief Constable of West Yorkshire*, (1988) 2 All ER 238 : (1988) 2 WLR 1049 damages against a police force were sought on behalf of the victim of a criminal. In the present proceedings damages and an injunction for negligence are sought against Amstrad for a breach of statutory duty which Amstrad did not commit and in which Amstrad did not participate.[61]

The incremental approach of development to cover new situation as laid down by BRENAN J. of Australia and as now approved in *Caparo*[62] and *Murphy*[63] will to a large extent prevent the abuse of the tort.

The passages from the speeches of LORD REID in *Home Office v. Dorset Yacht Co., Ltd.*,[64] and LORD WILBERFORCE in *Anns v. Merton London Borough*[65] which have been noticed above were applied in a new situation in *Junior Books Ltd. v. Veitchi Co. Ltd.*,[66] In this case, the respondents (the owners) engaged a building company to build a factory for them. The owners' architects nominated the appellants (the sub-contractors) to lay a concrete floor in the main production area of the factory. There was no privity of contract between the owners and the sub-contractors. Two years after the floor was laid, it developed cracks. The owners brought an action against the sub-contractors in negligence claiming damages for the cost of replacing the floor and for the consequent economic loss arising during the period of replacement. The sub-contractors raised a preliminary issue that the fact pleaded did not disclose a cause of action for the reason that in the absence of contractual relationship they could not be held liable as there was no plea that the defective floor was a danger to the health or safety of any person or constituted a risk of damage to any other property of the owners. The HOUSE OF LORDS negativing the sub-contractors' plea held that where the proximity between the person who produced faulty work or the faulty article and the user was sufficiently close, the duty of care owed by the producer to the user extended beyond a duty merely to prevent harm being done by the faulty work or article and included a duty to avoid faults being present in the work or article itself, so that the producer was liable for the cost of remedying defects in the work or article or for repairing it and for any consequential economic or financial loss. It was further held that the proximity between the parties was sufficiently close for the sub-contractors to owe a duty of care to the owners not to lay a defective floor which would cause the owners financial loss. This conclusion was reached on the following considerations: (1) The owners or their architects had nominated the sub-contractors as specialists sub-contractors and the relationship between the parties fell only just short of contractual relationship; (2) The sub-contractors must have known that the owners relied on the sub-contractors' skill and

61. P. 471-472 (The cases mentioned in this passage are all discussed above in this chapter, pp. 460 to 466.)
62. See footnote 54, *supra*.
63. See footnote 57.
64. Pp. 461-462, *supra*.
65. Pp. 462-462, *supra*.
66. (1982) 3 All ER 201 : (1983) AC 520 : (1982) 3 WLR 477 (HL).

experience to lay a proper floor and (3) The damage caused to the owners was a direct and foreseeable result of the sub-contractors' negligence in laying a defective floor.

An example of an Indian case which applied the principle of foreseeability and proximity in a new situation is found in the decision of the Madhya Pradesh High Court in *Madhya Pradesh Road Transport Corporation v. Basanti Bai*.[67] In that case a driver of the appellant was stabbed by a ruffian while going to join his duty in early hours of the morning. There was a communal riot in the city and the authorities had promulgated curfew order. The question before the court was whether the appellant was negligent in not providing adequate arrangement for the safety of the deceased while he was going to join his duty. The court after referring to *Donoghue v. Stevenson*,[68] *Hedley Burne & Co. Ltd. v. Heller and Partners Ltd.*,[69] and *Home Office v. Dorset Yacht Co., Ltd.*,[70] observed: "These cases clearly establish that a new duty-situation can be recognised by Courts and that in determining whether in a given situation, not covered by authority, a duty to take care exists, guidance is to be taken from the principle stated by LORD ATKIN in *Donoghue v. Stevenson*."[71] On applying the said principle the court held the appellant liable and expressed itself as follows: "Normally an employer owes no duty of care for the safety of his employee while the employee is proceeding to the place of employment from his house. The point, however, is whether the same rule prevails when the situation is abnormal and when as a result of outbreak of violence in the city, the law enforcement authority promulgate curfew order requiring citizens to be within doors as the only means which can reasonably ensure their safety. In such a situation, when every citizen is expected to be within doors as a matter of safety, if an employer requires his employee to come to the place of employment in early hours of the morning, it is reasonably foreseeable that the employee is likely to suffer injury at the hands of some ruffian while on the way to join his work unless adequate arrangements are made by the employer for the safety of the employee. Requiring an employee to come to work in such a situation is itself such an act from which harm to the employee is foreseeable and the employer being closely and directly connected with the act of requiring him to join his work, the employer must have his safety in contemplation. On the principle enunciated by LORD ATKIN in *Donoghue v. Stevenson*, the employer must, in the circumstances prevailing in the instant case, be held to owe a duty of care to the employee while he was on his way to his place of work. The employer should have taken adequate care for the safety of the employee while he was on his way, either by providing safe transport or some persons to accompany and guard him. In case it was not possible for the employer to make any arrangement for the safety of the employee, the employer should have temporarily closed down the business, as the only alternative of avoiding harm to the employee. It has also to be kept in view that the employee, in the instant case, unlike a police constable or a fireman, was not in such an employment where it was expected of him from the nature of employment to face the hazards of a riot".[72]

The proximity principle, as already seen, limits the persons to whom a duty is owed. They are referred to as neighbours by LORD ATKIN in *Donoghue v. Stevenson*,[73] and described to be those "who are so closely and directly affected by

67. 1971 ACJ 328 : 1971 MPLJ 706.
68. Pp. 460-461, *supra*.
69. Pp. 460-461, *supra*.
70. Pp. 460-462, *supra*.
71. 1971 ACJ 328, (332) : 1971 MPLJ 706.
72. 1971 ACJ 328, (332, 333) : 1971 MPLJ 706 (G.P. SINGH, J.).
73. 1932 AC 562 (HL) p. 580 : 147 LT 281 : 48 TLR 494.

my act that I ought reasonably to have them in contemplation".[74] It has further been seen that the proximity principle realistically "refers to such a relation between the parties as renders it just and reasonable that liability in negligence may be imposed."[75] In other words the relationship must have been such that in justice and fairness the defendant like a reasonable man ought to have kept the plaintiff in contemplation while doing the act of which complaint is made. It is in this sense that the test of proximity may be briefly described as foreseeability of a reasonable man. The proximity principle does not require physical proximity. A manufacturer has no physical proximity with the consumer of his product yet in the case of *Donoghue v. Stevenson*,[76] he was held to owe a duty to the consumer. It is also not necessary that the person wronged should be identifiable by the wrong-doer if the class to which he belongs comes within the scope of reasonable foreseeability. For example, drivers of motor-vehicles owe a duty of care to other road users and the claim of a road user who is injured by the negligence of the driver of a motor-vehicle in a road accident cannot be defeated on the ground that the defendant could not foresee that the plaintiff would be using the road on the date of the accident. Sometimes nice questions of duty arise which have to be answered by applying the test of foreseeability *ex post facto*. But the test is foresight of a reasonable man and not the hindsight of the court for it is easy to become wise after the event and so one must avoid to confuse the facts that actually happened with the facts which could have been reasonably foreseen and which really form the test of existence of the duty.[77] Taking again the example of road accident, it was held in *Bourhill v. Young*,[78] that a motor-cyclist who drove his vehicle negligently and was killed in a road accident could not have reasonably foreseen that the plaintiff, a pregnant woman, seeing the accident, would suffer severe nervous shock resulting in birth of the still-born child and accordingly he owed no duty to her and was not guilty of negligence in relation to her. In contrast in *Haley v. London Electricity Board*,[79] where the plaintiff, a blind man, was injured by falling into a trench dug by the defendants under statutory powers and where the defendants had taken precautions which would have given adequate warning to ordinary people with good sight and exercising ordinary care but which were insufficient for blind persons, the HOUSE OF LORDS held the defendants liable as they found it to be foreseeable that blind persons may pass along a city pavement. In *Carmarthenshire County Council v. Lewis*[80] a small child was negligently allowed to run on the road by a school authority. A lorry driver while saving the child met with an accident and was killed. The lorry driver's widow sued the school authority. It was pleaded in defence that though the school authority might have owed a duty of care to the child, they owed no such duty to the lorry-driver. The House of Lords negatived this defence on the ground that injury to someone else while saving the child was foreseeable. In the words of LORD REID: "Every day people take risks in order to save others from being run over, and if the child runs into the street the danger to others is almost as great as the danger to the child."[81] In *Barnes v. Hampshire County Council*,[82] a five year-old child, who was released from school 5 minutes early, was injured on way home. The usual practice was that a child

74. 1932 AC 562 (HL) p. 580 : 147 LT 281 : 48 TLR 494.
75. *Davis v. Radcliffe*, (1990) 2 All ER 536 (PC), p. 540. See p. 464, *supra*.
76. 1932 AC 562 : 147 LT 281 : 48 TLR 494 (HL).
77. *Southern Portland Cement Ltd. v. Cooper*, (1974) 1 ALL ER 87 (PC) p. 98 (e) : (1974) 2 WLR 152 : 118 SJ 99.
78. (1943) AC 92 : (1942) 2 All ER 396(HL).
79. (1965) AC 778 (HL).
80. (1955) AC 549 : (1955) 2 WLR 517 (HL).
81. (1955) AC 549 p. 564.
82. (1969) 3 All ER 746 (HL).

would be met by his parent at the time of release. The House of Lords held the school authority liable for negligence. The *test of foreseeability* was applied in awarding damages for nervous shock in *Mcloughlin v. O'Brian.*[83] In this case, the plaintiff's husband and three children were involved in a motor-accident caused by the negligence of the defendant. One child was killed and the husband and two other children were severely injured. The plaintiff was two miles away at her home at the time of the accident. She was told of the accident by a motorist who had been at the scene of the accident. She was taken to the hospital where she saw her husband and the two children severely injured and heard about the death of the third child. As a result she suffered severe and persisting nervous shock. In holding that the plaintiff was entitled to succeed, the House of Lords laid down that the test of liability for damages for nervous shock was reasonable foreseeability and the plaintiff was entitled to recover even though she was not at or near the place of the accident at the time or shortly afterwards as the nervous shock suffered by her was a reasonably foreseeable consequence of the negligence of the defendant. As explained recently in *White v. Chief Constable of the South Yorkshire Police,*[84] to satisfy the test the plaintiff will have to show existence of close relationship of love and affection with the victim of the accident and close proximity in time and space with the accident or its aftermath.

I(B)(i)(c) Economic Loss

Subject to exceptional cases, where a professional man is in contractual relationship[85] or where there is special proximity due to special facts such as that the plaintiff relies on special skill of the defendant and the relationship is just short of contractual relationship as was found in the cases of *Junior Books Ltd. v. Veitchi Co. Ltd.*,[86] and *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*,[87] the tort of negligence does not cover purely economic loss.[88] Physical damage to person or property or the existence of danger or threat of danger of such damage is an essential part of the cause of action in negligence.[89] In considering whether this requirement is met in a given case one has to exclude that property the defective condition of which is alleged to give rise to the danger or damage for which the action is brought.[90] These general features of the tort of negligence follow from the case of *Donoghue v. Stevenson*[91] itself. It may be recalled that the consumer's claim against the manufacturer in that case was not that she suffered economic loss as the ginger beer supplied by the retailer was defective but that the defective quality of the ginger beer caused physical damage to her person in that she suffered severe gastro-enteritis. The duty of care recognised in that case which was owed by the manufacturer was to avoid "foreseeable injury to the consumer's life or property."[92] These general features were admirably analysed by LORD BRANDON in his dissenting speech in *Junior Book's*[93] case and this analysis was accepted by the HOUSE OF LORDS in *D & F Estates Ltd. v. Church Commissioners.*[1] This was an action by lessees of a block of flats for recovery of cost of replacing defective plaster as damages in tort against the builders. It was held that in the absence of contract the cost of repairing a defect in a chattel or a structure discovered before it caused damage to person or any other property was purely economic loss and could not be recovered from the builders in tort by a buyer, hirer or lessee of the building. It was further held that in case of complex structures or chattels one element of the structure or chattel may be regarded as distinct from another element so that damage to one part because of hidden defect in the other may be regarded as damage to other property. It was observed that in *Anns*[2] the damage to walls because of hidden defect in the foundation could be considered as damage to other property. The majority decision in *Junior Books*'[3] case was explained as confined to special proximity found in that case.

Anns case which was distinguished as stated above in the case of *D & F Estates Ltd.* was finally overruled as being one of pure economic loss in *Murphy v. Brentwood District Council.*[4] In this case the Council had approved the plan of a building on the negligent advice of their engineers which led to the defective foundation of the building resulting in extensive damage to the walls and pipes. The plaintiff purchaser of the building suffered loss in reselling the building at a diminished price, *i.e.*, at a price less than its market value which the building would have fetched had it been in sound condition. The plaintiff's claim of this loss against the Council in an action in negligence was negatived by the House of Lords on the ground that this was pure economic loss and that the Council owed no duty to protect building owners or occupiers against such loss when carrying out its statutory functions of controlling and regulating building construction. The same view was taken in the case of *Department of Environment v. Thomas Bates & Sons Ltd.*,[5] These cases[6] establish that a person responsible for a defect in a building, who may compendiously be described as the builder, is responsible on the principle of *Donoghue v. Stevenson*[7] in the event of the defect, before it is discovered, causing physical injury to persons or damage to property other than be held responsible in tort for pure economic loss such as the cost of remedying the defect or the cost of

83. (1982) 2 All ER 298 : (1982) 2 WLR 982 : (1983) AC 410 (HL). See pp. 200-201, *supra*.
84. (1999) 1 All ER 1 (HL). See pp. 207-208 *supra*.
85. See text and footnotes 43 to 54, pp. 8 and 9 *supra*.
86. (1982) 3 All ER 201 : (1982) 3 WLR 477 : (1983) AC 520 (HL). See text and footnote 65, p. 483, *supra*.
87. (1964) AC 465 (PC). See text and footnote 25, p. 461, *supra*; text and footnotes 84, 85, pp. 657, 658 (Chapter XXI title 4), p. 635. See further other cases following *Hedley Byrne* in Chapter XXI title 4, p. 635.
88. *D & F Estates Ltd. v. Church Commissioners*, (1988) 2 All ER 992 : (1987) 7 Com LR 40 (HL); *Murphy v. Brentwood District Council*, (1990) 2 All ER 908 (HL).
89. *D & F Estates Ltd. v. Church Commissioners*, (1988) 2 All ER 992 : (1987) 7 Com LR 40 (HL)
90. *D & F Estates Ltd. v. Church Commissioners*, (1988) 2 All ER 992 : (1987) 7 Com LR 40 (HL)
91. (1932) AC 562 : 48 TLR 494.
92. (1932) AC 562 : 48 TLR 494. See text and footnote 20, p. 460, *supra*.
93. (1982) 3 All ER 201 : (1982) 3 WLR 477 : (1983) AC 520 (HL), pp. 216 to 218.

1. (1988) 2 All ER 992 (HL). For criticism, see Peter Cane, 'Economic Loss in Tort : Is the Pendulum out of Control', (1989) Modern Law Review 201.
2. See text and footnote 30, p. 461, *supra*.
3. See text and footnote 66, p. 467, *supra*.
4. (1990) 2 All ER 908 (HL).
   N.B.—See *Invercargill City Council v. Hamlin*, (1996) 1 All ER 756 (PC), which shows that many commonwealth countries such as Canada, Australia and New Zealand have developed their common law different from the view taken in *Murphy's* case. In Canada it is well established that a municipality may be liable for economic loss caused by the negligence of a building inspector (p. 765). In Australia it has been held that a negligent builder may be liable for economic loss suffered by a subsequent purchaser; (p. 766). In New Zealand it has been decided that community standards and expectations demand the imposition of a duty of care on local authorities and builders to ensure compliance with building bye laws and to make them liable for economic loss (pp. 766, 767). *Hamlin's* case was an appeal from New Zealand and the Privy Council endorsed the view prevalent in New Zealand not on the ground that *Murphy* was wrongly decided but on the view that courts in New Zealand were entitled to develop the common law departing from English case law on the ground that the conditions there were different and observed: "The ability of the common law to adopt itself to the differing circumstances of the countries in which it has taken root, is not a weakness but one of its great strengths". (p. 764). See further *Perre v. Apandey Pty. Ltd.*, (1999) 73 ALJR 1190 (supplier of bad seed held liable for pure economic loss to potato growers); Jane Swanton and Barbara McDonald, 'Liability in negligence for pure economic loss', (2000) 74 ALJ 17, pp. 21, 22. In Australia the trend is changing : see text and footnote 9, p. 472. See also, *Robinson v. PE Jones (Contractors) Ltd.*, [2011] 3 WLR 815 (CA).
5. (1990) 2 All ER 943 (HL).
6. Cases in footnotes 1, 4 and 5.
7. (1932) AC 562 : 76 SJ 376 : 147 LT 28 : 48 TLR 494.

repairing the damage to the building caused by the defect or of loss in value of the building. But it cannot be laid down as an inflexible rule that damage to person or property caused after the defect in the building is discovered will never be recoverable. Whether the knowledge of the defect negatived the duty of care or broke the chain of causation would depend upon whether it was reasonable to expect the plaintiff to remove or avoid the danger and whether it was unreasonable for him, knowing the danger, to run the risk of being injured. It was so held by the court of Appeal in *Target v. Torfaen Borough Council*.[8] In that case, the plaintiff a tenant in a house, designed and built by the Council, fell down from a flight of stone steps because of absence of handrails and proper lighting. The defect had become known to the plaintiff and he had complained yet the Council was held liable (subject to 25% contributory negligence of the plaintiff) as on the facts it was not reasonable or practical for the plaintiff to provide a handrail or lighting for the steps and it was not unreasonable for him to run the risk of injury.

The reasons why pure economic loss should not generally give rise to liability in negligence were well described by BRENNAN J. of Australia in *Bryan v. Maloney*, (1995) 182 CLR 609, p. 632 (where he was in minority of one): "If liability were to be imposed for the doing of anything which caused economic loss that was foreseeable, the tort of negligence would destroy commercial competition, sterilize many contracts, and in the well known dictum of CHIEF JUSTICE CARDOZO expose defendants to potential liability in an indeterminate amount for an indeterminate time to an indeterminate class". This passage from BRENNAN J's judgment was approvingly quoted by majority (GLEESON C.J., GUMMOW, HAYNE and HAYDON JJ.) in *Woolcock Street Investment Pty. Ltd. v. CDG Pty Ltd.*[9] and it was observed: "That is why damages for pure economic loss are not recoverable if all that is shown is that the defendants' negligence was a cause of the loss and the loss was reasonably foreseeable."[10] In this case it was held that the builder of a commercial building was not liable to a subsequent purchaser for economic loss arising out of structural defects in the building. *Bryan v. Maloney (supra)* was distinguished on the ground that it was a case of a building used for dwelling and not a commercial building. The distinction made between a dwelling and commercial building to bypass *Maloney* is not persuasive and *Woolcock* comes very near to the decision in *Murphy*.

I(B)(i)(d) Physical Damage

Though direct physical damage is qualitatively different from indirect economic loss for inferring liability, it does not follow that in cases of physical damage to property in which the plaintiff has a proprietary or possessory interest the only requirement to be established by the plaintiff is reasonable foreseeability. "The elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of harm sustained by the plaintiff;" of course these three matters overlap with each other and are really facets of the same thing. It was so held in *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd.*[11] by the HOUSE OF LORDS. In this case, a surveyor acting on behalf of a classification society recommended a cargo vessel to continue after temporary repairs and that repairs be further examined after the cargo was discharged. The vessel sank with total loss of cargo. Classification societies are independent non-profit-making entities, created and operating for the sole purpose

8. (1992) 3 All ER 27 : (1992) 2 HLR 164 (CA).
9. (2004) 78 ALJR 628.
10. (2004) 78 ALJR 628, p. 633.
11. (1995) 3 All ER 307 (HL) p. 326.

of promoting the collective welfare, namely the safety of lives and ships at sea, and they fulfil a role which in their absence would have to be fulfilled by states. In this background and on considerations of extra cost of insurance, the HOUSE OF LORDS held that the classification society did not owe a duty of care to the cargo owners and the carelessness of the surveyor causing loss of the cargo did not amount to actionable negligence for the reason that it would not be fair, just and reasonable to impose such a duty on classification societies.[12]

1(B)(i)(e) Policy Considerations

Policy considerations are material in limiting the persons who can claim that a duty of care not to cause economic loss was owed to them by a tortfeasor.[13] For example, if because of A's negligence, B, an artisan, is injured and is unable to supply goods, which he makes, to his customers with whom he has contracts, not only B but also his customers may suffer foreseeable economic loss, but on policy considerations A cannot be held to owe any duty of care to the customers who cannot sue A, and B can sue A for loss of earnings which will include loss of profits.[14] Similarly, when damage to B's goods is caused by negligence of A, a third person C, with whom B had entered into a contract for sale of those goods but in whom the property or possession had not passed before the damage cannot sue A for economic loss suffered by him even if that loss was foreseeable.[15] The law still remains as was laid down by SCRUTTON, L.J. in *Elliot Steam Tug Co. Ltd. v. Shipping Controller*;[16] "At common law there is no doubt about the position. In case of a wrong done to a chattel, the common law does not recognise a person whose only rights are a contractual right to have the use of services of the chattel for purposes of making profits or gains without possession of or property in the chattel."[17] In approving the law so stated by SCRUTTON, L.J., the Privy Council in *Candlewood Navigation Corporation Ltd. v. Mitsui OSK Lines*,[18] observed that some limit or control mechanism has to be imposed on the liability of a wrong-doer towards those who have suffered economic damage in consequence of his negligence and that this limitation is placed at the second stage mentioned by LORD WILBERFORCE in *Ann's* case.[19]

Policy considerations, it has been noticed, have been taken into account in not imposing a duty of care on police while exercising their statutory duty of investigating a crime.[20] Similarly policy considerations have generally negatived imposition of a common law duty of care on local authorities in relation to performance of their statutory duties.[21] Policy considerations will also negative a claim in negligence of a plaintiff who relied on his own criminal or immoral act to

12. (1995) 3 All ER 307, p. 332.
13. *Candlewood Navigation Corp. Ltd. v. Mitsvi OSK Lines Ltd.*, (1985) 2 All ER 935 (PC) pp. 942 : (1986) AC 1 : (1985) 3 WLR 381, 945; *Muirhead v. Industrial Tank Specialities Ltd.*, (1985) 3 All ER 705 (CA) pp. 714, 715 : (1986) QB 507 : (1985) 3 WLR 993.
14. "Earnings" include fees and shares and profits, *Phillips v. L.S.W. Ry.*, (1879) 5 C.P.D. 280; *Lee v. Sheard*, (1956) 1 QB 192.
15. *Leigh & Sillavan v. Aliakmon Shipping Co.*, (1986) 2 All ER 145 : (1986) 2 WLR 902 (HL).
16. (1922) 1 KB 127.
17. (1922) 1 KB 127, pp. 139, 140.
18. (1985) 2 All ER 935 (PC) pp. 938, 945 : (1986) AC 1 : (1985) 3 WLR 381. Followed by House of Lords in *Leigh & Silavan v. Aliakmon Shipping Co.*, (1986) 2 All ER 145 : (1986) AC 785 : (1986) 2 WLR 902 (HL); *Esso Petroleum Co. Ltd. v. Hall Russel & Co. Ltd.*, (1989) 1 All ER 37 (HL), pp. 52, 53.
19. (1972) 2 All ER 492 (HL) pp. 498, 499.
20. See text and footnotes 9 to 51, pp. 464, 465.
21. *X (minors) v. Bedford Shire County Council*, (1995) 3 All ER 353 : (1995) 2 AC 633 : (1995) 3 WLR 152 (HL); *Barrett v. Enfield London BC*, (1997) 3 All ER 171 (CA). But see *W v. Essex County Council*, (1998) 3 All ER 111 (CA).

support his claim.[22] Further policy considerations led to the distinction made between personal injury and psychiatric illness resulting in restricting the area within which damages can be claimed for the latter.[23] Policy consideration have also been taken into account in limiting the duty of health professionals responsible for protecting children from child abuse to act only in good faith and they were not held liable in negligence to the parents when on preliminary examination they suspected the parents of abusing their child which later on further examination was found to be incorrect and in the meantime the parents had suffered psychiatric injury.[24] Public policy also precludes a claimant to claim damages for the loss or damage which he suffers as a result of his criminal act and sentence imposed by a court even though the criminal act may have been done under the mental stress caused by the defendant's negligence.[25]

1(B)(i)(f) Omissions

The courts are reluctant to impose a duty to take affirmative action and, therefore, omissions less frequently attract liability as compared to acts.[26] "An omission consists in not performing an act which is normally expected of you either because you normally do it or because you ought to do it, and it is the latter type of omission with which the law is concerned. But while omissions incur legal liability where there is a duty to act, such a duty will in most legal systems be the exception rather than the rule, for it would be unduly oppressive and restrictive to subject men to a multiplicity of duties to perform positive acts."[27] As stated by LORD REID: "When a person has done nothing to put himself in any relationship with another person in distress or with his property, mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty."[28] The principle mentioned above is applicable to real omissions and not to omissions to take reasonable care in doing a positive act. It is not possible to give a comprehensive list of relationships which give rise to a duty to take affirmative action but some examples of such relationships are parents and infant children; occupier and visitor; Master and Servant. Special relationship may also in some cases lay a duty on the defendant to take affirmative action to protect the plaintiff from the activities of a third party in charge of the defendant. The *Dorset Yacht Co.'s* case,[29] illustrates this point where the Borstal Officers were found in breach of duty to prevent the Borstal trainees in their charge from escaping and doing damage to plaintiff's yacht. Similar will be the position in case of persons in charge of a mental hospital[30] and school.[31] Prison authorities and police in charge of prisoners in jail or in police stations have also the duty to take care that the prisoners

22. *Clunis v. Camden and Islington Health Authority*, (1998) 3 All ER 180 (CA).
23. *White v. Chief Constable of the South Yorkshire Police*, (1999) 1 All ER 1 (HL), pp. 32, 33. See also title 1(D)(v) Damages for Mental Suffering and Psychiatric Injury or Nervous Shock, p. 207.
24. *D.V.East Berkshire Community NHS Trust*, (2005) 2 All ER 443 (HL).
25. *Gray v. Thames Trains Ltd.*, (2009) 4 All ER 81 (H.L.).
26. See, Chapter 2, title 1, Act and Omission, p. 23.
27. SALMOND, Jurisprudence, 12th edition, p. 352.
28. *Home Office v. Dorset Yacht Co. Ltd.*, (1970) AC 1004 : (1970) 2 WLR 1140 (HL).
29. *Home Office v. Dorset Yacht Co. Ltd.*, (1970) AC 1004 : (1970) 2 WLR 1140 (HL), See pp. 427-428.
30. *Holgate v. Lancashire Mental Hospital Board*, (1937) 4 All ER 19.
31. *Carmarthenshire County Council v. Lewis*, (1955) AC 549 : (1955) 2 WLR 517 : 119 JP 230 (HL); *Weld-Blundell v. Stephens*, (1920) AC 956 (HL), p. 986 : 36 TLR 640; *Smith v. Leurs*, (1945) 70 CLR 256, pp. 261, 262. It has also been held that breach of duty of confidentiality by negligence or otherwise may give rise to a claim for damages: *Swinney v. Chief Constable of the Northumbria Police*, (1996) 3 All ER 449 : (1997) AC 464 : (1996) WLR 968 (CA). (In this case information given in confidence to Police about a violent suspect came to the knowledge of the suspect because of the negligence of the police who threatened the informer and his family with violence and arson as a result of which the informer suffered psychiatric illness and claimed damages against the Police. The claim was held to be maintainable).

are prevented from harming themselves especially in those cases where there is previous history of suicide attempts or self harm.[32] If proper precautions are not taken (*e.g.* there is failure to shut the door flap of the cell) which enables a prisoner to commit suicide, the dependants of the deceased are entitled to claim damages under the Fatal Accidents Act.[33] In such a claim the act of the deceased of self destruction does neither give rise to the defence of *Volenti non fit injuria* nor to the defence of *novus actus interveniens*.[34] But the court can apportion the liability in the award of damages for the act of suicide amounts to fault and gives rise to contributory negligence.[35] In a case like this the difference between the prisoner being of sound and unsound mind is inadequate to deal with the complexities of human psychology in the context of the stresses caused by imprisonment. The duty is very unusual one, arising from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives.[36] In India the negligence of prison authorities which results in suicide by a prisoner may make it a public law wrong redressable in damages also in public law.[37]

Even in cases where a public authority is conferred a statutory power, the normal rule is that omission to exercise the power will not generally give rise to a liability in common law.[38] In *Stovin v. Wise*[39] a motor accident took place at a road junction partly because the view was obstructed by an earth bank adjacent to the road. Although the local highway authority had statutory power under sections 41 and 79 of the Highways Act, 1980, which conferred discretion, for removal of earth bank, it had taken no steps in that direction. The House of Lords held that there was no common law duty on the Authority to exercise the power and omission to exercise it did not give rise to a claim for damages in negligence.[40] It was laid down that the minimum precautions for basing a duty of care upon the existence of statutory power in respect of an omission to exercise the power, if it could be done at all, were: (i) that in the circumstances it would have been irrational for the authority not to have exercised the power, so that in effect there was a public law duty to act and (ii) that there were exceptional grounds to hold that the policy of the statute conferred a right to compensation on persons who suffered loss if the power was not exercised.[41]

The above preconditions, laid down by the House of Lords, for holding a public authority liable in private law for omission to exercise a statutory power were accepted by the Supreme Court in *Union of India v. United India Insurance Co. Ltd.*,[42] though the court in that case held the Union of India liable in negligence and also for omission to exercise the power under section 13 of the Railways Act which provides that the Central Government 'may require' a railway administration to erect fences, screen, gates etc. In that case an express train had collided with a passenger bus at an unmanned level crossing and the Union of India owning the railway was

32. *Reeves v. Commissioner of Police of the Metropolis*, (1999) 3 All ER 897 (HL).
33. *Reeves v. Commissioner of Police of the Metropolis*, (1999) 3 All ER 897 (HL).
34. *Reeves v. Commissioner of Police of the Metropolis*, (1999) 3 All ER 897 (HL).
35. *Reeves v. Commissioner of Police of the Metropolis*, (1999) 3 All ER 897 (HL).
36. *Reeves v. Commissioner of Police of the Metropolis*, (1999) 3 All ER 897 (HL), pp. 902, 903.
37. See p. 47, *ante*.
38. *East Suffolk Catchment Board v. Kent*, (1940) 4 All ER 527 : (1941) AC 74 : 57 TLR 199(HL). See further pp. 578-579, *post*.
39. (1996) 3 All ER 801 (HL).
40. (1996) 3 All ER 801 (HL).
41. (1996) 3 All ER 801 (HL). *Stovin v. Wise* is distinguished in cases where duty is assumed but is negligently performed : *Gorringe v. Calderdale Metropolitan Council*, (2004) 2 All ER 326, pp. 330-332 (LORD STEYN) (HL).
42. AIR 1998 SC 640, pp. 651, 654 : (1997) 8 SCC 683.

held guilty of negligence being in breach of its common law duty for failing to convert the unmanned level crossing into a manned level crossing having regard to the volume of traffic and in not providing proper signboard for warning the road traffic.[43] It was, therefore, unnecessary to go into the question whether the Union of India was also liable for omission to exercise the statutory power under section 13. Yet the court found the Union of India liable for the omission holding that the two preconditions laid down in *Stovin v. Wise*, were satisfied basing its decision on the controversial doctrine of 'general reliance' which has been applied in some Australian cases but has had no support in English law.[44] The doctrine now stands rejected even in Australia.[45] It is submitted that when there existed a corresponding common law duty, the 'general reliance' of those likely to be affected would be that the railway administration will not be in breach of that duty and not necessarily on the exercise of the statutory power under section 13. For the same reason, it is submitted, it was neither irrational for the Central Government not to exercise the power under section 13 nor can it be said that the policy of section 13 was to confer a right to compensation, in addition to the already existing right in common law, on failure to exercise the power. This was not a case where, unless a right to compensation for omission to exercise the statutory power was inferred, the person injured was remediless under the common law. It is, therefore, reasonably possible to say that the two preconditions required for holding the Union of India liable for omission to exercise the power under section 13 were not satisfied in this case. In *Rajkot Municipal Corporation v. Manjulaben Jayantilal Nakum*,[46] it was held that the corporation was not under such a duty for maintenance of roadside trees to protect them from falling and injuring a passerby that a breach thereof gives rise to a common law action for negligence although the corporation may in its discretion under section 69 of the relevant Corporation Act provide from time to time for 'the planting and maintenance of trees at roadsides and elsewhere'. The court observed that having regard to the provisions of the Act and the conditions prevailing in the country it would not be just and proper to hold that the corporation was under a duty to keep constant vigil by testing the healthy condition of the trees in the public places frequented by passersby and that it was liable for omission thereof in negligence to a passerby who got injured by falling of tree.

The court of appeal in England has held that Fire Brigade, governed by the Fire Services Act, 1947, are not under a common law duty to answer a call for help and are not under a duty to take care to do so; but where the Fire Brigade by their own actions, had increased the risk of the danger which caused the damage, they would be liable for negligence in respect of that excess damage.[47] Same view has been taken in respect of the Coast Guard that they were under no enforceable private law duty to

43. AIR 1998 SC 640, p. 649. [This case was distinguished and not applied in *Pramod Malhotra v. Union of India*, (2004) 3 SCC 415, pp. 422 to 425 which was a case of pure economic loss. It was observed in this case, p. 428 that "compensation for violation of a statutory duty to enable individuals to recoup financial loss has never been recognised in India".]
44. *Capital and Counties plc. v. Hampshire County Council*, (1997) 2 All ER 865, pp. 876, 877 : (1997) QB 1004 : (1997) 3 WLR 331 (CA). This case also shows that the doctrine though referred was not accepted in *Stovin v. Wise, supra.*
45. *Pyrenees Shire Council v. Day*, (1998) 72 ALJR 152 (Aust), (BRENNAN CJ, GUMMOW and KIRBY JJ). As observed by Brennan CJ: "If community expectation that a statutory power will be exercised were to be adopted as a criterion of a duty to exercise the power it would displace the criterion of legislative intention—the appropriate criterion is legislative intention," (p. 158).
46. (1997) 1 SCALE 370, p. 405 : (1997) 9 SCC 552. But see *Municipal Corporation of Delhi v. Sushila Devi*, AIR 1999 SC 1929 : (1994) 4 SCC 317 : 1999 ACJ 801 discussed at p. 516 text and footnotes 25 and 26; See also, *Regional Transport Officer v. P.S Rajendran* (2010) 2 LW 440 (Madras High Court)
47. *Capital and Counties plc v. Hampshire County Council*, (1997) 2 All ER 865 : (1997) QB 1004 : (1997) 3 WLR 331 (CA).

respond to an emergency call, nor, if they did respond would they be liable if their response was negligent unless their negligence amounted to a positive act which directly caused greater injury than would have occurred otherwise.[48] But in *Kent v. Griffith*,[49] the court of Appeal held that, in the special circumstances of that case, the ambulance service was liable in negligence because of delay in reaching to the patient for transporting her to the hospital as a result of which she suffered further injuries. In this case the doctor attending on the patient, who suffered an asthma attack, telephoned the ambulance service on the emergency line requesting an ambulance to take the patient immediately to the hospital. The call was accepted and on further reminders the doctor was told that the ambulance was well on its way. The information given was wrong and there was unreasonable delay in sending the ambulance. In holding the ambulance service liable LORD WOOLF M.R. Observed: "The acceptance of the call in this case established the duty of care. On the findings of the judge, it was the delay which caused the further injuries. If wrong information had not been given about the arrival of the ambulance, other means of transport could have been arranged."[50]

In the Australian Case of *Crimmins v. Stevedoring Finance Committee*[51] a question arose whether a statutory authority supervising stevedoring operation at Australian ports owed a worker, who was exposed to asbestos dust the inhalation of which eventually caused the terminal lung disease mesothelioma, a common law duty of care. The question required examination of circumstances in which a statutory authority will come under a duty to take affirmative action to protect a person who may suffer harm if the authority does not act. The five judges who constituted the majority and decided in favour of existence of common law duty delivered separate judgments and it is difficult to formulate any list of circumstances accepted by all the majority judges which are required to be considered for deciding existence of a duty of care. However in the opinion of MCHUGH J., with whose reasons GLEESON C.J. agreed, in a novel case not covered by authority, where a plaintiff alleges that a statutory authority owed him a common law duty of care and breached that duty by failing to exercise a statutory power, the issue of duty should be determined by considering the following questions:

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, there is no duty.

2. By reason of the defendants statutory or assumed obligation or control did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, there is no duty.

3. Was the plaintiff or were the plaintiffs interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, there is no duty.

4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, there is no duty.

5. Would such a duty impose liability with respect to the defendants' exercise of core 'policy-making' or '*quasi*-legislative' functions? If yes then, there is no duty.

48. *OLL Ltd. v. Secretary of State for Transport*, (1997) 3 All ER 897 : (1997) 147 NLJ 1099 (QBD).
49. (2000) 2 All ER 474 (CA).
50. (2000) 2 All ER 474, p. 487.
51. 74 ALJR 1 (Jan. issue of 2000).

6. Are there any other supervening reasons in policy to deny the existence of a duty of care (*e.g.*, the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of the principles in that field deny the existence of a duty)? If yes, then there is no duty."[52]

1B(g) Acts of Third Party

The above principle that there is normally no duty to take affirmative action leads to the general rule that, apart from special contracts and relations and the maxim *respondeat superior*, one man is under no duty of controlling another to prevent his doing damage to a third.[53] In *P. Perl (Exporters) Ltd. v. Camden London Borough Council*,[54] the plaintiff company and the defendant local authority owned adjoining flats. Thieves entered the flat belonging to the defendant which was unoccupied. They bored a hole in the common wall and not admission to the plaintiff's flat and removed goods stored there. The defendant had done nothing to improve security though vagrants had been seen near the entrance way and other flats in the neighbourhood had been burgled. In a suit for damages it was held that the defendant did not owe any duty of care to the plaintiff to prevent the entry of thieves from their flat. This case was followed in *King v. Liverpool City Council*,[55] where the plaintiff was a tenant of a council flat. The flat just above the plaintiff's flat was also owned by the council. This flat was vacated by tenants. The plaintiff notified the Council that the vacant flat was unoccupied and unprotected against vandals. Various steps were taken by the Council which were not successful and the vandals entered and removed copper piping and other parts of the water system which caused flooding of the plaintiff's flat. On being informed the Council did some repair work. Vandals again entered and damaged the water supply. This caused another flood and the plaintiff had to leave the flat. In a suit for damages it was held that it was not possible for the Council to take effective steps to defeat the actions of trespassing vandals and the Council did not owe a duty of care to the plaintiff in respect of the damage caused by the actions of the vandals. These cases were considered and approved by the House of Lords in *Smith v. Littlewoods Organisation Ltd.*,[56] The facts in this case were that the respondents purchased a cinema with a view to demolishing it and replacing it with a super market. The respondents after entering into possession closed the cinema and employed contractors to make site investigations and to do some preliminary work. The cinema remained empty and unattended. Trespassing children started fire in the cinema which spread and demolished two adjoining properties. In a suit for damages by the owners of the affected properties it was held by the House of Lords that although an occupier was under general duty to exercise reasonable care to ensure that the condition of the premises was not a source of danger to adjoining property, this general duty did not encompass a specific duty to prevent damage from fire resulting from vandalism unless such a contingency was reasonably foreseeable. As the facts did not disclose that the risk of fire by vandals was foreseeable the suit failed. It was explained by LORD MACKAY[57] that where the injury or damage was caused by an independent human agency the risk had to be highly probable or very likely before it could be said that it

52. 74 ALJR 1, p. 19. In *AGAR v. HYDE*, (2000) 74 ALJR 1219, p. 1232 it was held that the Rugby Football Board owed no duty to players for altering the rules of the game and the Board and its members were not liable for failing to alter or amend the rules to avoid or minimise the risk of injury to players.
53. *Home Office v. Dorset Yacht Co. Ltd.*, (1970) All ER 294 (HL) pp. 321, 322 : (1970) 2 WLR 1140 : (1970) AC 1004.
54. (1983) 3 All ER 161 : (1984) QB 342 : (1983) 3 WLR 769 (CA).
55. (1986) 3 All ER 544 : (1986) 1 WLR 890 (CA).
56. (1987) 1 All ER 710 : (1987) AC 241 : (1987) 2 WLR 480 (HL).
57. (1987) 1 All ER 710, p. 721.

was reasonably foreseeable. LORD GOFF[58] with whom LORD KEITH agreed, was further of the opinion that liability in negligence for harm caused by third parties could be made out only in special circumstances namely (i) where a special relationship existed between the plaintiff and the defendant, (ii) where a source of danger was negligently created by the defendant and it was reasonably foreseeable that third parties might interfere and spark it off and (iii) where the defendant had knowledge or means of knowledge that a third party had created or was creating a risk of danger on his property and he failed to take reasonable steps to abate it. In a recent Australian case it has been held by the High Court of Australia that the unpredictability of criminal behaviour is one of the reasons why, in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk is foreseeable.[59]

1B(ii) Summary of Discussion

As a result of the above discussion the legal position may be summed up in the following propositions: (A) There are four requirements necessary to establish a duty of care. They are (1) foreseeability of harm; (2) proximity in relationship, which implies that the parties are so related that (3) it is just and reasonable that the duty should exist;[60] and (4) policy considerations do not negative the existence of duty. If the first three conditions are satisfied, policy considerations would rarely, in a limited class of cases, negative the existence of duty *e.g.* when public policy requires that there should be no liability.[61] A policy to limit the duty must be justified by cogent and readily intelligible considerations.[62] (B) Duty of care would arise in exceptional circumstances (1) for acts of third parties;[63] (2) in case of omissions;[64] and (3) to prevent economic loss.[65] (C) Proposition (A) cannot be used as a means of reopening issues settled by authoritative decisions and it deals essentially with the approach to a novel type of factual situation not covered by authorities.[66] (D) Subject to what is stated in proposition (C), proposition (A), can give rise to developing new categories of duty of care;[67] but this should be done incrementally and by analogy with decided cases.[68] In other words for deciding whether a new category of duty of care should be

58. (1987) 1 All ER 710, pp. 729 to 732. For cases where it has been held that the act of third parties breaks the chain of causation. See Chapter IX, title 1(c)(IV), pp. 191, 192.
59. *Modbury Triangle Shopping Centre Pty. Ltd. v. Anzil*, (2000) 75 ALJR 164.
60. *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*, (1984) 3 All ER 529 (HL), p. 534 : (1985) AC 210 : (1984) 3 WLR 953 (see also text and footnotes 32 to 34, pp. 461-462, *supra*); *Davis v. Radcliffe*, (1990) 2 All ER 536 (PC), p. 540 (see also text and footnotes 41, 42, p. 464 *supra*); *Caparo Industries plc v. Dickman*, (1990) 1 All ER 568 (HL), pp. 573, 574 : (1990) 2 AC 605; *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd.*, (1995) 3 All ER 307 (HL) p. 326. *British Telecommunications plc. v. James Thomson & sons Engineers Ltd.*, (1999) 2 All ER 241 (HL) p. 244.
61. *Yuen Kun-Yeu v. A.G. of Hongkong*, (1987) 2 All ER 705 (PC), p. 712 : (1988) AC 175 (see also text and footnotes 38 to 40, p. 463 and 11 to 24, pp. 472-474).
62. *Mcloughlin v. O'Brian*, (1982) 2 All ER 298 (HL), p. 319 : (1983) AC 410 : (1982) 2 WLR 982.
63. *Smith v. Littlewoods Organisation*, (1987) 1 All ER 710 : (1987) AC 241 (HL), pp. 729-732 (see further text and footnotes 56 to 58, pp. 478-479.
64. See pp. 477-479.
65. *D & F Estates Ltd. v. Church Commissioners*, (1988) 2 All ER 992 (HL) (see further pp. 452 to 455, *supra*); *Davis v. Radcliffe*, (1990) 2 All ER 536 (PC), p. 541 : (1990) 1 WLR 821; *Murphy v. Brentwood District Council*, (1990) 2 All ER 908 (HL) p. 915 : (1990) 3 WLR 414.
66. *Leigh & Sillavan v. Aliakman Shipping Co.*, (1986) 2 All ER 145 (HL) (See further text and footnotes 52, 53, p. 466, *supra*).
67. See text and footnote 18, p. 460, *supra*.
68. *Davis v. Radcliffe*, (1990) 2 All ER 536 (PC), p. 540 : (1990) 1 WLR 821; *Caparo Industries v. Dickman*, (1990) 1 All ER 568 (HL), p. 574; *Murphy v. Brentwood District Council supra*; *White v. Jones*, (1995) 1 All ER 691 (HL) p. 717; *M (a Minor) v. Newham London Borough Council*, (1994) 4 All ER 602 (CA) p. 630. As an example of incremental approach see *Punjab National Bank v. de Boinville*, (1992) 3 All ER 104 (CA) p. 117 : (1992) All ER 1138.

recognised the considerations are "analogy, policy, fairness and justice".[69] But as observed by Prof. Fleming "no one has ever succeeded in capturing any precise formula"[70] or in other words "a comprehensive test for determining whether there exists between two parties a relationship sufficiently proximate to give rise to a duty of care of the kind necessary for actionable negligence."[71] Whether the law should recognise a new category on the above principles will essentially depend on "the court's assessment of community standards and demands".[72]

It has been already noticed[73] that there are three *constituents of negligence*: (1) duty to take care, (2) breach of duty and (3) consequential damage.[74] Although these constituents are discussed separately, very often it is not possible to keep them in different compartments and the facts and considerations relevant to them coalesce and overlap.

1(C) Breach of Duty

After the plaintiff has shown that the 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. The test for deciding this is again the test of a reasonable or prudent man. The question to be asked is: Has the defendant omitted to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs would have done, or has he done something which a reasonable and prudent man would not have done?[75] The standard by which to determine whether a person has been guilty of negligence is the conduct of a prudent man in the particular situation; the amount of care, skill, diligence or the like, varying according to the particular case. The amount of care or the like required may thus vary to the greatest extent, while the standard itself—the care, skill or diligence of a careful, skilful, or diligent man in the particular situation—remains the same. The prudent man, ordinarily, with regard to undertaking an act is the man who has acquired the 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 question to be raised with regard to a man's conduct brought in question is, whether a prudent or careful or diligent man of his calling or business or skill would have undertaken to do the thing in question, supposing the party to have exercised due care in executing the work undertaken. The liability for negligence cannot be co-extensive with the judgment of each individual; that would be as variable as the foot of each individual.[76] The standard of foresight is that of the reasonable man; that eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.[77] Of course, a reasonable man does not mean a paragon of circumspection.[78] He is presumed to be free both from over-apprehension and over-confidence.[79] When the circumstances of the act indicate that certain consequences might ensue, the

69. *Stovin v. Wise*, (1996) 3 All ER 801 (HL), p. 824 : (1996) AC 923 : (1996) 3 WLR 388.
70. Fleming, the Law of Torts (9th ed. 1998) p. 151.
71. *Sullivan v. Moody*, (2001) 75 ALJR 1570 p. 1578.
72. *Bryan v. Moloney*, (1995) 182 CLR 609, p. 618 (MASON CJ, DEAN AND GAUDRAN JJ).
73. See pp. 457-460, *ante*.
74. For damage and damages see Chapter IX, p. 177.
75. See the definition of negligence formulated by ALDERSON B., in *Blyth v. Waterworks Co.*, (1856) 11 Ex 781, p. 457, *ante*.
76. PER TINDAL, C.J. in *Vaughan v. Menlove*, (1837) 3 Bing NC 468, 475.
77. PER LORD MACMILLAN in *Glasgow Corportion v. Muir*, (1943) AC 447, 448 : 169 LT 53 : 59 TLR 266 : (1943) 2 All ER 44.
78. PER LORD REID in *Billings & Sons v. Riden*, (1958) AC 240, 255 : (1957) 3 WLR 496.
79. *Glasgow Corporation v. Muir, (Supra)*.

reasonable person must be held to have foreseen the consequences or, at least, ought to have foreseen them.[80] A reasonable man in his actions also takes into account common negligence in human behaviour and so he will guard against the possible negligence of others when experience shows such negligence to be common and though not bound to anticipate folly in all its forms, he is not entitled to put out of consideration the teachings of experience as to the form those follies take.[81] But if a man is confronted with a dangerous situation not of his own making, and there are several courses open to him, and he is required to make a quick judgment, the failure to exercise the best possible judgment would not itself constitute negligence.[82] The standard of care required is a matter of law and does not vary according to the individual although it does vary according to the circumstances.[83]

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.[84] 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. In the words of LORD REID: "Reasonable men do in fact take into account the degree of risk and do not act upon a bare possibility as they would if the risk were more substantial."[85] The purpose to be achieved must also be taken into account and a balance struck between the risk involved and the consequence of not taking it.[86] Motor accidents would be greatly reduced if a speed limit of 5 K.Ms. per hour were imposed for all roads but for obvious reasons such a step cannot be taken. As observed by the Supreme Court in the context of hazardous industries: "We cannot possibly adopt a policy of not having any chemical or hazardous industries merely because they pose hazard or risk to the community. If such a policy were adopted, it would mean the end of all progress and development. Such industries even if hazardous have to be set up since they are essential for economic development and advancement of well being of the people. We can only hope to reduce the element of hazard or risk to the community by taking all necessary steps for locating such industries in a manner which would pose least risk of damage to the community and maximising safety requirements in such industries."[87] The rule that a man is held to exercise of the degree of care which an ordinary prudent man would exercise in the same situation is subject to one or two exceptions. If a person is highly skilled about a particular business, and knows that to be dangerous, which another, not so skilled as he, does not know to be dangerous, the law will hold him guilty of negligence in failing to use such expert skill. If a man holds himself out as being specially competent to do things requiring professional skill, he will be held liable for negligence if he fails to exhibit the care and skill of

80. *Veeran v. Krishnamorthy*, AIR 1966 Ker 172.
81. *London Passenger Transport Board v. Upson*, (1949) AC 155 (HL) pp. 173, 176 : (1949) 1 All ER 60; *Union of India v. Sushma Mitra v. M.P. State Road Transport Corporation*, 1974 ACJ 87 (90) (MP); *United India Insurance Co. Ltd.*, JT 1997 (8) SC 653 p. 655 : (1997) 8 SCC 683 : AIR 1998 SC 640.
82. *Indian Airlines v. Madhuri Chowdhuri*, AIR 1965 Cal 252.
83. *Nazir Abbas v. Raja Ajamshah*, ILR 1947 Nag 955.
84. In blackout conditions, a new duty is imposed on a person walking on the road, by reason of the difficulty which the driver of a vehicle has of seeing a person or thing not illuminated by a light, and in those circumstances, it is the duty of such a person to take all reasonable steps to minimise the difficulty of the drivers of the oncoming vehicles. *Franklin v. Bristol Tramways Co.*, (1941) 1 All ER 188 : (1941) 1 KB 255.
85. *Bolton v. Stone*, (1951) AC 850 (HL) p. 865 : (1951) 1 All ER 1078.
86. *Daborn v. Bath Tramways*, (1946) 2 All ER 333.
87. *M.C. Mehta v. Union of India*, (1986) 2 SCC 176 (201) : AIR 1987 SC 965. But by an order passed on 20th Dec. 1986 in the same case, the Supreme Court held that the liability of an enterprise engaged in a hazardous industry is absolute; See title 2(C) *post* and (1987) 1 SCC 395 : AIR 1987 SC 965 : (1986) 2 SCC 176.

one ordinarily an expert in that business. But the professional knowledge then prevailing should alone be attributed to him and he should not be judged on the basis of professional literature of later years.[88] Conformity with the general and approved practice will generally lead to the inference in favour of defendant.[89] In the commercialised world degree of care would also be determined by reference to the price which is being charged; *e.g.*, a five star hotel owes a very high degree of care for the safety of its guests.[90]

A man who traverses a crowded thoroughfare with edged tools, or bars of iron, must take special care that he does not cut or bruise others with the thing he carries. Such a person would be bound to keep a better look-out than the man who merely carries an umbrella; and the person who carries an umbrella would be bound to take more care in walking with it than a person who has nothing at all in his hands.

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 should 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 the facts, it can be seen that the course he had adopted was not in fact the best.[91]

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.[92]

In a suit for damages for negligence the plaintiff as already seen[93] must establish, first, a duty to take care, secondly, a breach of the duty, and thirdly, that such breach was the proximate cause of the loss or injury to the plaintiff.[94]

1(D) Illustrations

Defendant liable-Delay in repairing water-pipe.—The Manchester Corporation's service water pipe in a road burst and caused a pool of water to form on the road. The water lay unheeded for three days. On the third day a frost occurred, the water froze, and on the ice so formed a motor-car skidded and knocked down and killed a man. The Corporation were not informed until after this accident that the service pipe had burst. In an action by a widow of the deceased under the Fatal Accidents Act, 1846, against the owner of the motor-car and the Corporation, it was held, exonerating the owner of the motor-car, that the Corporation was liable in not having taken prompt steps to attend to the leak and so to prevent the road from being dangerous to traffic.[95]

88. *Roe v. Minister of Health*, (1954) 2 QB 66 : (1954) 2 WLR 915 : (1954) 2 All ER 131.
89. *Clark v. Maclennan*, (1983) 1 All ER 416 : (QBD).
90. *Klans Mittelbachert v. The East India Hotels Ltd.*, AIR 1997 Del 201 pp. 209, 214. See further pp. 531-532, *infra*.
91. *Dwarkanath v. Rivers Steam Co.*, (1917) 20 Bom LR 735, (PC).
92. *Jones v. Staveley, Iron & Chemical Co. Ltd.*, (1955) 1 All ER 6 : (1956) 1 Lloyd's 403.
93. See title 1(A) Meaning of Negligence, p. 457.
94. *Nazir Abbas v. Raja Ajamshah*, ILR 1947 Nag 955. The plaintiff must show that the duty which the defendant had failed to comply was owed to him and was "in respect of the kind of loss which he has suffered": *South Australia Asset Management Corpn. v. York Montague Ltd.*, (1996) 3 All ER 365 (HL), p. 370
95. *Manchester Corporation v. Markland*, (1936) AC 360.

Thrown out from motor car.—The defendant was driving a party, including the plaintiff, in his motor-car from Deolali to Igatpuri. The road passed a level-crossing. A train was timed to pass the crossing about the time. The defendant, who was driving his car at an excessive speed, got on the level-crossing but failed to take the sharp right-handed turn after the crossing. The car left the road just beyond the crossing, jumped down the embankment which was ten feet high and rushed into the paddy field below. The occupants of the car, with the exception of the defendant, were thrown out with much violence; and the plaintiff received such grave injuries as rendered him a cripple for the rest of his life. The plaintiff sued to recover damages caused to him by the defendant's negligence. It was held that the defendant was grossly and culpably negligent, and that he was liable in damages.[1]

Voluntary acceptance of drunken driver.—The plaintiff knowing that the driver of the motor-car was under the influence of drink and that, consequently, the chances of accident were thereby substantially increased, nevertheless, being under no compulsion either of necessity or otherwise, chose to travel by the car. She was injured in an accident caused by the drunkenness of the driver, in which the driver was killed. In an action against the personal representative of the driver, the defendant raised the defence of *volenti non fit injuria*. It was held that, except perhaps in extreme cases, the maxim did not apply to the tort of negligence so as to preclude from remedy a person who had knowingly and voluntarily accepted the risks which might arise from the driver of a car being under the influence of drink, and had been injured in consequence, and that the plaintiff was entitled to recover, the case not being one of the extreme type referred to.[2]

Failure to light barrier placed on highway.—A local authority erected a barrier across a highway near a crater made by a bomb. Hurricane lamps were placed upon the barrier, but the lights were extinguished by a strong wind. The man whose duty it was to attend to the lamps failed to visit them at night. The plaintiff, who was riding a bicycle along the street, received injuries through colliding with the barrier. It was held the local authority were liable, as having placed the obstruction in the highway they were under a duty to keep it lighted.[3]

Stop-light not sufficient signal.—The defendant had suddenly and violently applied her brakes while driving her motor-car in a stream of traffic. She gave no signal by hand of her intention to stop, but her car was fitted with a stop-light which was automatically operated when the brakes were applied. It was held that such a stop-light did not give sufficient warning of the intention of a driver to slow down or stop and that a hand signal should have been given.[4]

Accident in course of police duty.—The plaintiff was knocked down and injured by a motor cycle driven by a police constable who was himself killed. The accident occurred in the evening about twenty minutes after lighting-up time. The motor cycle was being driven at a speed of 60 m.p.h. in the course of police duty. The speed limit of 40 m.p.h. was by law made not applicable to vehicles used for police purposes. It was held that the estate of the police constable was liable for his negligence in spite of the above exemption from speed limit as he was driving at an excessive speed.[5]

1. *Sorabji H. Batlivala v. Jamshedji M. Wadia*, (1913) 15 Bom LR 959 : ILR 38 Bom 552; *Holloway v. Holland*, (1933) 10 OWN 1105.
2. *Dann v. Hamilton*, (1939) 1 KB 509 : 160 LT 433 : 55 TLR 297 : (1939) 1 All ER 59.
3. *Foster v. Gillingham Corporation*, (1942) 1 All ER 304.
4. *Croston v. Vaughan*, (1937) 4 All ER 249.
5. *Goynor v. Allen*, (1959) 2 All ER 644 : (1959) 2 QB 403 : (1959) 3 WLR 221.

Suicide in police custody.—Police taking a person with known suicidal tendencies are under a duty to take reasonable steps for preventing him in committing suicide and are liable in damages in action for negligence brought by the testatrix of the prisoner who died by suicide as the police failed to take reasonable preventive steps.[6]

Leaving hatch uncovered.—In the 'tween decks of a vessel in dock stevedores were engaged in rolling oil drums along the starboard alleyway which was let by clusters of electric lights and beside which a hatch had been uncovered by ship repairers for the purpose of slinging a stage through it to work in the hold below. At the dinner interval, when the stevedores left, the working conditions were perfectly safe but, in their absence, the ship repairers finished their work and departed, leaving the hatch still uncovered and having also placed a light, which previously illuminated that part of the ship, face downwards on the port side so that it no longer did so. The leading stevedore, on his return with an oil drum, found himself in darkness and, seeing the glimmer of the down-turned light, made a movement in that direction, with the intention of fetching it, but fell down the uncovered hatchway, sustaining injuries. It was held that the ship repairers were guilty of negligence in moving the light and in leaving the hatch uncovered; that the shipowners were also guilty of negligence in failing to ensure that the place where the stevedore was to work was reasonably safe; and that both the ship repairers and the shipowners were liable to him in damages since the negligence of both directly caused and contributed to the accident.[7]

Excavation protected by punner-hammer.—Where the defendants, electricity undertakers had protected an excavation made by them along a pavement by putting a punner-hammer across it and the plaintiff, a blind man, whose stick missed the punner-hammer, tripped and fell and as a result was rendered totally deaf, it was held in an action for damages for negligence, that duty was owed to blind persons if the operators foresaw or ought to have foreseen that blind persons might walk along the pavement, that the carrying out of such duty might involve extra precautions in the case of blind pedestrians and that the defendants had failed adequately to discharge that duty and were, therefore, guilty of negligence.[8]

Door not properly shut.—A contractor carrying out decorations in a house was to his knowledge left alone on the premises by the householder's wife. During her absence, he left the house to obtain wall-paper. He fastened back by its catch the latch of the yale lock on the front door and closed the door behind him. That door was accordingly then held shut only by its mortise lock, and could be opened by a mere turn of the handle. During the decorator's absence a thief entered the house and stole property, the value of which the householder claimed from the decorator. It was held that the contractual relationship between the decorator and the householder imposed a duty on the former to take reasonable care with regard to the state of the premises if he left them during the performance of his work; that it was a breach of that duty to leave the house with the front door in the condition in which he had left it; and that it was as a direct result of that breach of duty that the thief had entered the house and stolen the property, because the breach of duty consisted in a failure to guard against the very loss which in fact occurred. The decorator was accordingly liable for the householder's loss.[9]

6. *Reeves v. Commissioner of Police*, (1998) 2 All ER 381 : (1999) QB 169 : (1998) 2 WLR 401 (CA) affd. (1999) 3 All ER 897 (HL).
7. *Grant v. Sun Shipping Co. Ltd.*, (1948) AC 549 : (1948) 2 All ER 238.
8. *Haley v. London Electricity Board*, (1964) 3 All ER 185 : (1965) AC 778 : (1969) 3 WLR 479.
9. *Stansbie v. Troman*, (1948) 2 KB 48 : 64 TLR 226 : 92 SJ 167.

Loss of service.—M, a music hall artist, was employed by C, another music hall artist, to assist him in a music hall turn. While performing his turn at a theatre belonging to the defendants, M met with an accident owing to a loose floor board in the footlight area of the stage, and the defendants were held liable to M for negligence. C claimed that, as the employer of M, he was entitled to damages from the defendants in that he had lost the services of M owing to the defendant's negligence. It was held that although the injury sustained by M was caused by an omission and not a positive act, C was entitled to damages.[10]

Injury to person running behind lorry.—A lorry belonging to the defendant company was loaded with a large box or container. The driver attempted to drive under a railway bridge which was too low for the container to clear it and an accident occurred, the container being thrown off the lorry and injuring the plaintiff who was running behind the lorry at that moment. Shortly before the accident, the plaintiff had been on the lorry as a trespasser. It was contended by the defendants that they owed no duty of care to the plaintiff (a) because he was running along the highway to climb into it again, and was, therefore, a trespasser on the highway, and (b) because they had no reason to expect that he would be where he was at the time of the accident. It was held that the defendants and their driver, having created a potential source of danger owed a duty of care to anyone who might be on the highway in the near neighbourhood when the danger materialised, whether he was there lawfully or unlawfully, and the duty was not confined to someone whom they could have reason to expect to be there at the time.[11]

Starting of tram-car by passenger.—As the plaintiff was attempting to board a tram-car belonging to the defendant corporation at a request stopping place an unauthorised person (a passenger) gave the driver the starting signal by ringing the bell. The car started when the plaintiff had one foot on the step of the car and she fell and was injured. At the time of the occurrence the conductor was on the upper deck of the car collecting fares. It was held that as there was an appreciable time while the car was halted at the stopping place during which the conductor, in breach of his duty and without sufficient excuse, was absent from the platform of the car from which he should have given the starting signal, and as he might have foreseen that an unauthorised person might ring the starting bell if he absented himself from the platform, the conductor was negligent, and the corporation was liable to the plaintiff.[12]

Driver killed in avoiding a child straying from school.—A four-year-old boy attending a nursery school under the management of the appellant council as education authority, strayed from the premises on to a public highway, and the respondent's husband, who was driving a lorry, struck a telegraph post in avoiding him and was killed. The respondent sued the council for damages, alleging that the death was caused by their negligence or that of the teacher who had left the child temporarily unattended. It was held that the appellant council were liable to the respondent in damages, since the unexplained fact that in the temporary absence of the teacher it was possible for so young a child to wander from the school premises on to the highway, through a gate which was either open or very easy for him to open, disclosed negligence on their part.[13]

Duty towards visitors.—Contractors reconstructing the front approach to a house in which lived a caretaker and his wife so obstructed the normal approach that it

10. *Mankin v. Scala Theadrome Co. Ltd.*, (1964) 2 All ER 614.
11. *Farrugia v. Great Western Railway*, (1947) 2 All ER 565.
12. *Davies v. Liverpool Corpn.*, (1949) 2 All ER 175.
13. *Carmarthenshire County Council v. Lewis*, (1955) AC 549 : (1955) 2 WLR 517.

became impassable. Their workmen suggested to the caretaker's wife that persons might go in and out of the house by using the fore-court of the house next door, a route involving danger because it led through a narrow way between bushes and the unfenced sunk area of the house. On a November evening after dark the respondent, a woman of 71, visiting the caretaker and his wife by invitation, used that way in on the wife's suggestion. In leaving by the same way, after declining an offer to escort her, she fell into the area next door sustaining injuries. It was held that the contractors had been negligent and were liable in damages to the respondent, who, although she was guilty of contributory negligence, did not act unreasonably in attempting to use the alternative means of egress.[14]

Defendent not liable-Riding in cart without permission.—The plaintiff, a person of full age, contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with the cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her goods. On the way, the cart broke down, and the plaintiff was thrown out and severely injured. It was held that, as the defendant had not contracted to carry the plaintiff and she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained.[15]

Fall from tram-car.—The plaintiff, in attempting to board a tram-car of the defendant company, which was in motion, set his foot on the foot-board but failed to get a firm grip of the hand bar; and before he could raise himself into the car he slipped and fell, and had his toes injured by the wheels of the car. It was held that plaintiff was not entitled to recover damages as he himself was negligent in trying to get into the car when it was in motion.[16]

Injury from runaway horse.—The defendant's horse, by the negligence of the defendant's servant, ran away with a cart and turned from a highway into the yard of the defendant's house which opened on to the highway. The plaintiff's wife, who happened to be paying a visit at the defendant's house, ran out into the yard to see what the matter was, when she was met and knocked down by the horse and cart, receiving serious injuries. It was held that, as the defendant's servant was not bound to anticipate that the plaintiff's wife would be in the yard, there was no duty on the part of the defendant, towards the plaintiff's wife, and that the action, therefore, was not maintainable.[17]

Injury from falling tree.—The defendants were the occupiers of a building on land adjoining a highway. In the forecourt of the building was an elm some 130 years of age with a large crown of foliage, which had not been lopped or trimmed for many years. On a gusty day the tree fell across the highway, injuring the plaintiffs who were passing in a motor-car. After it had fallen, it was found that the elm had a disease of the roots which could not be detected while it was still standing. The fall of the tree was attributed in part to the condition of the roots, and in part to the crown on the tree, but neither of these causes, by itself, would be likely to account for its fall on the day in question. In an action by the plaintiffs for damages for negligence or nuisance it was held that whether the claim was based on negligence or nuisance the plaintiff must establish either that the defendants knew of the danger or ought to have known of it. The presence of disease being eliminated as an element of danger of which the defendants were or should have been aware, and the plaintiffs

14. *Billings & Sons Ltd. v. Riden*, (1958) AC 240 : (1957) 3 WLR 496 : (1957) 3 WLR 496 : (1957) 3 All ER 1.
15. *Lygo v. Newbold*, (1854) 9 Ex. 302.
16. *Temulji Jamsetji v. The Bombay Tramway Co.*, (1911) 13 Bom LR 345: ILR 35 Bom 478.
17. *Tolhausen v. Davies*, (1888) 58 LJ QB (NS) 98.

having failed to show that there was something in the appearance of the tree which should have indicated to the defendants the probability of danger, the claim for damages was rejected.[18]

Injury by cricket ball.—A person, being on a side road of residential houses, was injured by a ball hit by a player on a cricket ground abutting on that highway. The ground was enclosed on that side by a seven-feet fence, the top of which, owing to a slope, stood seventeen-feet above the level of the pitch. The wicket from which the ball was hit was about seventy-eight yards from this fence and one hundred yards from the place where the injury occurred. There was evidence that while over a period of years balls had been struck over the fence on very rare occasions, the hit now in question was altogether exceptional. It was held that the members of the club were not liable in damages to the injured person, whether on the ground of negligence or nuisance. Although the possibility of the ball being hit on to the highway might reasonably have been foreseen, this was not sufficient to establish negligence, since the risk of injury to anyone in such a place was so remote that a reasonable person could not have anticipated it.[19]

Theft of motor-bicycle.—The plaintiff went to a public house for refreshment, and before entering it left his motor-bicycle in a covered yard which formed part of the premises. There was no attendant to look after vehicles left in the yard, for the use of which no charge was made, nor did the plaintiff inform the publican that he had left his machine there. Later, on leaving the premises, the plaintiff discovered that the motor-bicycle had been stolen. In an action for damages against the publican, it was held (1) that, though, the plaintiff was an invitee, the defendant was not in his capacity of invitor liable for the loss of the motor-bicycle, for, though an invitor, when the invitation extends to the goods as well as to the person of the invitee is under a duty to protect not only the invitee but also his goods from damage due to defects in the premises, he is under no duty to protect the goods from the risk of theft by third parties, (2) that, as the motor-bicycle had not been delivered into the possession of the defendant, and as the defendant was unaware that it had been brought on to his premises, he had not become a bailee of it, and was therefore not liable as a bailee for its loss.[20]

2. STRICT LIABILITY

2(A) Rationale of Strict Liability

There are many activities which are so hazardous that they constitute constant danger to person and property of others. The law may deal with them in three ways. It may prohibit them altogether. It may allow them to be carried on for the sake of their social utility but only in accordance with statutory provisions laying down safety measures and providing for sanctions for non-compliance. It may allow them to be tolerated on condition that they pay their way regardless of any fault.[21] The last is the doctrine of strict liability. The undertakers of the activities have to compensate for the damage caused irrespective of any carelessness on their part. The basis of liability is the foreseeable risk inherent in the very nature of the activities. In this aspect, the principle of strict liability resembles negligence which is also based on foreseeable harm. But the difference lies in that the concept of negligence

18. *Caminer v. Northern and London Investment Trust Ltd.*, (1949) 2 KB 64 : 65 TLR 302 : (1949) 1 All ER 874.
19. *Bolton v. Stone*, (1951) AC 850 : (1951) 1 TLR 977 : (1951) 1 All ER 1078 : 50 LGR 20.
20. *Tinsley v. Dudley*, (1951) 2 KB 18.
21. For 'Fault' see Chapter 2, title 5, p. 28.

comprehends that the foreseeable harm could be avoided by taking reasonable precautions and so if the defendant did all that which could be done for avoiding the harm, he cannot be held liable except possibly in those cases where he should have closed down the undertaking. Such a consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions. The rationale behind strict liability is that the activities coming within its fold are those entailing extraordinary risk to others, either in the seriousness or the frequency of the harm threatened. "Permission to conduct such an activity is in effect made conditional on its absorbing the cost of the accidents it causes, as an appropriate item of its overhead."[22]

2(B)(i) *Rule in Rylands v. Fletcher*

Strict liability has its origin in the case of *Rylands v. Fletcher*,[23] where the facts were that the defendants who had a mill near Ainsworth in Lancashire wanted to improve its water-supply. They constructed a reservoir by employing reputed engineers to do it. When the reservoir was filled, water flowed down the plaintiff's neighbouring coal mine causing damage. The engineers were independent contractors. There was some negligence on their part in 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 the 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."[24] BLACKBURN, J., further said: "The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali work is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to other so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences."[25] In the HOUSE OF LORDS, LORD CAIRNS while approving the judgment of BLACKBURN, J., laid down that the rule applied when there was non-natural user of land. This qualification was

22. FLEMING, Torts, 6th edition, p. 302. Similar observations were made by Supreme Court in *M.C. Mehta v. Union of India*, (1987) 1 SCC 395, p. 421.
23. (1868) LR 3 HL 330.
24. *Fletcher v. Rylands*, (1866) LR 1 Ex 265, 279.
25. PER BLACKBURN, J., in *Fletcher v. Rylands*, (1866) LR 1 Ex 265, 280 : 4 H & C 263, 271, confirmed in LR 3 HL 330; *Manindra Nath v. Mathradas*, (1945) 49 CWN 827 : 80 CLJ 90.

emphasised by the Privy Council in *Rickards v. Lothian*.[26] In the words of LORD MOULTON in this case: "It is not every use to which land is put that brings into play this principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."[27] Another qualification of the rule is that the non-natural use by the defendant should result in "escape" of the thing from his land which causes damage and so in the absence of "escape", the rule has no application. This qualification came in the forefront before the HOUSE OF LORDS in *Read v. J. Lyons & Co.*,[28] In this case, the defendants undertook the management and control of an Ordnance Factory where they made high explosive shells for the Government. There was an explosion in the factory in which the plaintiff and some others employed within the factory were injured. In the plaintiff's claim for damages, negligence was not alleged nor was it proved during the trial. The case rested on the allegation that the defendants were manufacturing high explosive shells which they knew to be dangerous things and that the plaintiff suffered damage when one of the shells exploded. The HOUSE OF LORDS upheld the decision of the court of Appeal that in the absence of any proof of negligence no cause of action was made out. It was ruled that the Rule of *Rylands v. Fletcher* was conditioned by two elements, *viz.* the non-natural use of the land by the defendant and the escape from his land of something which causes damage and that at least the second element was absent in the case. It was urged before the HOUSE OF LORDS that it would be strange result to hold the defendants liable if the injured person was just outside their premises but not liable if he was just within them and that escape in the context of the rule meant escape from control and it was irrelevant where damage took place. These arguments were rejected though it was observed that they had considerable force on the reasoning that the rule itself was an extension of the general rule and it was undesirable or there was no logical necessity to extend it further. The case also cast some doubt on the question whether a person could recover damages for personal injuries on the basis of the rule of *Rylands v. Fletcher*.

The rule in *Rylands v. Fletcher* was again considered by the House of Lords in *Cambridge Water Co. Ltd. v. Eastern Counties Leather Plc.*[29] The plaintiff in this case was a company licensed to supply water in the Cambridge area. The water for supply was taken by borehole extraction from underground strata. The defendant was another company engaged in manufacture of fine leather. The tanning works of the defendant were at a distance of 1.3 miles from the plaintiff's borehole. The defendant used a volatile solvent known as perchlorethene (PCE) for degreasing pelts at its tanning works. PCE seeped into the ground beneath the defendant's works and thence having been conveyed in percolating water in the direction of the borehole contaminated the water available from the borehole. The time taken for PCE to seep from the tannery to the borehole was 9 months. The defendant started using PCE from 1950. PCE was introduced into a tank at the base of dry cleaning machines. Spillage of PCE in small quantities took place during topped up process upto 1976. It could not then be foreseen that small quantities of PCE spilled on the concrete floor of the defendant's works will enter the underground strata beneath the works and will be carried by percolating water to the defendant's borehole 1.3 miles away. Any

26. (1913) AC 263 : 108 LT 225 : 29 TLR 281 (PC).
27. *Rickards v. Lothian*, (1913) AC 263, 280 : 108 LT 225 : 29 TLR 281; *Eastern and South African Telegraph Co. v. Cape Town Tram Co.*, (1902) AC 381, 393 : 57 LTR 1990; *Western Engraving Co. v. Film Lab. Ltd.*, (1936) 1 All ER 106; *Collingwood v. Home & Colonial Stores*, (1936) 1 All ER 74 : 55 LT 550, *State of Punjab v. Modern Cultivators*, AIR 1965 SC 17 p. 22.
28. (1947) AC 156 (HL).
29. (1994) 1 All ER 53 (HL).

spillage would have been expected to evaporate rapidly in the air. The water so contaminated was never held to be dangerous to health. In 1980 EEC issued directives to the member states relating to the quality of water intended for human consumption. This directive was implemented in the United Kingdom by legislation in 1985. After 1985 the water from the borehole ceased to be wholesome and could not be lawfully supplied because of presence of PCE. The borehole was therefore taken out of commission and the plaintiff claimed damages. The plaintiff's claim for damages was essentially based on nuisance and strict liability rule in Rylands v. Fletcher. The claim was negatived on the ground that damage of the nature suffered by the plaintiff was not foreseeable. The House of Lords affirmed the rule laid down by the Privy Council in Wagon Mound No. (2) that foreseeability of damage is essential to establish a claim for damages in nuisance.[30] Further, the House of Lords held that irrespective of whether the rule in *Rylands v. Fletcher* was treated as an aspect of nuisance or as a special rule of strict liability, it was appropriate to take the view that foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule.[31] It appears that PCE that was spilled till 1976 was still in existence in the substrata below the defendant's works when the claim was filed and was being tried and the escape of PCE was continuing to the borehole. It was, therefore, argued that since the escape of PCE was continuing even after it has become known, the defendant could be made liable either in nuisance or under the strict liability rule in Rylands v. Fletcher. This argument was not accepted on the reasoning that the PCE was irretrievably lost in the ground below beyond the defendant's control long before the enforcement of relevant legislation making it unlawful to supply water contaminated with PCE from the borehole and long before it became known that PCE was being carried from the defendant's works to the borehole by underground percolating water. This was held to be a case of historical pollution for which the defendant could not be made liable.[32] The House of Lords, however, held that storage of substantial quantities of chemicals on industrial premises should be regarded as a classic case of non-natural use and there could be no objection in imposing strict liability for foreseeable damage caused in the event of their escape.[33]

The rule in *Ryland v. Fletcher* was also considered by the House of Lords in *Transco plc v. Stockport MBC.*[34] The plaintiff in this case had installed a gas main along an embankment on a stretch of a disused railway line. The defendant local authority later purchased the line with the plaintiff continuing to have the right of support from the embankment for its main. On a nearby site owned by the defendant lay a tower block of flats which was supplied with water by means of water pipe which the defendant had constructed between the tower block and the water main. Without any negligence of the defendant the water pipe which supplied water to the flats fractured and discharged considerable quantities of water leading to the collapse of the embankment. The plaintiff was compelled to do considerable work to remedy the situation and claimed damages on the basis of the rule in *Ryland v. Fletcher*. The House of Lords in negativing the claim held that the provision of a water supply to a large block of flats did not amount to a special hazard constituting an extraordinary use of land. But the House of Lords did not accept the submission that the rule had

30. (1994) 1 All ER 53 (HL)., p. 72.
31. (1994) 1 All ER 53 (HL)., p. 76.
32. (1994) 1 All ER 53 (HL)., p. 77.
33. (1994) 1 All ER 53 (HL)., p. 79.
34. (2003) 3 WLR 1467 (HL).

no relevance in the 21st Century and should be abolished as done in *Australia.*[35] They expressed the view that it only needed clarification.

As clarified in *Transco* the rule was a sub-species of nuisance. The rule required that an occupier of land had brought on to his land or was keeping there some dangerous thing which posed an exceptionally high risk to neighbouring property should it escape and which amounted to an extraordinary and unusual use of the land judged by the standards appropriate at the relevant place and time and that there had been escape, on to some other property causing damage which was a foreseeable consequence of the escape. The rule has no application when the defendant acts under statutory authority or when the escape is as a result of Act of God or because of the intervention of a third party. The case also supports the doubt which was expressed in *Read v. J. Lyans & Co.*,[36] that the rule is not concerned with liability for personal injuries and holds that the doubt is now settled and the rule being a species of nuisance does not apply for recovery of damages for personal injuries.[37]

The above discussion of authorities leads to the conclusion[38] that if the defendant makes 'non-natural use' of land in his occupation in 'he course of which there is escape of something which causes foreseeable damage to person or property outside the defendant's premises, the defendant is liable irrespective of any question of negligence on the basis of the rule of strict liability propounded in *Rylands v. Fletcher*. It is difficult to define the expression "non-natural use" except to say what was said in *Rickards v. Lothian*[39] that it must be some special use bringing with it into play increased damage to others and must not be merely the ordinary use of the land. The concept of non-natural use is flexible. A particular use which was non-natural a century back may be quite natural now. Considerations of time, place, surroundings, circumstances and purpose all enter in the determination of the question whether a particular use is natural or non-natural. The requirement of "escape" which was stressed most emphatically in the case of *Read v. Lyons*,[40] brings about an unfortunate and illogical distinction between the persons injured inside and those just outside the dangerous premises. It has halted the development of the general theory of liability in the English law in contrast to American law where the rule is stated to be that "one who comes on an ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognise as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm."[41] The House of Lords in *Cambridge Water Co.'s* case[42] took notice of the above criticism but declined to extend the strict liability rule observing that it is more appropriate for strict liability in respect of operations of high

35. *Burnie Port Authority v. General Jones Pty. Ltd.*, (1994) 179 CLR 520. Also see (2004) 78 ALJ 177.
36. See p. 489 text and footnote 28.
37. (2003) 3 WLR 1467, pp. 1473, 1474 (para 9) (LORD BRIGHAM), 1481 (para 35) (LORD HOFFMAN), p. 1486 (para 52) LORD HOBHOUSE.
See further Donal Nolan, *'The Distinctiveness of Rylands v. Fletcher*, (2005) 121 Law Quarterly Review 421.
38. For statement of the rule see also *M.C. Mehta v. Union of India*, (1987) 1 SCC 395, p. 419 ; AIR 1987 SC 965.
39. (1913) AC 263 ; 108 LT 225 ; 29 TLR 281 (PC). See text and footnote 26, p. 489, *supra*.
40. (1947) AC 156 (HL). See text and footnote 28, p. 489, *supra*.
41. American Restatement Article 519 Restatement 2d substituted "abnormally dangerous" for ultra-hazardous. FLEMING, Torts, 6th edition, p. 313.
42. (1994) 1 All ER 53 (HL).

risk to be imposed by Parliament than by courts.[43] The rule being a species of nuisance does not apply for recovery of damages for personal injuries.[44]

In India the rule has been considered by the Supreme Court in some cases and applied to personal injuries. It has even been extended to cover accidents arising out of use of motor vehicles on the road.

In *State of Punjab v. Modern Cultivators*[45] where damage was caused by overflow of water from a breach in a canal the Supreme Court held that use of land for construction of a canal system is an ordinary use and not a non natural use. The case was decided in favour of the plaintiff on the finding of negligence. This case does not modify the rule of *Rylands v. Fletcher*. It was so held in *Jay Laxmi Salt Works (P.) Ltd. v. State of Gujarat*[46] which was a case of damage caused by overflow of water from a reclamation bundh constructed by the State of Gujarat for reclamation of vast area of land from saltish water of sea. This case too was decided not on the reasoning that this was non natural use of land but on the basis of violation of public duty and negligence which lay in defective planning and construction of the bundh. The rule of *Rylands v. Fletcher* was again referred to in *Indian Council for Enviro Legal Action v. Union of India*,[47] but the case was decided on the *Mehta* principle of strict liability which was held to have laid down an appropriate principle suited to our country, apart from being of binding authority.

The strict liability rule in *Rylands v. Fletcher* has, however, been extended recently by the Supreme Court in *Kusuma Begum (Smt.) v. The New India Assurance Co. Ltd.*,[48] by relying on some general obiter observation in Gujarat SRTC v. Ramanbhai Prabhatbhai, (1987) 3 SCC 234, to apply to accidents arising out of use of motor vehicles on the road, in addition to no fault liability statutorily provided in the Motor Vehicles Act, without the necessity of establishing any negligence on the part of the driver of the motor vehicle causing the accident. The accident in this case arose on capsizing of a jeep due to tyreburst when the Motor Vehicles Act 1939 was in force and the dependants of the victim could have been allowed only Rs. 15000 as compensation on no fault basis under section 92A of the Act unless they proved negligence. The case was, however, decided when the Motor Vehicles Act, 1988 had come into force. The tribunal negatived negligence but allowed Rs. 50,000 as compensation on no fault basis under the corresponding provision viz., section 140 of the new Act. The claimants went in appeal to the High Court where they lost and, therefore, they went up in further appeal to the Supreme Court. In 1994 another provision section 136A was added in the Motor Vehicles Act which also provides compensation on no fault basis but on quite liberal terms in accordance with the structural formula given in the second schedule in cases where the annual income of the deceased was upto Rs. 40,000. It would have been too much to apply that provision directly to an accident which took place even before the 1988 Act was enacted. But it seems the Supreme Court was not satisfied with the quantum of compensation of Rs. 50,000 allowed to the dependants and it had to find out some basis for enhancing the compensation. That is probably the inarticulate reason for extending the rule of *Rylands v. Fletcher* to motor accidents. In this way the dependents were allowed Rs. 1,18,000 as compensation which could have been allowed to them under section 163A had it been applicable. In view of this decision a

43. (1994) 1 All ER 53, pp. 75, 76.
44. See text and footnote 37, *supra*.
45. AIR 1965 SC 17.
46. (1994) 4 SCC 1 : JT 1994 (3) SC 492.
47. AIR 1996 SC 1446 : 1996 (2) SCALE 44, p. 69; See further, *Munni Devi v. Babu Lal* (2010) 4 All LJ 161.
48. AIR 2001 SC 485 : JT 2001 (1) SC 37.

claimant can claim compensation on no fault liability under section 140 or section 163A of the Act or under the rule of strict liability of *Rylands v. Fletcher*. After introduction of section 163A which provides for compensation on liberal terms, it is hardly likely that any claim would be filed (where the deceased's annual income was upto Rs. 40,000) under the strict liability rule of *Rylands v. Fletcher*, where certain defences would be open which are not open to a claim under section 140, or section 163A. Use of a motor vehicle on the road cannot be said to be in modern times non-natural use of either the vehicle or the road and a motor vehicle causing the accident on the road cannot also be said to have escaped from land or premises in occupation of the owner of the motor vehicle. It is, therefore, difficult to see how the conditions for applicability of the rule of *Rylands v. Fletcher* are satisfied in case of an accident arising out of the use of a motor vehicle on the road. Instead of extending the rule of *Rylands v. Fletcher* to cover the case treating it to be a case of no negligence, it would have been easier to apply the rule of res ipsa loquitur and raise the presumption of negligence as was done in *Barkway v. South Wales Transport Co. Ltd.*, [(1948) 2 All ER 460] which was also a case of tyreburst and which was approvingly referred in *Krishna Bus Service v. Mangoli*.[49] A reading of a Three Judge Bench judgment in *Deepal Girishbhai Soni v. United Insurance Co. Ltd.*[50] shows that apart from sections 140, 163A of the M.V. Act or any other statutory provision, the claim for compensation can be only on the ground of fault. "Section 166 of the M.V. Act" the court said provides for "a complete machinery for laying the claim on fault liability." The case of Deepal Girishbhai Soni was followed by a two judge bench of the Supreme Court in *Oriental Insurance Co. Ltd. v. Premlata Shukla C.A.* 2526 of 2007 decided on 15-5-2007 [2007-3 M.P.H.T. 225 (S.C.)] where it was held (para 10): "Proof of rashness and negligence on the part of the driver of the vehicle is therefore sine-qua-non for maintaining an application under section 166 of the Act." It is submitted that the case of Kusuma Begum requires reconsideration.

The principle of *Rylands v. Fletcher* applies to a proprietor who stores electricity on his land if it escapes therefrom and injures a person or the ordinary use of property. It does not apply to the case of injury done to a peculiar trade apparatus unnecessarily so constructed as to be affected by minute currents of the escaping force.[51] The Supreme Court applied the strict liability rule of *Rylands v. Fletcher* against the Madhya Pradesh Electricity Board in a case where a cyclist was electrocuted by a live electric wire lying on the road.[52] The court also held that the defence that the live wire was lying on the road due to clandestine pilferage of a stranger could not be availed of by the Board to negate its strict liability.[53] The Board has statutory authority to transmit electricity, therefore, it is submitted that the case should have been more appropriately decided on the basis of negligence which was

49. (1976) 1 SCC 791 p. 799.
50. AIR 2004 SC 2107, pp. 2120, 2121.
51. *Eastern and South African Telegraph Co. v. Cape Town Tramways Co.*, (1902) AC 381; *National Telephone Co. v. Baker*, (1893) 2 Ch 186 : 50 WLR 657 : 86 LT 457.
52. *M.P. Electricity Board v. Shail Kumari*, AIR 2002 SC 551 ; Followed in *Mankunwar v. Chairman & Another*, AIR 2010 MP 26 : (2010) 93 AIC 323 : (2010) 2 MPLJ 536
53. *M.P. Electricity Board v. Shail Kumari*, AIR 2002 SC 551 p. 554. The court differed on this point from an earlier decision in *W.B. Electricity Boad v. Sachin Banerjee*, AIR 2000 SC 3629(1) : (1999) 9 SCC 21. Followed in *Ramesh Singh Pawar v. Madhya Pradesh Electricity Board*, AIR 2005 MP. 2; See also, *Chuni Lal & others v. State of Jammu and Kashmir & Another*, AIR 2010 (NOC) 740 (J&K); *Chellama & others v. Kerala State Electricity Board, Trivandrum*, AIR 2010 (NOC) 355 (Ker); *Alamelu v. State of Tamil Nadu* (2012) 114 AIC 707.

held to exist.[54] The court in *Sushil Kumar's* case relied upon a Privy Council decision[55] which was decided essentially on the interpretation of Articles 1053 and 1054 of the Quebe code[56] and not on the principle of *Rylands v. Fletcher*. Indeed, their Lordships said that in construing these Articles of the Code "*Rylands v. Fletcher and Nicholas v. Marsland* have better be left out of account."[57] *Sushil Kumar's* case was distinguished in *SDO Grid Corporation of Orissa Ltd. v. Timiduoram*[58] on the ground that there was a finding of negligence in that case which was tried as a suit. *Timiduoram* holds that when the fact of negligence is denied, the claim should never be entertained in a writ petition and should be left to be tried in a civil suit. The court clearly held that "the mere fact that the wire of electric transmission line belonging to the appellants had snapped and the deceased had come into contact with it and died by itself was not sufficient for awarding compensation. The court was required to examine as to whether the wire had snapped as a result of any negligence on the part of the appellants as a result of which the deceased had come in contact with the wire."[59] It is submitted that the case of Sushil Kumar requires reconsideration. The use of electric energy for lighting or other domestic purposes is so reasonable and prevalent that to bring electricity upon land or premises for such purposes is to use the land or premises in a natural and not an unnatural way. A person who keeps on his premises electric energy for domestic purposes is bound to exercise reasonable care to prevent damage therefrom accruing, but he is not responsible for damage not due to his own default.[60] It has also been observed that during bad weather, where there is a risk of electric wires being snapped from the pole, it is the duty of the electricity department to ascertain that the wires passing overhead are in-tact and it would constitute negligence if this exercise is not carried out.[61]

More English and Indian Cases Relating to Rylands v. Fletcher

The principle of *Rylands v. Fletcher* was held to apply where a company stored in close proximity nitrate of soda and dinitrophenol for the purpose of making munitions for Government, with the result that on a fire breaking out they exploded with terrific violence causing loss of life and serious damage to adjoining property.[62] Similarly where the defendants drove a very large number of piles into the soil, thereby setting up such heavy vibrations as to cause serious structural damage to an old house belonging to the plaintiffs, with the result that the greater part had to be taken down in compliance with a dangerous structure notice, it was held that the defendants were responsible as insurers for all damages caused by the escape of the vibrations, they had so created.[63]

Under the principle of *Rylands v. Fletcher*, a person who brings dangerous substances upon premises and carries on a dangerous trade with them is liable if,

54. See text and cases in footnote 1, p. 566; CLERK AND LINDSELL on Torts, 15th edition, para 24.55 p. 1232; *Transco plc v. Stockport*, (2003) 3 WLR 1467 (text and footnote 34, p. 490, *supra*).
55. *Supra*, footnote 70.
56. *Quebe Railway, Light, Heat and Power Company Ltd. v. Vandly*, AIR 1920 PC 181, p. 185 to 187.
57. *Quebe Railway, Light, Heat and Power Company Ltd. v. Vandly*, AIR 1920 PC 181, p. 187.
58. (2005) 6 SCC 156, p. 160 (para 8) : AIR 2005 SC 3971.
59. (2005) 6 SCC 156, p. 159 (para 6). To the same effect are: *Grid Corporation of Orissa Ltd. v. Sukmani Das*, AIR 1999 SC 3412 : (1999) 7 SCC 298; *Tamil Nadu Electricity Board v. Sumathi*, AIR 2000 SC 1603 : (2000) 4 SCC 543.
60. *Dhanal Soorma v. Rangoon Indian Telegraph Association Ltd.*, (1935) ILR 13 Ran 369.
61. *Tamil Nadu Electricity Board v. Kuppayammal* (2012) 3 LW 170 (Mad); *Raju Govind Dansingani v. Tamil Nadu Electricity Board*, (2012) 4 CTC 167
62. *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.*, (1921) 2 AC 465 : 126 LT 70.
63. *Hoare & Co. v. McAlpine*, (1923) 1 Ch 167 : 128 LT 526 : 39 TLR 97.

though without negligence on his part, these substances cause injury to persons or property in their neighbourhood.[64] It is immaterial whether he is or is not aware of the danger at the time when he brings and uses them. Thus a tramway company was held liable for using wood-blocks coated with creosote which gave off fumes which injured plants and shrubs of the plaintiff whose premises were near the road.[65] This liability exists whether the land is or is not owned by the person responsible for the bringing upon it and use of the dangerous substances.[66]

If a man brings on to his premises a dangerous thing which is liable to cause fire, such as a motor-car with petrol in it, the carburettor of which is not unlikely to get on fire when the engine is started, and a fire results and escapes causing damage to adjoining property, though without any negligence on his part, he is liable, for the rule is that he must keep such a thing under control at his peril.[67] The dangerous thing which is liable to cause fire should have been brought by the defendant on his premises in the course of some non-natural user.[68] If a person uses a traction engine which emits sparks in spite of all precautions being taken to prevent their emission, he will be liable if another person's hayrick be set on fire by the sparks, upon the ground that such an engine is a dangerous machine.[69]

The principle of *Rylands v. Fletcher* is followed in several Indian cases.[70]

64. *Belvedere Fish Guano Co. v. Rainham Chemical Works*, (1920) 2 KB 487; *Hale v. Jennings Brothers*, (1938) 1 All ER 579 : 82 SJ 193.
65. *West v. Bristol Tramways Co.*, (1908) 2 KB 14.
66. *Charing Cross, West End & Electric Co. v. London Hydraulic Power Co.*, (1913) 3 KB 442; *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.*, (1921) 2 AC 465.
67. *Musgrove v. Pandelis*, (1919) 2 KB 43 : 35 TLR 219 : 120 LT 601.
68. *Mason v. Levy Auto Parts*, (1967) 2 All ER 62 : (1967) 2 QB 530.
69. *Powell v. Fall*, (1880) 5 QBD 597 : 43 LT 562.
70. A suit for damages was held to lie against a proprietor who penned back the water of a stream by erecting a *bund* upon his land, so as to inundate the land of his neighbour, without his license and consent: *Becharam Chowdhary v. Puhubnath Jha*, (1869) 2 Beng LR (Appx.) 53. The defendant closed up the outlet of a bank upon his own land, whereby the surface drainage water had immemorially flowed from the plaintiff's land into and over the defendant's land and so escaped. By reason of the closing of those outlets the water was unable to escape, and the plaintiff's land became flooded and the crops therein damaged. It was held that the defendant was liable for the damage caused: *Mussamut Anundmoyee Dossee v. Mussamut Hameedoonissa*, (1862) Marsh. 85, sub-nom. *Must. Hameedoonissa v. Musst. Anundmoyee Dossee*, (1862) 1 Hay 152.

The Bombay High Court has held that before a person can be made liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural use of it. Otherwise he is not liable: *Mohalal v. Bai Jivkore*, (1904) 6 Bom LR 529; ILR 28 Bom 472. This case has been doubted and distinguished in *Ramanuja Chariar v. Krishnaswami Mudali*, (1907) ILR 31 Mad 169, which decided that the retention of water by a person on a portion of his land to prevent its passing on to other portions of his land was not an act done in the natural and usual course of enjoyment and the person so doing was liable for damage caused thereby.

A suit for damages, based on an allegation that defendant had neglected to drain his garden so as to prevent water from collecting there and injuring the adjoining property of the plaintiff is not maintainable as the owner of property is under no legal obligation to incur expenses upon it for the benefit of his neighbours, where it has not been altered in character by his acts or with his permission in such a way as to expose them to any injury: *Baldeo Das v. Secretary of State*, (1883) PR No. 30 of 1883.

Where the defendants with a view to make their land cultivable lowered its level with the consequence that water in a tank belonging to a third party passed to that land and subsequently overflowed into lands belonging to the plaintiff, it was held that the plaintiff was not entitled to any cause of action: *Kenaram Akhuli v. Sristidhar Chatterjee*, (1912) 16 CWN 875.

Where Government constructs an irrigation canal it undertakes a duty to protect other parties against damage arising from the water of the canal and if it does not take adequate precautions to deal with the overflow of water from the canal, for instance, by means of an outlet at the tail end of the canal, it is liable

[Footnote No. 70 Contd.]

The rule in *Rylands v. Fletcher* applies only if the defendant brings or accumulates on his own land something that is likely to escape and do mischief, irrespective of the question whether that was done by the defendant wilfully or negligently.[71]

An ability to foresee indirect or economic loss to another person as the result of the defendant's conduct does not automatically impose on the defendant a duty to take care to avoid that loss.[72]

Water.—The defendant in erecting a house put down pipes to convey water from the roof, but did not connect them with any drain. The water came through the pipes into the cellar of the house, collected there into a pool and flowed from there into the cellar of the adjoining house of the plaintiff, which was on a lower level: it was held that the plaintiff was entitled to damages in respect of the injuries caused thereby.[73]

By reason of an unprecedented rainfall a quantity of water was accumulated against one of the sides of the defendants' railway embankment, to such an extent as to endanger the embankment, when, in order to protect their embankment, the defendant cut trenches in it by which the water flowed through, and went ultimately on to the land of the plaintiff which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages for such injury the Jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property and that it was not done negligently. It was held that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable.[74]

When a person constructs a dam on his land which has the effect of diverting the water from its natural channel on to the land of a neighbour and damage to the neighbour's property results, he is liable to his neighbour. An owner of property has no right to let off water which has naturally accumulated therein even for the purpose of its preservation from damage therefrom if this will have the effect of transferring his misfortune to the property of another.[75]

[Footnote No. 70 Contd.]

to compensate those to whom damage may be caused by such overflow: *Secretary of State for India in Council v. Ramtahal Ram*, (1925) 6 PLT 708.

The retention of water by a person on a portion of his land to prevent its passing on to the other portions of his land is not an act done in the natural and usual course of enjoyment and the person so doing is liable for damage caused thereby: *Dhanusao v. Sitabai*, ILR 1948 Nag 698.

Where the defendant set fire to his land without taking necessary precaution to prevent the same from spreading into the lands in the neighbourhood, he was 'playing with fire' and to be deemed to have foreseen the possibility of the fire spreading into the lands adjoining his land and is liable for any damage caused to them: *M. Madappa v. K. Kariappa*, AIR 1964 Mys 80.

Where the defendant installed a big ore melting furnace near the plaintiff's house, he was held liable for emission of harmful gases with offensive smell and heating causing discomfort : *Darshan Ram v. Nazar Ram*, AIR 1989 P&H 253.

71. *Dhanusao v. Sitabai*, ILR (1948) Nag 698.
72. *Weller v. Foot and Mouth Disease etc.*, (1965) 3 All ER 560 : (1965) 3 WLR 1082 : (1966) 1 QB 569.
73. *Snow v. Whitehead*, (1884) 27 Ch D 588, dissenting from *Ballard v. Tomlinson*, (1884) 26 Ch D 194.
74. *Whalley v. Lancashire and Yorkshire Ry. Co.*, (1884) 13 QBD 131; *Greyvensteyn v. Hattingh*, (1911) AC 355; *Swamiullah v. Makund Lal*, (1921) ILR 43 All 688. Whalley's case has been distinguished by the former Nagpur High Court in a case in which it has held that it is lawful for a person to erect an embankment on his land to protect his land from the influx of water from adjoining land, and he is not liable for damage caused by the water being thrown on the land of another; *Shankar v. Laxman*, ILR 1938 Nag 289; *Ramnath v. Kalanath*, ILR 1950 Nag 509.
75. *Ramnath v. Kalanath*, ILR 1950 Nag 509.

The plaintiffs were the owners of electric cables which had been laid under certain public streets; defendants were the owners of hydraulic mains which had been laid under the same streets. These mains burst in four different places, in each case damaging the plaintiff's cables. The bursting of the mains was not due to any negligence on the part of the defendants. It was held that the defendants were liable although the site of the plaintiff's injury was occupied by them only under a licence and not under any right of property in the soil.[76]

A municipal authority, in laying out a park, constructed a concrete paddling pond for children in the bed of a stream, altered the course of the stream and obstructed the natural flow of water therefrom. Owing to a rainfall of extraordinary violence the stream overflowed at the pond, and, as the result of the operations of the authority, a great volume of water, which would have been carried off by the stream in its natural course without mischief, poured down a public street into the town and damaged the property of two railway companies. It was held that the extraordinary rainfall was not an act of God which absolved the authority from responsibility, and that they were liable in damages to the railway companies.[77]

Where water coming through two natural channels in the plaintiff's land had accumulated in the *agal* portion of the defendant's tank and the latter in order to get rid of the consequences of that injury to his land got constructed an embankment with a view to transfer that water to the land of the plaintiff, it was held that it was not open to the defendant to erect such an embankment.[78]

Injury caused by bee-hives.—Plaintiff and defendant resided on adjacent farms. The defendant kept a number of beehives. The bees swarming from these hives frequently caused annoyance to the inhabitants of the neighbouring farm. One day the defendant, for removing honey, smoked the hives with a 'smoker' without warning the plaintiff who was tackling his horse. The bees, irritated by the smoking operation, swarmed upon the plaintiff and his horse. The horse dragged the plaintiff and threw him violently against a wall, causing him severe injuries. It was held that the defendant was liable.[79]

Damage by rats to adjoining owner.—The defendants carried on the business of bone manure manufacturers on premises near the plaintiff's farm. For the purpose of their business they had on their premises a heap of bones, which caused large number of rats to assemble there. The rats made their way from the defendants' premises on to the plaintiff's land, and ate his corn, causing substantial loss, in respect of which the plaintiff claimed damages from the defendants. It was held that no cause of action was established against the defendants.[80]

Eating of yew tree leaves by horse.—The defendants planted on their own land, but so close to the boundary, as to project into the adjoining meadow in the occupation of the plaintiff, a yew tree, and the plaintiff's horse whilst feeding in the meadow ate off the portion of the tree which projected and died in consequence, it was held that the defendants were liable for the value of the horse.[81] But if the poisonous leaves had not extended to the defendant's neighbour's boundary, he would not have been liable; for his legal duty to his neighbour stopped with his boundary, within which he was free to do or grow whatever he wished so long as the boundary was not

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76. *Charing Cross Elec. Sup. Co. v. Hydraulic Power Co.*, (1914) 3 KB 772 : 83 LJKB 116.
77. *Greenock Corporation v. Caledonian Railway*, (1917) AC 556 : 117 LT 483 : 33 TLR 531.
78. *Guhiram v. Uday Chandra*, AIR 1963 Pat 455.
79. *O'Gorman v. O'Gorman*, (1903) 2 IR 573.
80. *Stearn v. Prentice Brothers, Limited*, (1919) 1 KB 394 : 35 TLR 207 : 120 LT 455.
81. *Crowhurst v. Amersham Burail Board*, (1878) 4 Ex. D 5.

overpassed. Thus, where the plaintiff's horse ate off the branches of a yew tree no part of which extended over his field, and the defendants were under no liability to fence against the plaintiff, it was held that they were not liable since they owed no duty of care in respect of trespassing animals.[82]

Swallowing of pieces of iron rope by cow.—The defendants' land adjoining the plaintiff's was fenced by a wire rope repaired by them. Through exposure the rope decayed and pieces of it fell on the grass on the plaintiff's land, whose cow in grazing swallowed one of the pieces, and died in consequence. The defendants were held liable to the plaintiff for the loss of the cow.[83]

Allowing thistles to grow.—Where an occupier of land allowed thistles, which he had not brought on to his land, but which were its natural produce, to seed, so that the seed was carried on to the adjoining land which was thereby injured it was held that no action lay for the damage caused thereby.[84]

Injury by chair detached from chair-o-plane.—The plaintiff was tenant of a stand on a fair-ground belonging to the defendants. While she was on her stand, a chair, with its occupant, became detached from a chair-o-plane, the property of and operated by the defendants, and severely injured the plaintiff. It was found as a fact that the action was due to the recklessness of the occupant of the chair. It was held that the defendants were liable without proof of negligence on their part.[85]

Escape of virus : Loss of business.—In consequence of the escape of a virus imported by the defendants and used by them for experimental work of foot and mouth disease on premises owned and occupied by them, cattle in the vicinity of the premises became infected with the disease. Accordingly an order was made under statutory power closing cattle markets in the district, with the result that the plaintiffs, who were auctioneers, were unable to carry on their business on those markets and suffered loss. On the question whether an action by the plaintiffs for damages for the loss was sustainable, it was held that the defendants were not liable in negligence, because their duty to take care to avoid the escape of the virus was due to the foreseeable fact that the virus might infect cattle in the neighbourhood and thus was owed to owners of cattle, but, as the plaintiffs were not the owners of cattle, no such duty was owed to them by the defendants and that the plaintiffs were not also entitled to recover under the rule in *Rylands v. Fletcher* because they had no interest in the cattle endangered by the escape of the virus and loss to the plaintiffs was not a sufficiently proximate and direct consequence of the escape of the virus.[86]

2(B)(ii) Exceptions to the Rule in Rylands v. Fletcher

The judgment of BLACKBURN, J., approved by the House of Lords in *Rylands v. Fletcher* itself recognised that the liability is not absolute being subject to certain exceptions. BLACKBURN, J. made it a part of the rule that "he (the defendant) can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God."[87] In the light of that passage, a person is not liable if the *damage* is owing to the following causes:[88]

82. *Ponting v. Noakes*, (1894) 2 QB 281.
83. *Firth v. Bowling Iron Co.*, (1878) 3 CPD 254.
84. *Giles v. Walker*, (1890) 24 QBD 656 : 62 LT 933.
85. *Hale v. Jenning Bros.*, (1938) 1 All ER 579 : 82 SJ 193.
86. *Weller v. Foot and Mouth Disease etc.*, (1965) 3 All ER 560 ; (1966) 1 QB 569 : (1965) 3 WLR 1082.
87. *Fletcher v. Rylands*, (1866) LR 1 Ex. 265; approved in *Rylands v. Fletcher*, LR 3 HL 330.
88. These exceptions are enumerated in *Narayanan Bhattathripad v. Government of Travancore-Cochin*, ILR 1956 TC 639. *M.C. Mehta v. Union of India*, (1987) 1 SCC 395, p. 419 : AIR 1987 SC 965.

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,[1] or if foreseen, could not by any amount of human care and skill have been resisted.[1] 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,[2] *e.g.*, storm, tempest,[3] lightning, extraordinary fall of rain,[4] extraordinary high tide,[5] extraordinary severe frost,[6] or a tidal bore which sweeps a ship in midwater.[7] In order that a phenomenon should fall within the operation of the rule of law with regard to the act of God, it is not necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated.[8]

The phrase *vis major* imports something abnormal and with reference to the context means that the property by the act of God has been rendered useless, for the time being, that is to say, it was rendered incapable of any enjoyment.[9]

Vis major, to afford a defence, must be the proximate cause, the *causa causans*, and not merely a *causa sine qua non* of the damage complained of. The mere fact that *vis major* co-existed with or followed on the negligence is no adequate defence. Before an act of God may be admitted as an excuse, the defendant must himself have done all that he is bound to do.[10]

The defendant in *Nicholas v. Marsland*,[11] had a series of artificial lakes on his land, in the construction or maintenance of which there had been no negligence. Owing to a most unusual fall of rain, so great that it could not have been reasonably anticipated, some of the reservoirs burst and carried away four country bridges. It was held that the defendant was not liable, inasmuch as the water escaped by the act of God. Similarly, a water-company whose apparatus was constructed with reasonable care, and to withstand ordinary frost, was held not liable for the bursting of the pipe by an extraordinarily severe frost.[12] But *Nicholas v. Karsland* was criticised by the HOUSE OF LORDS in *Greenock Corporation v. Caledonian Railway*.[13] In this case the Corporation obstructed and altered the course of a stream by constructing a concrete paddling pool for children. Due to a rainfall of extraordinary violence a great volume of water which would normally have been carried off by the stream overflowed the pad and caused damage to plaintiff's property. It was held that the rainfall was not an act of God and the Corporation was liable as it was their duty "so to work as to make proprietors or occupiers on a lower

1. *Nugent v. Smith*, (1876) CPC 423, 433; *Vithaldas v. Municipal Commissioner of Bombay*, (1902) 4 Bom LR 914; *Hubli Municipality v. Ralli Brothers*, (1911) 13 Bom LR 1138: ILR 35 Bom 492; *Lallu v. Vazl Haq*, (1918) 1 UPLR (Oudh) 15.
2. *Forward v. Pittard*, (1785) 1 TR 27.
3. *Nugent v. Smith*, *Supra*
4. *Nichols v. Marsland*, (1875) LR 10 Ex.255; *Ram Lall Singh v. L. Dhary Muthon*, (1877) ILR 3 Cal 776.
5. *Nitrophosphate & C. Manure Co. v. L. & St. Katherine Docks*, (1878) 9 Ch D 503.
6. *Blyth v. Birmingham Waterworks Co.*, (1856) 11 Ex 781.
7. *R. Navigation Co. v. Ram Krishna*, AIR 1968 Assam 38.
8. *Nitrophosphate & C. Manure Co. v. London & St. K.D. Co.*, (1878) 9 Ch D 503, 515.
9. *Apcharaddin Abdul Gani v. Gurudayal Kapali*, (1947) 83 CLJ 108.
10. *Municipal Corporation of Bombay v. Vasudeo Ramchandra*, (1904) 6 Bom LR 899. In this case the damage caused was due to the insufficiency of precautions taken by the defendant, in constructing bridges and embankments in a creek for carrying duct line to cope with conditions which might reasonably have been anticipated, and it was held that the defendant was liable. See *Seetharama Swami v. Secretary of State for India in Council*, (1925) MWN 352 : 21 MLW 449.
11. *Nichols v. Marsland*, (1875) LR 10 Ex 255. See *Ram Lall Singh v. Lll Dhary Muhton*, (1877) ILR 3 Cal 776; *Gooroo Churn v. Ram Dutt*, (1865) 2 WR 43.
12. *Blyth v. Birmingham Waterworks Co.*, (1856) 11 Ex. 781.
13. (1917) AC 556 (HL) : 117 LT 483 : 33 TLR 531.

level as secure against injury as they would have been had nature not been interfered with."[14] The Supreme Court in another context said that before heavy rain can be accepted as a defence for the collapse of a culvert the defendant must indicate what anticipatory preventive action was taken.[15]

Injury by snow.—Owing to extraordinarily severe snow-storms, snow and ice had accumulated on the roof of the defendant's premises. No steps were taken to remove the snow or to warn the public of its presence. The plaintiff, while standing on the pavement outside the premises and looking through the window of the defendant's shop, was injured by a fall of snow which had accumulated on the roof. The snow could have been removed from the roof but this was not done. She claimed damages, alleging nuisance, or, alternatively, negligence. It was held that the accumulation of snow constituted a public nuisance of which, in view of the severity of the storms, the defendants must be deemed to have had knowledge; that there was a duty on the part of the defendants to safeguard members of the public using the pavement from the danger occasioned by the snow; and that as they failed to abate the nuisance they were liable both in nuisance and in negligence and that the plea that the storms were an act of God was no defence as it was the snow, and not the storms, which directly caused the injury.[16]

Damage by water.—A State Government erected a reservoir adjoining the plaintiff's land in order to provide drinking water facilities to a village in the State. The State acquired a part of the plaintiffs land for the purpose of constructing a channel for carrying the overflow of water from the reservoir to a *Nalla* which was at a distance of about 1500 feet from the waste-weir of the reservoir. This channel was however not constructed except to the extent of 250 feet on the side of the *Nalla*. Due to very heavy rainfall the water from the reservoir overflowed into the waste-weir and thereafter flowed over the plaintiffs land, causing considerable damage to the land and the crops standing thereon. In a suit by the plaintiffs for damages they alleged that due to the negligence of the State in not taking proper precautions to guard against the overflow of water they had sustained the loss. The State *inter alia* contended that the loss was due to heavy rain which was an act of God and therefore they were not liable and further that the construction of the reservoir was an act of the State in the sovereign capacity and, therefore, it was not liable for the tortious or negligent acts of its servants. It was held that the fact that the danger materialised subsequently by an Act of God was not a matter which absolved the State from its liability for the earlier negligence in that no proper channel for the flow or overflow of water from the waste-weir was constructed by it in time; that the act of the State in constructing the reservoir for the supply of drinking water to its citizens at best could be considered a welfare act and not an act in its capacity as a sovereign; and that, therefore, the State was liable in negligence for the loss caused to the plaintiff.[17]

2. *Wrongful act of a third party.*[18] A landlord using his premises in an ordinary and proper manner is bound to exercise all reasonable care, but he is not responsible for damage not due to his own default, whether that damage be caused by inevitable accident or wrongful acts of third persons.[19]

14. (1917) AC 556 (HL), p. 579. Extraordinary high wind will be governed by the same considerations. *Cushing v. Walker & Sons* (1941) 2 All ER 693, p. 695. So also extraordinary high tide: *Greenwood Tileries Ltd. v. Clapson*, (1937) 1 All ER 765, p. 772.
15. *S. Vendantacharya v. Highways Department of South Arcot*, (1987) 3 SCC 400.
16. *Slater v. Worthington's Cash Stores*, (1941) 1 KB 488.
17. *State of Mysore v. Ramchandra*, (1970) 73 Bom LR 732.
18. *Box v. Jubb*, (1879) 4 Ex D 76.
19. *Rickards v. Lothian*, (1913) AC 263 : 108 LT 225 : 29 TLR 281.

Though the act of a third party may be relied on by way of defence, the defendant may still be held liable in negligence if he failed in foreseeing and guarding against the consequences to his works of that third party's act.[20]

Where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it, and damage was done to the plaintiff, it was held that the defendant was not liable.[21]

Plaintiff's hotel was destroyed by a fire caused by the escape and ignition of natural gas which percolated through the soil and penetrated into the hotel basement from a fractured welded joint in a main, under the street, belonging to the defendants. The cause of the break in the welded joint through which the gas leaked was due to operations caused by the local authority in constructing a storm sewer beneath the main. It was held that as the defendants were carrying gas at high pressure which was very dangerous, if it should escape, they owed a duty to the owners of the hotel, to exercise reasonable care and skill that the owners should not be damaged; that the local authority might at any time be conducting operations in connection with their sewers in the vicinity of defendants' mains, and it was the duty of the defendants to watch such operation; and that a failure by the defendants to know of them was not consistent with due care on their part in the interests of members of the public likely to be affected.[22] In an action for damage to property located on the second floor of a building leased to the defendant, through a continuous overflow of water from a lavatory basin on the top floor caused by the water tap having been turned on full and the water-pipe plugged by some third person, it was held that the defendant was not responsible unless he instigated the act or unless he ought to have prevented it; and that although he was bound to exercise all reasonable care he was not responsible for damage not due to his own default, whether caused by inevitable accident or the wrongful act of third persons.[23]

3. *Plaintiff's own default.*[24] The plaintiff and defendant occupied adjoining farms, which they rented from the same landlord. A fence upon the plaintiff's farm which, under his agreement of tenancy, he was liable, as between himself and the landlord, to keep and have in good repair, and which divided the farms, became out of repair, with the result that two of the defendant's horses escaped from a field forming part of the farm occupied by him into a field forming part of the farm occupied by the plaintiff and injured a colt belonging to him. The defendant had entered into an agreement with the landlord, in terms similar to that of the plaintiff, to keep in repair the fences on his holding. It was held that the defendant was liable to the plaintiff in damages for the injuries caused to the plaintiff's colt, inasmuch as the general principle that owners of animals must keep them upon their land at their peril applied, and the mere fact that the plaintiff had committed a breach of the obligation he was under as between himself and the landlord to repair the fence, was not enough to bring the case within the exception of damage caused by the plaintiff's own default.[25]

4. *Artificial work maintained for the common benefit of plaintiff and defendant, or with the consent of the plaintiff.*[26] Where the plaintiff and the defendant occupy parts of the same building, whether it be two floors of a warehouse, two sets of

20. *Northwestern Utilities, Ld. v. London Guarantee and Accident Co.*, (1936) AC 108,125.
21. *Box v. Jubb*, (1879) 4 Ex D 76.
22. *Northwestern Utilities Ld. v. London Guarantee and Accident Co.*, (1936) AC 108 : 154 LT 89 : 52 TLR 93.
23. *Rickards v. Lothian*, (1913) AC 263 : 108 LT 225 : 29 TLR 281.
24. See text and footnote 88, p. 498, *supra*.
25. *Holgate v. Bleazard*, (1917) 1 KB 443.
26. *Carstairs v. Taylor*, (1871) LR 6 Ex 217; *Bomanji v. Mahomedali*, (1905) 7 Bom LR 713.
27. See cases in footnote 30, *infra*.

offices, or two flats, and water which is laid on to the building escapes and does damage, the person from whose part the escape takes place is not liable in the absence of negligence. The reason for the escape is immaterial as long as the exercise of reasonable care would not have prevented it.[28]

Gnawing of rain-water box.—The defendant was the plaintiff's landlord and was living on the floor above him. Some rats gnawed a rain-water box maintained by the defendant for the benefit both of himself and the plaintiff, and the water running through injured plaintiff's goods below; it was held that no action lay.[29]

Leakage of cistern.—The defendant was the owner of premises to which water was laid on, and he had a cistern on the fourth floor. The plaintiff became tenant of the ground floor, and took his supply of water from the defendant. A leakage from the cistern having been noticed by the plaintiff, he informed the defendant, who instructed a competent plumber to remedy it. In consequence of the negligence of the plumber an overflow occurred, which damaged the plaintiff's goods. It was held that the defendant was not liable since the plaintiff had assented to the water being on the premises, and therefore the defendant, by instructing a competent plumber to remedy the leakage, had discharged his duty to the plaintiff.[30]

5. *When it is the consequence of an act done under the authority of a statute.*[31] "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 authorised, if it be done negligently. And...if by a reasonable exercise of the powers,...the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."[32] The statute must authorise the use of the dangerous thing either expressly or by necessary implication. This exception to the rule in *Rylands v. Fletcher* has recently been affirmed by the House of Lords in *Transco plc. v. Stockport.*[33]

2(C) Rule in M.C. Mehta v. Union of India

A more stringent rule of strict liability than the rule in *Rylands v. Fletcher* was laid down by the Supreme Court recently in the case of *M.C. Mehta v. Union of India.*[34] The case related to the harm caused by escape of Oleum gas from one of the units of Shriram Foods and Fertiliser Industries. The court held that the rule of *Rylands v. Fletcher* which was evolved in the 19th century did not fully meet the needs of a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries were necessary to be carried on as part of the development programme and that it was necessary to lay down a new rule not yet recognised by English law, to adequately deal with the problems arising in a highly industrialised economy. The court laid down the rule as follows: "Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are

28. *Kiddle v. City Business Properties Ltd.*, (1942) 1 KB 269, 274.
29. *Carstairs v. Taylor*, (1871) LR 6 Ex 217; *Bomanji v. Mahomedali*, (1905) 7 Bom LR 713.
30. *Blake v. Woolf*, (1898) 2 QB 426; *Anderson v. Oppenheimer*, (1880) 5 QBD 602; *Ross v. Fedden*, (1872) LR 7 QB 661.
31. *Madras Railway Co. v. Zemindar of Carvatenagarum*, (1874) 1 IA 364; *Ramchandram Nagaram Rice and Oil Mills Ltd., Gaya v. The Municipal Commissioner of the Purulia Municipality*, ILR (1943) 22 Pat 359.
32. PER LORD BACKBURN in *Geddis v. Proprietors of Bann Reservoir*, (1878) 3 App Cas 430, 455.
33. (2003) 3 WLR 1467 (HL). See text and footnote 27, p. 474.
34. *M. C. Mehta v. Union of India*, (1987) 1 SCC 395 : AIR 1987 SC 965.

affected by the accident and such liability is not subject to any of the exceptions which operate *vis-a-vis* the tortious principle of strict liability under the rule in *Rylands v. Fletcher.*[35] The court earlier pointed out that this duty is "absolute and non-delegable" and the enterprise cannot escape liability by showing that it had taken all reasonable care and there was no negligence on its part. The bases of the new rule as indicated by the Supreme Court are two: (1) If an enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident (including indemnification of all those who suffer harm in the accident) arising on account of such hazardous or inherently dangerous activity as an appropriate item of its over-heads; and (2) The enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards.

The rule in *Rylands v. Fletcher* requires non-natural use of land by the defendant and escape from his land of the thing which causes damage. The rule in *M. C. Mehta v. Union of India* is not dependant on these conditions. The necessary requirements for applicability of the new rule are that the defendant is engaged in a hazardous or inherently dangerous activity and that harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity. The rule in *Rylands v. Fletcher* will not cover cases of harm to persons within the premises for the rule requires escape of the thing which causes harm from the premises. The new rule makes no such distinction between persons within the premises where the enterprise is carried on and persons outside the premises for escape of the thing causing harm from the premises is not a necessary condition for the applicability of the rule. Further, the rule in *Rylands v. Fletcher* though strict in the sense that it is not dependent on any negligence on the part of the defendant and in this respect similar to the new rule, is not absolute as it is subject to many exceptions[36] but the new rule in *Mehta* case is not only strict but absolute and is subject to no exception. Another important point of distinction between the two rules is in the matter of award of damages. Damages awardable where the rule in *Rylands v. Fletcher* applies will be ordinary or compensatory; but in cases where the rule applicable is that laid down in *M.C. Mehta's* case the court can allow exemplary damages and the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it.[37] But in *Charan Lal Sahu v. Union of India,*[38] doubts were expressed as to correctness of this view as to damages by MISRA C.J. that the view taken in *Mehta* case was obiter and was a departure from the law applied in western countries. But doubts expressed by MISRA C.J. have not been accepted in *Indian Council for Enviro Legal Action v. Union of India*[39] and it was held that the rule laid down in *Mehta* case was not obiter and was appropriate and suited to the conditions prevailing in our country. This was a case where hazardous chemical industries had released highly toxic sludge and toxic untreated waste water which had percolated deep into the soil rendering the soil unfit for cultivation and water unfit for irrigation,

35. *M. C. Mehta v. Union of India*, (1987) 1 SCC 395, p. 421. Approved (except as to quantum of damages) in *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480, pp. 1531, 1549, 1550 : (1990) 1 SCC 613.
36. See title 2B(ii), p. 498.
37. See Chapter IX, title 1(D)(ii) text and footnotes 60, 61, p. 204.
38. AIR 1990 SC 1480, pp. 1545, 1557 : (1990) 1 SCC 613. See further Chapter IX title 1D(ii), text and footnote 58, p. 204. But in determining compensation payable to Bhopal gas victims *Mehta* principle was applied: *Union Carbide Corporation v. Union of India*, AIR 1990 SC 273, pp. 280, 281: (1989) 3 SCC 38.
39. AIR 1996 SC 1446 : 1996 (2) SCALE 44 p. 69 : (1996) 3 SCC 212.
But "the compensation to be awarded must have some broad correlation not only with the magnitude and capacity of the enterprise but also with the harm caused by it": *Deepak Nitrite v. State of Gujarat*, (2004) 6 SCC 402, p. 407 (para 6).

human or animal consumption resulting in untold misery to the villagers of surrounding areas.

A Division Bench of the M.P. High Court[40] has applied the rule of *M.C. Mehta v. Union of India* (p.503) against the M.P. Electricity Board although there was also finding of negligence against the Board. It is extremely doubtful if the rule in *M.C. Mehta* can be applied to transmission of electricity. *M.C. Mehta* related to escape of oleum gas and was applied in *Charan Lal Sahu* where there was escape of MIC gas. These gases were highly toxic gases. The transmission of Electricity is not that hazardous. Moreover, there appears to be no statutory authority to support the manufacture of obum gas or MIC. It is still a question open for decision of the Supreme Court if *M.C. Mehta* rule applies when there is statutory authority to carry out the hazardous industry. The Supreme Court has so far not applied this rule to transmission of Electricity or in a case where there is statutory authority to support the activity.

A two Judge bench of the Supreme Court, however in a case arising under section 124A of the Railway Act which provides for strict liability has made *obiter* observations to the effect: "Apart from the principle of strict liability in section 124A of the Railway Act and other statutes, we can and should develop the law of strict liability *dehors* statutory provisions in view of the Constitution Bench decision of this court in *M.C. Mehta* case.[41]

Mention must also be made of the Public Liability Insurance Act, 1991 which is an important legislation to promptly compensate members of the public from accidents arising out of hazardous industries. As the long title discloses, this is an Act to provide for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance. Section 3 of the Act provides for liability on no fault basis to the extent mentioned in the schedule in case of death or injury resulting from an accident while handling any hazardous substance. Hazardous substance is defined in section 2 (d) to mean any substance or preparation which is defined as hazardous under the Environment (Protection) Act, 1986 and exceeding such quantity as may be specified, by notification, by the Central Government. The liability is on the owner and in favour of any person other than workmen for they are already protected under Workmen's Compensation Act, 1923. It is the duty of the owner to insure himself against liability created by section 3 of the Act. The extent of liability in case of death or total permanent disablement is Rs. 25,000 and in case of permanent partial disability is on the basis of the percentage of disability as certified by an authorised physician. Further, there is provision for reimbursement of medical expenses upto Rs. 12,500 and relief for loss of wages not exceeding Rs. 1,000 p.m. due to temporary partial disability for a maximum period of 3 months. Compensation for damage to property can also be claimed upto Rs. 6,000. The liability to pay relief under the Act does not take away the right of the victim or his dependants to claim higher compensation under any other law but the amount of such compensation shall be reduced by the amount of relief paid under the Act. The liability created by the Act thus does not in any way affect the liability under the tort law except to the extent of the amount of relief paid under the Act.

40. *Jagdish v. Naresh Soni*, (2007) 3 MPHT 234.
41. *Union of India v. Prabhakaran Vijay Kumar*, (2008) 9 SCC 527 para 47 : (2008) 4 JT 598; This Rule of strict liability has been relied upon by Madras High Court in the case of *Union of India v. Railway Claims Tribunal* (2012) 5 Mad LJ 562 : (2012) 3 LW 889 : (2012) 2 MWN (Civil) 805

3. OCCUPIERS OF PREMISES

3(A) Introduction and the Occupiers Liability Act, 1957

By the expression 'Premises' in the context of this topic is meant not only land and buildings but also vehicles, railway carriages, scaffolding and the like. The expression thus includes certain type of movable properties the distinguishing features of which, speaking generally, under the present topic is that the defendant remains in control of them and the plaintiff suffers injury by entering into them. The liability of occupiers of premises except in relation to trespassers is now governed under the English law by the Occupiers Liability Act, 1957 which was enacted as a result of the report of a Law Reform Committee in 1952. The liability towards trespassers has also undergone considerable change by a liberal judicial approach in recent years and later by the Occupiers Liability Act, 1984.

Before the 1957 Act, the liability of an occupier varied according to the class to which the person coming on his premises belonged. Such persons were placed in four different classes, *viz.* (i) Person entering under a contract, (ii) Invitee *i.e.* a person who (without any contract) entered for the purpose of the occupier's business or for a business in which both were interested, *e.g.* a customer in a shop; (iii) Licensee, *i.e.* a person who entered with the occupier's permission, express or implied, for a business in which he alone had interest, *e.g.* a guest at a dinner and (iv) Trespassers. The duty of care which an occupier owed to these persons varied in a descending order, the highest being owed to a person entering under a contract and the lowest to a trespasser. When a person entered under a contract, the terms of the contract providing for the nature of the duty governed the parties. But in the absence of any specific term in the contract regulating the duty of care the court implied certain terms. Where the essential purpose of the contract was use of the premises, it was implied that there was a warranty by the occupier that the premises were as safe as reasonable care and skill could make them; but where the use of the premises was ancillary to the main purpose of the contract, the warranty implied was that the occupier had taken reasonable care to see that the structure was reasonably safe.[42] In the case of an invitee, *i.e.* a person entering without a contract but for the purpose of the occupier or for a purpose in which both had interest, the occupier's duty was "to use reasonable care to prevent damage from unusual danger, which he knows or ought to know."[43] In contrast as against a licensee, *i.e.* a person entering only for his own purpose with the express or implied permission, the occupier's duty was to warn him of any concealed danger of which he actually knew. So far as trespassers are concerned, the only duty that the occupier owed was not to injure him deliberately or recklessly; the more humane approach that the Courts have in recent years made in favour of trespassers will be considered later.

The Courts tried to mitigate the rigour of the law by applying ordinary principles of negligence if the injury was caused in the course of operation of some activity carried on by the occupier.[44] The classification of entrants and difference in the duty owed by an occupant in respect of them in practice gave rise to unrealistic distinctions and capricious results. As earlier stated, the dissatisfaction from this state of the law led to the reform in England by the Occupiers' Liability Act, 1957 introducing a common duty of care for all visitors except trespassers. Similar reforms followed in New Zealand and several Canadian and American jurisdictions.[45]

42. See *Thomson v. Cremin*, (1953) 2 All ER 1185 : (1956) 1 WLR 103 : 100 SJ 73.
43. *Indermaur v. Dames*, (1866) LR 1 CP 274, p. 288.
44. *Slater v. Clay Cross Co. Ltd.*, (1956) 2 QB 264, p. 269 : (1956) 3 WLR 232.
45. FLEMING, Torts, 6th edition, p. 416.

Speaking about the English Act, LORD DENNING said: "It has been very beneficial. It has rid us of those two unpleasant characters, the invitee and the licensee, who haunted the Courts for years, and it has replaced them by the attractive figure of a visitor, who has so far given no trouble at all. The draftsman expressed the hope that 'the Act would replace a principle of the common law with a new principle of *the common law*; instead of having the judgment of WILLES, J. construed as if it were a statute, one is to have a statute which can be construed as if it were a judgment of WILLES, J.' (in *Indermaur v. Dames*, L.R. 1 C.P. 274). It seems that his hopes are being fulfilled. All the fine distinctions about traps have been thrown aside and replaced by the common duty of care".[46] As in India we can follow without any legislation the English law of torts as modified by the statute law of England if the statute law is more in consonance with equity, justice and good conscience, there is no difficulty in holding that the principles of the English Act modifying the common law will be followed by the Indian Courts.[47]

Invitee, licensee, or visitor.—The Act abolishes the distinction between an invitee and licensee and both are comprehended under the Act in the term "visitor". An occupier now owes to his visitors a single common duty of care without any distinction whether the visitor be an invitee or a licensee. In case of contractual entrants also the same common duty of care is owed by the occupier if there be no express provision in the contract providing otherwise. The Act does not cover trespassers.

Duty laid on 'Occupier'.—The duty under the Act is laid on an "occupier". The leading authority on the meaning of this term is the decision of the HOUSE OF LORDS in *Wheat v. E. Lacon & Co.*,[48] The case lays down that the Act uses the word in the same sense as it was used in the common law cases on occupier's liability. "It was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises. In order to be an 'occupier' it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be occupiers. And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure but each may have claim to contribution from the other."[49] Where a landlord lets premises by demise to a tenant he is regarded as parting with all control over them.[50] When an owner lets floors or flats in a building to tenants but does not demise the common staircase or the roof or some other parts, he is regarded as having retained control of all parts not demised by him. So he can be held liable for a defective staircase,[51] for the gutters in the roof,[52] and for the private balcony.[53] When an owner merely creates a licence in favour of a person to occupy them, he still retaining the right to repairs, he is regarded as being sufficiently in control of the premises to impose on him duty towards visitors and can be held liable to a visitor who falls on a defective step,[54] or to the licensee's wife who is injured by fall of a

46. *Roles v. Nathan*, (1963) 1 WLR 1117 : (1963) 2 All ER 908.
47. See Chapter 1, title 1, pp. 1-4.
48. (1966) 1 All ER 582 : (1966) AC 552 : (1966) 2 WLR 581 (HL).
49. (1966) 1 All ER 582 : (1966) AC 552 : (1966) 2 WLR 581 (HL). (LORD DENNING).
50. *Cavalier v. Pope*, (1906) AC 428 : 54 WLR 68 : 95 LT 65 : 22 TLR 648 (HL). Referred to in *Wheat v. E. Lacon & Co.*, (1966) 1 All ER 582 : (1966) AC 552 : (1966) 2 WLR 581 (HL).
51. *Miller v. Hancock*, (1893) 2 QB 177. Referred to in *Wheat's* case, *supra*.
52. *Hargroves, Aronson & Co. v. Hartopp*, (1905) 1 KB 472. Referred to in *Wheat's* case, *supra*.
53. *Sutcliffe v. Clients Investments Co. Ltd.*, (1924) 2 KB 746. Referred to in *Wheat's* case, *supra*.
54. *Hawkins v. Coulsdon and Parley U.D.C.*, (1954) 1 QB 319. Referred to in *Wheat's* case, *supra*.

defective ceiling.[55] When an owner employs an independent contractor to do work on premises, the owner is usually still regarded as sufficiently in control of the place. In addition to the owner, the court may regard the independent contractor as himself being sufficiently in control of the place he works as to owe a duty of care towards persons coming lawfully there.[56] Where separate persons are each under a duty of care, the acts or omissions which would constitute a breach of that duty may vary greatly and that which would be negligent in one may well be free from blame in the other.[57] In *Wheat's* case, the premises were owned by the respondent, a brewery company. The ground-floor was run as a public house by one Mr. Richardson for the company. The first-floor was used by Mr. & Mrs. Richardson as their private dwelling. In the summer, Mrs. Richardson took as summer guests Mr. & Mrs. Wheat and their family for her profit. Mr. Wheat fell down the back staircase in the private portion and was killed. There were two causes for this accident: (i) the handrail was too short because it did not stretch to foot of the staircase and (ii) someone had taken the bulb out of the light point at the top of the stairs. The HOUSE OF LORDS held that the respondent company, Mr. and Mrs. Richardson were all occupiers within the Act as the Richardsons were only licensees and not tenants of the private portion. But it was further held that in the circumstances of the case, respondent company was not in breach of its duty of care and was not liable.

3(B) Visitors

As already stated the common duty of care under the Act is owed to visitors which expression now comprehends both invitees and licensees. When there is express permission or invitation by the occupier the case presents no difficulty in holding that the entrant is a visitor. But visitors also include persons entering with implied permission and it is here that difficulty arises in deciding whether the entrant is a visitor with implied permission or a trespasser. The question, however, is essentially one of fact to be decided objectively by assessing the inference arising from all relevant circumstances. But in deciding such a question some general principles have to be kept in view. The burden of proof is on the entrant to show that he had implied permission.[58] A person entering to communicate with the occupier is presumed to have implied permission[59] unless there is a notice forbidding him to enter.[60] Tolerance of repeated trespass of itself confers no licence;[61] but that is a factor which may be taken into account in support of an implied licence.[62] The Courts sometimes, especially in case of children, gave a finding in favour of existence of an implied licence which was really "a legal fiction employed to justify extending to meritorious trespassers, particularly when they were children, the benefit of the duty which at common law an occupier owed to his licensee."[63] The position of trespassers having now improved,[64] there may be less occasions now to infer a licence or permission when it really did not exist. A visitor ceases to be a visitor if he goes to a place which

55. *Greene v. Chelsea Borough Council*, (1954) 2 QB 127 : (1954) 3 WLR 12 : (1954) 2 All ER 318. Referred to in *Wheat's* case, *supra*.
56. *Harwell's* case (1947) KB 901. Referred to in *Wheat's* case, *supra*.
57. *Wheat's* case; (LORD PEARCE), *supra*.
58. *Edwards v. Railway Executive*, (1952) AC 737 : (1952) 2 All ER 630.
59. *Brunner v. Williams*, (1975) Cr LR 250.
60. *Robson v. Hallett*, (1967) 2 QB 393 : (1967) 2 All ER 407.
61. *Edwards v. Railway Executive, Supra*.
62. *Lowery v. Walker*, (1911) AC 10.
63. *British Railway Board v. Herrington*, (1972) AC 877, p. 933 : (1972) 1 All ER 749 (LORD DIPLOCK).
64. *British Railway Board v. Herrington*, (1972) AC 877, p. 933 : (1972) 1 All ER 749 (LORD DIPLOCK); see title 3(D), p. 512, *Post*.

is not covered by the permission,[65] or where he is not expected to go,[66] or when he does something contrary to warning or instructions.[67] In all such cases, the visitor would be treated as trespasser,[68] unless the negligence of the occupier had induced him to take the wrong step.[69]

The term 'visitor' will also include persons who enter premises for any purpose in the exercise of a right conferred by law for the Act provides that such persons "are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not." So a court official and a police constable entering the premises in execution of a court order or a warrant will be treated as visitors entering with the permission of the occupiers.

A person exercising a public right of way is neither the licensee not the invitee of the occupier, *i.e.*, the owner of the land over which the public right of way passes.[70] Both under the common law and the 1957 Act the owner of the land is under no liability for negligent nonfeasance towards any member of the public using the public pathway and so the owner cannot be held liable for non-maintenance or non-repair of the pathway and no damages can be claimed against him when a person using the pathway injures himself by tripping in a hole in it.[71]

Common duty of Occupier to visitors.—The common duty of care which an occupier owes to all his visitors "is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there." This is provided in section 2(2) of the Act. The duty is not to ensure the visitor's safety, but only to take reasonable care.[72] The safety referred to is safety not only from dangers due to the state of the premises but also known dangers due to things done or omitted to be done on them.[73] What is reasonable care will depend upon "all the circumstances of the case."[74] The section specifically says so. Section 2(3) provides that the circumstances relevant for the purpose will include "the degree of care, and of want of care which would ordinarily be looked for in such a visitor." This is explained by giving two examples that "in proper cases (a) an occupier must be prepared for children to be less careful than adults; and (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incidental to it, so far the occupier leaves him free to do so."

What amounted to 'such care as in all the circumstances of the case is reasonable' depended not only on the likelihood that someone might be injured and the seriousness of the injury which might occur, but also on the social value of the activity which gave rise to the risk and the cost of preventive measures. Those factors had to be balanced against each other. It would be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which were inherent in the activities they freely chose to take upon the land. These principles were laid

65. *Lewis v. Ronald*, (1909) 101 LT 534.
66. *Mersey Docks and Harbour Board v. Procuter*, (1923) AC 253.
67. *Anderson v. Coutts*, (1894) 58 JP 369.
68. *Hillen v. ICI (Alkali Ltd.)*, (1936) AC 65 (HL) pp. 69, 70 : 153 LT 403 : 51 TLR 532.
69. *Braithwaite v. Durham Steel Co.*, (1958) 1 WLR 986 : (1958) 3 All ER 161.
70. *M.C. Grown v. Northern Ireland Housing Executive*, (1994) 3 All ER 53 (HL).
71. *M.C. Grown v. Northern Ireland Housing Executive*, (1994) 3 All ER 53 (HL).
72. *Titchener v. British Railways Board*, (1983) 3 All ER 770 (HL) p. 774 : (1983) 1 WLR 1247. A case on corresponding Act of Scotland viz. Occupiers Liability (Scotland) Act, 1960.
73. *Ferguson v. Welsh*, (1987) 3 All ER 777 (HL), p. 782 : (1987) 1 WLR 1553.
74. *Titchener v. British Railways Board, supra*.

down by the House of Lords in *Tomlinson v. Cangleton Borough Council*.[75] In this case the defendant Borough Council owned occupied and managed a public park in which there was also a lake. The lake had sandy beaches and was a popular recreational venue where yachting sub-aqua diving and other activities were permitted but swimming was not. Notices reading, DANGEROUS WATER: NO SWIMMING, were posted. The claimant had gone to the lake. He ran into the water and dived striking his head on the sandy bottom which caused him an injury resulting in paralysis from the neck downwards. On the principles stated it was held that the defendants were not liable. That people took no notice of warnings could not create a duty to take other steps to protect them.

Adult or child, visitor.—The difference between an adult visitor and a child visitor is that the child will meddle where the adult will not and so what is safe for an adult may not be safe for a child, and this factor must be kept in view in deciding whether the occupier has been wanting in the duty of care required by the Act.[76] In *Glasgow Corporation v. Taylor*,[77] the facts were that a garden maintained by the Corporation was much frequented by children. There were poisonous shrubs in a part of the garden which was accessible by a gate which could be easily opened by young children. A child who entered with other children ate some berries of the poisonous shrubs which presented a tempting appearance to the children and died. The Corporation had known of the existence of the poisonous shrubs and had taken no step to warn the children or to prevent them in reaching that part of the garden. In a suit by the father of the deceased child, the Corporation was held liable for want of due care to the children. It has been aptly said that so far as infants are concerned, there is a duty "not merely not to dig pitfalls for them, but not to lead them into temptation."[78] A child visitor of Delhi zoo aged 3 years put his hand inside the iron bars where a tigress was kept and his hand was crushed by the tigress. It was held that the zoo authorities should have put iron mesh on the rods, which they did after the incident, to prevent a child putting his hand inside the rods and were liable in damages for the injury and the child was not guilty of any contributory negligence.[79] If a child has been lured into a forbidden area by the negligence of the defendant or his servant, he cannot be treated as a trespasser. So when a cart and a horse were left unattended by the defendant's servant in a street and the plaintiff aged seven was injured while playing with it and got injured, the defendant was held liable.[80] In *Jolley v. Suttan London Borough Council*[81] a derelict and rotten boat was left on a grass area where the children played which was occupied by the defendant local authority. The plaintiff a 14 year old boy in company with another boy attempted to repair the boat after jacking it. The boat fell down when the plaintiff was under it causing him serious injuries resulting in paraplegia. It was not disputed that the council should have removed the boat as there was a risk that the children would suffer minor injuries. But the council contended that it was not foreseeable that any child would jack up the boat and start repairing it like an adult and so they were not liable. This contention was negatived by the House of Lords. It was held that the ingenuity of children in finding ways of doing mischief to themselves should never

75. (2003) 3 All ER 1127 (HL).
76. *Hawkins v. Coulsdon & Purley U.D.C.*, (1954) 1 QB 319, p. 335 : (1954) 2 WLR 122 : 98 SJ 44 (DENNING L. J.); *Kumari Alka v. Union of India*, AIR 1993 Delhi 267 p. 272.
77. (1922) 1 AC 44.
78. *Latham v. R. Johnson & Nephew Ltd.*, (1913) 1 KB 398, p. 415 : 29 TLR 124 : 77 JP 137.
79. *Nitin Walia v. Union of India*, AIR 2001 Del 140.
80. *Lynch v. Nurdin*, (1841) 1 QB 29 : 55 RR 191. See further *Kumari Alka v. Union of India, supra* (child straying in a room where a water pump was running as the shutter was not closed).
81. (2000) 3 All ER 409 (HL).

be underestimated and it was foreseeable that the play could take the form of mimicking adult behaviour *viz.*, of jacking and attempting to repair the boat and so the council was liable.[82] But in proper cases the occupier may legitimately assume that the child will be accompanied by a responsible guardian and in this class of cases if the danger is such that it would be obvious to a guardian or if a warning has been given which can be comprehended by guardians, the occupier would not be liable if a child unattended by a guardian suffers harm.[83] In *Phipps v. Rochester Corporation*,[84] the plaintiff, a child aged five, went with his sister aged seven, to an open space on a building site of the defendants and there the plaintiff fell down into an open trench and broke his leg. The defendants were held not liable for there was no reason to suppose that children of tender age will be allowed to wander over the site unaccompanied by a proper guardian. But this rule will not apply to a place where, to the knowledge of the occupier, little children are permitted by their parents to go unaccompanied in the reasonable belief that they would be safe, *e.g.* a recognised playground.[85] The question of reasonable care in a given case depends upon all the circumstances of the case and "one of the circumstances is the age and intelligence of the entrant."[86] In *Titchener v. British Railways Board*,[87] the appellant, aged 15, was seriously injured when she was walking across a Railway line and was struck by a train of the respondents. The railway line ran through a built up and populous area. The line ran along an embankment and was fenced. The fence was made of sleepers standing upright in the ground but at the time of the accident and apparently for some years, there were gaps in it. There was some passage across the line through the gaps used as a short cut for a housing estate and brickworks. The proper way for these places was somewhat longer. The respondents must have been aware that people did cross the line in the above manner. The appellant knew of the existence of the railway line, that it was dangerous to walk across and along it, that she ought to have kept a lookout for trains and that she had done so when crossing the line on the previous occasions. On these facts the HOUSE OF LORDS held that the respondents did not owe the appellant a duty to maintain the fence in a better condition than they had. The general principle regarding fencing of railway line was laid down as follows: "The existence and extent of a duty to fence will depend on the circumstances of the case including the age and intelligence of particular persons entering on the premises; the duty will tend to be higher in a question with a very young or a very old person than in the question with a normally active and intelligent adult or adolescent. The nature of the locus and the obviousness or otherwise of the railway may also be relevant."[88]

As regards section 2(3)(b), it shows that *General Cleaning Contractors v. Christman*,[89] is still good law under the new Act.[90] The occupier can expect that a person in the exercise of his calling will appreciate and guard against risks incidental to his calling and he need not be, therefore, warned about them. In the case of

82. (2000) 3 All ER 409 pp. 415, 146.
83. *Phipps v. Rochester Corporation*,(1955) 1 QB 450, p. 472 : (1955) 1 All ER 129 (DEVLIN, J.).
84. *Phipps v. Rochester Corporation*,(1955) 1 QB 450, p. 472 : (1955) 1 All ER 129
85. *Phipps v. Rochester Corporation*, (1955) 1 QB 450, p. 472 (DEVLIN, J.).
86. *Titchener v. British Railways Board*, (1983) 3 All ER 770 : (1983) 1 WLR 1247 : (1984) 134 New LJ 361 (HL) p.774. A case under the Occupiers Liability (Scotland) Act, 1960.
87. *Titchener v. British Railways Board*, (1983) 3 All ER 770 : (1983) 1 WLR 1247 : (1984) 134 New LJ 361 (HL)
88. *Titchener v. British Railways Board*, (1983) 3 All ER 770, p. 775. For other cases regarding obligation to fence, see *Edwards v. Railway Executive*, (1952) AC 737 : (1952) 2 TLR 237 : (1952) 2 All ER 430; *Vijay Shankar v. Union of India*, AIR 1958 Punj 246; *British Railway Board v. Herrington*, (1972) AC 877 : (1972) 2 WLR 537 : (1972) 1 All ER 749.
89. (1952) 1 KB 141.
90. *Roles v. Nathan*, (1963) 2 All ER 908 (CA).

Christman,[91] a window cleaner was engaged to clean the windows of a Club. One of the windows was defective and so when it was being cleaned, it ran down quickly and trapped the hand of the window cleaner. It was held that he had no cause of action against the Club for the risk of a defective window is incidental to the calling of a window cleaner. Had it been a case of a guest the result would have been different. In *Roles v. Nathan*,[92] two chimney sweeps were killed by carbon-monoxide while trying to seal a sweephole in the chimney of a coke fired boiler while the fire was still alight and the occupier was held not liable. LORD DENNING in holding so observed: "These chimney sweeps ought to have known that there might be dangerous fumes about and ought to have taken steps to guard against them. They ought to have known that they should not attempt to seal up a sweep-hole while the fire was still alight. Where a householder calls in a specialist to deal with a defective installation on his premises, he can reasonably expect the specialist to appreciate and guard against the dangers arising from the defect. The householder is not bound to watch over him to see that he comes to no harm."[93] But the special skill of the specialist and the incidental risks to which he is exposed in his calling are only some of the factors to be taken into account. Thus it has been held that when a fire is negligently started, a fireman called to extinguish it if injured can claim damages where it could have been foreseen that the fire if started will require firemen to attend and extinguish it and because of the very nature of the fire, when they attend they will be at risk even though they exercise all the skill of their calling.[94]

Section 2(4)(a) of the Act provides that a warning to the visitor by the occupier is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe. Knowledge or notice of the danger is only a defence when the plaintiff is free to act upon that knowledge or notice so as to avoid the danger. So if there is only one way of getting in or out of premises and it was by a foot-bridge over a stream which was rotten or dangerous, the visitor if injured can make the occupier liable even though he is warned of the danger or has otherwise knowledge of it;[95] but if there are two foot-bridges one of which is safe the warning about the risk in using the other will be a complete defence as it is enough to enable the visitor to be reasonably safe.[96]

Section 2(4)(b) enacts the rule that where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the damage if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought to in order to satisfy himself that the contractor was competent and that the work had been properly done. This provision is to be given a broad purposive construction and the protection afforded by it covers a case of "demolition" which ought to be taken to be covered by the word construction.[97] The provision is also not limited in application to a situation where the work has been completed and it also affords protection against liability from dangers created by a negligent act or omission by the contractor in the course of his work on the

91. (1952) 1 KB 141.
92. (1963) 2 All ER 908 : (1963) 1 WLR 1117.
93. (1963) 2 All ER 908 : (1963) 1 WLR 1117.
94. *Salmon v. Seafarer Restaurants Ltd., (British Gas Corp. third party)* (1983) 3 All ER 729 : (1983) 1 WLR 1264 : 127 SJ 581.
95. *Greene v. Chelsea Borough Council*, (1954) 2 QB 172 : (1954) 3 WLR 12 : (1954) 2 All ER 318 referred in *Roles v. Nathan*, (1963) 2 All ER 908 : (1963) 1 WLR 1117.
96. *Roles v. Nathan, supra.*
97. *Ferguson v. Welsh*, (1987) 3 All ER 777 (HL), p. 783 : (1987) 1 WLR 1553.

premises.[1] The philosophy behind the provision is that "it would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work. In special circumstances, on the other hand, where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work, it might well be reasonable for the occupier to take steps to see that the system was made safe."[2] An occupier may become liable even to a sub-contractor's employee when the contractor employed, although prohibited from the terms of his contract, has ostensible authority to engage a sub-contractor; but in such a case also the occupier can claim the protection of section 2(4)(b).[3]

The Act in section 2(5) preserves the defence of *volenti non fit injuria*. It is also understood that it will allow apportionment of blame in case of contributory negligence of the visitor in accordance with the principles of the Law Reform (Contributory Negligence) Act, 1945. The Act also covers damage to property.

3(C) Activity Duty

It has already been mentioned that to mitigate the rigour of common law the courts held that when injury to an entrant was caused in course of some activity carried on by the occupier on his premises the normal principles of negligence applied and the occupier would be liable if he did not take reasonable care for the safety of the plaintiff.[4] This duty called as "activity duty" was *distinguished* from "occupancy duty" of the defendant and did not require that the plaintiff should bring his claim within the accepted categories of Invitee, Lincensee and Trespasser relationships and it was for the plaintiff to choose whether he sought to base his claim against the defendant for violation of activity duty or occupancy duty or both.[5] There is a difference of opinion on the question whether the activity duty had been abolished by the Occupiers Liability Act, 1957.[6] *Obiter dicta* in *British Railway Board v. Herrington*,[7] supports the view that it has been abolished. But the *obiter dicta* in *Titchener v. British Railway Board*,[8] are to the effect that the activity duty has not been abolished by the Occupiers Liability (Scotland) Act, 1960.

3(D) Trespassers

Till recently the law was that an occupier did not owe any duty of care to a trespasser except not to inflict damage intentionally or recklessly on a trespasser known to be present. This law was laid down by the HOUSE OF LORDS in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck*.[9] Similar was the view of the Privy Council in *Commissioner of Railways v. Quinlan*.[10] But an occupier cannot even

1. *Ferguson v. Welsh*, (1987) 3 All ER 777 (HL), p. 783 : (1987) 1 WLR 1553.
2. *Ferguson v. Welsh*, (1987) 3 All ER 777 (HL), p. 783 : (1987) 1 WLR 1553.
3. *Ferguson v. Welsh*, (1987) 3 All ER 777, p. 782.
4. *Slater v. Clay Cross Co. Ltd.*, (1956) 2 QB 264, p. 269 : (1956) 3 WLR 232 : 100 SJ 450. See text and footnote 44, title 3 (A) Introduction and the Occupiers Liability Act, 1957, p. 523, *Ante*.
5. *Thompson v. Municipality of Bankstown*, (1953) 87 CLR 619, p.623; *Miller v. South of Scotland Electricity Board*, (1958) SC (HL) 20, pp. 37-38.
6. SALMOND & HEUSTON, Torts, 18th edition, p. 244 holds the view that it has been abolished. WINFIELD & JOLOWICZ, Tort, 12th edition, pp. 206, 207 holds the opposite view.
7. (1972) AC 877 (HL) pp. 929, 942 : (1972) 1 All ER 749.
8. (1983) 3 All ER 770 (HL) pp.772, 776 : (1983) 1 WLR 1247.
9. (1929) AC 358 (HL).
10. (1964) AC 1054 : (1964) 1 All ER 897 (PC).

according to this view harm a trespasser by placing a spring gun[11] or setting a naked live wire[12] to prevent persons from trespassing on to his premises without giving any warning of the danger to potential trespassers. In *Cherubin's* case, the Supreme Court said that "the occupier is not entitled to do wilfully acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to the trespassers or in reckless disregard of the presence of the trespassers."[13]

The formulation of the duty in *Robbert Addies'* case was severely restrictive and gave way to a more liberal approach made in *British Railways Board v. Herrington*.[14] In this case, an electrified railway line of the Railway Board ran between two National Trust properties where children played. There was a fence alongside the railway line and a footbridge over it. At the place where the path turned towards the bridge, the fence had gone out needing repairs and it was possible to cross the railway line without using the bridge. The Railway staff had seen children on the line at this place. One day the plaintiff, a boy aged six, went over the broken fence and got severely burnt on the electrified rail. In holding the Railway Board at fault and liable in allowing the fence in a broken down condition having regard to the dangerous nature of the live rail and its perils for a small child, the HOUSE OF LORDS ruled that duty to a trespasser would arise when the likelihood of the trespasser being exposed to the danger was such that, by the standards of common sense and common humanity, the occupier could be said to be culpable in failing to take reasonable steps to avoid the danger. It was pointed out that an occupier owed no duty to the unknown merely possible trespasser as such a person could not be called a "neighbour" in the sense that word was used by LORD ATKIN in *Donoghue v. Stevenson* (1932 AC 562 : 76 SJ 396 : 48 TLR 494); but if the presence of the trespasser was known to or reasonably to be anticipated by the occupier, then the occupier did owe to the trespasser a duty to treat him with ordinary humanity which was a lower and less onerous duty than a general duty of care or the common duty of care owed to lawful visitors. Similar view was taken by the Privy Council in *Southern Portland Cement Ltd. v. Cooper*.[15] In this case the defendants were engaged in quarrying limestone. Waste material from crushing operations was dumped at a place over which ran a high tension electric cable. By and by the gap between the cable and the mound got considerably reduced and the cable could be touched by hand. School children were warned off the defendant's land on occasions and there was not much trespassing. The plaintiff, a boy aged thirteen, came on to the mound to play with a friend and got injured when his hand touched the cable. It will be noted that the dangerous situation was created by the defendants themselves, the presence of the children was reasonably expected and it would have been easy for the defendants to take steps to prevent the development of the dangerous situation which had caused the plaintiff injuries. On these considerations, the Privy Council held that the defendants owed the plaintiff a duty to take steps to prevent the development of the dangerous situation and were liable to the plaintiff for their failure to do so. LORD REID in that case stated the general principle in these words: "The occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound at

11. *Bird v. Holbrook*, (1820) 4 Bing 628. In *Ilott v. Wilkes*, (1820) 3 B & Ald. 304 the facts were identical except that the plaintiff had knowledge of the danger and it was held that this prevented him in having any remedy.
12. *Cherubin v. State of Bihar*, AIR 1964 SC 205 : (1964) 4 SCR 199.
13. *Cherubin v. State of Bihar*, AIR 1964 SC 205, p. 206.
14. (1972) 1 All ER 749 : (1972) AC 877 : (1972) 2 WLR 537 (HL). Considered in *Kumari Alka v. Union of India*, AIR 1993 Del 267, p. 274. See further *V. Krishnappa Naidu v. Union of India*, AIR 1976 Mad 95; *Smt. Krishna Devi v. Haryana State Electricity Board*, AIR 2002 Del 113.
15. (1974) 1 All ER 87 : 1974 AC 623 (PC).

least to give consideration to the matter when he knows facts which show a substantial chance that they may come there. Such consideration should be all embracing. On the one hand the occupier is entitled to put in the scales every kind of disadvantage to him if he takes or refrains from action for the benefit of trespassers, and on the other hand he must consider the degree of likelihood of trespassers coming and the degree of hidden or unexpected danger to which they may be exposed if they came. He may have to give more weight to these factors if the potential trespassers are children because generally mere warning is of little value to protect children. The problem then is to determine what would have been the decision of a humane man with the financial and other limitations of the occupier. Would he have done something which would or might have prevented the accident, or would he, regretfully it may be, have decided that he could not reasonably be expected to do anything."[16]

Herrington's case was referred to the Law Commission which recommended legislative action to define an occupier's duty towards trespassers which led to the enactment of the Occupiers Liability Act, 1984. According to this Act, an occupier owes a duty to persons other than visitors *i.e.* trespassers if the following conditions are satisfied (S.1(3)): (a) he is aware of the danger or has reasonable grounds to believe that it exists; (b) he knows or has reasonable grounds to believe that the other is in vicinity of the danger concerned or that he may come into the vicinity of the danger; and (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection. If these conditions are satisfied, the occupier's duty is to take such care as is reasonable in all the circumstances to see that the entrant does not suffer injury on the premises by reason of the danger concerned and it may, in an appropriate case, be discharged by taking such steps as are reasonable to give warning of the danger concerned or to discourage persons from incurring the risk. There is no duty with regard to damage to property and the defence of *volenti non fit injuria* is preserved.

In determining whether in a given case there existed a duty of care under the 1984 Act the test to be applied having regard to section 1(3)(B) is whether in the circumstances prevailing at the time that it was alleged that the breach of duty had resulted in injury to the claimant the occupier knew or had reasonable ground to believe that the person was coming or might come into the vicinity of the danger of which the occupier was aware. It was so held by the court of Appeal in *Danoghire v. Folkestone Properties Ltd.*[17] In this case the claimant went for a night swim shortly after midnight in mid winter, dived from a slipway into Folkestone harbour, stuck his head on a submerged pile, broke his neck and was rendered tetraplegic. It was known that children and sometimes adult swam from the slipway in summer and security guards would try to stop children swimming in the harbour. As it could not be expected that anyone would come for swimming at the dead of night in mid winter it was held that the occupier owned no duty of care to the claimant and his claim failed.

The duty to take care of a trespasser was carried, it is submitted, to an extreme in *Revill v. Neubery.*[18] In this case the defendant who was 76 year old was sleeping in a brickshed to protect valuable items stored in it. The plaintiff was on the point of entering the shed for burglary when he was shot by the defendant by a shotgun wounding him in the arm and chest. The plaintiff was prosecuted for various offences and was convicted on a plea of guilty. The defendant was also prosecuted for

16. (1974) 1 All ER 87 (PC) p. 98 : (1974) 2 WLR 152.
17. (2003) 3 All ER 1101 (CA).
18. (1996) 1 All ER 291 : (1996) QB 567 : (1996) 2 WLR 239 (CA).

wounding the plaintiff but was acquitted. But in the suit filed by the plaintiff for damages for causing injury by negligence being in breach of duty to a trespasser, the plaintiff succeeded. It was held that the defendant exceeded his right of private defence and was liable to pay damages which were reduced as the plaintiff was found guilty of contributory negligence and his blame was assessed to be two-third.

It is yet to be seen whether the Courts in India will follow the principles laid down in *Herrington's* case (f.n. 85, *supra*) and *Cooper's* case (f.n. 86, *supra*) or whether they will follow the principles of the English Act of 1984. It is submitted that criterion of duty towards trespassers as laid down in these two decisions is quite equitable and just and is not likely to give rise to any difficulty in application and so it may not be necessary to take recourse to the English Act of 1984 in India. But even if the principles of the English Act are followed the result in most of the cases would not be different.

3(E) Children

Children do not form a special class. They are treated as visitors or trespassers as the case may be. But the age and intelligence of an entrant is a relevant factor and the court is to take this into consideration in deciding cases of a child visitor or trespasser. These have already been considered above.[19]

3(F) Persons Lawfully Passing by the Premises

In regard to the persons lawfully passing by the premises, the duty extends to guarding against what may happen just behind the premises, on the road, or other place, where a person passing by may lawfully be. If a person, for instance, puts up a lamp projecting from his premises over the public footpath, it is his duty to maintain it in a safe state of repair. If an injury is caused by the falling of the lamp on a passer-by for want of repairs, he cannot be allowed to ride on by saying that he had employed a competent person to do the repairs.[20] "Where it is the duty of persons to do their best to keep premises, or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident had arisen."[21] If, owing to want of repair, premises on a highway become dangerous and constitute a nuisance so that they collapse and injure a passer-by or an adjoining owner, the occupier or owner of the premises, if he has undertaken the duty to repair, is answerable, whether he knew or ought to have known of the danger or not.[22] These principles were applied by the Supreme Court[23] in a case where a clock-tower which was 80 years old collapsed in Chandni Chowk, Delhi, causing the death of a number of persons. It was held that there was a special obligation on the owner of adjoining premises for the safety of structures kept besides a highway and that it was no defence for the owner to prove that he neither knew nor ought to have known of the

19. For cases of Child visitor text and footnotes 77 to 88, pp. 509, 510, *ante*; For cases of Child trespasser see text and footnotes 14 to 16, pp. 513-514, *ante*.
20. *Terry v. Ashton*, (1876) 1 QBD 314, 320. This case has been relied on by the Supreme Court in *Municipal Corpn. of Delhi v. Subhagwanti*, AIR 1966 SC 1750.
21. PER COCKBURN, C. J. in *Kearney v. London Brighton Ry. Co.*, (1870) LR 5 QB 411, 415; *Laugher v. Pointer*, (1826) 5 B & C 547, 576; *D'Souza v. Cassamalli Jairajbhoy*, (1933) 35 Bom LR 1007; *Kuppammal v. M. & S. M. Ry. Co., Ltd.*, (1937) 46 MLW 452 : (1937) MWN 921.
22. *Wringe v. Cohen*, (1940) 1 KB 229 : 161 LT 366 : 56 TLR 201 : (1939) 4 All ER 241.
23. *Municipal Corporation of Delhi v. Subhagwanti*, AIR 1966 SC 1750.

danger.[24] The same principle was applied in holding the Delhi Municipal Corporation liable when the branch of a tree standing on the road suddenly broke down and fell on the head of the pillion rider killing him when the scooter driver by his brother passed under the tree.[25] It was held that the Horticulture Department of the Corporation should have carried out periodical inspection and should have taken safety precautions to see that the road is safe for its users.[26] Where a heavy object is suspended over a highway, and must fall into it unless supported by artificial means which can only be kept in order by the person in possession of the premises, such person is bound absolutely to maintain the attachments.[27]

Where passers-by were injured by the falling of a brick from a bridge,[28] a barrel of flour from a window,[29] a packing case,[30] a bag of sugar from crane,[31] or a defective shutter from a house abutting on a highway,[32] or by the stump of a wall projecting about six to eight inches above the level of the road,[33] or by the falling of an advertisement banner attached to a frame overhanging the road,[34] it was held that they could recover damages.

Leaving unfenced excavated area.—A, a builder, left an excavated area open and unfenced against the road on which it abutted. B, lawfully walking at night along the thoroughfare, passing close by the premises, fell into the area. A was held to have failed to exercise the care of a prudent man.[35]

Collision with gate-post.—A railway company erected on the public highway certain gate-posts from which collapsible steel gates could be run across the road so as to close the entrance to the station-yard. A taxicab-driver, while driving his cab on a dark rainy night into the station-yard, collided with one of these posts, which was invisible owing to the darkening of the street in compliance with the Reduction of Lighting Regulations, and thereby damaged his cab. In an action by the cab-driver against the railway company for damages, it was held that the accident arose from the existence of the gate-post, which had been legalised by a statute, coupled with the diminution of light necessitated by the exigencies of the war; and that, therefore, the company was not guilty of negligence.[36]

Tree falling on person using highway.—An elm tree standing on land adjoining a busy London highway fell, injuring persons along the thoroughfare. The tree was about one hundred and thirty years old and carried a large, but not abnormal crown. The occupiers of the land had never lopped, topped or pollarded the tree. After its fall its roots were found to be affected by a disease known as elm butt rot, which was of

24. *Municipal Corporation of Delhi v. Subhagwanti*, AIR 1966 SC 1750., p. 1753. See further *Kallulal v. Hemchand*, AIR 1958 MP 48; *Nagamani v. Corporation of Madras*, AIR 1956 Mad 59; *Union of India v. M.Ravi* (2011) 3 CTC 200. There is an obligation on the owner of the premises for the safety of the structures which he keeps and if the structures fell into disrepair, the owner is liable to anyone who is injured or died by reason of the disrepair.
25. *Municipal Corporation of Delhi v. Sushila Devi (Smt.)*, AIR 1999 SC 1929, p. 1933.
26. *Municipal Corporation of Delhi v. Sushila Devi (Smt.)*, AIR 1999 SC 1929
27. *Noble v. Harrison*, (1926) 2 KB 332, 338 : 30 TLR 602; *Noor Bibi v. Municipal Committee, Ambala City*, (1939) 42 PLR 109.
28. *Kearney v. London Brighton Ry. Co.*, (1870) LR 5 QB 411.
29. *Byrne v. Boadle*, (1863) 2 H & C 722.
30. *Briggs v. Oliver*, (1866) 35 LJ Ex 163.
31. *Scott v. London Dock Co.*, (1865) 3 H & C 596.
32. *Wilchick v. Marks and Silverstone*, (1934) 2 KB 56 : 50 TLR 281.
33. *Silverston v. Marriott*, (1888) 55 LT 61.
34. *Manindra Nath Mukherjee v. Mathuradas Chattubhuj*, (1945) 80 CLJ 90 : 49 CWN 827.
35. *Barnes v. Ward*, (1850) 9 CB 392; *Hurst v. Toylor*, (1885) 14 QBL 918. See *Coffee v. McEvoy*, (1912) LR 290 (296).
36. *Great Central Railway v. Hewlett*, (1916) 2 AC 511.

long standing but would have been undiscoverable by any reasonable examination. There was evidence that elms are treacherous and shollow-rooted and liable to fall suddenly. The persons injured having brought an action against the occupiers for negligence or nuisance, it was held that, inasmuch as the tree was apparently sound and healthy and the evidence did not establish that inspection by an expert would have revealed that it was dangerous, the occupiers were not liable in either negligence or nuisance.[37]

Branch of tree falling on vehicle.—A branch of a tree growing on the defendants land overhung a highway. The branch suddenly broke, fell upon the plaintiffs vehicle, which was passing along the highway, and damaged it. The defendant did not know that the branch was dangerous. The fracture was due to a latent defect not discoverable by any reasonably careful inspection. It was held that the mere fact that the branch overhung a highway did not make it a nuisance, and that the defendant was not liable, inasmuch as he had not created the danger and had no knowledge, actual or imputed, of its existence.[38] But if there is a tree standing on the defendant's land which is dried or dead and for that reason may fall down and the defect is known or should have been known to the defendant, then the defendant is liable for any injury caused by falling of the tree or its branches.[39]

Injury to a child from spiked or unsafe wall.—In front of a window of the defendant's shop, and immediately abutting on a public highway, was a low wall eighteen inches high, the defendant's property, on the top of which was a row of sharp spikes. The plaintiff, a child of five, was found standing by the wall, bleeding from a wound such as might have been caused by her falling upon the spikes. It was held that there was evidence that the injury was caused by the wrongful act of the defendant, in maintaining the nuisance, while the plaintiff was using the highway in a proper manner.[40] The defendants were a demolition company who were carrying out the demolition of certain houses. Behind the houses was an open, cleared site where people were allowed to walk and children were accustomed to play. All the houses had been demolished except one which had been taken down to the level of the first floor ceiling. The rear wall of this house, which was over one hundred years old, had been damaged by bombing. On a Sunday afternoon, when none of the defendants' servants was on the site, the plaintiff, aged twelve, with other boys went on the site, and, having picked up some gas piping, started to pull away loose bricks from a window opening in the rear wall, with the result that the wall fell and the plaintiff was injured. In an action for negligence, it was held that although the plaintiff was a trespasser on the land, the presence of children on the site was so likely an occurrence that the plaintiff came within the class of "neighbour" to whom the defendants owed duty of care, and, therefore, they were liable in negligence to the plaintiff for failing to take precautions to prevent his suffering injury through the unsafe condition of the wall.[41]

Injury to motor cyclist.—The defendants were owners and occupiers of premises including a grassland called Green, one side of which adjoined a busy highway. Children up to ten or eleven years of age were permitted to play on the Green and the defendants knew that the children regularly played there with a football which often went over the wall which separated the Green from the highway and had to be

37. *Caminer v. Northern and London Investment Trust Ltd.*, (1951) AC 88.
38. *Noble v. Harrison*, (1926) 2 KB 332 : 42 TLR 518.
39. *Municipal Corporation Delhi v. Sushila Devi (Smt.)*, AIR 1999 SC 1929, p. 193 : (1999) 4 SCC 317 : 1999 ACJ 801. See further text and footnotes 25 and 26, p. 516.
40. *Fenna v. Clare & Co.*, (1895) 1 QB 199.
41. *Davis v. St. Mary's Demolition & Excavation Co. Ltd.*, (1954) 1 All ER 578.

retrieved from the highway. Once the football went over the wall on to the highway and caused a passing motor-cyclist to fall and sustain fatal injuries. It was held that the defendants were liable as they ought to have realised that children playing in this manner constituted a risk to the persons using the highway.[42]

An owner or occupier of land adjoining an ordinary highway is however not bound to fence it so as to prevent harmless animals like sheep from straying upon the highway.[43] Where a danger has been created on a highway by something done on the highway and not by anything done on the adjoining land, the owner of the adjoining land is not bound to make any alteration on or to his land to do away with that danger. Thus, where, in consequence of a highway having been made up by a highway authority, the level of the adjoining land, which is unfenced, has been lowered so as to cause a dangerous drop from the edge or kerb of the reconstructed highway, and a pedestrian slips down from the highway on to the adjoining land and is thereby injured, the owner of the adjoining land is not liable, but the highway authority is.[44]

3(G) Railway Level Crossing

Railway companies are always bound by statutes in England to keep closed the gates of the railway at level crossings at those times at which it would be dangerous to allow the public to cross the line. If this duty is not performed, and a passenger along the highway is, in attempting to cross the line of railway, injured, the leaving of the gates open is evidence of negligence on the part of the railway company, even though with care and circumspection, he might have been able to see at a distance the approach of the train which occasioned the injury.[45] If the gates of the railway, at a place where it crosses the highway at a level are open, it amounts to a statement and a notice to the public, that the line, at that time, is safe for crossing.[46] Apart from statute the carrying on of an inherently dangerous activity of running express trains through a level crossing, which is lawfully and necessarily used by local inhabitants, their guests and persons visiting on business, imposes on the railway company a general duty of care towards those who are lawfully on the level crossing. Such general duty to take all reasonable precautions to ensure the safety of persons lawfully using a level crossing extends not merely to positive operations but also to static conditions, and included the obligation to keep the crossing itself in reasonably adequate condition.[47]

In India there is no direct statutory duty on the Railways to erect gates and employ watchman *etc.* as in England until the Central Government so requires by a requisition under section 13 of the Railways Act.[48] But the Railways being engaged in an inherently dangerous activity affecting the safety of traffic at a level crossing are bound in India also by the common law duty on the principle of neighbourhood laid down in *Donoghue v. Stevenson*[49] and applied by the Privy Council in commissioner for *Railways v. McDermott*.[50]

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42. *Hilder v. Associated Portland Cement Manufactures Ltd.*, (1961) 3 All ER 709.
43. *Heath's Garage Ltd. v. Hodges*, (1916) 2 KB 370.
44. *Nicholson v. Southern Ry. Co., etc.*, (1935) 1 KB 558 : 152 LT 349 : 51 TLR 216.
45. *Directors etc. of North Eastern Ry. Co. v. Wanless*, (1874) LR 7 HL 12.
46. *Directors, etc., of North Eastern Ry. Co. v. Wanless*, (1874) LR 7 HL 12; *Stapley v. L. B. & S.C. Ry.*, (1865) LR 1 Ex 21. See *Bengal Provincial Ry. Co. v. Gopi Mohan*, (1913) ILR 41 Cal 308; *Bengal and North-Western Railway Company Ltd., v. Matukdhari Singh*, (1937) ILR 16 Pat 672.
47. *Commissioner for Railways v. Mcdermott*, (1966) 2 All ER 162 : (1967) 1 AC 169 (PC).
48. *Union of India v. United India Assurance Co. Ltd.*, (1997) 8 JT 653, p. 665 : AIR 1998 SC 640.
49. 1932 AC 562 : 101 LJPC 119 : 147 LT 281 : 48 TLR 494.
50. *Supra*, footnote 47.

Care should be exercised by the driver of an engine when he proposes to cross at night an unfenced level crossing laid across a public highway.[51] Mere allegation or proof that the company was guilty of negligence in such cases is altogether irrelevant; the plaintiff must allege and prove, not merely that the company was negligent, but that its negligence caused or materially contributed to the injury.[52]

A railway company allowing the public to cross the line otherwise than by a level crossing is not duty bound to use care to protect the public; but if it is such a place where people are in the habit of crossing, the company has to take reasonable precautions in the use of the spot, even though there is no right of way there.[53]

There is an obligation on the part of the Railway Company or Administration to ensure that whenever a railway line passes over a thoroughfare adequate warning should be given to the public of the passing of the trains at the time they pass so that accidents may be avoided.[54] As already seen, this duty need not necessarily be a statutory duty. It is implied and inherent in the functions to be discharged by the railway administration in the matter of running their railways. The railway administration must, therefore, when the road crossed is busy and the visibility of incoming train is obstructed take the precaution of either putting up a railway gate and keeping it closed at the time the train is due to pass or put up some other obstruction which would prevent the public from passing over the level crossing giving them information and notice of the approaching train.[55] Where a railway line crosses a busy road at such a point that the incoming train is not visible until the passer is on the railway track, there is no question of contributory negligence in case

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51. *Abdul Latiff v. Pauling & Co.*, (1916) 19 Bom LR 167, 171.
52. *Wakelin v. London & South Western Ry. Co.*, (1886) 12 App Cas 41. In this case the dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head-lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line. It was held that even assuming that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident, and that the company was not liable. This case is distinguished in *Jones v. Great Western Ry. Co.*, (1930) 47 TLR 39. Jones worked at a factory in front of which ran a railway siding, belonging to the defendants, that had to be crossed to obtain access to the works. He was killed by being crushed between the buffers of two trucks during shunting operations. No one saw the accident happen and there was no evidence how he got between the buffers. The defendants had employed a man to give warning to any one before the train was shunted, but he did not see the deceased and therefore did not give him any warning. It was held that, as there was an absence of warning, an inference could be drawn that the injury was due to the absence of that warning and that the defendants were liable for negligence. In *M. & S. M. Railway Co. Ltd. v. Jayammal*, (1924) ILR 48 Mad 417, a girl of seven years was knocked down by an engine of the defendants while she was crossing the railway line but she was held guilty of contributory negligence.
53. *Bengal Nagpur Railway Company Limited v. Taraprosad Maity*, (1927) 48 CLJ 45. To render a railway company liable for the omission on the part of the driver to whistle, it is necessary to prove that the driver has been guilty of a breach of duty or an error of judgment or that he saw the danger and failed to give warning. Failure to whistle is not the omission of any statutory precaution but in certain circumstances it may be reasonable to whistle and failure to do so may be evidence of negligence. No absolute rule can be laid down as to the circumstances under which the driver would be bound to whistle notwithstanding that it is not a statutory duty to do so but that duty arises only where the circumstances call for a warning to be given.
54. See *Titchener v. British Railways Board*, (1983) 3 All ER 770 (HL) p. 775 : (1983) 1 WLR 1247 : 134 New LJ 361; the existence and extent of any duty to fence will depend upon various factors.
55. *Swarnalata v. Union of India*, AIR 1963 Assam 117 : (1963) ILR 15 Ass 135. In this case it was found on evidence that it was only when the members of the public using the road came on to the railway line that they would be in a position to know that a train was approaching. See further *Krishna Goods Carriers (P.) Ltd. v. Union of India*, AIR 1980 Del 92.

of accident.[56] But there is no general duty to man all level crossings *e.g.* when the road crossed is not busy and the visibility is not obstructed.[57]

In *Union of India v. United India Assurance Co. Ltd.*,[58] the Supreme Court approved a passage from the judgment of Krishan J.C in *Union of India v. Lalman*,[59] as representing correctly the common law. The passage reads as follows: "A level crossing is on the one hand a danger spot in view of the possible movement of trains, and on the other is an invitation to passerby. This is a public crossing and not merely one by private accommodation. Therefore, it is the legal duty of the railway to assure reasonable safety. The most obvious way of doing it is to provide gates of chain barriers and to post a watchman who should close them shortly before the train passes. But failure to do so is not by itself an act of negligence provided that the railway had taken other steps sufficient in those circumstances to caution effectively a passerby of average alertness and prudence. At a reasonable distance on either side permanently written boards can be affixed asking the road users to beware of trains if the track on either side is visible from near the caution board or within a short distance from the crossing. This would be sufficient because a diligent road user could look round and see the train. On the other hand, if there is a bend on the track or there are trees or bush in between or the road on either side of the crossing is very far below the level of the railway track or for any other similar reason the track is not visible beyond a short distance, then even the caution boards are useless. In that case gates are indicated. Similarly boards may be affixed along the railway say half to three fourth of a mile in either direction calling up on the engine driver to whistle. A whistle by the driver can supplement, but cannot replace gates or caution boards as a device to protect the users of a crossing."[60] In addition to what is stated above it will also appear from the judgment of the Supreme Court that the common law principle will also require converting an unmanned crossing into a manned crossing with gates *etc.* if the volume of rail and road traffic is considerable. In the case before the Supreme Court the finding was that 300 vehicles passed through the crossing and six express trains cut across the public road every day in addition to other non-express passenger and goods trains. The writing on the sign board was moth eaten and there were no hand rails or gates. In these circumstances approving the finding of negligence reached by the High Court the Supreme Court observed: "Applying the common law principles, the railway must be deemed to be negligent in not converting the unmanned level crossing into a manned one with gates—having regard to the volume of rail and road traffic at the point."[61] The Supreme Court also held the Central Government negligent for omission to exercise the statutory power under section 13 of the Railways Act requiring the railway to erect gates etc. This part of the judgment is discussed elsewhere. The Supreme Court also held that there is a duty of the driver of a motor vehicle "to stop, see and hear, at the unmanned level crossing."[62] As in the case before the Supreme Court the driver of the motor vehicle did not stop even though the oncoming train was visible and the collision took place at the middle of the crossing, he too was found to be negligent. In the circumstances the owner of the motor vehicle and the Railway were held to be joint tort feasors.

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56. *Ramesh v. Union of India*, AIR 1965 Pat 167.
57. *Praglee & Oil Mills v. Union of India*, AIR 1980 All 168; *Union of India v. Hanuman Prasad*, AIR 1989 Cal 207.
58. (1997) 8 JT 653 : (1997) 8 SCC 683.
59. AIR 1954 VP 17.
60. AIR 1954 VP 17.
61. (1997) 8 JT 653, p. 667 : (1997) 8 SCC 603.
62. (1997) 8 JT 653, p. 661 : (1997) 8 SCC 603.

S attempted to cross a railway line at night at a spot where persons were in the habit of crossing with the acquiescence of the company. At the time he attempted to cross, there was a train standing still on the up line in such a position as to prevent a person on the line behind it from seeing anything approaching on the down line. S came from behind the train on the up line, and, crossing on the down line, was struck by an express train and killed. It was held that the company was liable for negligence.[63] The plaintiff, a medical doctor, whose time was of pecuniary value, was, while driving along a public highway, detained for twenty minutes at a level crossing by the unreasonable and negligent delay of the servants of the defendant railway company in opening the gates at the crossing. It was held that the defendants were liable in damages to the plaintiff for such delay.[64] Where the plaintiff's elephant was hit and killed by a train at a level crossing, which was not guarded by a gatekeeper and the gates had not been closed before the approach of the train, and there was no unreasonable conduct on the part of the driver of the elephant, it was held that the defendant railway company was liable.[65]

Where the plaintiff who was travelling in his car at the speed of seven miles per hour, finding the gates of a railway level crossing open, tried to cross the rails and while doing so, a railway engine collided against his car and broke it, it was held that the plaintiff was not guilty of contributory negligence and that he was entitled to recover damages from the railway company.[66]

3(H) Invitation to Alight at a Railway Station

The announcement of the name of a station coincident with the stoppage of the train thereat, and its coming to a complete standstill, is, in the absence of a warning to the passengers to keep their seat, an invitation to alight.[67] If a passenger gets out of the train under these circumstances he is not guilty of any want of reasonable care. An invitation to passengers to alight on the stopping of a train without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence.[68] Railway companies are bound to provide, at every station, reasonable means for passengers to alight.[69] Passengers are equally bound to use reasonable care in alighting on the platform, or elsewhere, where it becomes necessary for them to alight.[70] If, for instance, a train overshoots a platform, a thing which very often happens, a passenger is bound to see whether or not the train is shunted back, and to take reasonable care when he gets down, otherwise the railway company will not be liable.[71] The test is—was the place where the plaintiff was required to alight, a safe or dangerous place, that is, was it a place where persons of ordinary intelligence and physical capacity exercising reasonable care could alight without risk of injury?[72] The mere fact of the end of a train passing the platform, where the passenger can

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63. *Dublin Wicklow and Wexford Ry. Co. v. Slattery*, (1878) 3 App Cas 1155; *Rogers v. Rhymney Ry.*, (1872) 26 LT 879; *Clarke v. Midland Ry.*, (1880) 43 LT 381; *Smith v. South Eastern Ry. Co.*, (1896) 1 QB 178; *Mercer v. S.V. & C. Ry., Co's Managing Committee*, (1922) 2 KB 549.
64. *Boyd v. Great Northern Ry.*, (1895) 2 IR 555.
65. *Bengal and North-Western Railway Company Ltd. v. Matukdhari Singh*, (1937) ILR 16 Pat 672.
66. *Dayashankar v. B.B. & C.I. Railway*, (1931) ALJR 847.
67. *Weller v. London, Brighton & South Coast Ry.*, (1874) LR 9 CP 126; *Bridges v. Directors &c. of North London Ry. Co.*, (1873-74) LR 7 HL 213.
68. *Cokle v. London & South Eastern Ry. Co.*, (1872) LR 7 CP 321, 326.
69. *Robson v. North Eastern Ry. Co.*, (1876) 2 QBD 85.
70. *Praeger v. The Bristol and Exeter Ry. Co.*, (1871) 24 LTNS 105.
71. *Lewis v. London, Chatham & Dover Ry. Co.*, (1873) 43 LJ QB 8; *Siner v. Great Western Ry. Co.*, (1869) LR 4 Ex. 117.
72. *Owen v. The Great Western Ry. Co.*, (1877) 46 LJ QB 486.

safely alight, is not of itself evidence of negligence, for it is impossible always to regulate the speed of the train, and sometimes the platform may not be long enough. But when this happens, it becomes the duty of the company to take measures for the safety of the passengers in the carriages beyond the platform. They are not to be exposed to unnecessary danger: the train may be backed, and in the meantime the passengers may be warned to keep to their seats until it is backed. If, being so warned, they choose to get out and expose themselves to unnecessary danger, that is their fault, and in such circumstances the company would not be liable. But if that course is not adopted, and the train does not back, the passengers should be asked if they will alight, and porters should assist them in getting out,—such of them at least as may require such assistance,— at all events, something should be done to prevent their incurring unnecessary danger.[73]

In India the foregoing principles have been followed, and it has been held that mere overshooting is not necessarily or by itself negligence. There must be something more in order to entitle the plaintiff to claim damages on the ground of negligence of the railway company.[74]

On the approach of a train to a station, a porter called out the name of the station, and the train was brought to a standstill. Hearing carriage doors opening and shutting, and seeing a person alight from the next carriage, the plaintiff stepped out of a carriage; but the carriage in which he was, having overshot the platform, he fell on to the embankment and was hurt. It was night, and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the driver intended to back the train. It was held that the company was liable for negligence on the part of its servants.[75] But where under similar facts a porter had shouted to the passengers to keep to their seats but the plaintiff failed to hear him as he was asleep and got out in a hurry without looking to see what he was stepping on and fell five feet below and was injured, it was held that the company was not liable as he was guilty of contributory negligence.[76] A railway train drew up at a small station with the engine and part of one of the carriages beyond the platform. A passenger in that carriage, having a parcel in her hands, opened the door and waited on the iron step some time for assistance; but no one coming to assist, she, fearing that the train would move on, tried to alight by getting on to the footboard, and in so doing fell and injured herself. It was held that she was entitled to maintain an action against the company.[77] The mere stopping of a train and calling out the name of a station is not, in all cases, evidence of an invitation to alight. The plaintiff was a passenger by the defendants' railway to Bromley station. As the train arrived there she heard "Bromley, Bromley" called out several times. The train was brought to a standstill, but not before it had partly overshot the platform. As the plaintiff was in the act of getting out, and when her foot was on the step of the carriage, the train was put back with a jerk, and she fell on the platform. The period occupied by the stoppage of the train was little more than momentary,

73. PER COCKBURN, C. J. in *Rose v. North Eastern Ry. Co.*, (1876) 2 Ex D 248, 250. In this case a railway train drew up at a station with two of the carriages beyond the platform. The servants of the company called out to the passenger to keep their seats, but were not heard by the plaintiff and the other passenger in one of the carriages. After waiting some little time, and the train not having been put back, the plaintiff got out, and in so doing fell and was injured. It was held that the railway company was liable for negligence.
74. *Kessowjee v. G.I.P. Ry.*, (1904) 6 Bom LR 673, (1904) 7 Bom LR 119, (1907) 9 Bom LR 671, 34 IA 115.
75. *Weller v. L.B. & S.C.Ry.*, (1874) LR 9 CP 126; *Praeger v. B. & E. Ry.*, (1871) 24 LTNS 105.
76. *Sharpe v. Southern Railway*, (1925) 2 KB 311.
77. *Robson v. N.E. Ry. Co.*, (1876) 2 QBD 85. See *Owen v. G. W. Ry.*, (1877) 46 LJQB 486.

and the plaintiff knew the station well; it was held that there was no evidence of negligence on the part of the defendants.[78]

The plaintiff was a passenger travelling on the defendants' railway, and received severe injuries from a fall which he experienced in stepping upon the platform when the train, which overshot the station, stopped. It was held that the railway company was guilty of negligence in not keeping the station properly lighted, in allowing the train to overshoot the station, and in not warning the plaintiff against alighting.[79]

The plaintiff was a passenger in a railway train of the defendant company. At the station, where the plaintiff had to get out of the carriage, the train overshot the platform; and the plaintiff, on the implied invitation of the defendants, alighted where the train stopped. The place was dark and there were no lamps. No warning was given to the plaintiff that the train had passed the platform or that special care must be taken in descending. The plaintiff fell heavily and was seriously injured. It was held that the company was liable in damages.[80]

3A. PERSONS IN CHARGE OF CHILDREN

The question of standard of care of parents and teachers in charge of children was recently considered by the Supreme Court in *M.S. Grewal v. Deepchand Sood.*[81] It was observed that while the parent owes his child, a duty of care in relation to the child's physical security a teacher in a school is expected to show such care towards a child under his charge as would be exercised by a reasonably careful parent, that duty of care varies from situation to situation and that more care is needed when the children are taken out on a picnic for fun and swim in a river.[82] In this case 14 children of 4th, 5th and 7th classes of Dalhousie Public School drowned in the river Beas when they along with other children were taken out for an outing. The teachers in charge of the children were found negligent and the school was vicariously held liable in damages to the parents of the children.

4. PERSONS PROFESSING TO HAVE GREATER SKILL

Where it is evident that persons hold themselves out to be persons of skill, they are bound to exercise skill. It is not enough that the defendants have acted *bona fide* and to the best of their skill and judgment. The practice of a profession, art, or calling, which, from its nature, demands some special skill, ability, and experience, carries with it a representation that the person practising or exercising it possesses, to a reasonable extent, the amount of skill, ability, and experience which it demands. His duty is to use such care as would be used by others in the same profession. This duty to take reasonable care is independent of contract. For example, if professional persons employed by an education authority negligently fail to assess and provide for special educational needs of a child (with whom they have no contractual relationship) they are liable to him in tort being in breach of their common law duty

78. *Lewis v. L.C.D.Ry.*, (1873) 43 LJQB 8. See *Harrold v. The Great Western Ry. Co.*, (1866) 14 LT 44.
79. *Woodhouse v. C. & S. E. Ry. Co.*, (1868) 9 WR (Eng.) 73.
80. *Kessowjee Issur v. Great Indian Peninsula Railway*, (1907) 34 IA 115 : 9 Bom LR 671. The case is noted also in f.n. 55, *supra*.
81. AIR 2001 SC 3660.
82. AIR 2001 SC 3660, pp. 3665, 3667. See further *Carmarthenshire County Council v. Lewis*, (1955) AC 549 : (1955) 2 WLR 517 : (1955) All ER 565 (HL); *Barnes v. Hampshire County Council*, (1969) 3 All ER 746 (HL). Both these cases are discussed at p. 452, *ante*.

and the authority is also vicariously liable.[83] Dealing with the case of a valuer, the HOUSE OF LORDS recently observed: "The valuer will only be liable if other qualified valuers, who cannot be expected to be harsh on their fellow professionals, consider that, taking into consideration the nature of the work for which the valuer is paid and the object of that work, nevertheless he has been guilty of an error which an average valuer in the circumstances, would not have made."[84] Similar test can be applied to other professionals. Of this class the following are discussed hereinafter.

4(A) Directors of Companies

Directors of a company ought to show more than ordinary care towards the shareholders, for they are persons holding themselves out as capable of directing complicated affairs and inviting persons to trust their money to the company which they profess to direct. They are, unlike trustees, who undertake irksome duties for no pay or advantage, for they are always either paid or deriving some benefit or advantage from their position. They must show diligence which good men of business are accustomed to show.[85]

4(B) Carriers

4(B)(i) Carriers of Goods

Anyone who undertakes to carry the goods of all persons indiscriminately, for hire, is a common carrier.[86] A person who carries goods of particular persons on special contract and does not hold himself out to transport the goods of everyone wishing to employ him is a private carrier and not a common carrier. Common carriers are generally of three descriptions: (a) carriers by land; (b) carriers by water; and (c) carriers by air. Carriers by land are the proprietors of stage-coaches, omnibuses, and motor-lorries, which ply between different places and carry goods for hire. So are truckmen, cartmen, and porters, who undertake to carry goods for hire from one town to another or from one part of a town to another. But furniture removers are not liable as common carriers.[87] Carriers by water are the owners, and masters of ships whether they are regular packet ships, or carrying smacks or coasting ships, or other ships carrying general freight. So are the owners and masters of steam-boats engaged in the transportation of goods for persons generally for hire.

Duties.—A common carrier is bound to carry all goods offered for transportation by any person, whatsoever, upon receiving a suitable hire. He must take the utmost care of goods from the moment of receiving them.[88] If the carriage is to be by water,

83. *E (a minor) v. Dorset County Council*, (1994) 4 All ER 640 (CA) p. 667 : (1995) 2 AC 685. See further pp. 4 to 8 *ante*.
84. *Smith v. Eric S. Bush (a firm)*, (1989) 2 All ER 514 (HL), p. 525 : (1990) 1 AC 831 : (1998) 2 WLR 790. For valuers see pp. 609-611.
85. *Catchpole v. Ambergate etc. Ry. Co.*, (1852) 1 El. & Bl. 111.
86. *Gisburn v. Hurst*, (1709) 1 Salk 249.
87. *Watkins v. Cottell*, (1916) 1 KB 10.
88. *East Indian Railway Company v. Sispal Lal*, (1911) 14 CLJ 472. See *Lakhichand v. GIP Railway*, (1911) 14 Bom LR 165 : ILR 37 Bom 1.

carriers are bound to provide a ship tight, staunch and strong, and suitably equipped for the voyage, with proper officers and crew; to guard against all injuries incident to the property, by reasonable care in preserving the goods from the effects of storm or bad air, of leakage, and of embezzlements. Every carrier is bound to use all the diligence which prudent and cautious men, in the like business, usually employ for the safety and preservation of the property confided to their charge.[89] The fact that pursuant to a contract of insurance, the consumer/assured has received from the insurer value of the goods to the extent of the damage, does not reduce the liability of the carrier/wrong-doer who is otherwise responsible for the loss.[90]

Liability.—A common carrier, at common law is an insurer of goods committed to his charge and is responsible for their safe transport and delivery. In case of loss or injury thereto, he is, therefore, as a rule, liable, though there may have been no negligence on his part. To this rule there are exceptions, *e.g.* when the loss or injury has been caused by an act of God, the King's enemies, or an inherent vice or defect in the goods carried and without negligence on the part of the carrier.[91] The carrier may limit his liability by means of special contract or condition.[92]

A railway company is under liability as a common carrier for loss of or damage to the luggage of a passenger not only where the luggage is placed in the luggage van, but also where it is retained by the passenger as hand luggage, unless the company can prove that the passenger assumed the immediate care of the luggage so retained and that the loss or damage was occasioned by his failure to exercise proper care of it. The company is not relieved of this liability merely because the luggage is not in the carriage in which the passenger himself travels, or is placed in a carriage of a higher class.[93]

89. *Gill v. Manchester Ry. Co.*, (1873) LR 8 QB 186; *Lakhichand v. GIP Railway*, (1911) 14 Bom LR 165 : ILR 37 Bom 1.
90. *Economic Transport Organization, Delhi v. Charan Spinning Mills Private Limited*, (2010) 4 SCC 114
91. *Nugent v. Smith*, (1876) 1 CPD 423. See *Akhil Chandra v. IGN & Ry. Co.*, (1915) 21 CLJ 565; *Surendra Lal Choudhuri v. Secretary of State for India in Council*, (1916) 21 CWN 1125; *K.C. Dhar v. Ahmed Bux*, (1933) 37 CWN 559; *River Steam Navigation Co. Ltd. v. Shyamasundar Tea Co. Ltd.*, ILR (1954) 6 Assam 433; *Brakes India Ltd. v. BIC Logistics Ltd.* (2010) 3 CTC 258.
If loss is caused owing to "perils of the sea," the defendant must prove it; *Esufali v. Thaha Ummal*, ILR (1924) 47 Mad 610.
92. *Price & Co. v. Union Lighterage Co.*, (1903) 1 KB 750; *Wyld v. Pickford*, (1841) 8 M & W 443; *Hajee Ismail Sait v. The Company of the Messageries Maritimes of France*, (1905) ILR 28 Mad 400. See Carriers Act (III of 1865), ss. 3, 6, 9; the Indian Contract Act (IX of 1872), section 152; the Indian Railways Act (X of 1880), s.72. The condition must not be inconsistent with the provisions of the Indian Carriers Act, *e.g.* any condition exonerating carrier from liability for the negligence of its servants or agents is void: *River Steam Navigation Co. Ltd. v. Jamunadas Ramkumar*, (1931) ILR 59 Cal. 472. The Indian Contract Act does not apply to common carriers by sea, and a common carrier cannot reduce his liability to that of a bailee under section 151 of the Contract Act. A common carrier cannot contract out of his common law liability: *Alibhai Mahomed v. B.I.S.N. & Co.*, (1919) 12 BLT 173. See, however, *Dekhari Tea Co. Ltd. v. Assam Bengal Ry. Co. Ltd.*, (1919) ILR 47 Cal 6; *Easwara Iyer & Sons v. Madras Bangalore Transport*, (1964) ILR 1 Mad 997. See *Indian Airlines Corporation v. Keshavlal*, AIR 1962 Cal 290 : 65 CWN 949, where a common carrier who in the contract of carriage of goods by air from Bombay to Calcutta had contracted itself out of liability for loss of or damage to goods due to negligence of its staff was held not liable for damages for loss of goods due to such negligence. See also *National Tabocco Co. v. Indian Airlines Corpn.*, AIR 1961 Cal 383.
93. *Vosper v. Great Western Ry. Co.*, (1928) 1 KB 340; *Great Western Ry. Co. v. Bunch*, (1888) 13 App Cas 31. A railway company, when sued for loss of goods entrusted to it for carriage, may exonerate itself by proof of general care, in dealing with large quantities of similar goods and proving that that amount of care is usually sufficient to prevent loss, damage or destruction: *Hirji Khetsy v. B. B. & C. I. Ry.*, (1914) 16 Bom LR 467: ILR 39 Bom 191. If it is shown that the company has failed to take as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value, it would be liable : *Narsinggirji Manufacturing Co. v. G.I.P. Ry.* (1918) 21 Bom LR 406; *Surendra Lal Chowdhuri v. Secretary of State for India in Council*, (1916) 21 CWN 1125.

The common law liability of common carriers has been to some extent relaxed by statutes. The Indian Carriers Act, 1865 now governs the liability of common carriers.[94] The Carriers Act does not apply to Railways which are governed by the Railways Act, 1890. Similar special Acts have been passed to cover carriage of goods by Sea (Carriage of Goods by Sea Act, 1925) and by Air (Carriage by Air Act, 1972). The liability of a common carrier under the Carriers Act and of a railway under the Railways Act (after amendments in 1949 and 1961) is, speaking generally, that of an insurer so that the plaintiff need not prove negligence. Both the Acts, however, contain provisions which enable them to reduce the liability by special contract in certain cases. The Railways Act also enables a Railway to reduce its liability by offering reduced rate of carriage known as the Owner's Risk rate.

The law relating to the liability of a common carrier under the Carriers Act, 1865 was reiterated by the Supreme Court in the context of goods carried by road. The court said: "The liability of a common carrier under the Carriers Act is that of an insurer. This position is made further clear by the provisions in section 9 in which it is specifically laid down that in a case of claim of damage for loss to or deterioration of goods entrusted to a carrier it is not necessary for the plaintiff to establish negligence. Even assuming that the general principle in cases of tortious liability is that the party who alleges negligence against the other must prove the same, the said principle has no application to a case covered under the carriers Act. This is also the position notwithstanding a special contract between the parties."[95] These principles, the court held, were also applicable to a claim of damages for deficiency in service against a common carrier under the Consumer Protection Act, 1986 and the claimant has not to prove negligence of the common carrier for showing deficiency in service.[96] But the requirement to serve notice under section 10 of the Carriers Act is mandatory even for bringing a claim under the Consumer Protection Act.[97]

4(B)(ii) Carriers of Passengers

The duty of carriers of passengers is to take due care (including in that term the use of skill and foresight) to carry the passengers safely.

Duties.—The passenger carriers are bound to carry passengers whenever they offer themselves, and are ready to pay for their transportation, and are not at liberty to refuse a passenger, if they have sufficient room and accommodation. The proprietors are bound to provide road-worthy vehicles suitable for the safe transportation of the passengers, and also careful drivers, of reasonable skill, who are well acquainted with the road they undertake to drive. The right which the passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the company to carry him safely.[98]

Liabilities.—Passenger carriers undertake to provide for the safe conveyance of those who engage them as far as human care and foresight can go. They are not liable for any accident.[99] Thus the liability of a passenger carrier is not the same as that of a common carrier. A passenger carrier is liable only in case of negligence whereas, as already seen, a common carrier is liable generally as an insurer without proof of negligence.

94. Brakes India Ltd. v. BIC Logistics Ltd. (2010) 3 CTC 258.
95. *Patel Roadways Ltd. v. Birla Yamaha Ltd.*, JT 2000 (3) SC 618, pp. 632, 633 : AIR 2000 SC 1461, pp. 1468, 1469 : (2000) 4 SCC 91.
96. *Patel Roadways Ltd. v. Birla Yamaha Ltd.*, JT 2000 (3) SC 618 : AIR 2000 SC 1461 : (2000) 4 SCC 91. Followed in *Economic Transport Organization (M/s.) v. Dhanwad District Khadi Gramodyog Sangh*, JT 2000 (4) SC 327 : AIR 2000 SC 1635 : (2000) 5 SCC 78.
97. *Arvind Mills Ltd. v. M/s. Associated Roadways*, AIR 2004 SC 5147.
98. *Austin v. Great Western Ry. Co.*, (1867) LR 2 QB 442, 445.
99. *Christie v. Griggs*, (1809) 2 Camp 79; *Aston v. Heaven*, (1797) 2 Esp 533.

Railway companies.—are bound to use proper care and skill in carrying their passengers; they are not liable as common carriers of passengers independently of negligence.[1] They must take all such steps as skill, prudence, and foresight can devise to keep passengers free from personal injury while travelling on their system.[2] If an accident is caused by a latent defect in a vehicle, which it is impossible, with the exercise of all due care, caution, and skill, to have discovered, the railway company is not liable.[3] If there is a special contract absolving the railway company from injury caused by their negligence no action lies.[4] The railway authorities are bound to make provision for the safety of children of tender years but they can make these provisions on the basis that such children would be accompanied by someone capable of looking after them.[5] If no reasonable steps are taken to prevent damage to person and property of passengers from unruly mob when such incidents are a matter of recurring phenomenon, the Railway administration will be held liable for negligence.[6]

Liability for Baggage of passengers.—In regard to their liability for the luggage of passengers, railway companies stand upon the ordinary footing of common carriers.[7] Baggage means such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunk of passengers, which are not designed for any such use, but for other purposes, such as a sale and the like.

Death caused by assault in a running train.— In 1981, a passenger was criminally assaulted while travelling in a local train and was robbed of her gold chain, bangles and wristwatch. She pulled the alarm chain but despite the ringing of the alarm bell neither the guard nor the motorman stopped the train. She ultimately succumbed to the injuries in the compartment. The Supreme Court held the Railway Administration guilty of negligence and in breach of common law duty of taking reasonable care for the safety of passengers. Had the train been stopped and first aid provided to the passenger, she may not have succumbed to the injuries. The court allowed Rs. 2 lacs as compensation to the husband of the deceased.[8] The case also holds the railway administration liable for violation of Article 21 of the constitution as the Railways are owned by the Union Government.

Death caused by explosives illegally introduced into railway carriage.—Where a passenger was killed in a railway carriage by an explosive illegally introduced into it, it was held that the railway company was not liable in damages unless guilty of negligence in permitting the fireworks to be brought into the carriage. As it was not the duty of the company to search every parcel carried by a passenger, the onus was on the plaintiff to show that the parcels containing the fireworks suggested danger.[9]

1. *East India Ry. v. Kalidas Mukerjee*, (1901) AC 396; 3 Bom LR 293; ILR 28 Cal 401; *Shiam Narain Tikkoo v. The B.B. & C.I. Ry. Co.*, (1919) ILR 41 All 488. See *Ishwardas Varshni v. King Emperor*, (1921) ILR 1 Pat 260 and *Union of India v. S.N.M. Bairogiya*, (1954) ILR 33 Pat 249, as to the liability of railway companies for overcrowding in railway compartments.
2. *Jewan Ram Khettry v. E.I.Ry. Co.*, (1924) ILR 51 Cal 861. If an accident is due to the train leaving the metals, the railway company is liable for negligence unless it proves that it took all such steps as skilful, prudent, and foresighted persons under the circumstances would have taken to avoid the accident.
3. *Readhead v. Midland Ry. Co.*, (1869) LR 4 QB 379. It is, however, the duty of those who carry passengers to see that every part of the car or bus which is likely to go out of order and create accident is properly examined: *Bhurmal etc. Motor Assoc v. Raghunath*, (1962) 65 Bom LR 180 : 1963 Mh LJ 241 : AIR 1963 Bom 144.
4. *Thompson v. L.M. & S. Ry. Co.*, (1930) 1 KB 41.
5. *O'Connor v. British Transport Commission*, (1958) 1 All ER 558 : (1958) 1 WLR 346 : 102 SJ 214.
6. *Sumati Devi M. Dhanwatay v. Union of India*, AIR 2004 SC 2368 : (2004) 6 SCC 113.
7. *Jenkyns v. Southampton, etc. Steam Packet Co.*, (1919) 2 KB 135.
8. *P.A. Narayanan v. Union of India*, AIR 1998 SC 1659 : JT 1998 (1) SC 749 : (1998) 3 SCC 67. Such a case will now also be covered by section 123(c) inserted in 1994 in the Railways Act, 1989.
9. *East India Ry. v. Kalidas Mukerjee*, (1901) AC 396; 3 Bom LR 293.

Injury by falling of ladder in railway compartment.—The plaintiff travelled in a second class compartment of a train on the defendants' railway. The compartment carried a ladder to get to upper berth. The ladder when not in use was kept underneath one of the lower berths. On the occasion in question, someone had folded the ladder and kept it in a rack near the roof of the compartment. The plaintiff went to sleep on one of the lower berths. After the train had proceeded on an hour's journey, the ladder fell on the plaintiff's head and caused him injury. The plaintiff having sued to recover damages it was held that the defendants were not shown to have been negligent.[10]

The requirement of the law that the plaintiff must prove negligence for succeeding in a suit against a railway was leading to hardship in many cases. The Railways Act 1890 was, therefore, amended in 1943 by insertion of section 82A which is now section 124 of the Railways Act, 1989. This section provides for liability of the Railway administration for loss occasioned by the death of a passenger, dying as a result of a railway accident and for personal injury and loss of property arising from the accident whether or not there has been any wrongful act, neglect or default on the part of the Railway administration. The compensation payable under this section is to the extent as may be prescribed. The compensation is payable on the happening of an accident which as defined is one which occurs in the course of working a railway being either a collision between trains of which one is a train carrying passengers or the derailment of or other accident to a train or any part of a train carrying passengers.[11] By the Railways (Amendment) Act 1994 a new concept of 'untoward incident' and compensation for death of or personal injury to a passenger as a result of untoward incident was provided in section 124A without proof of negligence as in case of accident in section 124. 'Untoward incident' is defined in section 123(c) to mean commission of a terrorist Act, making of a violent attack or commission of robbery or dacoity, indulging in looting, shootout or arson, and the accidental falling of any passenger.[12] The compensation payable under sections 124 and 124A is regulated by the Railways Accidents and Untoward Incidents (Compensation) Rules, 1990.

The definition of untoward accident has been liberally construed. It has been held to cover a case where a passenger fell down while attempting to board the train.[13] Section 124A makes the Railway administration liable irrespective of any fault except when the passenger dies or suffers injury due to (a) suicide or attempted suicide by him; (b) self inflicted injury (c) his own criminal act (d) any act committed by him in a state of intoxication or insanity and (e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the untoward accident. In other respects section 124A provides for strict liability and if a case comes within its purview it is wholly irrelevant as to who was at fault.[14]

As regards *carriage by air* uniformity of rules of international carriage has been brought about by the Warsaw Convention as amended by the Hague Protocol, 1955. The convention makes the liability of the carrier strict but limited to the amount specified therein. The convention has been enforced as law in the United Kingdom

10. *Vishnu v. B.B. & C.I. Ry.*, (1923) 25 Bom LR 881.
11. The section applies when there is an 'accident'. Having regard to its object the section has been liberally construed : *Sunil Kumar Ghosh v. Union of India*, (1983) MPLJ 437.
12. *Union of India v. M. Thankaraj*, AIR 2000 Ker 91; *Union of India v. Kamlesh Goel (Smt.)*, AIR 2001 Raj 102 (Snatching of a passenger's gold chain); *Union of India v. Uggina Srinivas Rao*, AIR 2001 AP 360 (falling of passenger).
13. *Union of India v. Prabhakar Vijay Kumar*, (2008) 9 SCC 527 para 11 : (2008) 4 JT 598.
14. *Union of India v. Prabhakar Vijay Kumar, supra* para 17; *Anokhi Devi v. Union of India*, AIR 2012 Raj 46.

by the Air Act, 1961 and in India by the Carriage by Air Act, 1972. Provision is made in these Acts to apply the rules of the convention with modification to non-international carriage. The convention is exhaustive of the matters covered by it relating to international carriage and excludes the common law remedy to claim damages on those matters.[15] Even the rules of the convention as applied with modification to non-international carriage in the United Kingdom exclude the application of the common law.[16] In India it has been held that liquidated damages awardable for air accident on an international carriage under the convention cannot be reduced by set-off of collateral benefits such as amounts received under personal accident insurance policy.[17] According to Article 17 of the convention 'the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any *bodily injury* suffered by a passenger, if the *accident* which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking and disembarking'. In *Morris v. KLM Royal Dutch Airlines*,[18] the claimant was indecently assaulted by a fellow passenger while she was sleeping. She suffered mental injury but no physical injury. The court of Appeal on a construction of Article 17 held that indecent assault was an *accident* but mental injury was not *bodily injury* and therefore the claimant was not entitled to recover any damages.[19] The word 'accident' in Article 17 has been construed to comprise of two elements: (1) There must be an event, and (2) The event must be unusual, unexpected or untoward. The existence of permanent integral features of the aircraft, such as crompted seating, alterations of air pressure, atmosphere or temperature or the subjecting of passengers to carrying in aircraft with those features were held not capable of satisfying the first limb of the definition of an accident and passengers suffering Deep Vein Trombosis (DVT) because of these reasons were held not entitled to damages.[20] Similarly when a passenger suffered injuries following slip on plastic strip fixed to floor of aircraft, it was not held to be an 'accident' giving rise to a claim for damages.[21]

As regards death or injury resulting in a *road accident* sections 140 and 163A of the Motor Vehicles Act, 1988 provide for compensation to the extent of the amounts specified therein on no fault liability.[22] Till recently it was understood that in other cases damages can be allowed only on proof of negligence. It has, however, been recently held that the strict liability rule of *Rylands v. Fletcher*, will apply to road accidents arising out of use of Motor Vehicles.[23]

4(C) Innkeepers and Hotelkeepers

An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation.[24] A person who keeps a mere private boarding or lodging-house is not an innkeeper.[25] A lodging-house keeper makes a contract with every man that comes; whereas an innkeeper is bound, without making any special

15. *Sidhu v. British Airways plc*, (1997) 1 All ER 193 : (1997) AC 430 : (1997) 2 WLR 26 (HL).
16. *Fellowes (or Herd) v. Clyde Helicopters Ltd.*, (1997) 1 All ER 775 : (1997) AC 534 : (1997) 2 WLR 380 (HL).
17. *Kandimallan Bharati Devi v. General Insurance Corporation*, AIR 1988 AP 361.
18. (2001) 3 All ER 126 (CA).
19. (2001) 3 All ER 126 (CA).
20. *Re Deep Vein Trambosis and Air Travel Group Litigation*, (2004) 1 All ER 445 (CA).
21. *Barclay v. British Airways*, (2009) 1 All ER 871 (C.A.).
22. See Appendix II, pp. 675 and 695.
23. See, pp. 492, 493.
24. *Thompson v. Lacy*, (1820) 3 B & Ald 283.
25. *Packhurst v. Foster*, (1700) 1 Salk 387; *Dansey v. Richardson*, (1854) 3 E & B 144.

contract, to provide lodging and entertainment for all, at a reasonable price.[26] A hotel may be treated as an inn and the hotelkeeper may be liable as innkeeper.[27]

Duties.—An innkeeper is bound to take in all travellers and wayfairing persons, if he can accommodate them; and he must guard their goods with proper diligence. If an innkeeper improperly refuses to receive or provide for a guest he is liable to be indicted therefor.[28] But if all the rooms of an inn be full, the innkeeper is under no obligation to provide a traveller with a shelter and accommodation. The common law liability of an innkeeper to provide accommodation continues so long as the guest is only a traveller.[29] In the case, therefore, of a person wishing to reside at a hotel the proprietor is not bound to allow him to remain after reasonable notice to quit has been given.[30]

Refusal to accomodate traveller.—The Imperial Hotels Ltd. owned two hotels in the same vicinity. Constantine, a coloured cricketer asked for accommodation at one of them and was refused, but he was supplied with accommodation at the other. It was held that the hotelkeeper was in breach of his duty at common law and was liable without proof of actual damage.[31]

Liability.—An innkeeper is liable for the safety of the goods which are brought within the inn. It is no excuse for the innkeeper that he delivered to the guest the key of the chamber in which he is lodged, and that he left the chamber door open.[32] The responsibility of an innkeeper for the safety of a traveller's property begins at the moment when the relation of guest and host arises, and that relation arises as soon as the traveller enters the inn with the intention of using it as an inn, and is so received by the host. It does not matter that no food or lodging has been supplied or found up to the time of the loss. It is sufficient if the circumstances show an intention on the one hand to provide and on the other to accept such accommodation. Where a traveller is provided with accommodation and refreshment in an inn, the fact that the expenses thereof are by agreement between the innkeeper and another person to be paid for by that other person does not prevent the relation of innkeeper and guest from arising, and the innkeeper, therefore, incurs the customary liability for the safe custody of the traveller's goods in the inn.[33]

An innkeeper is not liable if the guest's servant or friend steals or carries away his goods. He is not an insurer of the goods of his guest, but is liable for negligence.[34]

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26. *Thompson. v. Lacy, supra.*
27. See text and footnotes 31, 38, 39, 41 to 47, *infra.*
28. *Rex v. Ivens*, (1835) 7 C & P 213.
29. *Browne v. Brandt*, (1902) 1 KB 696.
30. *Lamond v. Richard*, (1897) 1 QB 541.
31. *Constantine v. Imperial Hotels Ltd.*, (1944) 1 KB 693 : 172 LT 128 : (1944) 2 All ER 171. See further the Hotel Proprietor Act, 1956.
32. *Calye's* case (1584) Coke Rep, Vol. IV, Book VIII, f. 32; *Morgan v. Ravey*, (1861) 6 H & N 265; *Shacklock v. Ethorpe Ltd.*, (1939) 3 All ER 372. See *Whateley v. Palanji Pestanji*, (1866) 3 BHC (OCJ) 137, where it was held that the common law of England regulated the relation of a Parsi innkeeper and a European guest in Bombay and that an innkeeper was liable for the loss of the goods of his guest without proof of actual negligence. This case is, however, distinguished by the Allahabad High Court in a case in which it has held that the Bombay decision has no application to the mofussil of India and that the liability of a hotelkeeper to his guest is regulated by section 151 of the Indian Contract Act. Where, therefore, the property of a guest at a hotel was stolen from his room while he was at dinner in a different part of the hotel building, and it was found that the room occupied by him was to the knowledge of the hotel-keeper in an insecure condition, which the latter had taken no steps to rectify, it was held that the hotel-keeper was liable: *Jan v. Cameron*, (1922) ILR 44 All 735.
33. *Wright v. Anderson*, (1898) 1 KB 209.
34. *Dawson v. Chamney*, (1843) 5 QB 164.

The liability of the landlord of a boarding house in respect of luggage is not co-extensive with the liability of an ordinary innkeeper. But there is a duty on the part of a boarding-house keeper to take reasonable care for the safety of property brought by a guest into his house.[35] An innkeeper is bound only to supply such accommodation for the goods of his guests as he possesses, and is not responsible for damage to those goods unless he is in default.[36]

The liability of an innkeeper with respect to the personal safety of his guest is less onerous. He does not insure the personal safety of the guest. The reason for the grave liability in the case of goods is to be found in the social conditions which existed when the liability first became established. The prevalence of highway robbery and the risk of possible collusion between the thief and the innkeeper account for the onerous burden on the latter with respect to goods. The guest is an invitee, and the innkeeper, as the occupier of premises to which he has invited the guest, is bound to take reasonable care to prevent damage to the guest from unusual danger which the occupier knows or ought to know of. But further, by reason of the contractual relationship existing between an innkeeper and a guest in the inn, there is an implied warranty by the innkeeper that the inn premises, are, for the purpose of personal use by the guest, as safe as reasonable care and skill in the part of any one can make them, but the innkeeper is not responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises.[37] Thus the contractual relationship puts on an innkeeper a greater obligation than exists with respect to a mere invitee.

It is doubtful whether common law liability of an innkeeper in respect of goods applies to a hotel in India.[38] However, dealing with a five star hotel in the context of personal safety of a guest it was observed by LAHOTI J. (as he then was): "A five star hotel charging a high or fancy price from its guests owes a high degree of care to its guests as regards quality and safety of its structure and services it offers and makes available. Any latent defect in its structure or service, which is hazardous to guests, would attract strict liability to compensate for consequences flowing from its breach of duty to take care-and an obligation to pay exemplary damages—A five star hotel cannot be heard to say that its structure and services satisfied the standards of safety of the time when it was built or introduced. It has to update itself with the latest and advanced standard of safety."[39]

Theft of horse.—In *Claye's* case it was held that an innkeeper who, at the request of his guest, sent his horse to pasture and the horse was stolen, was not liable for the loss.[40]

Theft of overcoat.—The plaintiff, being on his way from his place of business in Liverpool to his home outside the town, went into the dining-room of an hotel in Liverpool, kept by the defendants, to get a meal, and put his overcoat in a place where coats were ordinarily kept in that room. The coat was missing when he finished his meal. It was held that there was no sufficient evidence to establish the relation of innkeeper and guest between the defendants and the plaintiff so as to make them liable for the loss of the coat without proof of negligence on their part.[41]

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35. *Scarborough v. Cosgrove*, (1905) 2 KB 805; *Dansey v. Richardson*, (1854) 3 E & B 144.
36. *Winkworth v. Raven*, (1931) 1 KB 652.
37. *Maclenan v. Segar*, (1917) 2 KB 325.
38. See footnote 32, *supra.*
39. *Klaus Mittelbachert v. The East India Hotels Ltd.*, AIR 1997 Del 201, p. 214.
40. *Calye's* case, (1584) Co. Rep., Vol. IV Bk VIII, f. 32; otherwise if the innkeeper had put the horse to graze of his own accord: *Howley v. Smith*, 25 Wend 642.
41. *Orchard v. Bush & Co.*, (1898) 2 QB 284.

Theft of fur cap.—The plaintiff was a guest at a small hotel owned and managed by the defendant. The door of the room she occupied was not fitted with a lock and could not be secured. On mentioning this matter to the defendant, she was assured that it would be quite safe for her to leave her belongings in the bedroom. While the plaintiff was absent, her valuable fur cap, which she had left in the bedroom, was stolen. It was held that the loss of the fur cap was not due to the plaintiff's failure to take the ordinary care which a prudent person would take, and the plaintiff was entitled to recover damages for her loss.[42]

Theft of ring.—The plaintiff and her husband arrived at the defendants' hotel and engaged a room. The plaintiff put her diamond ring which she was wearing into a jewel-case and placed that in her suitcase, which she latched but did not lock. When they went to dinner the husband locked the room and took the key with him. After dinner, they returned to their room, and on leaving it to go to a dance the husband again locked it and handed the key in at the hotel office. They returned very late and got the key from the hall porter. Next morning the plaintiff opened her suitcase and jewel-case and found that the ring was missing. There was a notice in the room that all articles of value should be deposited at the office. In an action by the plaintiff it was held that she had taken reasonable care of the ring and the fact that she had not deposited the ring at the office in compliance with the notice did not imply that she had retained the protection of it in her own hands to the relief of the defendants, and that the defendants were liable.[43]

Theft of jewellery.—A notice in the bedroom of a private residential hotel stated: "The proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the managers for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained." A notice pursuant to section 3 of the Innkeepers' Liability Act, 1863, was conspicuously displayed in the hall of the hotel. It was found that the house was not an inn at common law. A man and his wife, on arrival at the hotel as guests, in accordance with the custom of the hotel, paid for a week's board and residence in advance. They then went upstairs to the bedroom allotted to them, where the first-mentioned notice was displayed. It was held that the terms of the notice in the bedroom formed no part of the contract made between the guests and the proprietors of the hotel. The contract had been made *before* the guests could see the notice. It was for an indeterminate period, to which an end could be put by notice on either side, and the terms of the notice in the bedroom could form no part of the contract until that contract had been so terminated.[44]

Injury to guest.—The plaintiff became a guest for reward to the defendant at his hotel, and was given a room on the second floor. Soon after midnight a fire arose in the upper part of the building. The plaintiff was unaware of the position of the staircase, and sought to escape from her room by means of a rope made of sheets and blankets. She fainted when making her descent, and fell upon a glass roof below, whereby she suffered severe injuries. In an action against the defendant for negligence it was held that, as he had omitted to make such inquiries as would have revealed to him the defects in his structure and the risks of fire thereby occasioned, he was liable.[45] The plaintiff was a guest at the defendants' hotel in London. At night he returned to his room and desired to use the lavatory. He had ascertained during day light that the lavatory was diagonally across the passage from his room door, and, as the passage was unlighted he crossed it in the dark and by feeling his way

42. *Brewster v. Drennan*, (1945) 2 All ER 705.
43. *Carpenter v. Haymarket Hotel Ld.*, (1931) 1 KB 364.
44. *Olley v. Marlborough Court Ld.*, (1949) 1 KB 532.
45. *Maclenan v. Segar*, (1917) 2 KB 325.

came to a door which he believed to be that of the lavatory but was in fact a door leading to the basement. Opening and passing through his door the plaintiff immediately fell down a flight of steps and sustained injury. It was held that the defendants owed to the plaintiff, as an invitee, a duty to take all reasonable care to see that the premises were safe; that their failure to light the passage was breach of the duty which had resulted in injury to the plaintiff; and that the plaintiff was entitled to recover damages, either on the ground of negligence or breach of warranty.[46]

Injury to guest in a swimming pool.—The plaintiff a guest in a five star hotel in August, 1972 while diving in the swimming pool of the hotel hit his head at the bottom and suffered serious injuries and died as a result of the injuries during the pendency of the suit which he filed for damages. The swimming pool constructed in 1965 did not provide a safe depth of water at the plummet point atleast according to the standards prevailing from 1970. It was held that a five star hotel was expected to update itself with latest and advanced standards of safety and the hotel was liable, the swimming pool being a trap on account of its having a latent hazard in structure and designing.[47]

Damage to goods.—The plaintiff, a guest at the defendants' inn, put his motor-car in the inn garage, which garage was open on one side. In consequence of an unusually severe frost, water in the engine froze and injured it. It was held that the defendant was not liable.[48]

Coach parked outside inn.—Mere permission (which is not an invitation) given by an innkeeper to a guest to park a motor vehicle belonging to him in a place which is outside the actual "hospitium" of the inn does not extend the "hospitium" *pro hac vice* (for this occasion only) so as to render the innkeeper liable for the loss of the vehicle or for damage done to it.[49]

Theft of motor-car from car park of inn.—The plaintiff, a farmer, who lived about a mile from the defendant's inn, had been accustomed to visit the inn on several evenings each week to meet his friends and drink with them. Having spent the day on business in a town some three miles from the inn, he drove in his motor-car to the inn, passing his own house on the way. On arrival he placed the car in the car park in front of the inn, but when he left the inn at closing time the car was found to have been stolen. He claimed to recover from the defendant, as the keeper of a common inn, the agreed value of the motor-car. It was held that any person who came to an inn for the purpose of receiving such accommodation as the innkeeper could give him and he was ready to pay for, and who was so received by the innkeeper, was a traveller and entitled to the protection given by the common law to a guest, even though he was a local resident and came for no more than temporary refreshment and did not intend to stay the night in the inn.[50]

4 (D) Physicians and Surgeons

4(D)(i) General Principles

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. A surgeon does not undertake that

46. *Campbell v. Shelbourne Hotel Ltd.*, (1939) 2 KB 534.
47. *Klaus Mittelbachert v. The East India Hotels Ltd.*, AIR 1997 Del 201; See also, *Susan Leigh Beer v. Indian Tourism Development Corporation Ltd.* (2011) 178 DLT 83 : (2011) 102 AIC 350 : ILR (2011) 6 Del 31.
48. *Winkworth v. Raven*, (1931) 1 KB 652.
49. *Watson v. Peoples Refreshment House Association Ltd.*, (1952) 1 KB 318.
50. *Williams v. Linnit*, (1951) 1 KB 565.

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 advantages than himself; but he undertakes to bring a fair, reasonable, and competent degree of skill; and in 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.[51] In a suit for damages against a doctor 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.[52] Proving negligence on part of the doctor requires evidence and a civil suit for compensation has been held to be the appropriate remedy, as against a writ petition under Article 226 of the Constitution.[53] 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 the administration of that treatment. A breach of any of these duties gives a right of action for negligence to the patient.[54] The doctor has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency.[55] The doctor "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."[56] The Supreme Court in *Achutrao Haribhau Khodwa v. State of Maharashtra*[57] laid down the law as follows: "The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence."[58] The Supreme Court has also held that the principle of *res ipsa loquitor*

51. *Lanphier v. Phipos*, (1838) 8 C & P 475; *Slater v. Baker*, (1767) 2 Will 359, 8 East 348; *Dryden v. Survey C.C.*, (1936) 2 All ER 535, *Poonam Verma v. Ashwin Patel*, AIR 1996 SC 2111, p. 2116.
In an action by a medical practitioner to recover the amount of his fees it is open to the defendant to lead evidence to show that he treated the patient ignorantly or improperly, which plea, if proved, furnishes a good defence to the action : *Parreira v. Gonsalves*, (1905) 8 Bom LR 93.
52. *Anto Nio Dias v. Fredreick Augustus*, AIR 1936 PC 154; See also, *Jagat Narain Sharma v. Union of India*, AIR 2010 (NOC) 254 (Del); State of Kerala v. Illath Narayanan, AIR 2010 (NOC) 652 (Ker); *The Collector of North Arcot Ambedkar District & Another v. K.Mani & Others* (2010) 1 LW 696 : (2010) 2 CTC 710 : (2010) 2 Mad LJ 1168 (initial burden to prove negligence on part of the doctor, is on the plaintiff).
53. *Sharda Devi v. State of U.P.* (2010) 81 ALR 310 : (2010) 4 All LJ 593.
54. *Dr. Laxman v. Dr. Trimbak*, AIR 1969 SC 128 : (1969) 1 SCR 206; *A.S. Mittal v. State*, AIR 1989 SC 1570, p. 1574 : (1989) 3 SCC 223. [*Mittal's* case refers to the guidelines issued by the Central Government for holding eye camps (p. 1575)]; *Poonam Verma v. Ashwin Patel, supra*, p. 2116; *State of Haryana v. Santra (Smt.)*, AIR 2000 SC 1888, p. 1891 : (2000) 5 SCC 182; *Kusum Sharma v. Batra Hospital and Medical Research Centre*, (2010) 3 SCC 480.
55. *Dr. Laxman v. Dr. Trimbak*, AIR 1969 SC 128 : (1969) 1 SCR 206; *See* also, *Padam Chandra Singhi v. P.B. Desai* (2011) 113 (5) Bom LR 3409 : (2011) 6 AIR Bom R 254, para 152.
56. *Dr. Laxman v. Dr. Trimbak*, AIR 1969 SC 128 : (1969) 1 SCR 206
57. AIR 1996 SC 2377 : 1996 (2) SCALE 328 : (1996) 2 SCC 634.
58. 1996 (2) SCALE 328, p. 336 (SCALE). See further *Spring Meadows Hospital (M/s.) v. Harjar Ahluwalia*, (1998) 2 JT 620, p. 628 : AIR 1998 SC 1801, p. 1806 : (1998) 4 SCC 39 (Error of judgment which a reasonably competent doctor would not have made amounts to negligence); *State of Haryana v. Santra (Smt.), supra*, p. 1892; *Vinitha Ashok v. Lakshmt Hospital*, AIR 2001 SC 3914 p. 3923 : (2001) 8 SCC 731 (case of ectopic pregnancy. Removal of pregnancy was done without ultrasonography and uterus of the
[Footnote No. 58 Contd.]

may apply in certain cases.[59] In the case of *Achutrao* a mop (towel) was left inside a woman's peritoneal cavity while she was operated for sterilization in a Government hospital causing peritonitis which resulted in her death. The conclusion of negligence was drawn against the doctors by applying the principle of *res ipsa loquitor* and the Government was vicariously held liable.[60] If the initial burden of negligence is discharged by the claimant, it would be for the hospital and the doctor concerned to substantiate their defence that there was no negligence and the burden is greater on the hospital/institution concerned than on the claimant.[61] The Supreme Court has also deprecated the practice of doctors and certain government institutions to refuse even primary medical aid to the patients and referring them to other hospitals simply because they are medico legal cases.[62]

Under English law as laid down in *Bolam's* case 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.[63] In *Bolam's* case,[64] MC NAIR, J., in his summing up to jury observed: "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not 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. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent."[65] The above test laid down by MC NAIR, J., has been repeatedly approved by the HOUSE OF LORDS.[66] and has also been approvingly referred to by the Supreme Court.[67] In *Jacob Mathew v. State*

[Footnote No. 58 Contd.]
patient had to be removed. There was expert evidence to indicate that ultrasonography would not have established ectopic pregnancy but some textbooks indicated otherwise. The general practice in the area in which the doctors practised was not to have ultrasonography therefore no negligence was attributed on this ground even if two views could be possible). *Smt. Archana Paul v. State of Tripura*, AIR 2004 Gau 7 (sterilisation conducted with due care. Petitioner told that there is a failure rate of 2% to 2.63%. Petitioner agreeing that she will not make the doctor liable if operation fails. No case made out for award of damages). See further 'Sterilisation operation—whether Medical Negligence' AIR 2004 Journal 291. For damages in such case see pp. 225, 226, *supra*.
59. *A.S. Mittal v. State of U.P.*, AIR 1989 SC 1570 p. 1575 : (1989) 3 SCC 223; See also, *Union of India v. Revathy* (2011) 1 LW 368 : (2011) 1 Mad LJ 1183, wherein negligence in a tubectomy operation was writ large and it was held that it is for the medical person to establish that operation has been done upon the plaintiff/claimant, diligently, with care and caution and that too without any act of omission or commission or negligence.
60. (1996) 2 SCALE 328 p. 336. The disciplinary control of medical council does not negative the liability of doctors for negligence; *Indian Medical Association v. V.P. Shantha*, AIR 1996 SC 550 : (1995) 6 SCC 651.
61. *Savita Garg v. Director National (Heart Institute)*, (2004) 8 SCC 56, p. 64 : AIR 2004 SC 5088.
62. *Pt. Parmanand Katara v. Union of India*, AIR 1989 SC 2039; *Poonam Sharma v. Union of India, supra*.
63. *Bolam v. Friern Hospital Management Committee*, (1957) 2 All ER 118 : (1957) 1 WLR 582 : 101 SJ 357; *Shivanand Doddamani (Dr.) v. State of Karnataka*, (2010) 5 Kant LJ 155 : (2010) 4 AIR Kant R 1057: (2010) 94 AIC (Sum 16) 10: (2010) 3 KCCR 1832.
64. *Bolam v. Friern Hospital Management Committee*, (1957) 2 All ER 118 : (1957) 1 WLR 582 : 101 SJ 357
65. *Bolam v. Friern Hospital Management Committee*, (1957) 2 All ER 118 : (1957) 1 WLR 582 : 101 SJ 357
66. *Whitehouse v. Jordon*, (1981) 1 All ER 267 (HL), p. 277 : (1981) 1 WLR 246 : 125 SJ 167; *Maynard v. West Midlands Regional Health Authority*, (1985) 1 All ER 635 (HL), pp. 637, 638 : (1984) 1 WLR 634; *Sidaway v. Bathlem Royal Hospital*, (1985) 1 All ER 643 (HL) pp. 648, 649, (LORD SCARMAN) , p. 657 (LORD DIPLOCK), p. 650, (LORD BRIDGE). Also see *Chin Keow v. Government of Malaysia*, (1967) 1 WLR 813 (PC); *Roe v. Minister of Health*, (1954) 2 QB 66 : (1954) 2 WLR 915.
67. *State of Haryana v. Santra (Smt.)*, AIR 2000 SC 1888, p. 1891. See further: *Ram Biharilal v. Dr. J.N. Srivastava*, 1985 ACJ (MP); *Dr. Pinnamaneni Narsimha Rao v. Gundavarapa Jayaprakasee*, AIR 1990 AP 207 pp. 215, 216; *Venkatesh Iyer v. Bombay Hospital Trust*, AIR 1998 Bombay 373, pp. 390, 391. *The Joint Director of Health Services v. Sonal*, AIR 2000 Mad 305, pp. 309, 310; *Alpana Dutt (Mrs.) v. Apollo*
[Footnote No. 67 Contd.]

of Punjab,[68] the Supreme Court said: "The water of *Bolam* test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore, it has touched as neat clean and a well-condensed one."[69] The test "holds good in its applicability in India."[70] The principles stated in *Jacob Mathew* have been reiterated in *Martin F.D' Souza v. Mohd. Ishfaq*[71] and *INS Malhotra v. Dr. A Kriplani*.[72] The test covers the entire field of liability of a doctor namely liability in respect of diagnosis;[73] liability in respect of a doctor's duty to warn his patient of risks inherent in treatment;[74] liability in respect of operating upon or giving treatment involving physical force to a patient who is unable to give his consent;[75] and liability in respect of treatment.[76] The question of consent in India is also governed by the *Bolam* test as elaborately laid down in the case of *Samira Kohli v. Prabha Manchanda*.[77]

In *Martin F. D'Souza v. Mohd. Ishfaq*[78] the Supreme Court surveyed the entire case law and reiterated the principles which were stated in *Jacob Mathew's* case. In this case the claimant complained of deafness because of negligence of the doctor in administration of overdose of amikacin injection. On appreciation of evidence the negligence of the doctor was negatived. The court in addition to reiterating the principles relating to medical negligence issued the following general direction:[79]

> "**106.** We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We

[Footnote No. 67 Contd.]
Hospitals Enterprises, AIR 2000 Mad 340; *State of Gujarat v. Laxmiben Jayantilal Sikligar*, AIR 2000 Guj 180; *Dr. M.K. Gourikuty v. M.K. Raghavan*, AIR 2001 Kerala 398; *Poonam Sharma v. Union of India*, AIR 2003 Del 50, p. 59.

68. (2005) 6 SCC 1. See also, *Marghesh K. Parikh v. Dr. Mayur H. Mehta*, (2011) 1 SCC 31, para 9 : AIR 2011 SC 249; *Kusum Sharma v. Batra Hospital and Medical Research Centre*, (2010) 3 SCC 480, para 89, 90 : AIR 2010 SC 1050; *Dr. J.S.Rajkumar v. Assistant Commissioner of Police & others* (2012) 6 CTC 739.
69. (2005) 6 SCC 1, p. 19 (para 20).
70. (2005) 6 SCC 1, p. 33 (para 48-(4)). *State of Punjab v. Shivram*, (2005) 7 SCC 1, p. 7, 8 : AIR 2005 SC 3280. For this case which related to failure of sterilization operation, see p. 227, *ante*. *Post Graduate Institute of Medical Education & Research v. Jaspal Singh*, (2009) 7 SCC 330 para 20 : (2009) 7 JT 527 (In this case death was 'surely materially contributed by mismatched blood transfusion' and death by medical negligence was proved, para 20).
71. (2009) 3 SCC 1 : AIR 2009 SC 2049.
72. (2009) 4 SCC 705 : (2009) 4 JT 266.
73. *Maynard v. Midlands Regional Health Authority*, (1985) 1 All ER 635 : (1998) 1 WLR 634 (HL).
74. *Sidaway v. Bethlem Royal Hospital Governors*, (1985) 1 All ER 643 : (1985) 2 WLR 480 : 135 New LJ 203 (HL). This case also holds that the English law does not recognise the doctrine of informed consent. See text and footnotes 52, 53, p. 92 (title 10, Chapter V).
75. *F. v. West Berkshire Health Authority*, (1989) 2 All ER 545 (HL).
76. *White House v. Jordan*, (1981) 1 All ER 267 : (1981) 2 WLR 246 (HL); *Poonam Verma v. Ashwin Patel*, AIR 1996 SC 2111, p. 2116 (medical practitioner registered as Homeopath prescribing allopathic drugs, patient dying, Doctor is *per se* guilty of negligence).
77. (2008) 2 SCC 1 paras 48 to 50 : AIR 2008 SC 1385, see p. 93 *ante* and pp. 539, 540 *post*.
78. (2009) 3 SCC 1 : AIR 2009 SC 2049.
79. (2009) 3 SCC 1 : AIR 2009 SC 2049, para 106.

> further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew case*, otherwise the policemen will themselves have to face legal action."

In *Maynard v. Midlands Regional Health Authority*,[80] the plaintiff was treated for chest ailment by two consultants of the defendant Health Authority. The consultants thought she was suffering from tuberculosis but they also considered the possibility that she might be suffering from Hodgkins disease. They decided upon an exploratory operation for Hodgkins disease before obtaining the result of test for tuberculosis. As a result of the said operation performed by one of the consultants, it was found that she was suffering from tuberculosis and not from Hodgkins disease. As a result of the operation, however, the plaintiff suffered damage to a nerve of the vocal cord which impaired her speech. This damage was an inherent risk of the operation. The plaintiff brought a suit claiming damages against the Health Authority on the ground of negligence of the consultants in that they decided upon the exploratory operation for Hodgkins disease before obtaining the result of the test for tuberculosis. On the evidence it was found that Hodgkins disease was an extremely dangerous disease, that the exploratory operation for confirming it was a reasonably safe procedure though like all operations it had its hazards and that the menace of the disease was so great that it was not unreasonable not to wait for the result of the test for tuberculosis. The HOUSE OF LORDS (LORD SCARMAN) in upholding the finding of the court of Appeal that negligence was not established, observed: "It is not enough to show that there is a body of competent professional opinion which considers that theirs' (consultants') was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken it was reasonable in the sense that a responsible body of medical opinion would have accepted it as proper. A doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."[81]

The professional opinion relied upon by the defendant in cases of diagnosis and treatment must be reasonable or responsible. If it is not so demonstrated to the satisfaction of the court, the defendant can properly be held liable despite a body of professional opinion sanctioning the defendant's conduct though such cases would be rare. It was so held by the House of Lords in *Bolitho v. City and Hackney Health Authority*.[82] In the words of LORD BROWNE-WILKINSON: "In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that relative risks and benefits have been weighed by the experts in forming their opinion. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible."[83]

80. (1985) 1 All ER 635 : (1984) 1 WLR 634 : 128 SJ 317 (HL).
81. (1985) 1 All ER 635 (HL), p. 638 : (1984) 1 WLR 634 : 128 SJ 317. See further *Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1, pp. 20, 21 : AIR 2005 SC 3180; *Kusum Sharma v. Batra Hospital and Medical Research Centre*, (2010) 3 SCC 480.
82. (1997) 4 All ER 771 (HL), p. 779 : (1997) 3 WLR 1151.
83. (1997) 4 All ER 771 (HL), p. 779 : (1997) 3 WLR 1151.

In *Sidaway v. Bethlem Royal Hospital Governors*,[84] the plaintiff who suffered persistent pain in her neck and shoulders was advised to have an operation on her spinal column. The plaintiff was warned by the Surgeon of the possibility of disturbing a nerve root and its possible consequences but the surgeon did not mention the possibility of damage to spinal cord the risk of which was very small, only 1%. Unfortunately, though the operation was performed with due care, the plaintiff suffered injury to her spinal cord which made her severely disabled. In a suit for damages the plaintiff contended that the Surgeon had been in breach of a duty owed to her to warn her of all possible risks inherent in the operation and so her consent for the operation was not an informed consent. In dismissing the claim, the HOUSE OF LORDS held that the test of liability in respect of a doctor's duty to warn his patient of risks inherent in treatment recommended by him was the same as the test applicable to diagnosis and treatment, namely that the doctor was required to act in accordance with a practice accepted at the time as proper by a responsible body of medical opinion and as the Surgeon's non-disclosure of the risk of damage to the plaintiff's spinal cord accorded with a practice accepted as proper by a responsible body of neuro-surgical opinion the defendants were not liable to the plaintiff. Applying the same test, it was held in *Gold v. Harrington Health Authority*,[85] that omission of a surgeon to give a warning to the plaintiff before performing a sterilization operation that there was a risk of its failure did not amount to negligence and the plaintiff was not entitled to sue for damages when she became pregnant as a result of the failure of the operation. It was pointed out that failure rate of sterilization operation was 20 to 60 per 10,000 and in 1979 when the operation was performed a substantial body of responsible doctors would not have warned of the risk of failure of the sterilization operation. The court distinguished its earlier decision in *Thake v. Maurice*,[86] where it was held to have been negligent on the part of a surgeon undertaking a vasectomy not to warn the risk of its failure, on the ground that there was no independent medical evidence called by either side in that case to show as to what was the practice accepted by the surgeons generally at the time of operation. But when questioned by a patient about the risks involved in the treatment the doctor must truthfully inform him of all the risks involved.[87] In *Chester v. Afsher*,[88] the claimant patient underwent surgery for removal of three intraverbal discs as a cure for severe back pain. Although the claimant had questioned the surgeon she was not told about the known risk (1% to 2%) of nerve damage resulting in paralysis which she suffered after the operation. Had she been told about this risk she would not have atleast then undergone the operation. On these facts the claimant was held entitled to damages. There was a breach of duty on the part of the surgeon in not informing the patient of the risk but the patient would have remained remedyless, had the conventional but for test were applied, therefore, in the special circumstances of the case and to prevent injustice that test was not applied.

In an Australian case[89] relating to breach of duty in 'failure to warn', the plaintiff Mrs. Hart was suffering from persistent sore throat. Dr. Chappel, whom she consulted diagnosed a pharyngeal pouch in her oesophagus and recommended

84. (1985) 1 All ER 643 : 135 New LJ 203 (HL).
85. (1987) 2 All ER 888 : (1988) QB 481 : (1987) 3 WLR 649 (CA). Followed in *State of M.P. v. Sundari Bai*, AIR 2003 MP 284.
86. (1986) 1 All ER 497 : (1986) QB 644 : (1986) 2 WLR 337 (CA). For damages recoverable in such cases see Chap. IX, title 1(D)(via). See also, *Smt. Manwari Devi v. Union of India & others*, AIR 2010 (NOC) 651 (H.P.); *Kamli Devi v. State of Himachal Pradesh*, AIR 2010 HP 69.
87. *Sidaway v. Bethlem Royal Hospital Governor*, (1985) 1 All ER 643 (HL), p. 661 (Lord Bridge), p. 664 (LORD TEMPLEMAN).
88. (2002) 3 All ER 552 (CA) affirmed (2004) 4 All ER 578 (HL).
89. (1998) 72 ALJR 1344.

surgery. Dr. Chappel, however, failed to inform her of the small, but known risk of infection and damage to vocal cords resulting in voice loss though she had expressed her concern about it. Inspite of there being no negligence in performing the surgery, the risk materialised and Mrs. Hart suffered serious voice loss. The finding was that had she been warned of the risk, she would have sought further advice and she would have wanted the operation performed by the most experienced person available. On these facts the High Court of Australia by majority upheld the decree for award of damages. The Australian case was referred with approval by the House of Lords in *Chester v. Afsher*.[90]

4D(ii) Treatment of Patients Incapable of Giving Consent

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.[91] 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 interests of the patient if, but only if, it is carried out in order either to save his life or to ensure improvement or 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 the 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*.[92] This was a case where a mentally handicapped woman, who was an inpatient in a mental health hospital, was having sexual relations with a male patient in the same hospital and an application to the court was made for permitting sterilization operation which was held to be in the best interests of the patient. The sterilization operation of a minor is also governed by the same principles.[93] Indeed according to the current position in England the sterilization of a minor or a mentally incompetent adult will in virtually all cases require the prior sanction of a High Court judge.[94]

In *Samira Kohli v. Prabha Manchanda*,[95] the appellant was admitted for diagnostic laparoscopy (and at best for limited surgical treatment that could be made by

90. See footnote 88, *supra*.
91. See cases in footnotes 4 and 10, pp. 540, 541.
92. (1989) 2 All ER 545 (HL).
93. *Re B (a minor) (wardship: sterilization)*, (1987) 2 All ER 206 (HL).
94. Practice Note (1993) 3 All ER 222 N.B. The case of *F v. Berkshire Health Authority* (footnote 89 *supra*) points out that in the United States and Australia sterilization operation of a woman, who cannot give her consent, requires consent of the court. In Canada sterilization of such a woman is unlawful unless performed for therapeutic reasons as a life saving measure or for prevention of spread of disease. In India any unwarranted sterilization of a woman would not merely violate the woman's right under the general law but also her fundamental right under Article 21 of the Constitution. It is, therefore, necessary that the English practice should be followed in India. The controversy that arose when hysterectomy operations were performed on inmates of a Pune Government run Home for mentally deficient girls (See Indian Express, Feb. 14, 1994) would have been avoided had prior permission of the High Court been obtained by a petition under Article 226 for the operations.
In *Arun Balkrishnan Aiyar v. M/s. Soni Hospital*, AIR 2003 Mad 389 the patient underwent an operation for removal of overian cyst for which her consent was taken. During the course of the operation, the surgeon found that removal of the uterus was also necessary. As the patient was unconscious, consent of her husband was taken for removal of uterus. It was held that the consent so obtained in the circumstances was valid.
95. (2008) 2 SCC 1 : AIR 2008 SC 1385.

laparoscopy). During the diagnostic laparoscopy when the doctor found that the appellant was suffering from endometriosis, the doctor performed hysterectomy (removal of uterus) and bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes). For this treatment no consent of the appellant was taken on the ground that she was unconscious being under general anaesthesia and the consent of her mother was taken. The court found that this was not a case of emergency and the doctor should have waited for the appellant to regain consciousness and then asked for her consent. On these facts the consent taken was found to be defective. As a result damages to the extent of Rs. 25,000/- were allowed to the appellant and the doctor was deprived of the fees for the treatment although the doctor was not found to be negligent in any other respect.

Similar principle has been applied in judging the legality of withdrawal of treatment of an insensate patient who has no chance of recovery. The principle of self-determination, *i.e.*, respect for the wishes of the patient has given rise to the rule that if an adult patient of sound mind and properly informed requires that the life support system be withdrawn the doctors responsible for his care must give effect to his wishes.[1] In cases of this kind the patient cannot be said to have committed suicide nor the doctors can be said to have aided or abetted him in doing so. The patient exercises his right of declining treatment and the doctor complies with the patient's wishes which he is under a duty to do. But when a doctor has in his care a patient who is incapable of deciding whether or not to consent to treatment, what has the doctor to do? This question was answered in *Airedale NHS Trust v. Bland*[2] and it was held that the doctor in such cases is under no absolute obligation to prolong the patient's life regardless of the circumstances or the quality of his life. If responsible and competent medical opinion is of the view that it would be in the patient's best interests not to prolong his life because such continuance would be futile and would not confer any benefit on him, medical treatment including artificial feeding, and administration of drugs can be lawfully withheld from an insensate patient with no hope of recovery even though it is known that the result of withdrawal of treatment would be that the patient would shortly thereafter die. Withdrawal of life support system in such cases does not amount to any criminal act for the doctor acts in the best interests of the patient, and the death of the patient is regarded as having been exclusively caused by the injury or disease with which he was suffering. It was also held in this case that the doctors should as a matter of practice seek the guidance of the court by applying for declaratory relief before withdrawing life support system from an insensate patient. It was further held that euthanasia by means of positive steps, *e.g.*, by administration of drugs to end a patient's life is unlawful. The patient in this case had been in a persistent vegetative state for three and half years after suffering severe crushed chest injury which caused irreversible damage to the higher functions of the brain and there was no hope of recovery or improvement of any kind. On an application by the health authority responsible for the care of the patient for a declaration that treatment could be lawfully withdrawn the court granted the declaration. The current opinion in England is that the termination of artificial feeding and hydration for patients in a persistent vegetative state (PVS) will in virtually all cases require the prior sanction of a High Court judge.[3] It has also been held that withdrawal of treatment in accordance with the ruling in *Bland's* case does

1. *Re B* (adult's refusal of medical treatment) (2002) 2 All ER 449 (Tetraplegic patient being kept alive by ventilator. Patient wishing to have ventilator turned off. Held right of a competent patient to request cessation of treatment had to prevail over the natural desire of medical profession to try to keep the patient alive.)
2. (1993) 1 All ER 821 : (1993) AC 789 : (1993) 2 WLR 316 (HL). See further *Frenchay Health Care NHS Trust v. S*, (1994) 2 All ER 403 : (1994) 1 WLR 601 (CA).
3. Practice Note (1994) 2 All ER 413. Practice Note (1996) 4 All ER 766.

not violate right to life or other rights enumerated in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 now enforced in England by the Human Rights Act, 1998.[4]

Under the common law a minor, who is capable of making a reasonable assessment of this advantages and disadvantages of a treatment advised by a physician or surgeon, is competent to give consent for the treatment.[5] The Parliament (U.K.) has also intervened by section 8 of the Family Law Reform Act of 1969 which enacts that consent of a minor, who has attained the age of sixteen years, to any treatment will obviate the necessity to obtain any consent for it from his parent or guardian. But in case of refusal by such a minor to give his consent, the court, in the exercise of its inherent wardship jurisdiction over minors, may override the wishes of the minor if it finds that objectively considered, refusal of medical treatment in the circumstances of the case would in all probability lead to the death of the minor or to some permanent injury and the treatment would be in the minor's best interests.[6] In case of a minor who has not attained sufficient intelligence and understanding doctors owe a duty of care for him in accordance with good medical practice recognised as appropriate by a competent body of professional opinion. This duty is, however, subject to the qualification, that if time permits, they must obtain the consent of the parents before undertaking any serious treatment involving risk of injury to the minor. The parents owe the child a duty to give or to withhold consent in the best interests of the child and without regard to their own interests. In case of refusal by the parents the court, when approached in the *parens patriae* jurisdiction, takes over the rights and duties of the parents and has to decide as to what course would be in best interests of the child. But in reaching the ultimate decision the court will consider various circumstances including the wishes of the parents and may have to do a balancing exercise in assessing the course to be adopted. These principles laid down by Lord Donaldson M.R. in *Re J (a minor) (wardship medical treatment)*[7] were reiterated by the court of Appeal *in Re J (a minor) (wardship medical treatment)*.[8] In this case a child who was born with a life-threatening liver was advised liver transplant by consultant paediatricians but the mother did not give her consent because she was not willing to permit the child to undergo the pain and suffering of invasive surgery. On being approached by the local authority, at the instance of the consultants for grant of permission, the trial judge granted the permission. But on mother's appeal the court of appeal having regard to all the circumstances allowed the appeal and declined to grant the permission.

In a unique case[9] relating to conjoined twins the court of appeal was faced with the difficult task of balancing the right to life of each twin in granting permission for surgical operation to separate them. The twins were conjoined at abdomen. One of the twins J was capable of independent existence but the other twin M was alive only because a common artery enabled J to circulate oxygenated blood for both of them. In the absence of operation both were likely to die in three to six months. The operation would have inevitably resulted in the death of M but would have enabled J to lead a relatively normal life. The parents refused to give permission for the operation and the hospital caring for the twins applied for permission to operate. Though each of the twins had right to life, the court of appeal confirmed the trial

4. *NHS Trust A v. M*, (2001) 1 All ER 801 : (2001) 2 WLR 942.
5. See text and footnote 51, p. 92, *ante*.
6. *Re, W (a minor) (medical treatment)*, (1992) 4 All ER 627 : (1992) 3 WLR 758 (CA). In this case the court permitted the treatment contrary to the wishes of the minor.
7. (1990) 3 All ER 930 (CA), p. 934 : (1991) 2 WLR 140.
8. (1997) 1 All ER 906 (CA),pp. 912, 913.
9. *Re A (Children)* (conjoined twins : surgical separation) (2000) 4 All ER 961 (CA).

judge's order for permitting the operation after carrying out a balancing exercise and choosing lesser of the two evils.

On the question of self determination it has been held by the Court of Appeal[10] that *prima facie* every adult had the right to decide whether he would accept medical treatment even if a refusal might risk permanent injury to his health or cause premature death. But if the patient had no capacity to decide at the time of refusal either because of the ailment or because of undue influence by others, it was the duty of the doctors to treat him in whatever way they considered to be in his best interests.[11] The doctors or the hospital authorities may also in such a case, where the refusal of treatment may be life threatening or likely to cause irreparable serious damage to the patient's health, apply for a declaration to the Court.[12]

In *Glass v. United Kingdom*[13] decided by the European Court of Human Rights, the facts were "disturbing and unbelievable". David Glass a 12 year old child who was severely mentally and physically handicapped was rushed to hospital as he suffered acute respiratory failure. The doctors told the child's mother that her son was dying and they needed to administer diamorphine to ease his distress. The mother strongly disagreed. But the doctors against the mother's wishes administered diamorphine. Some members of the family attacked the doctors and during the ensuing tumult the mother successfully resuscitated the child who had seemed to have stopped breathing. The child sufficiently recovered and was discharged into home care on that very day. The European Court of Human Rights, on these facts, awarded 10,000 Euros as non-pecuniary damage. The case is a pointer that if a child patient is unable to give consent and the guardian declines to give consent for treatment, as thought proper by the doctors, they should either decline to give that treatment or apply to the court for directions for the treatment.

4(D)(iii) No Team Liability

The law in dealing with cases of negligence of doctors does not recognise any doctrine of team liability and the case of each doctor in the team has to be considered separately. It was so held in *Wilsher v. Essex Area Health Authority*,[14] where the plaintiff an infant who suffered near blindness sued for negligence while he was placed after premature birth in 24 hour special care unit of the defendant hospital. A junior doctor inserted a catheter to monitor oxygen but the catheter was inserted in a vein in place of an artery. The junior doctor consulted the senior doctor who failed to detect the mistake and he himself committed the same mistake while replacing the catheter. The excess oxygen given as a result of the mistake could have caused damage to the retina resulting in near blindness. The junior doctor was held not to have been negligent as he consulted the senior doctor. But the senior doctor was held to be negligent in not being able to detect the mistake and in repeating the same mistake. The defendant was vicariously held liable for the negligence.

10. *St. George's Health Care NHS Trust v. S*, (1998) 3 All ER 673 : (1998) 3 WLR 936 (A pregnant woman can decline induced delivery and can insist for normal delivery).
11. *Re T (adult : refusal of medical treatment)*, (1992) 4 All ER 649 (CA); (In this case a patient refused blood transfusion under the influence of her mother. Her father moved the court and under the Court's direction blood transfusion was given). For a case where a mentally ill patient refused food and the court ordered him to be fed without his consent; see *B. v. Croydon Health Authority*, (1995) 1 All ER 683 : (1995) 2 WLR 294(CA).
12. *Re T (adult : refusal of medical treatment)*, (1992) 4 All ER 649 (CA)
13. Application No. 61827/00 9th March, 2004. Noted from (2004) 63 Cambridge Law Journal 306-309.
14. (1986) 3 All ER 801 : (1988) AC 1074 (CA).

4(D)(iv) Some More Examples

The casualty officer in a hospital, which is open for receiving patients, who fails to see and examine a person would be negligent inasmuch as he does not discharge the duty of care owed by the hospital authority to the person who suffers by his negligence.[15]

Negligent operation or administration of drug.—The plaintiff brought an action against the Governors of a hospital for damages for injuries alleged to have been caused to him during an operation by the negligence of some member of the hospital staff. It was held that the action was not maintainable.[16] This decision has been severely criticised in a later case where it is held that a local authority carrying on a public hospital owes to a patient the duty to nurse and treat him properly, and is liable for the negligence of its servants even though the negligence arises while a servant is engaged on work which involves the exercise of professional skill on his part. Where, therefore, an infant plaintiff was treated in such a hospital by a competent radiographer in the employ of the hospital and by reason of his failure to use adequate screening material in giving Grenz-ray treatment, the infant plaintiff suffered injury to her face, it was held that as the radiographer was a whole-time employee of the hospital, the local authority was liable for his negligence under the doctrine of *respondeat superior*.[17] The same duty and liability is owed by and attached to the Governor of a voluntary hospital, whether he rendered the services gratuitously or for reward.[18] The current position in this context was stated by DENNING, L.J., as follows: "The hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors, but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time. The hospital authorities are responsible for all of them. The reason is because, even if they are not servants, they are the agents of the hospital to give the treatment. The only exception is the case of consultants and anaesthetists employed by the patient himself."[19] The plaintiff's wife, who had been admitted to a hospital to undergo an operation, lost her life owing to an overdose of a dangerous drug administered to her just before the operation by two nurses at the hospital. The overdose was due to a mistake on the part of the nurses in reading the amount ordered by the doctor to be administered. The plaintiff brought an action against the nurses and the hospital authority. It was held that the nurses were guilty of negligence and were liable, but that the hospital authority was not liable as principals for the nurses' negligence, the only duty resting on the hospital being to see that the nurses who were engaged were duly qualified.[20] It is submitted that according to modern view which prevails after *Gold's* case,[21] the hospital authorities should have been held liable. At the end of an abdominal operation a swab which had been used by surgeon to pack off adjacent organs from the area of the operation was left in the patient's body, with the result that three months later he died. It was held that there was no general rule of law which required a surgeon at the end of an operation such as the one in question, after removing all the swab of which he was aware, to make sure that no swab had been left in the patient's body, that the question whether or not the omission by a surgeon to remove a swab constitutes failure by him to exercise reasonable skill and care must be decided on the evidence given in a

15. *Barnett v. Chelsea etc. Hosp. Management*, (1968) 1 All ER 1068 : (1969) 1 QB 428 : (1968) 2 WLR 422.
16. *Hillger v. The Governors of St. Barthlomew's Hospital*, (1909) 2 KB 820.
17. *Gold v. Essex County Council*, (1942) 2 KB 293.
18. *Gold v. Essex County Council*, (1942) 2 KB 293.
19. *Roe v. Minister of Health*, (1954) 2 All ER 136 : (1954) 2 QB 66 : (1954) 2 WLR 915. See further Chapter VIII, title 2(A)(i)(c), p. 145.
20. *Strongways-Lesmere v. Clayton*, (1936) 2 KB 11.
21. *Gold v. Essex County Council, supra*. See Chapter VIII, title 2A(i)c, p. 145.

particular case; that the doctrine of *res ipsa loquitur* applied, so as to shift the burden of proof to the defendant.[22]

Negligence of maternity home to give warning of infectious disease.—The plaintiff entered the defendant council's maternity home for her confinement. Two cases of puerperal fever had occurred in the home and certain disinfecting precautions were taken by the medical officers but the plaintiff was not informed of this by the matron. The plaintiff developed puerperal fever and suffered a severe illness. She brought an action against the county council to recover damages for negligence and breach of duty on the part of the council and those for whom they were responsible. It was held that she was entitled to recover on the ground that the defendants ought to have known that the home was dangerous and had failed to take reasonable steps to prevent damage to the plaintiff from the danger.[23]

Negligence of surgeon.—The plaintiff, who was suffering from a contraction of third and fourth fingers of his left hand, was operated on at the defendant's hospital by a surgeon. After the operation, the plaintiff's hand and forearm were bandaged to a splint and they remained so for fourteen days. During this time the plaintiff complained of pain, but, apart from ordering the administration of sedatives, no action was taken by the surgeon. When the bandages were removed, it was found that all four fingers of the plaintiff's hand were stiff and that the hand was practically useless. It was held that the defendants were liable for the negligence of the surgeon.[24] A very promising young boy of 17 was admitted in a Government hospital for removal of tonsils. As a result of the negligence in the administration of anaesthesia during the operation, the patient became victim of cerebral anoxia making him dependant on his parents. The anaesthetist, the surgeon and the Government were all held liable for damages to the plaintiff.[25] When an injection meant for intramuscular use was administered as an injection intravenous in a Government hospital resulting in the death of the patient, the Government was held liable in public law for damages under Article 226.[26]

In *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka,*[27] the complainant who was then an engineering student suffered from recurring fever. The X ray examination revealed tumour in left hemithorax with erosion of ribs and vertebra. Even then without having MRI or Myelography done, cardiothororacic surgeon excised the tumour and found vertebral body eroded. Operation resulted in acute paraplegia of the complainant. MRI or Myelography at the pre-operation stage would have shown necessity of a neurosurgeon at the time of operation and the paraplegia perhaps avoided. Consent was not taken for removal of tumour but only

22. *Mohan v. Osborne*, (1939) 2 KB 14. See *Morris v. Winsbury-White*, (1937) 4 All ER 494. See further text and footnotes 57 to 60, pp. 534, 535, *ante* and *Arun Balkrishnan Aiyar v. M/s. Soni Hospital*, AIR 2003 Mad 389. While operating abdominal pad was left inside the body which was removed later by another operation. The Surgeons and the hospital in relation to the first operation were held guilty of negligence and liable for damages).
23. *Lindsey County Council v. Mary Marshall*, (1937) AC 97.
24. *Cassidy v. Ministry of Health*, (1951) 1 All ER 574 : (1951) 2 KB 343 : (1951) 1 TLR 539.
25. *Dr. Pinnamenani Narsimha Rao v. Gundavarapu Jayaprakasu*, AIR 1990 AP 207. See further in a tubectomy operation when there was lack of adequate resuscitative facilities and trained staff in a Government hospital the State was held vicariously liable though doctor operating was not negligent and the husband of the woman, who died was awarded Rs. 1 lac as compensation. *Rajmal v. State*, AIR 1996 Raj 80. When anaesthetist was not provided in a Government hospital, Government was held liable in negligence : *Dr. Leela Bai v. Sebastian*, AIR 2002 Ker 262. For negligence in a medico legal case resulting in Death. See *Poonam Sharma v. Union of India*, AIR 2003 Del 50.
26. *Smt. Bholi Devi v. State of Jammu & Kashmir*, AIR 2002 SC 65.
27. (2009) 6 SCC 1 : (2009) 6 JT 651 (Appeals by both parties from the decision of the National Consumer Disputes Redressal Commission).

for excision biopsy. The hospital and the surgeon were held liable for negligence. When the matter reached the Supreme Court the complainant who was then 40 was gainfully employed as IT Engineer. The nature of his work required him to travel to different locations but as he was confined to a wheelchair he was unable to do so on his own and needed a driver-cum-attendant. Presuming his working life to be sixty years the court awarded a sum of Rs.2000/- per month for 30 years under this head which was capitalised to a sum of Rs.7.2 lakhs. The complainant was further awarded a sum of Rs.14,40,000 to cover expenses for a nurse and Rs.10,80,000 to cover expenses on physiotherapy for 30 years. In addition the complainant was allowed Rs.50 lakhs for medical expenses and loss of earnings and Rs.10 lakhs towards pain and suffering. The total amount of compensation thus allowed was Rs.1 crore with interest at 6% till the date of payment giving due credit for any compensation already paid.

4(D)(v) Euthanasia

A two judge bench of the Supreme Court held that a person has a right not to live a forced life and attempt to suicide is not illegal.[28] But this view has been overruled by a constitution Bench of the Supreme Court.[29] The result is that sections 306 and 309 of the Penal Code which respectively make attempt to suicide and abetment to suicide punishable offences remain constitutionally valid. It is thus now clear that a doctor would be liable for abetting suicide under section 306 IPC, if he by taking positive steps, *e.g.*, by administration of drugs, although with the consent of the patient, ends the patient's life. To permit euthanasia is a matter of policy within the domain of the legislature.

Under the English Law suicide is not an offence after 1961 but mercy killing in the form of euthanasia is murder and assisted suicide is a statutory offence punishable by 14 years' imprisonment. In *R (on the application of Pretty) v. Director of Public Prosecutions*[30] the House of Lords recently held that the right to life and other human rights enumerated in the European convention and enforced in England by the Human Rights Act, 1998 have not affected the said law and that the convention did not oblige a state to legalise assisted suicide. Similar views have been expressed in Canada[31] and the United States.[32]

The Parliament of Australia's Northern Territory passed The Rights of the Terminally ill Act the world's first law that permitted medically assisted voluntary euthanasia. The law allowed the incurably sick to end their lives, provided that a physician and psychiatrist determine the patient to be both terminally ill and sane. Passed 15 to 10, the controversial bill was dubbed by opponents the 'Kill Bill'. This Act of the Northern Territory was, however, soon overridden by the Euthanasia Act, 1997 enacted by the Commonwealth which took two steps. It removed the power of the Northern Territory to make law permitting euthanasia and provided that the Rights of the Terminally ill Act had no force or effect except as regards the lawfulness or validity of anything done in accordance with it prior to the commencement of the commonwealth law.[33] In Netherlands the Parliament enacted the Termination of Life on Request and Assisted Suicide (Review of Procedures)

28. *P. Rathinam Nagbhusan Patnaik v. Union of India*, AIR 1994 SC 1844 p. 1868.
29. *Gian Kaur (Smt.) v. State*, AIR 1996 SC 946 : 1996 (2) SCALE 881 approving *Airedale NHA Trust v. Bland*, 1993 (2) WLR 316 : (1993) 1 All ER 821 (HL) that euthanasia is not lawful.
30. (2002) 1 All ER 1 (HL).
31. *Rodriges v. A.G. of Canada*, (1994) 2 LRC 136.
32. *Vacco v. Quill*, (1997) 521 US 793; *Washington v. Glucksberg*, (1997) 521 US 702. But it appears that two states in America namely Oregon and Washington have enacted laws permitting medically assisted suicide: The Times of India 25/5/2009.
33. *Northern Territory v. GPO*, (1999) 73 ALJR 470, p. 480.

Act, 2001, which formalises a relaxation of the law prohibiting euthanasia and assisted suicide previously by judicial decision. The Act only permits euthanasia and doctor-assisted suicide under a regime of ascertaining the wishes of the patient and with considerable medical supervision.[34] In India so far no such legislation appears to be in contemplation.[35]

4(E) Solicitors

Solicitors are persons of skill and knowledge, and like physicians undertake matters of the very highest difficulty and importance. Ordinary neglect, where so great a care is demanded, becomes very grave.

A solicitor is liable for the consequences of ignorance or non-observance of the rules of practice of the Court; for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession.[36] Solicitors and advocates are expected to know the latest relevant authority which has been reported in law reports whether official or general.[37]

A suit for damages against a solicitor on the ground that he failed to lodge and prosecute an appeal which would have very likely resulted in reversal of a judgment against the plaintiff is not such a collateral attack on the judgment as to amount to abuse of the process of the court and is maintainable.[38]

A solicitor is liable if his client proves negligence operating to produce the loss of the cause,[39] *e.g.* allowing a claim to be barred by limitation.[40] or struck out for failure to apply for a trial date within the prescribed period.[41] He is also liable for the negligence of his agent[42] or partner. In *Ross v. Counters*,[43] the Solicitors' negligence in not noticing the mistake in attestation of a will which he was engaged to draw by the testator resulted in depriving the plaintiff of her legacy on the testator's death and in a suit by the plaintiff claiming damages in negligence for the loss of the bequest under the will, the solicitors were held liable. A solicitor who was instructed by the testator to prepare a new will superseding an earlier will and who in breach of his professional duty and due to negligence failed to do so was held liable by the House of Lords in *White v. Jones*, in damages to a disappointed prospective beneficiary when the testator died before the will had been prepared.[44] Similar view has been taken by the High Court of Australia in *Hill v. Van ERP*.[45] In this case the solicitor had the will witnessed by the husband of the beneficiary which made the will invalid according to the law of Queensland. It was held that the solicitor owed a duty of care to the intended beneficiary, which rendered her liable in negligence. In holding so

34. See (2002) 1 All ER 1 p. 26 (HL).
35. The Society for Right to Die with Dignity, formed recently in Bangalore, does not also advocate mercy killing through poison injection. It only advocates that a terminally ill person should be allowed to die peacefully by withdrawing all medication and life sustaining equipment except sedatives. (Indian Express, January 15, 1996).
36. PER TINDAL, C.J., in *Godefroy v. Dalton*, (1830) 6 Bing 460, 468.
37. *Copeland v. Smith*, (2000) 1 All ER 457 (CA), p. 462.
38. *Walpole v. Partridge & Wilson*, (1994) 1 All ER 385 : (1994) QB 106 : (1993) 3 WLR 1093 (CA).
39. *Godefroy v. Jay*, (1831) 7 Bing 413; *Floyd v. Nangle*, (1747) 3 Atk 568.
40. *Fletcher & Son v. Jubb; Booth & Helliwell*, (1920) 1 KB 275.
41. *Charles v. Hugh Jones & Jenkins*, (2000) 1 All ER 289 (CA).
42. *Simmons v. Rose; In Re. Ward*, (1862) 31 Beav 1.
43. (1979) 3 All ER 580. For other cases where Solicitors were held liable see *William Abercrombie v. Frederick Chater-Jack*, AIR 1932 PC 194; GAP, *Brickenden v. London Loan & Savings Co., Canada*, AIR 1934 PC 176.
44. *White v. Jones*, (1995) 1 All ER 691 : (1995) 2 AC 207 (HL).
45. (1997) 71 ALJR 487.

BRENNAN C.J. observed: "If the solicitor's carelessness results in loss of a testamentary gift intended to be given to a beneficiary, it is ultimately fair, just and reasonable that the solicitor should be liable in damages to the intended beneficiary."[46] In *County Personnel (Employment Agency) Ltd. v. Alan R Pulver & Co. (a firm)*,[47] a solicitor was held liable for negligence to his client for not alerting him as to the effect of an unusual clause in a lease while negotiating an underlease. But a solicitor, who had acted for a testator in preparing a will, owes no duty of care to the beneficiary when he acts for the testator in a subsequent transaction relating to a property covered by the will.[48]

Where a solicitor is guilty of negligence or misconduct, the court may order him to make good any loss occasioned by such negligence or misconduct.[49] But, where the loss does not flow from his act or default, the court will not, merely because he has been guilty of misconduct, mulct him in damages.[50] A solicitor is liable for libelling his client.[51]

Except in the most exceptional circumstances a solicitor advising a partnership has no duty to communicate his advice to all the partners; he only has to advice the partner who has the matter in hand on behalf of the firm.[52] A solicitor acting as an Advocate in court enjoys under the English law the same immunity as a Barrister.[53]

A solicitor does not normally owe any duty of care to his client's opponent, but in special circumstances he may owe such a duty. For example, when in a litigation between husband and wife relating to the custody of their children, the husband's solicitors gave undertaking to the wife's solicitors not to release the husband's passport in which the children's names were entered and the husband obtained the passport because of his solicitor's negligence which enabled him to remove the children to Kuwait, the husband's solicitors were held liable in negligence to the wife.[54]

A solicitor cannot be held liable for negligence in the conduct of either criminal or civil proceedings if it involved an attack on the decision of a court of competent jurisdiction. So a plaintiff who was convicted by a criminal court on a plea of guilty cannot sue his solicitors for damages that they were negligent in advising him to plead guilty.[55]

There was no general rule that a solicitor should never act for both parties in a transaction where their interests might conflict. In such a case he can act for both parties provided he obtained informed consent of both.[56] In a case where a solicitor in the course of acting for both lender and borrower in a re-mortgage transaction discovered information casting doubt on the borrower's ability to repay the loan and failed to report the information to the lender, it was held that he was not in breach of any duty to the lender unless his instructions required him to do so.[57]

46. (1997) 71 ALJR 487, p. 491.
47. (1987) 1 All ER 289 : (1987) 1 WLR 916 (CA).
48. *Clarke v. Bruce Lane & Co.*, (1988) 1 All ER 364 : (1988) 1 WLR 881 (CA).
49. *Norton v. Cooper*, (1856) 3 S & G 375.
50. *Marsh v. Joseph*, (1896) 13 TLR 136.
51. *Groom v. Crocker*, (1939) 1 KB 194 : (1938) 2 All ER 394 : 158 LT 447; *Pilkington v. Wood*, (1953) 1 Ch 770; *Otter v. Church, Adams, Tatham & Co.*, (1953) 1 Ch 280.
52. *Sykes v. Midland Bank Executor*, (1970) 2 All ER 471.
53. *Saif Ali v. Sydney Mitchell & Co.*, (1978) 3 All ER 1033 : (1980) AC 198 (HL).
54. *Al Kandari v. J.R. Brown & Co. (a firm)*, (1988) 1 All ER 833 : 1988 QB 665 (CA).
55. *Somasundaram v. M. Julius Melochior & Co. (a firm)*, (1989) 1 All ER 129 : (1988) 1 WLR 1394 (CA).
56. *Clark Boyce v. Movat*, (1993) 4 All ER 268 (PC).
57. *National Home Loans Corp. plc. v. Giffen Couch & Archer (a firm)*, (1997) 3 All ER 808 (CA).

4(F) Counsel

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.[58] 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*,[59] 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.

But a counsel was not held liable when the advice required and given at the door of the court was not sufficiently detailed but substance of advice was not negligent.[60] The High Court of Australia still sticks to the view that advocates and solicitors instructing advocates are not liable for professional negligence.[61]

In India, section 5 of the Legal Practitioners (Fees) Act, 1926 provided 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. After adverting to the provisions of the Act, the Supreme Court in *M. Veerappa's* case[62] held that an advocate who has been engaged to act is clearly liable for negligence to his client. The Supreme Court, however, left open the question whether an advocate who has been engaged only to plead can be sued for negligence. In *Raman Services Pvt. Ltd. v. Subash Kapoor*[63] the Supreme Court held that if an advocate fails to appear due to strike call given by the bar, he can be made liable for the costs which the litigant has to pay for setting aside an *exparte decree*. The court also added that "the litigant who suffers entirely on account of his advocate's non-appearance in court, has also the remedy to sue the advocate for damages."[64] An advocate has also no lien over papers of his client for unpaid fees and he cannot retain the files of his client; his remedy is only to sue for fees.[65]

In *CBI v. K.Narayana Rao*[66] the Supreme Court has clarified that in law of negligence, professionals such as lawyers, doctors, architects and such others are included in the category of persons possessing certain special skills. However, the lawyer is not expected to assure the client that he would win the case under any circumstances. The only assurance which can be given by the lawyer is that he would exercise his special skills with reasonable competence. It has thus been held that a professional can be held guilty of negligence on either of the two findings "viz. either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess."

4(G) Bankers

With respect to money placed in their hands by their customers for the ordinary purposes of banking, bankers hold themselves out as persons worthy of trust, and as

58. *Ronald v. Worsely*, (1967) 3 All ER 993 : (1969) 1 AC 191 : (1967) 3 WLR 1666 (HL).
59. (2000) 3 All ER 673 (HL).
60. *Moy v. Pettman Smith*, (2005) 1 All ER 903 (HL).
61. *Dorta Ekenaike v. Victoria Legal Aid*, (2005) 79 ALJR 755 (KIRBY J. dissenting).
62. *M. Veerappa v. Evelyn Squeira*, AIR 1988 SC 506, p. 514 : (1988) 1 SCC 556.
63. AIR 2001 SC 207, p. 211 : (2001) 1 SCC 118.
64. AIR 2001 SC 207, p. 211 : (2001) 1 SCC 118.
65. *R.D. Saxena v. Balaram Prasad Sharma*, AIR 2000 SC 2912; *New India Assurance Co. Ltd. v. A.K. Saxena*, AIR 2004 SC 311.
66. (2012) 9 SCC 512, See also, *Marghesh K. Parikh v. Dr. Mayur H. Mehta*, (2011) 1 SCC 31

persons of skill. Their duty, in respect of paying their customer's cheques, is to honour them to any amount not exceeding the credit balance due to the customer from the banker at any material time.[67] A failure to do so constitutes negligence and the bankers are liable in damages, which may include damages for injury to the credit of the customer. A Banker is vicariously liable for the negligent act of its employees done is the course of employment.[68]

Liability of Banker for paying forged cheques.—Bankers are liable for negligence in paying forged cheques. They are bound to exhibit skill in detecting such forgeries. If a man should lose his cheque-book or neglect to search the desk in which it is kept, and a servant or stranger should take it up, it is impossible to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment.[69]

In *Young v. Grote*,[70] it was held that negligence on the part of a customer in drawing a cheque disentitled the customer from recovering the extra amount which was paid by the banker owing to the cheque being forged afterwards. The HOUSE OF LORDS have affirmed its principle by holding that a customer of a bank owes a duty to the bank in drawing a cheque to take reasonable and ordinary precautions against forgery, and if, as the natural and direct result of the neglect of those precautions the amount of the cheque is increased by forgery, the customer must bear the loss as between himself and the banker.[71] But it must be shown in order to hold the customer liable for negligence in drawing cheques, that there was a breach of duty by the neglect of some usual and proper precautions.[72] Another duty which a customer owes to his bankers is that he must inform the bank of any unauthorised cheques purportedly drawn on the account as soon as he, the customer, becomes aware of it.[73] The existence of both these duties under the English law has been affirmed by the Privy Council,[74] but it has further been held that the customer is not under a duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented for payment nor is he under a duty to check his periodic bank statements so as to enable him to notify the bank of any unauthorised debit items.[75] In this case,[76] an accounts clerk of the plaintiff forged the signature of the Managing Director of the plaintiff on 300 cheques purporting to be drawn by the company between 1972 and 1978 and these cheques were paid by the defendant bank on presentation. The plaintiff's system of internal financial control from the point of view of detecting fraud was unsound and inadequate yet the defendant bank was held liable. Where a bank offered to give expert advice on

67. *Joachimson v. Swiss Bank Corporation*, (1921) 3 KB 110, 127.
68. *Indian Iron & Steel Co. v. Bihar State Electricity Board*, AIR 2004 Jhar 54.
69. *Governor and Company of the Bank of Ireland v. Trustees of Evane Charities in Ireland*, (1855) 5 HLC 389; *Coles v. The Bank of England*, (1839) 10 Ad & E1 437; *Ahmed Moola Dawood v. S.R.M.M.C.T. Pereinan Chetty Firm*, (1925) 3 BLJ 22; See also, *Ashok Amritraj v. Reserve Bank of India* (2012) 5 CTC 763: (2012) 6 Mad LJ 509.
70. (1827) 4 Bing 253.
71. *London Joint Stock Bank v. Macmillan and Arthur*, (1918) AC 777, distinguishing *Scholfield v. Earl of Londesborough*, (1896) AC 514, 523 (in which LORD HALSBURY invited the House to overrule *Young v. Grote*, (1827) 4 Bing 253, but four other Lords took a different view).
72. *Mercantile Bank of India Ltd. v. Central Bank of India Ltd.*, AIR 1938 PC 52.
73. *Greenwood v. Martins Bank Ltd.*, 1933 AC 51 (HL).
74. *Tai Hing Cotton Mill Ltd. v. Liu Chang Hing Bank Ltd.*, (1985) 2 All ER 947 : (1986) 1 AC 801 : (1986) 3 WLR 317 (PC).
75. *Tai Hing Cotton Mill Ltd. v. Liu Chang Hing Bank Ltd.*, (1985) 2 All ER 947 : (1986) 1 AC 801 : (1986) 3 WLR 317 (PC).
76. *Tai Hing Cotton Mill Ltd. v. Liu Chang Hing Bank Ltd.*, (1985) 2 All ER 947 : (1986) 1 AC 801 : (1986) 3 WLR 317 (PC), followed in *Canara Bank v. Canara Sales Corporation*, (1987) 2 SCC 666 : AIR 1987 SC 1603 : (1987) 62 Com Cases 280.

investments to its customers and loss was occasioned to a customer by advice given by the manager of the bank which advice was given without ordinary care and skill that a bank manager should possess and exercise the bank was held liable for loss.[77]

The Calcutta High Court has held that where a banker makes a payment on a forged cheque, he cannot make the customer liable except on the ground of negligence imputable to the customer.[78] If the signatures on the cheque or at least that of one of the joint signatories to the cheque are not or is not genuine, there is no mandate on the bank to pay. In such a case the question of any negligence on the part of the customer, such as leaving the cheque book carelessly so that a third party can easily get hold of it can afford no defence to the bank.[79] In action in not examining the accounts sent by the Bank when the customer had no knowledge of the forgery, cannot defeat his claim against the Bank who has made payment on a forged cheque.[80] Where the only negligence imputed to the customer was that he allowed his cheque-book to remain in an unlocked box, it was held that the customer was not liable to be debited with the loss although one of the rules of business of the bank said that "constituents should keep all blank cheque forms under lock and key, otherwise the bank is not responsible for any loss in this connection."[81]

If a banker fails to carry out the instructions of a customer he will be liable for negligence. For instance, if he issues bank drafts without authority in accordance with the customer's instructions against valid cheques of the customer, owing to the fraud of the customer's servant, he will be liable in damages in respect thereof.[82]

Opinion as to creditworthiness.—If a banker gives a reference in the form of a brief expression of opinion in regard to creditworthiness, he does not accept, and there is not expected of him, any higher duty than that of giving an honest answer.[83] But if the circumstances are such that others could reasonably rely on the banker's skill or ability to make careful inquiry before giving information or advice and they could be reasonably expected to rely on the information or advice given, the banker may become liable for giving wrong information or advice negligently.[84]

The payee of a demand draft sent it by unregistered post to his Calcutta office. During its transmission, a stranger, having obtained wrongful possession, forged an endorsement and delivered it to the defendant bank for collection and credit of the proceeds to his account. The bank got the draft cashed, credited the proceeds to the

77. *Woode v. Martins Bank Ltd.*, (1958) 3 All ER 166, (1959) 1 QB 55, (1958) 1 WLR 1018; *Cornish v. Midland Bank*, (1985) 3 All ER 513 (CA).
78. *Bhagwan Das v. Creet*, (1903) ILR 31 Cal 249, distinguishing *Young v. Grote*, (1827) 4 Bing 253, "which has created as much diversity of opinion as any case in the books" : per LORD MACNAGHTEN in *Scholfield v. Earl of Londesborough*, (1896) AC 514. See *Punjab National Bank, Limited v. The Mercantile Bank of India, Limited*, (1911) ILR 36 Bom 455: 13 Bom LR 835. See *J.G. Robinson v. The Central Bank of India Ltd.*, (1931) ILR 9 Ran 585, where there was want of proper inquiry on the part of collecting bank owing to certain suspicious circumstances. In *Mahabir Prasad v. United Bank of India*, AIR 1992 Cal 270, it has been held by the Calcutta High Court that a suit by customer for recovery of amount paid by the banker on a forged cheque cannot be defeated by merely pleading negligence; but the banker can sue in tort for damages for negligence.
79. *Bihar Co-op. D. & C.M. Ltd. v. Bank of Bihar*, AIR 1967 SC 389 : (1967) 1 SCC 848.
80. *Canara Bank v. Canara Sales Corporation*, (1987) 2 SCC 666 : AIR 1987 SC 1603 : (1987) 62 Com Case 280.
81. *Pirbhu Dayal v. Jwala Bank*, ILR 1938 All 634; *Firm R.B. Bansilal Abirchand v. Sadasheo*, ILR 1943 Nag 687.
82. *Bank of Montreal v. Dominion Gresham Guarantee and Casualty Co.*, (1930) AC 659.
83. PER LORD MORRIS of Borth-y-Gest in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, (1964) AC 465 : (1963) 2 All ER 575 : (1963) 3 WLR 101.
84. *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, (1964) AC 465 : (1963) 2 All ER 575 : (1963) 3 WLR 101. See title 4, Chapter XXI, p. 635.

account of its constituent and allowed him to withdraw the money. In an action by the payee for conversion, the bank contended that it was an innocent agent and hence not liable, that there had been no conversion as the draft was already considered to be cash in mercantile usage, that the bank merely returned it to the person from whom it received and, further, inasmuch as the payee acted negligently in sending the draft by ordinary post, he was estopped from recovering the amount. It was held that the bank was liable to the payee for conversion; and that the payee's negligence, if any, was not the direct cause of the loss and that there was no estoppel.[85]

Delivery of goods to wrong person.—Where the banker delivers the goods received by it on behalf its customer to a wrong person whereby they are lost to the customer, "the liability of the bank is absolute, though there is no element of negligence, as where the delivery is obtained by means of an artfully forged order. In law banker could contract out of this liability but he would be unlikely to do so in practice."[86]

4(H) Manufacturers, Repairers and Builders

A manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.[87] In order to render a manufacturer liable to the ultimate purchaser, it is necessary that the article must reach that purchaser in the form in which it leaves the manufacturer without opportunity for intermediate examination. A manufacturer will not be liable where the retail dealer had an opportunity of inspection and could by a simple test have ascertained the unsuitability of the goods for the purpose for which they were sold.[88] Where an article supplied is known to be required for immediate use, the test of liability in an action for negligence causing a defect in the article is not whether the injured party had an opportunity for intermediate examination of the article, but whether such an examination could reasonably be anticipated by the person supplying it, who will be liable if no such reasonable anticipation existed.[89] The scope of a manufacturer's duty of care does not extend beyond consequences that are reasonably foreseeable and so if the damage suffered is not of a type which could be reasonably foreseen by the manufacturer, he is not liable.[90]

The principle laid down in *Donoghue's* case is that there can be no duty cast upon the vendor without proximate relationship of which the main test is whether there is reasonable opportunity for examination between the time of the sale or the doing of the work and the use or consumption of the article by the purchaser. The principle laid down in *Donoghue's* case applies not only to manufacturers, but also to suppliers or repairers[91] or distributors[92] of goods. The repairer of an article owes a duty to any person by whom the article is lawfully used to see that it has been carefully repaired in a case where there is no reasonable opportunity for the examination of the article

85. *Ram Lal Bhadani v. Dass Bank Ltd.*, (1943) ILR 1 Cal 15.
86. *Halsbury's Laws of England (4th edition)*, Vol. 3 para 94; *UCO Bank v. Hem Chandra Sarkar*, AIR 1990 SC 1329 : (1990) 3 SCC 389.
87. *Donoghue v. Stevenson*, (1932) AC 562 : 48 TLR 494 : 147 LT 281; *Bates v. Batey & Co. Ltd.*, (1913) 3 KB 351. Overruled. For a case of defective motors incorporated in pumps used in a fish farm, see *Muirhead v. Industrial Tank Specialities Ltd.*, (1985) 3 All ER 705 : (1986) QB 507 : (1985) 3 WLR 993.
88. *Kubach v. Hollands*, (1937) 3 All ER 907 : 81 SJ 766.
89. *Herschtal v. Stewart and Arden Ltd.*, (1940) 1 KB 155 ; (1939) 4 All ER 123.
90. *Aswan Engineering v. Lupdine Ltd.*, (1987) 1 All ER 135 (CA), p. 153.
91. *Dransfield v. B. I. Cables, Ltd.*, (1937) 4 All ER 382 : 54 TLR 11 : 82 SJ 95.
92. *Watson v. Buckley*, (1940) 1 All ER 174.

after the repair is completed and before it is used, and when the use of the article by persons other than the person with whom the repairer contracted must be contemplated or expected.[1] In the case of distributors it is necessary to show that in some way they have been careless in their handling of the particular goods. Remedy by way of damages in tort extends to a negligent manufacturer causing monetary loss by the supply of a sub-standard article.[2]

The principle of *Donoghue's* case has been applied to builders in recent years. In the words of LORD DENNING: "The distinction between chattels and real property is quite unsustainable. If the manufacturer of an article is liable to a person injured by his negligence so should the builder of a house be liable."[3] In *Anns v. Merton London Borough*,[4] LORD WILBERFORCE, with whom LORD DIPLOCK, LORD SIMON and LORD RUSSEL agreed, observed: "If there was at one time a supposed rule that the doctrine of *Donoghue v. Stevenson*, (1932 AC 562) did not apply to reality, there is no doubt under modern authority that a builder of defective premises may be liable in negligence to persons who thereby suffer injury."[5] In *Rimmer v. Liverpool City Council*,[6] it was held by the Court of Appeal that a landlord who also designed or built the premises owed in his capacity as designer or builder a duty of care to all persons who might reasonably be expected to be affected by the design or construction of the premises, the duty being to take reasonable care to see that such persons would not suffer injury as a result of faults in the design or construction of premises. Further, in *Junior Books Ltd. v. Veitchi Co. Ltd.*,[7] the defendants who were sub-contractors to lay a floor in the plaintiffs' factory and who were not in contractual relationship with the plaintiffs were held liable for defective flooring and for payment of damages for replacing the flooring and for other items of consequential loss. Recent cases[8] have confined the liability in tort of a builder for a defect in the building to physical injury to persons or damage to property (other than the building itself) caused by the defect before it is discovered and have negatived the liability for pure economic loss.

Snail in ginger beer.—The plaintiff drank a bottle of ginger beer, manufactured by the defendants, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not detected until the greater part of the bottle had been consumed. The bottle was of dark opaque glass so that the condition of its contents could not be ascertained by inspection. The plaintiff suffered from shock and severe gastro-enteritis. In a suit by the plaintiff to recover damages it was held that the defendants were liable.[9]

Dermatitis caused by woollen garments.—The plaintiff contracted dermatitis as the result of wearing a woollen garment which, when purchased from the retailers, was in a defective condition owing to the presence of excess sulphites which, it was found had been negligently left in it in the process of manufacture. The presence of the deleterious chemical was a hidden and latent defect, and could not be detected by any examination that could reasonably be made. The garment was made by the

1. *Haseldine v. C.A. Daw & Son Ltd.*, (1941) 2 KB 343 : (1941) 3 All ER 156.
2. *Eastern M.C. Ltd. v. Premier Auto Ltd.*, (1962) 65 Bom LR 183.
3. *Duttan v. Bogonor Regis United Building Co. Ltd.*, (1972) 1 All ER 462, pp. 471, 472 : (1972) 1 QB 373.
4. (1977) 2 All ER 492 : (1978) AC 278 (HL).
5. (1977) 2 All ER 492, p. 504. See further pp. 494, 495 (LORD SALMON for the same view).
6. (1984) 1 All ER 930 : (1984) QB 1 : (1984) WLR 426.
7. (1982) 3 All ER 301 : (1983) AC 520 : (1982) 3 WLR 477 (HL).
8. *D & E Estates Ltd. v. Church Commissioners*, (1988) 2 All ER 992 (HL); *Murphy v. Brentwood District Council*, (1990) 2 All ER 908 (HL); *Department of Environment v. Thomas Bates & Sons Ltd.*, (1990) 2 All ER 943 (HL). See the discussion of these and other cases pp. 470 to 472, *ante*.
9. *Donoghue v. Stevenson*, (1932) AC 562 : 48 TLR 494.

manufacturers for the purpose of being worn exactly as it was worn in fact by the plaintiff. It was held that there was a duty to take care as between the manufacturers and the plaintiff for the breach of which the manufacturers were liable.[10]

Improper repair of motor wheel.—The owner of a motor lorry took the wheel of the lorry, the flange of which had come off, to a motor repairer, with instructions to re-assemble it. The repairer's assistants re-assembled it and replaced it on the lorry, and the lorry owner's servant drove the lorry away. An hour or two later, the flange came off while the lorry was being driven on the highway by the lorry owner's servant, and, bowling along the road, it mounted the pavement and hit the female plaintiff, injuring her. It was held that the lorry owner having entrusted the repair of the lorry to a competent repairer, he was not liable either for negligence or nuisance to a person who suffered injury upon the road by reason of the competent repairer having been negligent; that the lorry owner was not under a duty to ascertain for himself, whether the competent repairer had competently repaired the lorry; that the repairer was liable to the person who suffered injury on the road as a result of his negligence, as he was in the same position as that of the manufacturer of an article sold by a distributor in circumstances which prevented the distributor or ultimate purchaser or consumer from discovering by inspection any defect in the article.[11]

Improper repair of lift.—The plaintiff in the course of his duties went to visit a tenant residing in a flat in a block of flats. He entered into a lift on the ground floor to go to the fifth floor where the tenant was living. The lift went as far as the second floor and then fell to the bottom of the well and the plaintiff received serious injury. The lift was in the charge of a company of lift engineers who for a periodic remuneration kept the lift in proper order and informed the landlord of the block of flats if any repairs were necessary. The lift required some repairs and they were carried out by an employee of the firm of engineers. In an action by the plaintiff it was held that whether the plaintiff was an invitee or a licensee of the landlord the only obligation on the landlord was to take care that the lift was reasonably safe and that he had fulfilled that obligation by employing a competent firm of engineers to look after the lift and that, therefore, the landlord was not liable but the engineers were liable as they owed a duty to the plaintiff to see that the lift was carefully repaired when there was no opportunity for its examination before it was used by the plaintiff.[12]

Supplying defective motor-car.—The defendants supplied for the plaintiff's use a reconditioned motor-car. The plaintiff drove the car out on business. In turning a corner the near rear wheel came off, owing to the negligence of the defendants' servants before delivery and the plaintiff suffered injury. It was held that the defendants owed a duty to the plaintiff to take reasonable care that the car which was intended, as they knew, for his immediate use, should be in a safe condition, and that they were liable for negligence.[13]

Wire in sweetmeats.—The defendants were manufacturers of sweets. A seven pound box of sweets manufactured by them was sold to a middleman who supplied

10. *Grant v. Australian Knitting Mills Ltd.*, (1936) AC 85 : 79 SJ 815 : 52 TLR 38. See *Evans v. Triplex Safety Glass Co. Ltd.*, (1936) 1 All ER 283, where the above case was distinguished on the ground that the plaintiff had not proved negligence in the manufacture of glass by the defendant company. See *Parker v. Oloxo Ltd.*, (1937) 3 All ER 524, where the manufacturers were held liable for supplying hair-dye to a shopkeeper who applied it to the plaintiff who thereby got an acute attack of dermatitis and nervous trouble. See *Watson v. Buckley*, (1940) 1 All ER 174, which is also a case of hair-dye. See further text and footnote 16, p. 554, *infra* for another case of hair-dye.
11. *Herschtal v. Stewart and Arden Ltd.*, (1940) 1 KB 155 : (1939) 4 All ER 123.
12. *Haseldine v. C.A.Daw & Son Ltd.*, (1941) 2 KB 343 : (1941) 3 All ER 156.
13. *Stennett v. Hancock*, (1939) 2 All ER 578 : 83 SJ 379.

them to the plaintiff. The plaintiff was putting the sweets into a displaying tray when his finger was injured by a piece of wire in one of the sweets. He sued the defendants who contended that there was ample opportunity for intermediate examination. It was held that the defendants were negligent, and the case was within the doctrine of *Donoghue v. Stevenson*.[14]

Defect in chain.—Donoghue's case has been distinguished in cases in which the defect of the manufacturers is discoverable on reasonable inspection. A crane was supplied by manufacturers in parts to be assembled by the purchasers before use and there was a patent and discoverable defect in certain parts which was discovered by an experienced crane erector who erected the crane but who took his chance of operating it without remedying the defect and got killed by the falling of a part of it. In an action by his widow under the Fatal Accidents Act, it was held that the defects being discoverable on reasonable inspection, and having in fact been discovered by the deceased, the manufacturers owed him no duty and were not liable for the accident.[15]

Injury caused by hair dye.—A hair dresser treated the plaintiff's hair, with a dye, and as a result the plaintiff contracted dermatitis. The dye had been delivered to the hair dresser in labelled bottles together with a small brochure of instruction. Both the labels and the brochure contained a warning that the dye might be dangerous to certain skins, and a recommendation that a test should be made before it was used. The hair dresser made no test and did not warn the plaintiff. It was held that the manufacturers had given the hair dresser a warning which was sufficient to intimate to him the potential danger of the dye and, therefore, they were not liable, but the hair dresser was liable for negligence.[16]

Injury to workman owing to defective tool supplied.—The plaintiff, a maintenance fitter, was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift which had been provided for the plaintiff's use by his employers, although apparently in good condition, was of excessive hardness, and was, in the circumstances, a dangerous tool; it had been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers who, in turn, had sold it to the employers, whose system of maintenance and inspection was not at fault. The plaintiff claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool, and against the makers on the ground that, as the manufacturers of the drift, they were under a duty to those who they contemplated might use it. It was held that the employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering. It was, however, held that the manufacturers were liable.[17] The plaintiff was employed as a slaughterman by the first defendants in an abattoir which was owned and controlled by the Liverpool Corporation, the second defendants. New chains were supplied by the Corporation which were unsuitable for the work as they were of a heavier type so that it was difficult to form a slip-knot which would grip tightly the legs of the pigs. Both plaintiff and the first defendants knew that the chains were unsuitable for the work, but did not complain to the Corporation. One year after the new chains had been in use one pig fell out of the slip-knot of the chain and injured the plaintiff. It was held that the plaintiff never became the servant of the Corporation and his claim against the Corporation was liable to fail by reason of the

14. *Barnett v. Packer & Co.*, (1940) 3 All ER 575.
15. *Farr v. Butters Bros. & Co.*, (1932) 2 KB 606 : 147 LT 427.
16. *Holmes v. Ashford*, (1950) 2 All ER 76 : (1950) 2 All ER 76.
17. *Davie v. New Merton Board Mills Ltd.*, (1958) 1 QB 210, affirmed by HOUSE OF LORDS in (1959) AC 604.

full and complete knowledge of the unsatisfactory nature of the chains possessed by the plaintiff.[18]

5. KEEPERS OF DANGEROUS ANIMALS

A person who owns or is in possession or control of an animal may become liable for damage caused by the animal under the common law in three ways. He may become liable under the ordinary law of torts; he may become liable without any fault when the animal is of a dangerous character or when the animal though generally not of a dangerous character is in particular of dangerous character to the defendant's knowledge; and he may become liable for cattle trespass. When a person sets a dog to bite another person he is liable for assault and battery in the same way as if he has himself hit the person. When a person keeps pigs in a residential area, he may become liable for nuisance in the same way as if he had collected material which emitted offensive stench to the neighbours. Similarly, a person may become liable in negligence if he does not take proper care of his animal and the negligence results in injury to another. These are examples of liability under the ordinary Law of Torts. The other two kinds of liabilities under the English law have been codified by the Animals Act, 1971[19], which retains to a large extent the rules of the common law. Liability for cattle trespass has already been dealt with earlier. Here we are concerned with the liability for animals of dangerous character.

Wild animals roaming in the forest, even though their hunting be prohibited, are not the property of the State and the Government is not liable for injury caused by a wild animal *e.g.* black bear.[20]

There are two classes of animals: (A) those that are of a dangerous character (animals *ferae naturae*); and (B) those not normally of a dangerous nature (animals *mansuetae naturae*).

5(A) Animals Ferae Naturae

If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of such classes takes the risk of any damage it may do.[21] Thus a lion, a bear, a wolf,[22] a monkey,[23] and an elephant,[24] are regarded as savage animals. He who keeps a savage animal does so at his peril. He is bound to keep it so far under control as to prevent it indulging in its propensity and inflicting injury. If the animal escapes and hurts any one, it is not necessary for the party injured to show that the owner knew the animal to be especially dangerous. It is immaterial whether the owner knows it to be dangerous or not.

18. *Gledhill v. Liverpool Abattoir Utility Co., Ltd.*, (1957) 3 All ER 117 : (1957) 1 WLR 1028 : 101 SJ 797. See also the liabilities created by the Consumer Protection Act, 1986 which extends to goods as well as services.
19. For the text of section 2 of the Act and its interpretation see *Mirvahedy v. Henley*, (2003) 2 All ER 401 (HL).
20. *State of H.P. v. Halli Devi (Smt.)*, AIR 2000 HP 113.
21. *Filburn v. People's Palace & Aquarium Co.*, (1890) 25 QBD 258, 261.
22. 1 Hale PC 420.
23. *May v. Burdett*, (1846) 9 QB 101.
24. *Filburn v. People's Palace and Aquarium Co., supra* ; *Vedapuratti v. Koppon Nair*, (1911) ILR 35 Mad 708; *Maung Kyaw Dun v. Ma Kyin*, (1900) 7 Burma LR 73, in which it was held that in the country a man was not liable for any damage done by his elephant without any proof of negligence or that he knew it to be of vicious disposition in view of the manner in, and extent to, which elephants are employed in the country, is not followed by the Madras High Court in the above case. See *Behrens v. Beriram Mills Circus Ltd.*, (1957) 2 QB 1 : (1957) 1 All ER 583 : (1957) 2 WLR 404, where it was held that elephants were *ferae naturae* and it made no difference that the elephant in the case was, in fact, tame and no more dangerous than a cow.

It has been held that zoo authorities have to keep dangerous animals (*e.g.* a tiger) in such a manner that under no circumstances these animals are able to cause any injury to any visitor.[25] A white tigress was kept inside iron bars in the National Zoological Park Delhi. There was a railing before the iron bars. A child visitor aged 3 years crossed the railing and put his right hand into the iron bars when the tigress suddenly grabbed the hand and crushed it which had to be amputated. The zoo authorities were held liable in damages for not taking the precaution of so keeping the tigress by putting a wire mesh on iron bars or otherwise so as to prevent a child visitor from putting his hand into iron bars.[26]

Bees are *ferae naturae* but when hived they become the qualified property of the person who hives them. The owner of a swarm of bees has no legal right to follow the bees on another man's land. When a swarm of bees settles on another person's land, the former owner of the bees loses his right in them, which again become *ferae naturae*.[27]

The defendant kept a monkey which he knew to be accustomed to bite people, and which bit the plaintiff; and the defendant was held liable.[28] DENMAN, C.J. said: "whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. The negligence is in keeping such an animal after notice."[29]

5(B) Animals Mansuetae Naturae

If the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief.[30] The law assumes that animals belonging to this class such as sheep, horses, oxen, camels,[31] dogs, etc., are not of a dangerous nature, and anyone who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous.[32] The knowledge of the defendant must be shown as to their propensity to do the act in question. It not being usual for dogs,[33] cats,[34] or horses,[35] or rams,[36] or bulls,[37] or camels[38] to attack human beings, the plaintiff complaining of such injury from such animals must establish that the defendant knew they were exceptionally savage, and prone to injure mankind.

25. *Nitin Walia v. Union of India*, AIR 2001 Del 140, p. 142.
26. *Nitin Walia v. Union of India*, AIR 2001 Del 140
27. *Kearry v. Pattinson*, (1939) 1 KB 471 : 160 LT 101 : (1939) 1 All ER 65.
28. *May v. Burdett*, (1846) 9 QB 101.
29. *May v. Burdett*, (1846) 9 QB 101, pp. 110, 112.
30. *Filburn v. People's Palace and Aquarium Co.*, (1890) 25 QBD 258, 261.
31. *Mc Quaker v. Goddard*, (1940) 1 KB 687.
32. *Mc Quaker v. Goddard*, (1940) 1 KB 687.
33. *Mason v. Kelling*, (1699) 12 Mod 332.
34. *Buckle v. Holmes*, (1926) 2 KB 125.
35. *Cox v. Burbidge*, (1863) 13 CB NS 430; *Bradley v. Wallaces Ltd.*, (1913) 3 KB 629. A person is guilty of negligence if he allows an unbroken colt to run loose after a mare on a highway at night: *Turner v. Coates*, (1917) 1 KB 670; *Manton v. Brocklebank*, (1923) 2 KB 212 : 39 TLR 344. Knowledge that a horse has a propensity to bite horses is no evidence of knowledge of a propensity to bite mankind: *Glanville v. Sutton*, (1928) 1 KB 571 : 44 TLR 98.
36. *Jackson v. Smithson*, (1846) 15 M & W 563.
37. *Hudson v. Roberts*, (1851) 6 Ex 697.
38. *McQuaker v. Goddard*, (1940) 1 KB 687 : 44 TLR 98.

A single instance of ferocity of such an animal towards mankind is sufficient notice.[39] If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master.[40] Where an animal has been found by its owner to possess such a nature, it passes into the class of animals which the owner keeps at his peril.[41]

Dog.—The defendant was the owner of a dog known by him to be savage. A servant of the owner who was entrusted with the custody of the dog incited it to attack the plaintiff who was a maid-servant of the owner of the dog and thereupon the dog flew at and bit the plaintiff. It was held that the owner was liable.[42] The defendant's dogs, which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation were taken by such servant to a public recreation-ground. The plaintiff, a child seven years of age, became frightened of the dogs and cried whereupon the dogs attacked and bit him severely. The court allowed the plaintiff Rs. 400 as a *solatium* for the pain and suffering he had undergone and a further sum of Rs. 600 to reimburse his father for the expenses incurred in going to Kasauli and in other medical necessities.[43] The plaintiff, who went to the defendant's house on a lawful business, crossed the verandah and made for the door of the dining-room with the object of entering it, when a dog, which was chained inside the door, attacked and bit her. The dog when chained and on guard was ferocious; and this was known to the defendant. The plaintiff sued to recover expenses of treatment and other damages. It was held that the defendant was liable.[44] A boy was bitten by a 'stray dog'. The High Court in a *suo moto* action held that the boy was entitled to be compensated on account of negligence of the Municipal Corporation to control stray dogs.[45]

The defendant parked his saloon motor-car in a street and left his dog inside. The dog had always been quiet and docile. As the plaintiff was walking past the car, the dog, which had been barking and jumping about in the car smashed a glass panel, and a splinter entered the plaintiff's left eye, which had to be removed. In an action for damages, it was held that the plaintiff could not recover, as a motor-car with a dog in it was not a thing which was dangerous in itself, and as the accident was so unlikely that there was no negligence in not taking precautions against it.[46]

Cat.—The plaintiff, accompanied by her husband and carrying a pet dog, entered a tea-shop by permission of the defendants the proprietors thereof. On the premises was a cat which had kittens. The cat had been shut up in a store-room, but had escaped. The plaintiff put her dog on the floor. The cat sprang on the dog and bit it. The plaintiff picked up the dog and handed it to her husband. The cat sprang on her and bit her arm. Evidence was given that cats rearing kittens were inclined to be savage and in a vicious state even if gentle otherwise; and that if such a cat smelt the clothing of a person who had been carrying a dog it might attack that person. It was held that the defendants were not liable.[47] Where a cat strayed from its owner's land

39. *Osborne v. Chocqueel*, (1896) 2 QB 109; *Lenon v. Fisher*, (1923) 25 Bom LR 873
40. *Baldwin v. Casella*, (1872) LR 7 Ex 325. But if no special servant is appointed to keep control over the dog, the knowledge of any servant of the dog's owner will not be sufficient: *Stiles v. The Cardiff S.N. Co.*, (1864) 33 LJQB 310.
41. *Krishna Rao v. Maroti*, ILR (1937) Nag 17. A person who keeps domestic animals which become animals *ferae naturae* is liable for damage caused by them : *Gould v. McAulifee*, (1941) 1 All ER 515.
42. *Baker v. Snell*, (1908) 2 KB 352 : 99 LT 753 : 24 TLR 811.
43. *Prakash Kumar Mukerji v. Harvey*, (1909) ILR 36 Cal 1021.
44. *Lennon v. Fisher*, (1923) 25 Bom LR 873.
45. *Court on its own Motion v. State of Himachal Pradesh*, AIR 2010 (NOC) 866 (H.P.).
46. *Fardon v. Harcourt-Rivington*, (1932) 48 TLR 215 : 48 TLR 215.
47. *Clinton v. J. Lyones & Co.*, (1912) 3 KB 198.

into the land of a neighbour and killed fowls and pigeons kept there, it was held that the owner of the cat was not liable.[48]

Horse.—Where a vicious horse belonging to the defendant was let loose in a field of the defendant which the public were in the habit of crossing and the plaintiff in crossing the field was attacked, bitten and stamped on by the horse, it was held that the plaintiff was entitled to recover damages for the injury caused to him.[49] The male plaintiff hired a horse and landau from the defendant, a livery-stable keeper, for the purpose of a drive. The defendant provided the driver as well as the horse and landau. The female plaintiff, the wife of the male plaintiff, was one of the party who went in the landau. During the drive the horse shied at a traction engine and the landau was upset and the plaintiffs were injured. In an action claiming damages in respect of their injuries, it was held that the defendant was liable in damages not only to the male plaintiff but also to the female plaintiff, first, inasmuch as he was, in view of his means of knowledge as to the character of the horse, under a duty to warn not only the person who hired it, but any person he knew or contemplated would use it, and, secondly, inasmuch as the defendant, who kept control of the landau, accepted the female plaintiff as a traveller or passenger, and was, therefore, bound to use due care to see that she was safely carried.[50] The owners of two young and unbroken fillies kept for several months in a field across which ran a public footpath. When the plaintiff was walking along the footpath the fillies galloped across the field and one of the fillies knocked down the plaintiff, who was badly frightened and suffered nervous breakdown. Evidence led showed that the fillies were playful and had a natural propensity to gallop up to and gather round people crossing the field but they were not vicious. It was held that the plaintiff could not succeed in the absence of proof that the defendants were aware of any vicious propensity on the part of the fillies.[51]

Buffalo.—In a fight between two buffaloes belonging to different owners, one was killed. It was held that the owner of the buffalo which killed the other was not liable to make compensation in the absence of neglect or carelessness on his part in keeping the animal.[52]

Bull.—The defendant kept a bull which was known by him to be dangerous. The animal had been de-horned and was kept untethered in a loose box. The keeper in order to clean the box asked the plaintiff, a labourer, to assist him by holding the door of the box open as a means of escape should it be necessary. The keeper having failed to secure the animal, the plaintiff offered to try to do so and was doing so when the bull charged and severely injured him. It was held that the principle of strict liability for injuries caused by an animal known to be dangerous did not apply where the animal had been placed under control and had not escaped; that the principle was inapplicable here; and that the defendant was not negligent.[53]

6. DANGEROUS GOODS

In the case of articles dangerous in themselves there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty

48. *Buckle v. Holmes*, (1926) 2 KB 125 : 134 LT 743 : 42 TLR 369.
49. *Lowery v. Walker*, (1911) AC 10. See *Gonda Singh v. Chuni Lal Shaha*, (1915) 19 CWN 916.
50. *White v. Steadman*, (1913) 3 KB 340 : 109 LT 249 : 29 TLR 563.
51. *Fitzgerald v. Cooke Bourne (Farms) Ltd.*, (1963) 3 All ER 36 : (1964) 1 QB 249.
52. *Mungal Singh v. Lehna Sing*, (1870) PR No. 72 of 1870.
53. *Rands v. McNeil*, (1955) 1 QB 253 : (1954) 3 All ER 593.

being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter.[54] If, however, the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another's volition, then he will not be liable, for against such conscious act of volition no precaution can really avail. It has been suggested that the separate category of dangerous goods should be abolished[55] for the ordinary rule of negligence, that the greater the risk, the greater the precaution must be taken to obviate it,[56] is good enough to cover use of dangerous goods. But there is yet another suggestion that the category of dangerous goods be reconstituted and the rule of strict liability imposed for them.[57] The old classification has, however, been retained here which contains a discussion on the following items:—

(A) Fire.
(B) Fire-arms.
(C) Fireworks and Explosive Material.
(D) Poisonous Drugs.
(E) Other Dangerous Articles.

6(A) Fire

Every person who lights a fire is clothed by the common law with a heavy responsibility to his neighbours as regards the lighting, safe-keeping, and spreading of such fire. The making of a fire involves the bringing on land of something not naturally there, and therefore, the owner of the fire is bound to keep it in at his peril. But this is an over-statement for even under common law, a man is not liable for damage caused by "domestic fire", that is, a fire which began in his house or on his land, provided that it originated by accident and without negligence.[58] The common law came to be modified by the Fires Prevention (Metropolis) Act, 1774 which enacts that no action shall be maintainable against anyone in whose building or on whose estate a fire shall accidentally begin. Even if there was ever any liability for mere escape of fire unattended by non-natural use or negligence, it was abolished by this Act. But even after the Act, a person is liable (i) if the fire was caused by the negligence of himself or his servants, or by his own wilful act; and (ii) on the principle analogous to *Rylands v. Fletcher*.[59] In *Goldman v. Hargrave*,[60] a redgum tree standing on the defendant's land was struck by lightning and caught fire. The land around the tree was cleared; the tree was cut down and sawn into sections. The defendant did not, however, completely extinguish the fire say by dousing it with water or otherwise and he merely left the fire to burn itself out. Three days after a strong wind revived the fire which spread to and damaged the plaintiff's land. The Privy Council held that there is a general duty of care on an occupier on which a hazard to his neighbour arises, to remove or reduce the hazard, whether it arises by the act of God, or from natural causes or by human agency; and the standard of duty of care is to require the occupier to do what is reasonable having regard to the circumstances and the resources that he actually had. The Privy Council found the defendant liable for negligence as he had not extinguished the fire which he could

54. *Dominion Natural Gas Co. Ltd. v. Collins and Perkins*, (1909) AC 640, 646, 649 : 25 TLR 831.
55. *Griffiths v. Arch Engineering Co.*, (1968) 3 ALL ER 217, p. 220.
56. *Read v. J. Lyons & Co.*, (1947) AC 156 (HL) pp. 172, 173, 180, 181 : (1945) KB 216.
57. Royal Commission in Civil Liability and Compensation for personal injury. Comnd. 7054 (Vol.1), Chap. 31.
58. *Tuberville v. Stamp*, (1697) 1 Salk 13.
59. *Musgrove v. Pandelis*, (1919) 2 KB 43 : 120 LT 601 : 35 TLR 216, *Mason v. Levy Auto Parts of England Ltd.*, (1967) 2 All ER 62 : (1967) 2 WLR 1384.
60. (1967) 1 AC 645 : (1966) 3 WLR 513 (PC) considered in *Stovin v. Wise*, (1996) 3 All ER 801 (HL), p. 819. For a case of vandals causing fire see *Smith v. Littlewoods Organisation Ltd.*, (1987) 1 All ER 710 (HL) and text and footnotes 57 to 59, pp. 478, 479, *supra*.

have done without much expense. In *Mason v. Levy Auto Parts of England Ltd.*,[61] the defendants kept in their yard large stacks of wooden cases containing greased or wrapped machinery, as well as quantities of petroleum, acetylene and paint. A fire broke out for an unknown reason and damaged the plaintiff's adjoining garden. The defendants were not found to be negligent but they were held liable on the principle analogous to *Rylands v. Fletcher* as the use of the land was held to be non-natural. According to this principle the defendant would be held liable "if (1) he brought on to his land things likely to catch fire and kept them there in such condition that if they did ignite the fire would be likely to spread to the plaintiff's land; (2) he did so in the course of some non-natural use; and (3) the things ignited and the fire spread."[62]

"When the legislature has sanctioned and authorised the use of a particular thing, and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible".[63] Thus, when the legislature has sanctioned the use of locomotives, there is no liability for injury caused by sparks flying from them.[64] But, if there is no such sanction given, a railway company will be liable for injury caused by such sparks even though there is no negligence. If the railway company had not express statutory power to use such engines, it is liable for damage by fire proceeding from it, though negligence be negatived, because it does so at its peril.[65]

Fireman's rule.—Under American Law there exists what is known as a 'fireman's rule' which means that a fireman suffering injury while doing his duty of extinguishing a fire cannot sue a person whose negligence had caused the fire even if injury suffered was foreseeable. But this rule does not form part of the English Law as held by the House of Lords in *OGWO v. Taylor*.[66] The English Law on this point stated in this case is as follows: "where it can be foreseen that the fire which is negligently started is of the type which could, first of all, require firemen to attend to extinguish that fire and where because of the very nature of the fire when they attend they will be at risk even though they exercise all skills of their calling, there seems no reason why a fireman should be at any disadvantage when the question for compensation for his injuries arises.[67] In this case, a fireman who was wearing protective clothing and who went on duty to extinguish a fire negligently started by the defendant, was held entitled to compensation for the injuries suffered by him from steam generated by fighting fire with water. The same principle has been

61. (1967) 2 All ER 62 : (1967) 2 QB 530.
62. (1967) 2 All ER 62 : (1967) 2 QB 530.
63. PER COCKBURN, C. J. in *Vaughan v. Taff Vale Ry. Co.*, (1860) 5 H & N 679, 685; *The Secretary of State for India in Council v. Kali Brahmo Chatterjee*, (1928) 33 CWN 50. The effect of *Vaughan v. Taff Vale Ry. Co.*, is considerably narrowed down by the Railway Fires Act, 1905, 5 Edw. VII, c. 11 and Railway Fires Act, 1923, (13 & 14 Geo. 5, c. 27). The Act provides that when damage is caused to agricultural land or crops by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage (s.1).
64. *Vaughan v. Taff Vale Ry. Co.*, (1860) 5 H & N 679
65. *Jones v. Festiniog Ry. Co.*, (1868) LR 3 QB 733. Where a cottage was destroyed by fire caused by a spark emitted from a steam roller which was found to constitute a nuisance, it was held that the difference between the money value of the owners' interest before and after the fire should be the measure of damages and not the cost of rebuilding the cottage: *Moss v. Christchurch Rural Council*, (1925) 2 KB 750.
66. (1987) 3 All ER 961 : (1987) 2 WLR 988 (HL).
67. (1987) 3 All ER 961, p. 966, where a passage from the judgement of WOOLF J. in (1983) 3 All ER 729, p. 736 is approved.

applied to police officers called for rescue work in a disaster caused by the defendants negligence.[68]

Fire brigade.—The court of appeal has held that a fire brigade does not enter into a sufficient proximate relationship with the owner or occupier who calls for their services so as to come under a duty of care merely by attending at the fire ground and fighting the fire. But where the fire brigade, by their own actions had increased the risk of the danger which causes damage to the plaintiff, they would be liable for negligence in respect of that damage, unless they could show that the damage would have occurred in any event.[69]

Escape of, from railway engine.—The Allahabad High Court has ruled that in a suit based on the allegation that the plaintiff's property near a railway line was destroyed by reason of sparks flying from an engine of the defendant railway company, the railway company must show that they had taken proper precautions to avoid damage to property adjacent to the railway line.[70]

Where the damage caused to the plaintiff's property was not by fire, which was due to accident, but the fire spread to some gunny bags stacked near the plaintiff's window, and to stop which no attempt was made by the defendant, it was held that the defendant was liable as the damage caused to the plaintiff's property was due to his negligence in not taking any steps to prevent the spread of fire.[71]

There is a liability on the part of a proprietor of property, for damage caused to the property of the neighbour by a fire accident resulting from negligence, even though the proprietor is not in actual occupation but a tenant under the proprietor.[72]

Hayrick on fire.—A farmer had a hayrick in a highly dangerous condition. It smoked and steamed—unmistakable signs of being about to take fire. To the advice and remonstrance of his neighbours who pointed out its condition, all the answer the farmer vouchsafed was that he would change it. Finally, he did take a kind of precaution. He made a chimney through the rick, which, though done with good intentions, was scarcely wise. The rick took fire, and burnt the plaintiff's cottage, in the next field. The farmer was held responsible for the damage.[73]

Setting fire to chimney.—Where a maid-servant, whose business was simply to light a fire, took it into her head to clear a chimney of soot, by setting it on fire and burnt the whole place down, she was held liable.[74]

Blow lamp.—The defendants were owners and occupiers of dwelling-house which was contiguous to that of the plaintiff. The second defendant employed an independent contractor to thaw frozen pipes in her loft, which contained a large quantity of combustible material. The independent contractor applied a blow-lamp to the pipes which were, in parts, lagged with felt; the felt caught fire and the fire spread rapidly throughout the loft and to the plaintiff's house. The court found that the fire was caused by the negligence of the independent contractor because, although the use of a blow-lamp was one of the normal methods of thawing pipes, it was negligent

68. *Frost v. Chief Constable of the South Yorkshire Police*, (1997) 1 All ER 540 : (1997) 3 WLR 1194 : (1997) 1 RLR 173 (CA).
69. *Capital and Counties plc. v. Hampshire County Council*, (1997) 2 All ER 866 : (1997) QB 1004 (CA).
70. *The Secretary of State for India v. Dwarka Prasad*, (1927) ILR 49 All 559; *Bombay, Baroda and Central India Railway v. Dwarka Nath*, (1935) ILR 58 All 771. See *Secretary of State for India v. Sheobhagwan Chiranjilal*, (1935) ILR 58 All 576.
71. *Chinnaswami Chettiar V. Sundarammal*, (1955) 1 MLJ 312 : (1955) MWN 41 : (1955) 68 LW 99.
72. *Indrani Ammal v. Asappah*, AIR 1968 Mad 366.
73. *Vaughan v. Menlove*, (1837) 4 Scott 244.
74. *M'Kenzie v. M'Leod*, (1834) 10 Bing 385.

to use one in proximity to inflammable material. It was also held, that a householder was liable for an escape of fire from his premises to those of his neighbour where the fire was caused by the negligence of an independent contractor whom the householder had invited to his house to carry out work there, and therefore, the defendants were liable in damages to the plaintiff.[75]

6(B) Fire-arms

Fire-arms, which are loaded, are highly dangerous things, and more than ordinary care is therefore necessary in dealing with, or handling them. As fire-arms are instruments the destructive power of which is obvious to everyone, the law is very strict in imposing liability for damage done by them. The possession of a loaded gun imposes upon the person who is in possession of it, an obligation to use a much greater amount of care than would the possession of the same gun were it unloaded.[76]

Girl sent to fetch loaded gun.—The defendant, having left a loaded gun with another man, sent a young girl to fetch it with a message to the man in whose study it was to remove the priming, which the latter, as he thought, did, but, as it turned out, did not do effectually. The girl brought it home and, thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable.[77]

The defendants, proprietors of a toy and fancy goods shop, sold a "safety pistol" and fifty blank cartridges, to A, a boy twelve years of age. In playing with the pistol A fired it and injured his playmate, the plaintiff B, a boy about ten years of age. The cause of the accident was that the pistol had become fouled. It was held that the pistol and cartridge formed a dangerous combination in the hands of A, and that the defendants, having chosen to sell these pistols and cartridges, could not be heard to say that they did not know that they might become dangerous in A's hands, and that, therefore, they were liable to B in damages.[78] The defendant, a farmer, allowed his son S to buy a gun and showed him how to use it but told him not to take the gun out of the farm and not to use it when other children were present but did not instruct S how to handle the gun when in the presence of others. Disobeying the defendant's instructions S went out shooting with other boys all of whom had fire-arms except the plaintiff. While the boys were walking in a single file the boy behind S, probably trying to take S's gun, pulled the trigger as a result of which the gun went off and injured the plaintiff. It was held that the defendant was liable in negligence as he had allowed S to have the gun without giving him instructions as to how to handle the gun in the presence of others and that the defendant's instructions to S not to use the gun in the presence of other children made no difference as the defendant could not possibly see that they were obeyed.[79]

6(C) Fire-works and Explosive Materials

Persons are bound to use the very greatest care in the use of fire-works and other highly explosive materials, or materials otherwise dangerous or destructive. Owners

75. *Balfour v. Barty King*, (1957) 1 QB 496 : (1957) 1 QB 496 : (1957) 2 WLR 84, followed in *Sturge v. Hackett*, (1962) 3 All ER 166 : (1962) 1 WLR 1257. "Where fire escapes because it was negligently started or controlled by someone other than the occupier, the occupier is liable unless that other person is a stranger; a stranger, for this purpose, is a trespasser or a licensee acting in quite unexpected manner." This was the holding of the court of Appeal in *H.J.N. Emanuel v. Greater London Council*, (1971) 2 All ER 835. WEIR, Case Book on Torts, 5th edition, p. 379.
76. *Sullivan v. Creed*, (1904) 2 IR 317.
77. *Dixon v. Bell*, (1816) 5 M & S 198.
78. *Burfitt v. A. & E. Kille*, (1939) 2 KB 743 : (1939) 2 All ER 372.
79. *Newton v. Edgerley*, (1959) 3 All ER 337 : (1959) 1 WLR 1031.

and controllers of dangerous goods are bound to exercise more than ordinary care, for they have not only taken upon themselves a matter of business requiring great care, but the law having regard for human life and safety, demands great care from them. The duty to keep an explosive substance without causing injury to others is a "non-delegable" duty.[80] On this principle people sending goods of an explosive or dangerous nature to be carried are bound to give notice of their nature, and, if they do not, are liable for resulting damage.

Sending nitric acid without warning.—Where the defendant sent nitric acid to a carrier without warning, and the carrier's servant, handling it as he would handle a vessel of any harmless fluid was injured by its escape, the defendant was held liable.[81]

Sending combustibles without warning.—The defendants sent a box containing combustible and dangerous substances to a railway company without notifying the contents as he was bound by law to do, and this box was placed near the place where the plaintiff's husband was at work, and it suddenly exploded, and the plaintiff's husband sustained such injuries in consequence that he died from the effects of them. It was held that the defendant was liable for the consequences of the explosion, whether it occurred in a manner which he could not have foreseen as probable, or not.[82]

Stocking fire-works.—Where the defendant stocked fire-works in a room which was let by the plaintiff and fire started in that room and burnt down plaintiff's goods and premises, it was held that the defendant was liable.[83]

Negligent in keeping of phosphorous.—The defendant, a schoolmaster, was held liable to one of his pupils for an injury resulting from the careless act of another boy in handling phosphorus. The phosphorus bottle was locked up, and the key kept in the kitchen; but someone had got it surreptitiously, and left it in the conservatory: there it was found by the boys; one of them put a lighted match into it and put in the stopper. He afterwards opened it to look at it, when the bottle burst and the plaintiff was injured. It was held that the schoolmaster was liable.[84]

6(D) Poisonous Drugs

Persons dealing with poisonous drugs are bound to take more than ordinary care as the mischief which is likely to occur for want of such care is extremely dangerous to the public. A dealer in drugs, who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled in the market, is liable to all persons, whether purchasers or not, who, without fault on their part, are injured by using it as medicine in consequence of the false label, however many intermediate sales it may have passed through before it reached the hands of the person injured. The liability arises out of the duty which the law imposes upon persons to avoid acts in their very nature dangerous to the lives of others.[85]

Dangerous packing of disinfectant powder.—Where the vendor of a tin containing disinfectant powder knew that it was likely to cause danger to a person opening it, unless special care was taken, and the danger was not such as presumably would be known to, or appreciable by, the purchaser unless warned of it, it was held that,

80. *Balakrishnan v. Subramanian*, AIR 1968 Ker 151.
81. *Farrant v. Barnes*, (1862) 11 CBNS 553.
82. *Lyell v. Ganga Dai*, (1875) ILR 1 All 60 (FB).
83. *Saliah Mohamed Haji Ibrahim v. Abdul Samath Sahib*, (1935) 69 MLJ 218 : 42 MLW 210 : (1935) MWN 865; *Narasimha Ayyar v. Krishna Ayyar*, (1940) 2 MLJ 11; (1940) MWN 698; *Syeda Mahomed Rowther v. Shanmugasundaram*, (1943) 1 MLJ 188 : 55 MLW 109; (1943)1 MWN 136.
84. *Williams v. Eady*, (1893) 10 TLR 41.
85. *Thomas v. Winchester*, (1852) 6 NY 397, 409.

independently of any warranty, there was cast upon the vendor a duty to warn the purchaser of the danger.[86]

Selling belladona instead of dandelion.—The defendant, a compounding chemist, put extract of belladona, a poison, into a jar, labelled 'Extract of Dandelion', which is a harmless drug, and sold it as extract of dandelion to a retail druggist. The latter, believing the substance what it purported to be, sold it upon a prescription of a physician to the plaintiff. The result was serious injury and the defendant was held liable.[87]

Selling injurious hair-wash.—The defendant, a chemist, sold a compound which was made of ingredients known only to himself, which he represented to be harmless and beneficial hair-wash. The plaintiff bought a bottle for the use of his wife and injury resulted. It was held that the defendant was liable on the ground of negligence in the preparation of the hair-wash.[88]

6(E) Other Dangerous Articles

A person who intentionally induces another to rely on his examination of a dangerous chattel is liable if that other is injured owing to a defect in the chattel which could have been discovered by a proper examination. This principle is deducible from *Oliver's* case,[89] in which the defendants, a firm of stevedores engaged in unloading a ship, placed bags of maize in rope slings and then raised them to the deck. Here the bags, still in the rope slings, were turned over to an independent porterage company, which transported them to the dock by a crane, the defendants gratuitously permitting the porterage company to use the slings. A servant of the porterage company was killed when a defective sling, which defect could have been discovered by a proper examination, broke while the bags were being transported by a porterage company. The defendants were held liable.

Causing fire by pouring petrol near lamp.—Where the defendant poured petrol in a drum in proximity of a lighted hurricane lamp in a godown and the petrol caught fire and there was a big blaze which completely gutted the godown which was let to him for storing grains, it was held that he was liable for his negligent act, for which he was made to pay Rs. 1,200 as damages for reconstructing the godown.[90]

Injury by synthetic glue.—Where an employer has in constant use, in a workshop, a material dangerous to his workmen (such as a synthetic glue which is a cause of dermatitis if the glue is left to dry on the skin), the employer has not performed his duty if he keeps the recognized prophylactic (such as in the case put, "barrier cream") in the store of the factory, from where it can be drawn for use by either foreman or workmen; it must be available at the workshop, where the workman is using the material. The man in charge of the work in the workshop is responsible for seeing, so far as he can, that the workmen make use of this recognized prophylactic. If injury results from the employer's failure to take these precautions he will be responsible to the injured workman in damages at common law for his failure to provide a safe system of work. The injured workman is guilty of contributory negligence if he knows that the material is dangerous, knows of the recognized prophylactic and where it is kept, and does not use it.[91]

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86. *Clarke v. Army and Navy Co-operative Society*, (1903) 1 KB 155 : 19 TLR 80.
87. *Thomas v. Winchester*, (1852) 6 NY 397, 409.
88. *George v. Skivington*, (1869) LR 5 Ex 1.
89. *Oliver v. Saddler & Co.*, (1929) AC 584.
90. *Kothari Chhaganlal v. Nandwana Jayantilal*, (1951) 4 Sau LR 124.
91. *Clifford v. Charles H. Challen & Son Ltd.*, (1951) 1 KB 495.

Misdelivery of dangerously inflammable material.—Five packing cases containing dangerously inflammable celluloid film scrap were delivered in error by the defendants to the plaintiff's premises. No warning of their dangerous contents was given, but the plaintiff's foreman recognised the material as inflammable and dangerous when some of it was taken out of the cases. He warned the workmen in charge of the cases not to smoke near them, instructed them to replace the scrap and remove the cases to the yard, and arranged with the defendants to deliver the cases to their proper destination 150 yards away. Before the cases were removed a typist employed by the plaintiff approached the scrap while holding a lighted cigarette and it exploded causing serious damage. It was held that it was the duty of the defendant not to deliver this inflammable material without warning in such circumstances that the damage might result from some mischievous or foolish act of a person on the plaintiff's premises, and that, therefore, they were guilty of negligence.[92]

Gas (Coal-gas).—Gas companies are held liable for negligence in respect of gas, which is a dangerous substance.[93] They are bound to exercise the greatest care, for they are using a material difficult to manage, and of a very dangerous character, for it is explosive and poisonous. Those who carry on operations dangerous to the public are bound to use all reasonable precautions—all the precautions which ordinary reason and experience might suggest to prevent the danger.[94] It is not enough that they do what is usual if the course ordinarily pursued is imprudent and careless; for no one can claim to be excused for want of care because others are careless as himself, on the other hand, in considering what is reasonable it is important to consider what is usually done by persons acting in a similar business.[95]

Improper repair of gas pipe.—A gas-fitter was employed to repair a gas-meter. He took it away and supplied a temporary pipe. The plaintiff, a servant, in the course of his duty, and without any negligence, when lighting the gas, was injured by the explosion of the gas which had escaped by reason of the insufficiency of the connecting tube. It was held that the gas-fitter was liable.[96]

Injury from gas-cooker.—The plaintiff, a girl eleven years of age, attended a school maintained by the defendants. Whilst she was being instructed in cooking, her apron caught fire from a gas-cooker, and she received injuries. There was no guard round the cooker. It was held that the danger was one which ought reasonably to have been anticipated, and one which the defendants ought to have taken precautions to prevent by the provision of a guard round the stove or otherwise.[97]

Machinery.—Persons employing machinery are bound to provide reasonably safe machines. There are several Acts requiring persons using dangerous machinery to take proper precautions.[98]

Electricity.—It has been held that the statutory authority, under the Electricity Act, 1910 read with the Electricity Supply Act, 1948, to transmit electric energy may absolve an Electricity Board from liability for nuisance for the escape of electrical energy, but the Board can still be liable for negligence. It is negligence to omit to use

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92. *Philco Radio, Ltd. v. J. Spurling, Ltd.*, (1949) 2 All ER 882 : 65 TLR 757 : 93 SJ 755.
93. *Blenkiron v. The Great Central Gas Consum. Co.*, (1860) 2 F & F 437; *Dominion Natural Gas Co. Ltd. v. Collins and Perkins*, (1909) AC 640 : 101 LT 359 : 25 TLR 831.
94. PER COCKBURN, J., in *Blenkiron v. The Great Central Gas Consum. Co.*, (1860) 2 F & F 437.
95. *Blenkiron v. The Great Central Gas Consum. Co.*, (1860) 2 F & F 437.
96. *Parry v. Smith*, (1879) 4 CPD 325 : 41 LT 93 : 27 WR 801.
97. *Fryer v. Salford Corporation*, (1937) 1 All ER 617 : (1937) 81 SJ 177.
98. Mines and Quarries Act (2 & 3 Eliz II, c. 70); Factories Act (9 & 10 Eliz. II, c. 34); *Lewis v. Denye*, (1940) AC 921 : (1940) 3 All ER 299. The corresponding Indian Acts are Mines Act, 1952 and Factories Act, 1948.

all reasonable means to keep the electricity harmless. The standard of care required is a high one owing to dangerous nature of electricity and the burden of proving that there was no negligence is generally on the Board and there is no obligation on the plaintiff to prove negligence.[1]

7. CONTRIBUTORY NEGLIGENCE

7(A) General Principles

In trying a claim arising out of death or injury caused by negligence, the court may be faced with a situation where both parties were in some respects negligent. The court is then to decide as to whose negligence caused the death or injury. There are three possible answers to such an enquiry depending upon the circumstances of the case: (1) The defendant's negligence alone caused the death or injury; (2) The deceased's or the plaintiff's negligence was solely responsible for the death or injury; and (3) The negligence of both the parties caused the death or injury. It is obvious that if the finding is that the defendant's negligence alone caused the death or injury, the plaintiff would succeed even if the deceased or the plaintiff was in some respects negligent. Similarly, there is no difficulty in holding that the plaintiff will fail if the deceased's or his negligence was solely responsible for the death or injury, as the case may be, even if the defendant was in some respects negligent. In the third case, where the negligence of both the parties caused the death or injury, the common law rule was that the plaintiff was to fail[2] even when the defendant was more at fault. In other words, if the deceased's (in case of death) or the plaintiff's negligence contributed in some degree to the death or injury, the defendant succeeded by pleading contributory negligence irrespective of the fact that the death or injury was largely caused by the defendant's negligence. The defence of contributory negligence means that the deceased or the plaintiff failed to take reasonable care of his own safety which was a material contributory factor to his death or injury.[3] As the defence enabled the defendant to escape completely even when he was more at fault, the Courts were slow to infer that the negligence of the plaintiff was a contributory factor. The Courts devised the rule of last opportunity which meant that if the defendant had the last opportunity to avoid the accident resulting in injury he was held solely responsible for the injury in spite of the fact that the plaintiff was also negligent.[4] This rule was further extended to cover cases of constructive last opportunity meaning thereby cases where the defendant would have had last

1. *Manohar Lal Sobha Ram Gupta v. M.P. Electricity Board*, 1975 ACJ 494 (MP), p. 496. See further *Smt. Angoori Devi v. Municipal Corporation Delhi*, AIR 1988 Del 305; *Padma Behari Lal v. Orissa State Electricity Board*, AIR 1992 Orissa 68; *Asa Ram v. MCD*, AIR 1995 Del 164; *Sagar Chand v. State of J&K*, AIR 1999 J&K 154; *H.S.E.B. v. Ramanath*, (2004) 5 SCC 793. See also text and footnotes 51 to 55, pp. 493, 494.
2. *Butterfield v. Forrestor*, (1809) 11 East 60, p. 61 : 10 RR 433. In this case the defendant had put up a pole across a street road, which was discernible from 100 yards. The plaintiff came galloping on his horse and rode against the obstruction and fell with the horse. In a suit for damages, the plaintiff failed as he too was at fault in not slowing down the horse when the obstruction could be seen from 100 yards.
3. *Municipal Corporation of Greater Bombay v. Laxman Iyer*, (2003) 8 SCC 731, p. 737 : AIR 2003 SC 4882. See also *Ramlila Maidan Incident, In Re* (2012) 5 SCC 1
4. *Davies v. Mann* : (1842) 10 M & W 546 : 62 RR 698 is often referred to as the originator of the rule though the words 'last opportunity' do not occur there. The plaintiff in this case fettered the forefeet of his donkey and turned it into a narrow lane. It was run over by a heavy wagon belonging to the defendant. The wagon was going a little too fast and was not properly looked after by the driver. In a suit for damages, the plaintiff succeeded as the defendant by using ordinary care could have avoided the accident even though the plaintiff was also at fault in turning the donkey into the lane with its forefeet fetterred.

opportunity but for his own negligence.[5] A more rational approach was made in cases involving maritime collisions where the Courts had opportunity of apportioning damages under the Maritime Conventions Act, 1911. In *Admiralty Commissioners v. S.S. Volute*[6] a collision had occurred between the Merchant ship *Volute* and the Destroyer *Radstock*. The *Volute* was at fault in changing her course without giving proper signal and the *Radstock* was at fault in increasing her speed although she had the knowledge of the danger caused by the change of course of the *Volute*. It was held that both the ships were responsible for the collision even though the last opportunity for avoiding the collision was with the *Radstock*. VISCOUNT BIRKENHEAD, L.C., in his speech in that case, which has consistently been cited with approval, stated: "The question of contributory negligence must be dealt with somewhat broadly and upon common sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be shown, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame—might on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution."[7] As stated by the Privy Council on following the *Volute* in another maritime collision case, "Where the acts of negligence, though successive are close together in time and interact with each other, they fall to be considered not as severable but as co-operating factors in the final catastrophe."[8] The decision in the case of the *Volute* was followed later by the House of Lords in a non-maritime collision case and was regarded as one of general application.[9] In this case (a crossroad collision between a car and a motor-cycle), HUMPHREY, J., asked the Jury to answer the single question: Whose negligence was it that substantially caused the accident? The House of Lords held that that was a sufficient direction. The defendant in this case while driving the car at about thirty miles an hour along a main road, approached a point in the road without keeping a proper look out or slowing down where it was crossed by a side road, when a man riding a motor-cycle came into the road from the side road without warning and a collision occurred in which the motor-cyclist was killed. In a suit for damages filed by the widow of the deceased, the defendant was held not liable under the common law rule as the deceased was also negligent. The case lays down that where the negligence of the parties is contemporaneous or so nearly contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence, it would be said that the negligence of both contributed to the accident. Had it been a case of maritime collision the court could have apportioned the damages as in the case of the *Volute*. But the question of contributory negligence has in all cases to be decided on the same principles. As stated by the Law Revision Committee, 1939: "The question, as in all questions of

5. *British Columbia Electric Ry. v. Loach*, (1916) 1 AC 719.
6. (1922) 1 AC 129 : 38 TLR 255 : 126 LT 425 : 66 SJ 156 (HL). The Maritime Conventions Act, 1911, applies to India. Under this Act where by the fault of two or more vessels, damage or loss is caused to one or more of them, to their cargoes, or freight or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault; but if it is impossible to establish different degrees of fault, the liability shall be apportioned equally. Where loss of life or personal injuries are suffered by any person on board of a vessel owing to the fault of that vessel and any other vessel or vessels, the liability of the owner of the vessels shall be joint and several subject to any defence which could have been pleaded to an action for the death or personal injury inflicted.
7. (1922) 1 AC 129, p. 144. There was a rumour that the speech was really prepared by LORD PHILLIMORE (1950) 13 MLR 17.
8. *Amercian Main Line Ltd. v. Afrika*, AIR 1937 PC 168.
9. *Swadling v. Cooper*, (1931) AC 1 : 46 TLR 597 : 143 LT 732. See further *Stapley v. Gypsum Mines*, (1953) 2 All ER 478 : (1953) 3 WLR 279 : (1953) AC 663 (HL).

liability for a tortious act, is not, who had the last opportunity of avoiding the mischief, but whose act caused the wrong."[10]

The common law rule that if the plaintiff's or the deceased's (in case of death) negligence contributed in some degree to the injury or death, the action failed, was illogical and its origin lay possibly in the procedural and pleading anomalies of the common law.[11] Way bank in 1887, FRY, L.J., a great Judge, demanded why the court could not be empowered to divide the loss.[12] SCOTT, L.J., in 1943 referred to the "harsh and often cruel bearing of our common law doctrine of contributory negligence" and stressed the need for early law reform.[13] The reform in England came by legislation in the shape of the Law Reform (Contributory Negligence) Act, 1945. Section 1(1) of the Act provides: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." Section 4 defines 'damage' to include loss of life and personal injury and 'fault' to mean negligence, breach of statutory duty or other acts or omissions which give rise to liability in tort. The English Act extends to Scotland, has been copied in Northern Ireland and similar Acts have been adopted in Canada, Australia and New Zealand.[14] There is no corresponding Central Act in India but the provisions of the English Act have been followed, in preference to the common law rule, being more in consonance with justice, equity and good conscience.[15] The Madhya Pradesh case of *Vidya Devi* contains an elaborate discussion why the principles of the English Act should be followed in India even though there is no corresponding Act in India.[16] The Supreme Court without any reference to the English Act has held that "it is now well settled that in the case of contributory negligence, courts have the power to apportion the loss between the parties as seems just and equitable."[17]

In cases where the negligence of both the parties contributes to the damage for which damages are claimed the court can now apportion the fault and reduce the damages to the extent of the claimant's share in the responsibility for the damage. As the plaintiff's claim is now not entirely defeated but only rateably reduced in cases where the plaintiff is partly responsible for the damage, the Courts are not reluctant to infer that the plaintiff was also partly blameworthy.[18] A case similar on facts to the case of *Swadling v. Cooper*,[19] does not now end in dismissal but only in reduction of

10. Quoted with approval in *Boy Andrews v. St. Roguvald*, (1947) 2 All ER 350 : (1948) AC 140 (HL).
11. LORD WRIGHT, 13 Modern Law Review 5; *Vidyadevi v. M.P. State Road Transport Corporation*, 1974 ACJ 374 (MP), p. 379: AIR 1975 MP 89.
12. *Vidyadevi v. M.P. State Road Transport Corporation*, 1974 ACJ 374 (MP), p. 379: AIR 1975 MP 89.
13. *S. Parks v. Edward Ash Ltd.*, (1943) 1 KB 223, p. 230; *Vidyadevi v. M.P. State Road Transport Corporation, supra.*
14. FLEMING, Torts,6th edition, p. 245.
15. *Vidyadevi v. M.P. State Road Transport Corporation*, 1974 ACJ 374 : AIR 1975 MP 89 (G.P. SINGH, J.) ; *Subhakar v. Mysore State Road Transport Corporation*, AIR 1975 Ker 73; *Maya Mukerjee v. The Orissa Co-operative Insurance Society*, AIR 1976 Ori 224; *Rehana v. Ahmedabad Municipal Transport Service*, AIR 1976 Guj 37; *Rural Transport Service v. Bezlum Bibi*, AIR 1980 Cal 165. The Kerala State has enacted the Kerala Torts (Miscellaneous Provisions) Act, 1976.
16. *Vidyadevi v. M.P. State Road Transport Corporation, supra.*
17. *Municipal Corporation of Greater Bombay v. Laxman Iyer*, (2003) 8 SCC 731, p. 737 : AIR 2003 SC 4182. See further *Smt. Indrani Raja Durai v. Madras Motor & General Insurance Company*, (1996) 1 SCALE 563.
18. The end result of apportionment legislation is to abolish not only the defence of contributory negligence but also the last opportunity rule; *March V. E & M.H. Stramare Pty. Ltd.*, (1991) 65 ALJR 334 (High Court of Australia), p. 337.
19. (1931) AC 1 : 143 LT 732 : 74 SJ 536 : 46 TLR 597 (HL). See p. 567.

the damages recoverable by the plaintiff. In *Vidya Devi v. Madhya Pradesh State Road Transport Corporation*,[20] there was a collision between a bus and a motor-cycle at a road intersection when the bus was going on the main road and the motor-cycle came from a side road. The person riding the motor-cycle was killed. In a claim for damages by the widow and children of the deceased it was found that the Bus driver was negligent in not having a proper look-out while approaching the intersection and the deceased was negligent in driving at an excessive speed while coming from the side road to the intersection. It was further held that the negligence of both was responsible for the accident but the motor-cyclist was far more to blame than the Bus-driver. The responsibility was apportioned in proportion of two-third and one-third. The claimants were in this view allowed damages to the extent of one-third of what they would have got had the deceased's negligence not contributed to his death. In *Municipal Corporation Greater Bombay v. Laxman Iyer*,[21] the deceased who was riding a cycle came from the left side and took the right turn contrary to traffic regulations. At that time he was hit by the Corporation bus which was running at a moderate speed and the deceased was visible from a distance of 30 feet. It was found that the deceased was negligent in taking a wrong turn contrary to traffic regulations and the bus driver was negligent in not stopping the bus by quickly applying the brakes and in omitting to blow the horn. The deceased's negligence was held to have 25% contributed to the damage and the compensation was reduced to that extent.

In *T.O. Anthony v. Karvarnan*[22] there was a head on collusion between a bus belonging to the Kerala SRTC and a private bus in which the appellant who was driver of the bus of Kerala SRTC sustained injuries including fracture of right femur. It was found that the private bus was on the wrong side of the road but the appellant had also neither slowed down his bus nor swerved to his left on seeing the oncoming bus. On these facts the appellant was held partly responsible for the accident and his responsibility was fixed at 25% and that of the private bus at 75% and the compensation awarded to the appellant was reduced by 25%. This case was relied on in *Andhra Pradesh State Road Transport Corporation v. K. Hemlatha*[23] where a motorcycle was hit from behind by a speeding bus as a result of which the person driving the motorcycle died and another person on the motorcycle was injured. The deceased was also driving the motorcycle at a high speed so it was held to be a case of contributory negligence. The blame of the deceased for the accident was apportioned to be 1/4 and the total compensation determined was reduced to that extent.

The Act applies when the plaintiff's negligence contributes to "the damage" and not necessarily to the accident which results in the damage although in most cases it would be so. Thus damages would be reduced if a motor-cyclist involved in an accident and suffering a head injury did not wear a crash helmet.[24] It may be noticed that omission to wear a helmet is not negligence contributing to the accident but only to the damage suffered in the accident. This example also illustrates that for being responsible for contributory negligence the plaintiff need not be in breach of any

20. AIR 1975 MP 89 : 1974 ACJ 374 (MP). For a similar English case see *Lang v. London Transport Executive*, (1959) 1 WLR 1168; See further *Worsfold v. Howl*, (1980) 1 All ER 1028 (CA); *Gujrat State Road Transport Corporation v. Nabuben*, AIR 1996 Guj 48; *Divyananda v. Shiva*, AIR 1998 Kant 106; *Saffia Bee v. B. Sathar*, AIR 2000 Mad 167; *Purnarayan Sinha v. Election Commission*, AIR 2001 Gau 32.
21. (2003) 8 SCC 731 : AIR 2003 SC 4182. See also, *Yetkin v. Newham Borough Council*, [2011] 2 WLR 1073 (CA).
22. (2008) 3 SCC 748 paras 8 and 11 : (2008) 3 JT 297.
23. (2008) 6 SCC 767 : AIR 2008 SC 2851.
24. *O'Connell v. Jackson*, (1972) 1 QB 270 : (1971) 3 WLR 463 : (1971) 3 All ER 129; (Damages were reduced by fifteen per cent.); *Capps v. Miller*, (1989) 2 All ER 333 (CA) (The plaintiff had not secured the strap of the helmet; Damages reduced by ten percent)

duty to the defendant.[25] The question simply is whether the plaintiff or the deceased (in case of claims arising out of death) had failed to take reasonable care of his own safety which had contributed to the damage.[26] As observed by BALAKRISHNAN, J. "negligence ordinarily means breach of a legal duty to care, but when used in the expression 'contributory negligence' it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an 'author of his own wrong'.[27] Further "where by his negligence, if one party places another in a situation of danger, which compels that other to act quickly in order to extricate himself, it does not amount to contributory negligence if that other acts in a way, which, with the benefit of hindsight, is shown not to have been the best way out of the difficulty."[28] The broad observation in some cases[29] that a pillion rider cannot be guilty of contributory negligence as he has nothing to do with the occurrence of an accident needs some qualification. For example if rules require that a pillion rider should also wear a crash helmet and such a rider's omission to wear crash helmet results in a head injury to him, he may be held liable for contributory negligence. Section 128 of the Motor Vehicles Act, 1988 provides that no driver of a two wheeled motorcycle shall carry more than one person in addition to himself on the motorcycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the motorcycle behind the driver's seat with appropriate safety measures. The question as to how for a violation of Section 128 by the driver of the motorcycle and the pillion rider (e.g. when two persons are carried on the pillion seat) would lead to the inference of contributory negligence was decided by a full bench of the M. P. High Court and the answers given were as follows:[30]

> "If the damage in the accident has not been caused partly on account of violation of section 128 by the pillion rider of the motorcycle, the pillion rider is not guilty of contributory negligence. Similarly, if the damage suffered by the pillion rider has not been caused partly on account of violation of Section 128 by the driver, the pillion rider cannot put up a plea of composite negligence by the driver. In other words, if breach of Section 128 does not have a causal connection with the damage caused to the pillion rider, such breach would not amount to contributory negligence on the part of the pillion rider of the motorcycle or composite negligence on the part of the driver of the motorcycle."

Subject to non-requirement of the existence of duty, the question of contributory negligence is to be decided on the same principles on which the question of defendant's negligence is decided.[31] The standard of reasonable man is as relevant in the case of plaintiff's contributory negligence as in the case of defendant's

25. *Nance v. British Columbia Electric Railway Co.*, (1951) AC 601 : (1951) 2 All ER 448. But the duty may generally exist when there is a collision between two vehicles on the road for when two vehicles are so moving in relation to one another as to involve risk of a collision, the driver of each vehicle owes a duty to move with due care to avoid any collision; *Vidyadevi v. M.P. State Road Trasport Corporation*, 1974 ACJ 374 (MP) p. 376. See also, *Ramlila Maidan Incident, In Re.* (2012) 5 SCC 1, para 273. But see case in footnote 27 below.
26. *Sushma Mitra v. M.P. State Road Transport Corporation*, 1974 ACJ 87 (MP) pp. 92, 95.
27. *Pramod Kumar Rasikbhai Jhaveri v. Karmasey Kunvarg Tak*, AIR 2002 SC 2864, p. 2866 : (2002) 6 SCC 455.
28. *Pramod Kumar Rasikbhai Jhaveri v. Karmasey Kunvarg Tak*, AIR 2002 SC 2864 : (2002) 6 SCC 455. See further title 7(C), p. 574 and text and footnote 56, p. 188.
29. *Manjit Kaur v. Gurmail Singh*, AIR 1985 P&H 216; *S.D. Balaji v. General Manager Karnataka State Roadways Transport Corporation*, 1985 ACC CJ 150; *M.P. State Road Transport Corporation v. Abdul Rahman*, AIR 1997 MP 248, p. 252.
30. *Devi Singh v. Vikram Singh*, M.A. No. 670/2007 D/17-10-2007.
31. *Pramod Kumar Rasikhbhai Jhaveri v. Karmasey Kunwargi Tak*, AIR 2002 SC 2864 : (2002) 6 SCC 455.

negligence. In the words of DENNING, L.J.,: "A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."[32] Thus, if a driver so negligently managed his vehicle as to cause it to obstruct the highway and constitute a danger to other road users (including those who were driving too fast or not keeping a proper look-out, but not those who deliberately or recklessly drove into the obstruction) then the first driver's negligence might be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which, because of the presence of the obstruction, collided with it or with some other vehicle or some other person.[33] But if the plaintiff has acted as other person of ordinary prudence would have acted in the circumstances, he cannot be accused of want of care for his safety.[34] Thus a passenger resting his elbow on the window sill of a passenger bus in the country side when injured by another bus coming from the opposite direction was not held to be guilty of contributory negligence as it is a common habit of passengers of ordinary prudence while travelling in buses on the roads in the country side where the traffic is not heavy to rest elbow on the window of the Bus.[35] The position may be different if the same thing happened on the roads in a Metropolitan city where the traffic is heavy for there is a greater risk of vehicles coming too close while crossing each other in a crowded street and thereby injuring any part of the passenger's body which is protruding outside the window and an ordinary prudent passenger will desist from resting his elbow on the window in such a situation.[36]

It has also to be noticed that negligence of the plaintiff which can be described as contributory negligence must have causal connection with the damage suffered by him.[37] Taking again the example of omission to wear a crash helmet by a motor-cyclist involved in an accident, the omission would not amount to contributory negligence if the injury suffered by the motor-cyclist is not on the head but on his hand. The plaintiff's negligent or unlawful conduct which only leads to the plaintiff's presence at the place where the defendant's negligence operates to cause the injury cannot amount to contributory negligence. If a motor-cyclist drives without a driving

32. *Jones v. Livox Quarries Ltd.*, (1952) 2 QB 608, p. 615; approved by HOUSE OF LORDS in *Westwood v. The Post Office*, (1973) 3 All ER 184 : (1974) AC 1 : (1973) 3 WLR 289 (HL) pp. 192, 193 subject to the qualification that in case of safety precautions prescribed by statutory regulation, the plaintiff can assume that the Regulations have been complied with.
33. *Rouse v. Squires*, (1973) 2 All ER 903 (CA). See further *Chop Seng Hens v. The Vannasan*, (1975) 3 All ER 572 (PC) p. 577 : (1976) RTR 193. *Rouse v. Squires* was applied in *Karnataka State Road Transport Corporation v. K.V. Sakeena*, (1996) 2 SCALE 845 pp. 848 to 850 : (1996) 3 SCC 446 (A speeding bus at night collided with a truck trailer carrying a dumper which protruded one and half feet on either side of the trailer. Truck trailer driver held responsible to the extent of 40% and the bus driver to the extent of 60%); *Pramod Kumar Rasikbhai v. Karmsey Kunvargi*, AIR 2002 SC 2864. (A speeding truck had covered the road in such a way that it hardly left any room for a car coming from the opposite direction to avoid the collison and so the car driver was not held guilty of contributory negligence); *P.S. Somaiah v. The Director Banglore Dairy*, AIR 2003 Kant 258. (A motor cyclist overtaking a milkman from the wrongside and dashing against a Maruti Car was held guilty of contributory negligence upto 60%); *Bijoy Kumar Dugar v. Bidya Dhar Dutta* (2006) 3 SCC 242 : AIR 2006 SC 1255 (Head on collision of a Maruti car and a truck. Driver of the Maruti car found 50% liable for the damage and damages reduced by 50%).
34. *Sushma Mitra v. M.P. State Road Transport Corporation*, 1974 ACJ 87 (M.P.), pp. 92, 95.
35. *Sushma Mitra v. M.P. State Road Transport Corporation*, 1974 ACJ 87 (M.P.). See further *Ishwardas Paulsrao Ingle v. General Manager Maharashtra State Road Transport Corporation*, AIR 1992 Bombay 396.
36. *Sushma Mitra v. M.P. State Road Transport Corporation*, 1974 ACJ 87 (M.P.); pp. 92, 93, 94. See further *State of Haryana v. Ram Pal*, AIR 1989 P&H 137; *Foo Kok Food v. Yap Hai Chwee*, 1972 ACJ 385 (Malaysia).
37. Quoted and relied upon by Madras High Court in *Branch Manager, New India Assurance Co. Ltd. v. Malliga*, (2012) 2 TN MAC 576 : (2012) 8 Mad LJ 46.

licence and is run down by a motor-truck the mere fact that the motor-cyclist had no driving licence will not give rise to a plea of contributory negligence. It cannot be argued that had the motor-cyclist obeyed the law by refraining from driving without a licence, he would not have been at the place of the accident and so he is guilty of contributory negligence for this does not establish a real causal relationship between the unlawful or negligent conduct and the injury. The real question is: Was the injury suffered by the plaintiff within the risk of the act or omission constituting his negligence? In an Australian case,[38] the plaintiff rode on the pillion of a motor-cycle knowing that the lights were defective. The motor-cycle collided with an oncoming car not because the lights were defective but because the motor-cyclist was going on the wrong side and was not keeping a proper look-out. In a claim for injury suffered by the plaintiff against the motor-cyclist the plaintiff's conduct in accepting a ride on the pillion knowing the lights to be defective was not held to be contributory negligence as the accident was unrelated to the risk involved in this conduct. This conduct of the plaintiff merely led to his presence at the place where the defendant's negligence of driving on the wrong side and of not keeping proper look out for oncoming vehicles operated to cause the accident resulting in the plaintiff's injury. Briefly stated, the principle is that the inoperative negligence of the plaintiff, though continuing till the end, does not amount to contributory negligence.

The defence of contributory negligence was applied to reduce damages in a suit against a valuer for damages for negligently overvaluing property for loan advanced by the plaintiff who was also found to have contributed to the damage by applying imprudent lending policy of advancing a non-status loan of 70% of the value of the security.[39] The plaintiff's contribution to the damage was assessed at 20% and the basic loss was reduced to that extent.[40]

The question whether when a prisoner of sound mind with suicidal tendencies commits suicide as no proper precautions were taken by prison authorities to prevent him from doing so, the act of suicide or self destruction by the prisoner amounts to contributory negligence was considered by the House of Lords in *Reeves v. Commissioner of Police*,[41] and it was held that the act of suicide amounts to 'fault' as defined in the 1945 Act and the responsibility for the damage could be apportioned. On the question of apportionment of responsibility the court said that on the one hand, it must demonstrate publicly that the police have a responsibility for taking reasonable care to prevent prisoners from committing suicide and on the other hand respect must be paid to the fact that the prisoner was of sound mind and he too was responsible for his death. In the circumstances the responsibility was equally apportioned and the damages were accordingly reduced to half. But in *St. George v. Home Office*[42] where a prisoner addicted to drugs and alcohol and suffering recurring withdrawal seizures, which facts were known to the prison authorities, was allocated a top bunk bed from which he fell down, as he suffered withdrawal seizure, resulting in severe damage to his brain making him permanently disabled, the defence of contributory negligence was not accepted. It was held that the prisoner's addiction to drugs causing withdrawal seizures were matters of history known to prison

38. *Gent-Driver v. Neville*, (1953) QSR 1 ; FLEMING, Torts, 6th edition, p. 252. See further *Shri Inja Venkatrao v. Smt. Sundara Barik*, AIR 1991 Orissa 104 (Passenger sitting on the roof of bus knocked down by branch of a tree. Held no contributory negligence. Case does not seem to be correctly decided.)
39. *Platform Home Loans Ltd. v. Oyssen Shipways Ltd.*, (1999) 1 All ER 833 : (2000) 2 AC 190 : (1999) 2 WLR 518 (HL).
40. *Platform Home Loans Ltd. v. Oyssen Shipways Ltd.*, (1999) 1 All ER 833 : (2000) 2 AC 190 : (1999) 2 WLR 518 (HL).
41. (1999) 3 All ER 897 (HL).
42. (2008) 4 All ER 1039 (C.A.).

authorities and could not be said to have caused his fall which was solely because of negligence of prison authorities in allocating him the top bunk bed.

It has been held that contributory negligence must be pleaded by the defendant.[43] On the plea being established, the court is empowered to order reduction of the damages by an amount which is "just and equitable". Apportionment of blame and consequent reduction of damages are normally done; but it has been suggested that if the blame of the plaintiff employee is only slight, it may not be just and equitable to reduce the damages against the defendant employer,[44] conversely, it has been held that if the plaintiff's fault was so great that he should not get any damages, he would not be allowed any damages though the defendant's contribution to the damage could not be denied.[45] In apportioning the blame and reducing the damages the court should take into account the respective blameworthiness of the parties as also the causative potency of their acts or omissions.[46] The Supreme Court has held that "the individual guilty of contributory negligence may be the employee or agent of the claimant, so as to render the claimant vicariously responsible for what he did. There could be cases of negligence between spectators and participants in sporting activities. However, in such matters, negligence itself has to be established. In cases of 'contributory negligence', it may not always be necessary to show that the claimant is in breach of some duty, but the duty to act carefully, usually arises and the liability in an action could arise."[47]

The defence of contributory negligence has no place in a suit brought for damages on account of intentional wrong,[48] for example deceit[49] or bribery[50]. It has also been held that the 1945 Act has no application to a suit on breach of contract.[51]

7(B) Contributory Negligence of Children

The rule as to contributory negligence is not inflexibly applied in cases where young children are concerned. Allowance is made for their inexperience and infirmity of judgment.[52] The correct principle is that children do not form a separate category either for deciding whether the defendant owed any duty to the child plaintiff and was guilty of negligence being in breach of that duty,[53] or for deciding whether the child plaintiff was guilty of contributory negligence; but in deciding both these questions, the age of the child plaintiff and the experience and intelligence of ordinary children of that age are to be taken into account along with other relevant circumstances.[54] The Madras High Court has held that children capable of

43. *Fookes v. Slaytor*, (1979) 1 All ER 137 : (1978) 1 WLR 1293 : (1979) RTR 40 (CA); See also, *North East Karnataka Road Transport Corporation v. Vijayalaxmi*, ILR 2011 KAR 4845 :(2011) 2 TN MAC 840: (2012) 1 AIR Kant R 606: (2012) 112 AIC 535: (2012) 3 Kant LJ 281.
44. *Hawkins v. Ian Ross (Castings) Ltd.*, (1970) 1 All ER 180.
45. *Richardson v. Stephenson Clarke Ltd.*, (1969) 1 WLR 1695.
46. WEIR, Case Book on Tort, 5th edition, p. 205; *Davies v. Swan Motor Co. (Swansea) Ltd.*, (1949) 2 KB 291 : (1949) 1 All ER 620 (DENNING, L.J.). See further, *The Miraflores and the Abadesa*, (1967) 1 AC 826 (HL), p. 846 : (1967) 2 WLR 806; *Fitzgerald v. Lane*, (1987) 2 All ER 455 (CA).
47. *Ramlila Maidan Incident, In Re*. (2012) 5 SCC 1
48. *Abdul Qayum v. Fariuddin Mirza*, (1950) ALJ 60.
49. *Alliance and Liecester Building Society v. Edgestop*, (1994) 2 All ER 38 : (1993) 1 WLR 1462 ; *Standard Chartered Bank v. Pakistan National Shipping Corp.*, (2003) 1 All ER 173 (HL).
50. *Corporation Nacional del Cobrede Chile v. Sogermin Metals Ltd.*, (1997) 2 All ER 917.
51. *A.B. Marintrans v. Comet Shipping Co. Ltd.*, (1985) 3 All ER 442 : (1985) 3 All ER 442.
52. *Lynch v. Nurdin*, (1841) 1 QB 29 : 5 Jur 797 : 55 RR 191.
53. See Title 3(E) 'children' (p. 515), *ante*, in the context of occupier's liability. See further Chap. III, title 11, pp. 65-68.
54. *Gough v. Thorne*, (1966) 1 WLR 1387, p. 1391 : (1966) 3 All ER 398; *Amul Ramchandra Gandhi v. Abbas Bhai Kasambhai Diwan*, AIR 1979 Guj 14; *Punjab Roadways Hoshiarpur v. Satya Devi (Smt.)*, AIR 1993 HP 23 p. 27; *M.P. State Road Transport Corporation v. Abdul Rahman*, AIR 1997 MP 248, pp. 250-252. See further, Chap. III, title 11, pp. 65-68.

discrimination and perceiving danger can be guilty of contributory negligence. In this case a girl of seven years was knocked down by an engine while she was crossing the railway line after passing through a wicket-gate. It was held that the proximate cause of the accident was the negligence of the girl in not looking out for a passing engine when she was crossing the line and that as she was capable of appreciating danger and was old enough to have a sense of discrimination she was guilty of contributory negligence.[55] But a child of six, standing near a footpath when knocked down by lorry[56] and a child of the same age when knocked down by a motor-vehicle while trying to cross the road[57] will not be held guilty of contributory negligence for children of such age do not have adequate road sense. Similarly a child of four was not held guilty of contributory negligence in accepting a ride on a motor cycle driven by his uncle with another person sitting on the pillion.[58]

By an untrue statement a boy aged nine years who was accompanied by his brother aged seven, prevailed on an employee of the defendant company to sell him a small quantity of petrol. The children wanted the petrol for use in a game in which they enacted a Red Indian scene they had witnessed in a cinematograph theatre. In the result, the boy was seriously burned. It was held by the Privy Council that the defendants' employee having given an explosive substance to a boy who had limited knowledge of the likelihood of an explosion and its possible effect, and the boy having done that which a child of his age might be expected to do, the defendants could not avail themselves of the defence of contributory negligence, that the employee's negligence contributed to cause the injuries suffered by the boy and that they were liable.[59]

7(C) Choice of Evils

Where the creation of a dangerous situation is ascribable to the negligent act of the defendant, he is not to be excused from liability for consequent harm by reason of the fact that the person endangered loses self-possession and in the confusion his reaction to the danger takes a course which turns out not to be the safest one. In such circumstances contributory negligence on the part of the person injured is not made out unless he is shown to have acted with less caution than any person of ordinary prudence would have shown under the same trying conditions.[60]

Falling of horse from heap of rubbish.—The defendants had made a dangerous trench in the only outlet of a mews, putting up no fence and leaving only a narrow passage, on which they heaped rubbish. The plaintiff, a cabman, in the exercise of his calling, attempted to lead a horse out over the rubbish, and the horse fell and was killed; it was held that the plaintiff was not disentitled to recover, because he had, at some hazard created by the defendants brought his horse out of the stable.[61]

Coach with defective coupling.—The defendant, a coach proprietor, negligently suffered a coach to go out with a defective coupling. Going down a hill, the coupling broke and the horses became frightened. The driver was thereby compelled to drive

55. *M. & S. M. Railway Co. Ltd. v. Jayammal*, (1924) ILR 48 Mad 417.
56. *R. Srinivasa v. K.M. Parsivamurthy*, AIR 1976 Karnataka 92. See further *Delhi Transport Corporation v. Kumari Lalita*, AIR 1982 Delhi 558.
57. *Motias Costa v. Roque Augustinho Jacinto*, AIR 1976 Goa 1; *Muthusamy v. SAR Annamalai*, AIR 1990 Mad 201.
58. *M.P. State Road Transport Corporation v. Abdul Rahman, supra.*
59. *Yachuk v. Oliver Blais*, (1949) AC 386 : (1949) 2 All ER 150 : 65 TLR 300.
60. *Directors, etc. of North Eastern Ry. Co. v. Wanless*, (1874) LR 7 HL 12; *Chaplain v. Hawes*, (1828) 3 C & P 554; *Ketch Frances (Owners) v. Steamship Highland Loch (Owners)*, (1912) AC 312. See title 1(C) (iv), 'Intervening Acts or Events; Novus Actus Intervenes', Chapter IX, p. 188.
61. *Clayards v. Dethick*, (1848) 12 QB 439 : 76 RR 305.

to the side of the road, where the coach struck a post and was on the point of being upset. The plaintiff, who was riding on the back part of the coach, believed himself to be in jeopardy and in order to avoid immediate danger jumped down from the coach and was hurt. As it turned out, he might have avoided harm by remaining on the coach. It was held that the defendant was liable.[62]

Springing open of railway carriage door.—The plaintiff was travelling in a second class carriage and was sitting close to one side of the carriage looking out. He got up, walked across to the other side of the carriage and put his hands upon the door, which at once sprang open. The left hand immediately lost its hold, but he grasped the door with his right hand arm, and hung on to it whilst it was open. He was carried in this way some 300 yards or more, when seeing the pier of an arch over the line ahead of him, and fearful of coming in contact with it he let go and endeavoured to throw himself across a bush below him; but not having made allowance for the momentum of the train, he missed the bush and fell on the line. He was afterwards found on the ballast much injured. The court gave judgment in his favour.[63]

7(D) Rescue of Third Person

In the United States of America it is established that where by the negligence of A a situation has been created by which B is placed in danger, C is not guilty of contributory negligence in making an effort, such as a reasonable and prudent man would make in such an emergency, to rescue B, although by pursuing that course C places himself in great and obvious danger. The doctrine of voluntary assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection as a member of his family, or is a mere stranger to whom he owes no such special duty.[64] This principle has since been followed by the court of Appeal in England.[65] A rescuer who acts on such a moral compulsion that having regard to his powers and his opportunities he would feel disgraced if he merely stood by would be entitled to succeed.[66] The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity.[67]

Rushing in front of train.—The plaintiff's husband saw a boy standing on a track in imminent danger from an approaching train, which had failed to give the statutory signal. To rescue the boy the deceased rushed upon the track immediately in front of the moving train, and in that act was killed. It was held that the deceased was not guilty of contributory negligence, since a dangerous situation had been created by the negligent operation of the train, and the deceased was justified in making the effort to save the boy; provided he acted with such care as a prudent person would have shown in such an emergency. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless the exposure is clearly rash and reckless.[68]

Injury sustained while rescuing.—While the plaintiffs, husband and wife, were in a shop as customers, a skylight in the roof of the shop was broken, owing to the negligence of contractors engaged in repairing the roof, and a portion of the glass fell

62. *Jones v. Boyce*, (1816) 1 Stark 493, 495 : 18 RR 212.
63. *Stokes v. Saltonstalt*, 13 Peters 181.
64. *Eckert v. Long Island Railroad Co.*, 43 NY 502.
65. *Haynes v. Harwood*, (1935) 1 KB 146, 157 : 152 LT 121 : 78 SJ 801.
66. *Scaramanga v. Stamp*, (1880) 5 CPD 295, 304.
67. *Haynes v. Harwood*, (1935) 1 CB 146, p. 165 : 152 LT 121 : 78 SJ 801.
68. *Ridley v. Mobile, etc., Ry. Co.*, (1905) 86 SW Rep. 606.

and struck the husband, causing him a severe shock. His wife, who was standing close to him, was not touched by the falling glass, but, reasonably believing her husband to be in danger, she instinctively clutched his arm, and tried to pull him from the spot. In doing this she strained her leg in such a way as to bring about a recurrence of thrombosis. In an action to recover damages from the contractor, it was held that the husband was entitled to damages, and that the wife was also entitled to damages, inasmuch as what she did was, in the circumstances, a natural and proper thing to do.[69]

The plaintiff, a police constable, was on duty inside a police station in a street in which were a large number of people, including children. Seeing the defendants' runaway horses with a van attached coming down the street he rushed out and eventually stopped them, sustaining injuries in consequence, in respect of which he claimed damages. It was held that the defendants' servant was guilty of negligence in leaving the horses unattended in a busy street, and that as the defendants must or ought to have contemplated that someone might attempt to stop the horses in an endeavour to prevent injury to life and limb, and as the police were under a general duty to intervene to protect life and property, the act of, and injuries to, the plaintiff were the natural and probable consequences of the defendants' negligence.[70]

7(E) Imputed Contributory Negligence

The law recognises certain situations where the plaintiff though not himself negligent is identified with another person whose negligence is imputed to him to debar him from recovering full amount of damages by holding him guilty of contributory negligence. This doctrine of identification or imputability though originally of very wide scope is now confined within narrow limits. It now applies only to those relations alone where one person is held responsible for another's wrong whether he be plaintiff or defendant. In other words, a plaintiff is identified with another only if that other's negligence would be imputed to him if he were a defendant. This is described as the "bothways test" and makes identification co-extensive with vicarious liability.[71] Thus the negligence of a servant or agent acting in the course of employment but not of any independent contractor can be pleaded as contributory negligence of the plaintiff.[72] One spouse may be held the servant or agent of the other spouse in certain situations.[73]

Doctrine of identification or imputability.—According to this doctrine if a person voluntarily engaged another person to carry him, he so identified himself with the carrier as to be precluded from suing a third party for negligence in cases where the carrier was guilty of negligence. "The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased."[74] But this principle of identification was expressly overruled in the case of *The Bernina*,[75] in which it is laid down that where damage is sustained by the concurrent negligence of two or more persons, there is a right of action against all or any of them at the plaintiff's option, and the exception of contributory negligence extends only to the acts and defaults of the plaintiff himself, or of those who are really his agents. There is, now, no longer any inference of law that the driver of an omnibus, or a coach, or a cab, or the engineer of a

69. *Brandon v. Osborne Garett & Co.*, (1924) 1 KB 548; *Morgan v. Aylen*, (1942) 1 All : ER 489.
70. *Haynes v. Harwood*, (1935) 1 KB 146 : 152 LT 121 : 78 SJ 801.
71. FLEMING, Torts, 6th edition, p. 261.
72. *Mallet v. Dunn*, (1949) 2 KB 180 : 65 TLR 207 : (1949) 1 All ER 973.
73. *Berril v. Road Haulage Executive*, (1952) 2 Lloyd's Rep. 490.
74. PER MAULE, J., in *Thorogood v. Bryan*, (1849) 8 CB 115, 131; *Armstrong v. Lancashire Yorkshire Ry. Co.*, (1875) LR 10 Ex 47.
75. (1888) 13 App Cas 1 : 58 LT 423 : 52 JP 212. See *The Drumlanrig*, (1911) AC 16.

train, or the captain of a vessel and their respective passengers, are so far identified as to affect the latter with any liability for the former's contributory negligence.[76]

The Supreme Court has accepted this view and has held that contributory negligence of the driver cannot be imputed to the passengers.[77]

An innocent ship damaged by collision through the fault of two other ships can recover the whole damage from either of the delinquent ships.[78] A collision having occurred between the steamships *Bushire* and *Bernina* through the fault or default of the masters and crew of both, two persons on board the *Bushire*, one of the crew and a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased having brought actions against the owners of the *Bernina* for negligence, it was held that the deceased persons were not identified in respect of the negligence with those navigating the *Bushire*, and that the representatives could recover the whole of the damages, the Admiralty rule as to half damages not be applicable to actions under LORD CAMPBELL'S Act.[79] Where the drivers of two rival omnibuses were competing for passengers, the one endeavouring to get before the other, and both driving at great speed, and in trying to avoid a cart which got in their way, the wheel of the defendant's omnibus came in contact with the projecting step of the omnibus on which the plaintiff was riding, and caused it to swing against a lamp-post, and the plaintiff was thrown off and injured, it was held that he was not disentitled to recover damages from the proprietor of the rival omnibus, by reason of misconduct on the part of his own driver.[80]

Children in the custody of adults.—The doctrine of identification extended to identify an infant injured in an accident with the adult in charge of him at that time and so contributory negligence of the person in charge was imputed to the child suing for damages.[81] This too has been overruled since the decision in *Mills v. Armstrong*.[82] Where an infant in charge of his grandmother while crossing the road was injured by the negligent driving of a vehicle, it was held that the contributory negligence of the grandmother was not defence to the infant's claim for damages.[83]

The Bombay High Court has laid down that although the mother of a child might have been guilty of negligence which contributed to the accident, yet if the defendant could, by the exercise of ordinary care and diligence, have avoided the mischief which happened, her negligence would not excuse him.[84]

8. BREACH OF STATUTORY DUTIES[85]

If things authorised to be done by a statute are carelessly or negligently done, an action is maintainable.[86] Such a breach is known as "statutory negligence".[87]

76. *Mathews v. London Street Tramways Co.*, (1888) 58 LJQB 12.
77. *Union of India v. United Insurance Co. Ltd.*, AIR 1998 SC 640, pp. 645, 646.
78. *S.S. Devonshire v. Barge Leslie*, (1912) AC 634.
79. *Mills v. Armstrong, "The Bernina"*, (1888) 13 App Cas 1; *The Harvest Home*, (1904) p. 409.
80. *Rigby v. Hewitt*, (1850) 5 Ex 240, 243.
81. *Waite v. N. E. Ry.*, (1859) EB & E 728.
82. (1888) 13 App Cas 1 : 58 LT 423 : 52 JP 212.
83. *Oliver v. Birmingham, and Midland Motor Ominbus Co.*, (1933) 1 KB 35 : 147 LT 317 : 58 TLR 540, holding that *Waite's* case has been overruled by *Mills v. Armstrong*.
84. *Narayan Jetha v. The Municipal Commissioner and the Municipal Corporation of Bombay*, (1891) ILR 16 Bom 254.
85. See further *New Forms of the Tort of Breach of Statutory Duties, Law Quarterly Review*, (2004) April, p. 324.
86. *Gaekwar Sarkar of Baroda v. Gandhi Kachra Bai*, (1903) ILR 27 Bom 344 (PC); *East Fremantle Corporation v. Annois*, (1902) AC 213 : 85 LT 732: 18 TLR 199. See also, *Delhi Airtech Services (P) Ltd. v. State of U.P.* (2011) 9 SCC 354 : AIR 2012 SC 573.
87. *Lochgelly Iron and Coal Co. v. M'Mullan*, (1934) AC 1, 23 : 149 LT 526 : 49 TLR 566.

The word "negligence" in such cases means adopting a method which in fact results in damage to a third person, except in a case where there is no other way of performing the statutory duty. So that it is negligent to carry out work in a manner which results in damage unless it can be shown that, and that only, was the way in which the duty could be performed.[1] Powers given by a statute must be exercised reasonably, and not to the prejudice of the public.[2] The correct legal position is that in a suit claiming damages based on common law the defendant can successfully plead that the offending act was done under statutory authority but this defence is not available if the statutory authority was negligently exercised.[3] It is not correct to say that mere negligent exercise of statutory power furnishes a cause of action.[4] It is only when a duty of care is owed by the authority to the person that he can claim damages so where a state authority exercised statutory powers for the protection of inmates of nursing homes and negligent exercise of that power resulted in closure of a nursing home causing great economic loss to the owners of the nursing home, the owners had no remedy to sue the authority in damages for negligence for it could not be said that a common law duty of care was owed by the authority to the owners of the nursing home.[5]

But an omission to perform, a statutory duty as distinguished from negligence in the performance of it does not give rise to a right of action in favour of a person suffering damage by reason of such omission unless such a right is expressly or impliedly given by statute.[6] Damage resulting from the omissive breach of a statutory duty cannot be recovered unless the damage in question is of a kind which the legislative body had a mind to prevent in enacting the statute.[7] Omission to exercise a statutory power or discretion is dealt with elsewhere.[8] It has been observed by the Supreme Court that "compensation for violation of a statutory duty to enable individuals to recoup financial loss has never been recognised in India.[9]

The defence of *volenti non fit injuria* is not applicable in an action based on a breach of statutory duty,[10] but contributory negligence on the part of the plaintiff is a good defence.[11] An action in respect of injuries caused by breach of a statutory duty does not differ from an action in respect of injuries caused by any other wrong,[12] for an action for breach of a statutory duty is properly an action in tort.[13]

1. *Provender Millers (Winchester) Ltd. v. Southampton C.C.*, (1940) 1 Ch 131, 140 : (1939) 4 All ER 157.
2. *Manley v. St. Helen's Canal & Ry. Co.*, (1885) 2 H & N 840; *Ponuswamy v. The Collector of Madura*, (1863) 3 MHC 35, A suit for compensation for wrongful seizure of cattle will lie, the provisions of Act I of 1871 being no bar to such a suit; *Shatrughan Das Coomar v. Hokna Shawtal*, (1889) ILR 16 Cal 159; *Dullabhji v. G.I.P. Rly.* (1909) 12 Bom LR 73. Where a municipality permitted a latrine to be erected by the defendant at a particular spot, which was likely to be a great nuisance to the plaintiff, the court granted an injunction restraining the defendant from using the spot in question for the purposes of a latrine; *Rama Rao v. Martha Sequeira*, (1919) 37 MLJ 224; *Kailas S. Works v. Municipality*, (1968) 70 Bom LR 554.
3. *X (minors) v. Bedfordshire County Council*, (1995) 3 All ER 353 (HL) pp. 362, 367 : (1995) 2 AC 633 : (1995) 3 WLR 152.
4. *X (minors) v. Bedfordshire County Council*, (1995) 3 All ER 353 (HL) : (1995) 2 AC 633 : (1995) 3 WLR 152. See further text and footnote 22, 23, p. 579, *infra*.
5. *Jain v. Trent Health Authority*, (2009) 1 All ER 987 (H.L.)
6. *Cowley v. Newmarket Local Board*, (1892) AC 345; *Sydney Municipal Council v. Bourke*, (1895) AC 344.
7. *Gorris v. Scott*, (1874) LR 9 Ex 125; *Secretary of State for India v. Muthuveerama Reddy*, (1910) ILR 34 Mad 82.
8. See pp. 475 to 478.
9. *Pramod Malhotra v. Union of India*, (2004) 3 SCC 415, p. 428 (para 26) : AIR 2004 SC 3338.
10. *Wheeler v. New Merton Board Mills Ltd.*, (1933) 2 KB 669 : 49 TLR 574 : 149 LT 587; *Buddeley v. Granville (Earl)*, (1887) 19 QBD 423.
11. *Caswell v. Powell Duffryn Associated Collieries Ltd.*, (1940) AC 152 : (1939) 2 All ER 722; *Sparks v. Edward Ash Ltd.*, (1943) 1 KB 223 : (1943) 1 All ER 1
12. *Caswell v. Powell Duffryn Associated Collieries Ld., Supra.*
13. *American Express Co. v. British Airways Board*, (1983) 1 All ER 557, p. 563 : (1983) 1 WLR 701; *Trustees Port of Bombay v. Premier Automobiles*, AIR 1981 SC 1982, p. 1986.

There are three classes of cases in which a liability may be established founded upon a statute:—

(1) Where there is liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy.

(2) Where the statute gives the right to sue merely, but provides no particular form of remedy, there the party can only proceed by action at common law.

(3) Where a liability not existing at common law is created by a statute, which at the same time gives a special and particular remedy for enforcing it, the remedy provided by the statute must be followed.[14] But in this case the general scope of the Act and the nature of the statutory duty must be looked at before a proper conclusion can be reached as to whether the legislature intended the statutory remedy to be the only remedy for the breach of the statutory duty.[15]

It is essentially a question of construction whether a statute creating a new obligation and providing a mode for enforcing it also impliedly enables a person injured by omission to perform the obligation to sue for damages.[16] When the statute provides a remedy by criminal prosecution or otherwise the presumption is that the remedy of civil suit is excluded.[17] But this presumption is rebutted where on the construction of the Act it is apparent that the obligation was imposed for the benefit or protection of particular class of persons as in the case of Factories Acts and similar legislation.[18] The inference that there is a concurrent right of civil action is readily drawn when the predominant purpose is manifestly the protection of a class of workmen by imposing on their employers the duty of taking special measures to secure their safety.[19] Thus action for damages was held to be maintainable at the instance of a workman who suffered personal injuries because of breach of statutory duty to fence certain machinery in a factory,[20] or because of omission to take precautions statutorily prescribed for protection of mine workers.[21]

A distinction must also be drawn between a public law remedy of judicial review including declaration and injunction for enforcing due performance of a statutory duty and a private law remedy by way of a suit for damages.[22] The breach of a public law right does not by itself give rise to a claim for damages.[23] Further, mere careless

14. PER WILLES J., in *The Wolverhampton New Waterworks Co. v. Hawkesford*, (1859) 6 CBNS 336.
15. *Atkinson v. Newcastle Waterworks Co.*, (1877) 2 Ex D 441; per VAUGHAN-WILLIAMS, L.J., in *Groves v. Wimborne (Lord)* (1898) 2 QB 402, 416; per LORD MACNAGHTEN in *Johnstone & Toronto Type Foundry Co. v. Consumers' Gas Co. Toronto*, (1898) AC 447, 454.
16. G.P. SINGH, Principles of Statutory Interpretation, 12th edition, pp. 763-772.
17. *Doe d. Bishop of Roshester v. Bridges*, (1831) 109 ER 1001; *Pasmore v. Oswaldwistle Urban District Council*, (1898) AC 387 (HL); *Cutler v. Wandsworth Stadium Ltd.*, (1949) 1 All ER 544; (1949) AC 398 : 65 TLR 170 (HL); *Ten Chye Choo v. Chang Kew Moi*, (1970) 1 All ER 266 : 113 SJ 1000 : (1970) 1 WLR 147 (PC); *Lourho Ltd. Lourho Ltd. v. Shell Petroleum Co. Ltd.*, (1981) 2 All ER 456 : (1982) AC 173 : (1981) 3 WLR 33 (HL).
18. *Lourho Ltd. v. Shell Petroleum Co. Ltd.*, Supra, p. 461. The matter is essentially one of true intention of the Act and in even in cases where the provision is for protection of a class of persons a right to sue for damages may not be intended; *Regina v. Deputy Governor of Parkhurst Prison*, (1991) 3 WLR 340 : (1992) 1 AC 58 (HL); *Scally v. Southern Health and Social Services Board*, (1991) 4 All ER 563 (1992) 1 AC 294 : (1991) 3 WLR 778 (HL).
19. *Cutler v. Wandsworth Stadium Ltd.* Supra, p. 551.
20. *Grover v. Lord Wimborner*, (1898) 2 QB 402 : 47 WR 87 : 14 TLR 493.
21. *Black v. Fife Coal Co. Ltd.*, (1912) AC 149 (HL).
22. *X (minors) v. Bedfordshire County Council*, (1995) 3 All ER 353 (HL) p. 363.
23. *X (minors) v. Bedfordshire County Council*, (1995) 3 All ER 353 (HL).

exercise of statutory powers or duties does not furnish cause of action for damages and the plaintiff has to show that circumstances are such as to raise a duty of care at common law.[24] The principles as to when mere breach of a statutory duty causing damage will give rise to a private law claim for damages were restated by the House of Lords as follows: "The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indications. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action.—However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach.—The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions."[25] In this case it was held that a local education authority's obligation to provide sufficient schools for pupils within its area and to have regard to the need for securing special treatment for children in need of such treatment under the Education Acts, 1944 and 1981 could give rise to public law remedy of judicial review but there was no corresponding private law right to damages for breach of statutory duty.[26] But in *Phelps v. Hillington Borough Council*,[27] it was held that an educational psychologist employed by a local authority and called in for advising the authority in respect of children suffering from learning deficiencies owed a common law duty of care to such a child and the authority would be vicariously liable for his negligence.[34] Phelps case was followed in case of an education officer employed by a local education authority and common law duty was applied to him in relation to a child with special educational needs on the basis of three stage test of foreseeability of damage, proximity and that the situation was one in which it was fair, just and reasonable that the law should impose a duty of care.[28] But in the particular circumstances of the case negligence was negatived.

The aforesaid principles were applied also in other cases. In *O'Rourke v. Camden London Barough Council*[29] it was held that section 63 of the Housing Act, 1985

24. *X (minors) v. Bedfordshire County Council*, (1995) 3 All ER 353 (HL) pp. 362, 367.
25. *X (minors) v. Bedfordshire County Council*, (1995) 3 All ER 353 (HL), pp. 364, 365.
26. *X (minors) v. Bedfordshire County Council*, (1995) 3 All ER 353 (HL). Followed in *Cullen v. Chief Constable of Royal Ulster Constabulary*, (2004) 2 All ER 237 (HL) which related to breach of a duty to allow a person in custody access to a solicitor which did not prolong or otherwise affect his detention or trial. It was held that mere breach of this public law right did not confer a right in private law for damages.
27. (2000) 4 All ER 504 (HL).
28. *Carty v. Croydon London Borough Council*, (2005) 2 All ER 517 (HL).
29. (1997) 3 All ER 23 (HL).

containing provisions to provide accommodation for homeless persons did not give rise to a cause of action for damages in private law. The factors that were taken into account in reaching the conclusion that Parliament did not intend that a breach of the duty to provide accommodation to homeless was actionable in tort were: (i) the duty was enforceable in public law by individual homeless persons; (ii) the Act was a scheme of social welfare on grounds of public policy and public interest to confer benefits at the public expense not only for the private benefit of homeless persons but for the benefit of society in general, and (iii) the existence of the duty depended on the housing authority's judgment and discretion.[30] But common law duty of care was inferred in *Barret v. Enfield London Council*.[31] In this case the respondent council obtained for the appellant, when he was below one year of age, a place for safety order under section 28(1) of the Children and Young Persons Act, 1969 and subsequently a care order under section 1 of the Act. The appellant remained in care of the respondent till he was 17. Thereafter the appellant claimed damages on the ground that the respondent council was in breach of a common law duty of care owed to him in consequence of which he suffered deep-seated psychiatric problems caused by the respondent who acting by its social workers and others negligently failed to safeguard the plaintiff's welfare. The appellant's claim was struck out without trial but that order was set aside in appeal by the House of Lords. It was held that while a decision to take a child into care pursuant to a statutory power was not justiciable, it did not follow that having taken a child into care, a local authority could not be liable for what it or its employees did in relation to the child even if that involved some element of discretion for if the authority uses its discretion so unreasonably that it falls outside the discretionary power conferred upon it, there is no *a priori* reason for excluding all common law liability.[32] In *B.V. Attorney General of New Zealand* it was held that the common law duty of care was owed by the Director General of Social Welfare and individual social workers to the child or young persons in respect of whom the statutory duty to arrange for a prompt enquiry existed in a particular case under the Children and Young Persons Act (New Zealand), 1974.[33]

An employer wanting to avoid liability on a claim for damages for breach of statutory duty must show that he has complied with his statutory duty by taking all reasonable steps to prevent his employees from committing breaches of regulations. Where an employer ought to have realised that there was a substantial risk that skilled workmen would not be sufficiently familiar with regulations which imposed a statutory duty on them, in situations where no danger was apparent, it would be his duty to instruct the workers on the steps they must take to avoid a breach. This duty exists even where failure to give such instructions did not amount to negligence at common law.[34]

In a suit for damages, the plaintiff must prove that the injury suffered is of a kind which is within the aim and scope of the Act creating such duty, and not merely an accidental result of its breach.[35] He must prove not only the breach, but also that the breach caused the injuries.[36]

30. (1997) 3 All ER 23, p. 26.
31. (1999) 3 All ER 193 (HL).
32. (1999) 3 All ER 193 (HL). pp. 205, 210. see further *S. v. Gloucestershire County Council*, (2000) 3 All ER 346 (CA).
33. (2003) 4 All ER 833 (PC).
34. *Boyle v. Kodak Ltd.*, (1969) 2 All ER 439 : (1969) 1 WLR 661 : 113 SJ 382.
35. *Gorris v. Scott*, (1874) LR 9 Ex 125; *Ward v. Hobbs*, (1878) 4 App Cas 13 : 27 WR 114. See *Hubli Municipality v. Ralli Bros.*, (1911) 13 Bom LR 1138 : ILR 35 Bom 492; *Jeet Kumari Poddar v. The Chittagong Engineering and Electric Supply Co. Ltd.*, ILR (1946) 2 Cal 433.
36. *Grand Trunk Railway v. Mc Alpine*, (1913) AC 838.

A public utility like a State Electricity Board, which is a statutory authority, is bound to render service efficiently promptly and impartially to the members of the public and is liable for damages when there is deficiency in service e.g. unreasonable delay in giving electrical connection from the date of demand of deposit for connection.[37]

Liability-accident at gate of level crossing.—Where the defendant company neglected to have gates and a watchman at a crossing as required by certain Acts, and one day a child was lying on the rails with one foot severed from its body, it was held that the accident to the child was caused by the company's omission to fence.[38]

Failure to keep sufficient water pressure.—A water company was by statute required to maintain water-pipes with fire plugs charged at a certain pressure to be used in case of fire. The company failed to keep the required pressure, as a result of which, so it was alleged, when the plaintiff's house, on one occasion, caught fire it could not be promptly extinguished and the house was destroyed. It was held that the only remedy contemplated by the statute was the recovery of the penalty provided for in the statute.[39] Under similar circumstances where an action was brought against a municipality, the Bombay High Court held that the municipality was not liable as its failure to make an adequate and reasonable provision for extinguishing fire did not amount to misfeasance but to non-feasance, and, therefore, no action lay.[40]

Leaving trench open.—The defendant municipality excavated a trench for a pipe drain in a public lane. The trench remained open for some time and owing to a heavy fall of rain water collected in it and by percolation or saturation caused a considerable subsidence which resulted in a very heavy damage to the plaintiff's houses close by the trench. It was held that the keeping of the drain open for a considerable time amounted to negligence and the defendant was liable.[41]

Allowing rain-water to discharge on another's land.—Where a railway company allowed the rain water to flow for some four miles by the sides of their railway line through gutters made up of continuous burrow pits and then allowed it to discharge itself on the lands of the plaintiff, the railway company was held not to have exercised the powers conferred by the Indian Railways Act and was held liable for negligence.[42]

Death caused by electric current carried by derrick.—A derrick used in putting up a house was brought into contact with the overhead wires of the respondent company, with the result that a current of electricity was diverted to the street and killed the plaintiff's husband. It was held that the respondents being authorized by an Act in the alternative to place their wires either overhead or underground were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires in the absence of evidence that such precautions would have been effectual to avert the accident.[43]

Insufficient drains.—Where municipal authorities under their statutory powers took over the care of a watercourse, and made it into a public drain which proved in course of time to be increasingly insufficient to hold and pass on the mixture of slime and sewage poured into it, with the result that the plaintiff's property was flooded

37. *Punjab State Electricity Board v. Zora Singh*, (2005) 6 SCC 776.
38. *Williams v. G.W. Ry. Co.*, (1874) LR 9 Ex 157.
39. *Atkinson v. Newscastle Waterworks*, (1877) 2 Ex D-441.
40. *Mohanlal v. Ahmedabad Municipality*, (1937) 40 Bom LR 552.
41. *Vithaldas v. Municipal Commissioner of Bombay*, (1902) 4 Bom LR 914. See *Dholka Town Municipality v. Desaibhai*, (1913) 15 Bom LR 1034 : ILR 38 Bom 116.
42. *H.H. the Gaekwar v. Katcharabhai*, (1900) 2 Bom LR 357 : ILR 25 Bom 243, on appeal (1903) 5 Bom LR 405 : ILR 27 Bom 344 : 30 IA 60.
43. *Dumphy v. Montreal Light, etc. Co.*, (1907) AC 454.

thereby, it was held that they were liable for negligence, notwithstanding that the drain when first formed was sufficient for its purpose.[44]

9. MASTER'S LIABILITY TO SERVANT

The common law duty of a master in relation to his servant was restated by the House of Lords in *McDermid v. Nash Dredging and Reclamation Co. Ltd.*,[45] as follows: "The relevant principle of law is divided into three parts. First, an employer owes to his employee a duty to exercise reasonable care to ensure that the system of work provided for him is a safe one. Second, the provision of a safe system of work has two aspects: (a) the devising of such a system and (b) the operation of it. Third, the duty concerned has been described alternatively as either personal or non-delegable. The essential characteristics of the duty is that, if it is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for the non-performance of the duty."[46] The qualification that the duty is "personal" or "non-delegable" does not mean that the employer cannot delegate it "but only that the employer cannot escape liability if the duty has been delegated and then not properly performed".[47] In *McDermid's* case[48] the plaintiff was employed by the defendants as a deck hand in the course of dredging operations carried on by the defendants and their parent company as a joint enterprise. The plaintiff was eighteen years of age with a limited experience of dredging operations. The plaintiff was seriously injured while working on a tug owned by the parent company as a result of the negligence of the tugmaster employed by that company. The tugmaster was not a servant of the defendants yet they were held liable on the reasoning that they had delegated both their duty of devising a safe system of work and its operation to the tugmaster who was negligent in failing to operate that system. An employee is not disentitled to recover simply because his occupation required him to run the risk of the injury.[49] Such a rule prevails in some states of the United States but has not been accepted in England.[50]

In a recent case[51] the High Court of Australia in a joint judgment laid down: "An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risk of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. *The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work.*"[52] In this case the employee was employed to load and stack boxes into the back of a truck which was filled with a mechanical lifting platform. The platform was powered by the battery in the truck and was operated by a switch. It emitted a loud noise when it was being raised and a 'clanging' sound when it hit the top to bring it level with the tray of the truck. But no sound was emitted when the platform was being lowered.

44. *Hawthorn Corporation v. Kannuluik*, (1906) AC 105.
45. (1987) 2 All ER 878 : (1987) AC 906 : (1987) 3 WLR 212 (HL).
46. (1987) 2 All ER 878, p. 887.
47. (1987) 2 All ER 878, p. 880.
48. (1987) 2 All ER 878 : (1987) AC 906 : (1987) 3 WLR 212 (HL).
49. *White v. Chief Constable*, (1999) 1 All ER 1, p. 49 (HL).
50. *White v. Chief Constable*, (1999) 1 All ER 1, p. 49 (HL).
51. *Czatyrko v. Edith Cowan University*, (2005) 79 ALJR 839.
52. *Czatyrko v. Edith Cowan University*, (2005) 79 ALJR 839, pp. 842, 843 (para 12).

The employee in the course of his work stepped backwards when the platform was being lowered without realizing that it was being lowered and fell heavily and suffered injuries. The risk that the employee would attempt to step backwards in the belief that the platform was raised without checking whether this was the case, was plainly foreseeable. The risk would have been readily avoided by taking simple measures like fitting of a warning 'beeper' or the introduction of a system for giving of an oral warning when the platform was being lowered. The employer was, therefore, held in breach of its duty to take reasonable care to prevent the risk of injury to the employee who was not held guilty of any contributory negligence.

When the employer knows that acts done by employees during their employment might cause physical or mental harm to a particular fellow employee, it is the employer's duty if he has power to do so to supervise or prevent such acts and in case he fails to do so he may become liable in negligence.[53] A female police officer who was sexually abused by a fellow officer and was later subjected to a campaign of harassment and victimisation by fellow officers and on whose complaint no step was taken to prevent these acts was held to have a *prima facie* case against the commissioner of police in negligence for breach of duty.[54] The employer may also be liable to the employee for psychiatric injury suffered by him which was caused by stress at work provided it was foreseeable e.g. when the employee had complained about his health and no steps were taken to reduce the stress by providing extra help.[55] But if the psychiatric injury was not foreseeable, e.g. when the employee though complaining about the amount of work she was required to perform never suggested either expressly or impliedly that the duties required of her were putting or would put her health at risk, the employer was not held liable for the psychiatric injury which the employee suffered.[56]

Without prejudice to its generality or non-delegable character, the common law duty, as explained above, will include the following:—

1. The master must furnish the employees with adequate materials and resources, for the work.[57] On the master rests "the duty of taking reasonable care to provide appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."[58] Thus a master was held liable for supplying a bad rope for staging to paint a ship[59] or a motor-car the starting gear of which was defective.[60]

The employer is, however, under no duty to dismiss or refuse to employ an adult employee merely because there might be some risk to the employee in doing the work.[61]

2. The master is bound to take all reasonable precautions to secure the safety of his servants or workmen.[62] If hidden and secret dangers exist upon his premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, so

53. *Waters v. Commr. of Police of the Metropolis*, (2000) 4 All ER 934 (HL).
54. *Waters v. Commr. of Police of the Metropolis*, (2000) 4 All ER 934 (HL).
55. *Hutton v. Sutherland*, (2002) 2 All ER 1 (CA); *Barber v. Somerset County Council*, (2004) 2 All ER 385 (HL).
56. *Koehler v. Cerebos (Australia) Ltd.*, (2005) 79 ALJR 845, p. 851.
57. *Wilson v. Merry*, (1868) LR 1 HL (SC) & Div 326, 332.
58. Per LORD HERSCHELL in *Smith v. Baker & Sons*, (1891) AC 325 : 65 LT 467 : 40 WR 392. See *South Indian Industrials Ltd. v. Alamelu Ammal*, (1923) 17 MLW 495 : (1923) MWN 344; *Dhanal Soorma v. Rangoon Indian Telegraph Association Ltd.*, (1935) ILR 13 Ran 369.
59. *Heaven v. Pender*, (1883) 11 QBD 503 : 49 LT 357.
60. *Baker v. James*, (1921) 2 KB 674. SCRUTTON, L.J. says that this decision is exactly opposite of that in *Priestly v. Fowler*, (1837) 3 M & W 1; *Fanton v. Denville*, (1932) 2 KB 309, 316 : 147 LT 243 : 48 TLR 433.
61. *Withers v. Perry Chain Company Ltd.*, (1961) 3 All ER 676 : (1961) 1 WLR 1314 : 105 SJ 648.
62. *Brydon v. Stewart*, (1855) 2 Macq 30; *Paterson v. Wallace*, (1854) 1 Macq 748.

that they may take precautions against them.[63] Extraordinary situation *e.g.* a riot in the town may bring in additional duty of care.[64]

A master owes no duty to his servant to safeguard the property of the servant which a servant for his own convenience brings on the premises of his master. There is no duty on the master to take reasonable care to protect the servant's clothing from theft.[65] The duty does not also extend to protect the servant from economic loss.[66] There is also no duty to take care that the manner of dismissal does not cause financial loss.[67]

3. The master is responsible for his own negligence causing injury to the servant.[68] Such negligence may be brought home to the master, by showing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants whose incompetency was the cause of the accident.[69] After abolition of the doctrine of common employment the master is liable for the negligence of a fellow servant acting in the course of employment although there was no negligence of the master in appointing or retaining him.[70]

In addition to the common law duty, statutes also lay down the duty to provide safe system of work including safe premises "so far as reasonably practicable." In deciding upon the question whether there is breach of such a duty it has to be considered whether, having regard to his degree of control and knowledge of the likely use, it would have been reasonable for the employer to take measures which would ensure that the premises were safe and without risk, the onus being on him to show that weighing the risk of health against the means, including cost, of eliminating the risk, it was not reasonably practicable for him to take those measures.[71] The employer has also to ensure suitable work equipment. Something viz. door closure which was work equipment did not cease to be so simply because it had broken down and someone had to repair it.[72]

Negligence on the part of the servant may disentitle him to recover, wholly or partly, depending on whether he was entirely or partly to be blamed for the damage suffered by him.[73]

Want of precaution to secure safety of servant.—Where a master ordered a servant to take a bag of corn up a ladder which the master knew, and the servant did not know, to be unsafe, and the ladder broke, and the servant was injured, the master was held liable.[74] Where the defendants, well knowing that certain car cases were diseased and infectious, employed the plaintiff, who was ignorant of that fact, to cut

63. *Williams v. Clough*, (1858) 3 H & N 258; *Cole v. De Trafford*, (No. 2) (1918) 2 KB 523.
64. *Madhya Pradesh Road Transport Corporation v. Basantibai*, 1971 ACJ 328 (MP) see text and footnote 67, p. 468, *supra*.
65. *Deyong v. Shenburn*, (1946) 1 KB 227.
66. *Reid v. Rush & Tompkins Groupple*, (1989) 3 All ER 228 : (1990) 1 WLR 212 (CA).
67. *Johnson v. Unisys Ltd.*, (2001) 2 All ER 801 (HL).
68. *Smith v. Baker & Sons*, (1891) AC 325 : 60 WR 661; *Williams v. Birmingham Battery & Metal Co.*, (1899) 2 QB 338; *Cole v. De Trafford (No. 2)*, (1918) 2 KB 523; *Monaghan v. Rhodes & Son*, (1920) 1 KB 487; *Baker v. James, supra*.
69. *Ormond v. Holland*, (1858) El Bl & El 102; *Ashworth v. Stanwix*, (1861) 3 El & El 701.
70. See Chapter VIII, title 2(A)(ii)(b)(vii), 'Doctrine of Common Employment' p. 166.
71. *Marshall v. Gotham Co. Ltd.*, (1954) 1 All ER 937 : (1954) AC 360 : (1954) 2 WLR 812 (HL); *Mailer v. Austin Rover Group Plc*, (1989) 2 All ER 1087 : (1990) 1 AC 619 : (1989) 3 WLR 520 (HL).
72. *Spencer-Franks v. Kellogg Brown and Root Ltd.*, (2009) 1 All ER 269 (H.L.)
73. See text and footnotes 43 to 45, p. 573, *supra*.
74. *Williams v. Clough*, (1838) 3 H & N 258.

them up whereby the plaintiff was infected by the disease and suffered injury therefrom, it was held that the defendants were liable.[75]

Failure to provide goggles.—A workman employed as a garage hand had, to the knowledge of his employers, only one good eye. In working on the back axle of a vehicle to remove a U-bolt which had rusted in, he struck it with a hammer and a metal chip flew off seriously injuring his good eye. He was not wearing goggles. He claimed damages against his employers in respect of that injury on the ground that they were negligent in failing to provide and require the use of goggles as part of the system of work. It was held that the employers were negligent in failing to provide the workman with protective goggles for work of this description, and that he was entitled to damages.[76]

Want of safety appliances.—The plaintiff, a window cleaner, was employed by the defendants, a firm of contractors, to clean the windows of a club. While, following the practice usually adopted by employees of the defendants he was standing on the sill of one of the windows to clean the outside of the window and was holding one sash of the window for support, the other sash came down on his fingers, causing him to let go and fall to the ground, suffering injury. On a claim by him against the defendants for damages it was held that even assuming that other systems of carrying out the work, *e.g.* by the use of safety belts and ladders, were impracticable, the defendants were under an obligation to ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents; the defendants had not discharged their duty in this respect towards the plaintiff; and, therefore, they were liable to him in respect of his injury.[77]

The plaintiff, while working for the defendants on the drip edge of a flat roof fell on to an adjoining sloping roof, about two feet below, made of asbestos. The asbestos broke and he fell more than ten feet to the ground and was seriously injured, his expectation of life being materially shortened. He claimed damages from the defendants, alleging that they were in breach of their common law duty to him to provide a safe system of working. It was held that the risk of the plaintiff falling through the asbestos roof was one which the defendants could and should have foreseen, and that in failing to take such precautions as would guard him from falling they had failed in their duty to provide a safe system of working and were guilty of negligence at common law.[78]

Dangerous machinery.—The plaintiff was employed since twelve years by the defendants to oil and grease the machines in the factory of the defendants. Out of about 500 machines in the factory about 12 were dangerous to oil when in motion. Neither any specific instructions were given to the plaintiff for not oiling these machines when in motion and nor was any notice put on these machines to that effect. The plaintiff was injured while oiling one of these machines when in motion. It was held that the defendants were liable for breach of the common law duty not to expose the plaintiff to unnecessary risk.[79] Where the real cause of the accident to the plaintiff was that his neck-tie became entangled in a dangerous machinery on which he was working and his employers failed to issue instructions for proper dress, it was

75. *Davies v. England*, (1864) 33 LJ QB 321; *Mellors v. Shaw*, (1861) 1 B & S 437 : 30 LJ QB 333; *Williams v. Birmingham Battery and Metal Company*, (1899) 2 QB 338.
76. *Paris v. Stepney Borough Council*, (1951) AC 367 : (1951) 1 TLR 25 : 94 SJ 837 : (1951) 1 All ER 42.
77. *General Cleaning Contractors v. Christmas*, (1952) 2 All ER 1110 : (1953) AC 180 : 97 SJ 7 : (1953) 2 WLR 6.
78. *Harris v. Brights Asphalt Contractors Ld.*, (1953) QB 617 : (1953) 1 QB 617 : (1953) 1 WLR 341.
79. *Lewis v. High Duty Alloys Ltd.*, (1957) 1 ALL ER 740 : (1957) 1 WLR 632.

held that the employers were at fault for not correcting his improper dress but that the plaintiff was also guilty of contributory negligence in not having taken the elementary precaution of seeing that his neck-tie was in a safe position.[80] It has, however, been held that a master was not liable merely because he failed to safeguard the servant from risks which he could not reasonably foresee.[81]

Negligence of Co-employee.—T, an employee of the defendants, after finishing the day's work, was bicycling along a road in the defendant's premises towards the pay office to collect his wages. After having travelled some distance T rode across a bus park on the defendant's premises and negligently knocked down one S, who was also an employee of the defendants. S was killed as a result of the collision and his widow brought an action against the defendants for damages on the ground that the death of S was caused by the negligence of T who was acting in the course of his employment and that the defendants were vicariously liable. It was held that T was acting in the course of his employment at the time of the accident and that the defendants were liable for T's negligence.[82]

A workman suffered personal injuries arising in part from his own error in part from the mistake of a crane driver who was a fellow employee. In an action for damages, the workman alleged that his employer was liable for the negligence of the crane driver; it was held that the crane driver's mistake was not to be judged by the same standard as that of the workman, since whereas negligence was founded on a breach of duty, contributory negligence was not. The employer's duty was a personal duty to take reasonable care for the safety of his servants; and the law required a higher standard of care from him, whether acting by superior servants or fellow servants, than it required from an injured workman; and the plaintiff was therefore entitled to damages.[83]

Want of safe working place.—The appellant was a fitter employed by the first respondents who were lift repairers and who had entered into an agreement to maintain a lift on the premises occupied by the second respondent. The left door of the machine-house of the lift was defective. The appellant as well as other employees had reported this defect but neither of the respondents took any steps to repair it. The appellant along with two other employees went to replace some wire ropes and found that the right door was open but the left door was jammed in the machine-house. The appellant tried to lever himself up by putting his weight on the left door but the door gave way and the appellant fell and was injured. It was held that the first respondents as employers were liable as they failed to provide a safe place of work and second respondents who were the occupiers were also liable as jamming of the left door created an unusual danger to the appellant which he did not fully appreciate.[84]

Master not liable for the negligence of third party.—The plaintiff's eye was injured by a splinter of metal which flew off a cold chisel which he was using at his work; the cause of the accident was that the head of the chisel was dangerously hard. The chisel had been manufactured by the second defendants and had been supplied by them to the plaintiff's employers, the first defendants, who had issued it to the plaintiff. The chisel was a new one when issued to the plaintiff two or three weeks before the accident. In an action for damages for personal injuries to the plaintiff caused by the negligence of the first defendants or the second defendants or both, it was held that (i) an employer who buys tools from a reputable manufacturer to be put

80. *Lovelidge v. Anselm Oldling & Sons*, (1967) 1 All ER 459.
81. *Bailey v. Ayr Engineering and Constructional Co. Ltd.*, (1958) 2 All ER 222 : (1959) 1 QB 183.
82. *Staton v. National Coal Board*, (1957) 2 All ER 667 : (1957) 1 WLR 893 : 101 SJ 592.
83. *Jones v. Staveley Iron and Chemical Co. Ltd.*, (1955) 1 QB 474 : (1956) AC 627 : (1956) 2 WLR 479.
84. *Smith v. Austin Lifts Ltd.*, (1959) 1 All ER 81 : (1959) 1 WLR 100 : 103 SJ 73.

to uses for which the tools are intended by the manufacturer is not under a duty either to examine the tools before issuing them to employees or to institute frequent inspections of tools after use, unless there is something which suggests that the tools are defective; and, accordingly, the plaintiff had not proved negligence on the part of his employers; (ii) the plaintiff, having established that the chisel came direct from the manufacturers and having shown that the excessive hardness had not been produced at his employers' factory, had discharged the burden of proving negligence on the part of the manufacturers and was entitled to recover damages against them.[85]

The plaintiff was employed by the defendants in their foundry. Their business was to buy scrap metals to be melted down. In one load of scrap there was a live shell which would normally have been removed from the scrap. The plaintiff urged by a third workman T to hit the shell did hit it with a sledge hammer resulting in explosion of the shell and injury to the plaintiff. It was held that although T, the third workman, was negligent, it was a case of one isolated fact of wilful misbehaviour which was outside the scope of T's employment with the defendants for which the defendants could not be vicariously liable.[86]

Dangerous employee causing injury.—For nearly four years one of the defendants' employees had made a nuisance of himself to his fellow employees, including the plaintiff, a cripple, by persistently engaging in skylarking, such as tripping them up. For many times he had been reprimanded by the foreman and warned that he would hurt someone, but to no avail. No further steps were taken to check this conduct by dismissal or otherwise. Subsequently, this employee, indulging in horse-play, tripped up the plaintiff and injured him. In a claim by the plaintiff against the defendants for damages on the ground that they had failed to maintain such discipline among their employees as would protect him from dangerous horse-play, it was held that as this potentially dangerous misbehaviour had been known to the employers for a long time, and as they had failed to prevent it or remove the source of it, they were liable to the plaintiff for failing to take proper care of his safety.[87]

Injury to window cleaner.—The plaintiff, a window cleaner with a lifelong experience in the trade, was cleaning from outside a window in a brewery, when a handle, by which he was supporting himself gave way, and he fell and received injury. He had often cleaned the window before, and knew that the woodwork was unsound. From his experience he knew that it was unsafe to trust to handles. He had worked for the defendants for some 14 years, and was already thoroughly experienced when he joined them. He had never received any instructions regarding safety precautions, except a standing order to the effect that if he found a window which presented unusual difficulty or risk, he was to report to the defendants for further instructions. In an action for damages for negligence, it was claimed, first, that the defendants were under a duty to provide a place of work as safe as reasonable skill and care could make it, and that at least they should have inspected the premises from time to time; secondly, that they should have issued warnings in writing and orally from time to time, against the dangers of window cleaning in general, and those connected with unsafe handles in particular. It was held that in the case of so experienced a workman as the plaintiff, the defendants had fulfilled their duty to take reasonable care for his safety. That duty, though conveniently divided for the purposes of argument in individual cases into such sub-divisions as the

85. *Mason v. Williams Ltd.*, (1955) 1 All ER 808 : (1955) 1 WLR 549 : 99 SJ 338. See further text and footnotes 88 to 91, p. 589.
86. *O'Reilly v. Nat Rail & Tramway*, (1966) 1 All ER 499.
87. *Hudson v. Ridge Manufacturing Co. Ltd.*, (1957) 2 QB 348 : (1957) 2 WLR 948 : 101 SJ 409 : (1957) 2 All ER 229.

provisions of reasonably safe premises, or tools, or systems of work, was one and the same. As to premises, there was a great difference in degree between the performance of the duty when the premises were the master's own and where the premises were those of a stranger. As to system, when the workman was so experienced, and the danger was so patent, the issue or repetition of warnings would be likely to do more harm than good.[88]

Injury by dangerous tool.—Under the common law an employer's duty was to provide a reasonably safe equipment or tool and that duty was taken to have been discharged if the employer purchased the equipment or tool from a reputable source whose latent defect he had no means of discovering. If an employee got injured by such a defective equipment or tool he could not make the employer liable though he could sue the manufacturer for damages. This legal position was clearly laid down by the House of Lords in *Davie v. New Merton Board Mills Ltd.*[89] In this case the plaintiff, a maintenance fitter, was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift, which had been provided for the plaintiff's use by his employers although apparently in good condition, was of excessive hardness and was, in the circumstances, a dangerous tool; it had been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers who, in turn, had sold it to the employers, whose system of maintenance and inspection was not at fault. The plaintiff claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool, and against the makers on the ground that, as the manufacturers of the drift, they were under a duty to those who they contemplated might use it. It was held that the employers, being under a duty to take reasonable care to provide a reasonably safe tool had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering. It was, however, held that the manufacturers were liable.

The plaintiff, who was employed by defendant No. 1, lost an eye when a splinter of steel flew from a chisel which he was hammering. The chisel was manufactured by defendant No. 2 from alloyed steel purchased from a third party who had heat treated it after its manufacture. It was found that defendant No. 1 had known that previously an accident was caused by the chisel to the plaintiff's leading hand who had failed to withdraw it from circulation and also that the defect in the chisel was caused by neglect in the original heat treatment by the third party. It was held that the plaintiff was entitled to succeed against defendant No. 1 but defendant No. 2 was not liable to the plaintiff because it was the keeping of the chisel in circulation by defendant No. 1 with knowledge that it was dangerous that caused the accident and accordingly, the chain of causation by defendant No. 2 was broken and that defendant No. 2 having got a competent hardener, *viz.* the third party,[90] to do the hardening of the chisel from them was not liable for the faulty hardening.[91] The aforesaid cases[91] which illustrate the common law led to great hardship and left the employee without a remedy in a case where the manufacturer and the employer were divided in time and space by

88. *Wilson v. Tyneside Window Cleaning Co.*, (1958) 2 QB 110 : (1958) 2 WLR 900 : 102 SJ 380 : (1958) 2 All ER 265.
89. *Davie v. New Merton Board Mills Ltd.*, (1959) AC 604 : (1959) 2 WLR 331. In *Sumner v. William Henderson & Sons. Ltd.*, (1963) 1 All ER 408 : (1964) 1 QB 450 : (1963) 2 WLR 330 it was held that where the business of a store continued while the work of modernisation was being carried on by a competent contractor the owner of the store would be liable to the employees for the injuries caused by the negligence of the contractor.
90. *Taylor v. Rover Co. Ltd.*, (1966) 2 All ER 181 : (1966) 1 WLR 1491.
91. See cases in footnote 43, p. 587 and footnotes 87, 88 above.

decades and continents so that the person actually responsible was no longer traceable. The British Parliament, therefore, intervened and enacted the Employer's Liability (Defective Equipment) Act, 1969. Section 1(1) of the Act provides that where (a) an employee suffers personal injury (which includes death) in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and (b) the defect is attributable wholly or partly to the fault of a third party, the injury shall be deemed to be also attributable to the negligence on the part of the employer, but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury. The section has been liberally construed and even a ship supplied by its owner for his business has been held to be an equipment within the meaning of the Act.[92] A flagstone provided by employer for purposes of their business of repairing and relaying pavement has also been held to be an equipment within the Act.[93]

Master not liable when servant would not have taken precaution.—The respondent was employed as a moulder for all his working life in the appellants' foundry. The appellants had in their stores spats which could be had by any workman for the asking and strong boots which could be had on payment. The appellants did not advise the respondent to wear protective clothing as the respondent was an experienced moulder and knew the risk of metal splashing attached to his work. The respondent sustained injury by molten metal splashing on his left foot as the ladle of molten metal he was holding slipped. At that time he was wearing ordinary boots. The injury would not have occurred if he had been wearing protective spats or special boots. It was held that the appellants were not liable as they had discharged their duty of care by making protective clothing available to the respondent who was experienced and knew the danger involved in the work.[94]

10. BURDEN OF PROOF IN ACTIONS OF NEGLIGENCE

General rules.—As a rule, the onus of proving negligence is on the plaintiff. He must show that he was injured by an act or omission for which the defendant is in law responsible.[95] There must be proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff.[96] Further it must be shown that the negligence is the proximate cause of the damage. Where the proximate cause is the malicious act of a third person against which precautions would have been

92. *Cottman v. Bibby Tankers Ltd., The Derby shire*, (1987) 3 All ER 1068 (HL).
93. *Knowles v. Liverpool City Council*, (1993) 4 All ER 321 : (1993) 1 WLR 1428 (HL).
94. *Qualcast Ltd. v. Haynes*, (1959) 2 All ER 38 : (1959) AC 743 : (1959) 2 WLR 510. Merely because it is established that some of the employers in the trade followed a practice which might have averted the accident this does not establish conclusively the negligence of the employer who did not follow the practice : *Brown v. Rolls Royce Ltd.*, (1960) 1 All ER 577 : (1960) 1 WLR 210. In *Cummings (or McWilliams) v. Sir William Arrol & Co. Ltd.*, (1962) 1 All ER 623 : (1962) 1 WLR 295 : 1962 SLT 121, the dictum of LORD RADCLIFFE in *Qualcast Ltd v. Haynes*, was applied and it was held that even though the employer had failed to provide a safety belt as required by statute they were not liable as it was proved that the deceased workman who was experienced would not have worn the safty belt even if provided. See also *Wigley v. British Vinegars Ltd.*, (1962) 3 All ER 161 : (1962) 3 WLR 731 : (1964) AC 307. See further text and footnotes 5 and 6, p. 179, Chapter IX.
95. *Hammack v. White*, (1862) 11 CBNS 588 : 31 LJCP 129; *Manzoni v. Douglas*, (1880) 6 QBD 145; *McKenzie v. Chilliwack Corporation*; (1812) AC 888; *Cole v. De Trafford (No.2)*, (1918) 2 KB 523; *Kali Krishna Narain v. The Municipal Board, Lucknow*, (1942) QBD 773.
96. *Heaven v. Pender*, (1883) 11 QBD 503 : 49 LT 357; *Toomey v. London, Brighton and South Coast Ry. Co.*, (1857) 3 CB NS 146.

inoperative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.[1]

The question of burden of proof as a determining factor does not arise at the end of the case except in so far as the court is unable to come to a definite conclusion and the question arises as to which party has to suffer from this.[2] Thus when the plaintiff claimed damages from her employer that she suffered cramp of the hand or forearm due to repetitive typing work commonly called repetitive stress injuries making her unfit for typing work which led to her discharge and the medical evidence produced by the parties was neither satisfactory to establish that the cramp had an organic cause as alleged by the plaintiff nor was it satisfactory to establish that the cause was conversion hysteria as alleged by the defendant the action failed as the burden of proof of establishing the organic cause was on the plaintiff.[3]

Where the plaintiff has adduced evidence sufficient to call upon the defendant to reply and the defendant thereupon, being under the burden of laying the material facts before the Court, has refrained from doing so, the onus of proving negligence is discharged by the plaintiff.[4]

Where injury is caused by negligent driving of a motor-car, proof by the plaintiff that the car which caused the accident belonged at the time to the defendant affords *prima facie* evidence that the car was driven either by the defendant or by his servant or agent. The defendant may displace that presumption by proving that the car was not under his control at the time of the accident.[5]

Ordinarily, a person who drives a vehicle on highway has a duty to take reasonable and proper precaution in the use of the vehicle. The driver must exercise not only care but also skill. He must observe the ordinary rules of the road.[6] He should not drive at an excessive speed. What is an excessive speed will depend upon the surrounding circumstances of the case.[7]

The principle that a man cannot recover damages if he has consented to run the risk of accidental harm is applicable to cases arising out of accident on a road.[8]

The onus of proving contributory negligence is on the defendant.[9]

Composite negligence.—Where injury is caused by the wrongful act of two parties, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, the plaintiff is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more than his whole damage.[10] He has a right to recover the full amount of damages from any of the defendants.

1. *Rickards v. Lothian*, (1913) AC 263 : 108 LT 225 : 29 TLR 291.
2. *Watt v. Thomas*, (1947) AC 484 p. 487; *Pickford v. Imperial Chemical Industries*, (1998) 3 All ER 463 (HL), p. 472.
3. *Pickford v. Imperial Chemical Industries, supra*, pp. 473, 474.
4. *Dekhari Tea Co. Ltd v. Assam Bengal Ry. Co. Ltd.*, (1919) ILR 47 Cal 6.
5. *Liladhar v. Harilal*, (1936) 39 Bom LR 44; *Kundan Kaur v. Shankar Singh*, AIR 1966 Punj 394.
6. *Vidya Devi v. M.P. State Road Transport Corporation*, 1974 ACJ 374 (MP) (376); *Piara Singh v. Gian Kaur*, 1985 ACJ 758; *M/s. Sachdeo Rice Mills v. Smt. Raj Anand*, AIR 1988 P & H 136.
7. *Champalal v. Venkataraman*, AIR 1966 Mad 466.
8. *Ram Peary v. Jai Prakash*, AIR 1963 Pat 316.
9. *Dublin W. & W. Ry. Co. v. Slattery*, (1878) 3 App Cas 1155 (1169); *Wakelin v. L. and S. W. Ry. Co.*, (1886) 12 App Cas 41; *Koegler v. A. Yule & Co.*, (1870) 14 WR (OCJ) 45; *Woodhouse v. C.& S.E.Ry. Co.*, (1868) 9 WR (Eng) 73.
10. *Palghat Coimbatore Transport Co. Ltd. v. Narayanan*, ILR 1939 Mad 306.

Further, "if an injured person shows that one or the other or both of two persons injured him, but cannot say which of them it was, then he is not defeated altogether. He can call each of them for an explanation."[11] Thus if a passenger in a bus is injured when the bus collided with another vehicle and when he is not in know of the facts as to how the collision had taken place, he can sue both the drivers and their employers for damages. In such a case, the plaintiff cannot be defeated by the simple device of the defendants' abstaining to place the true facts before the Court. If they do not disclose relevant information, adverse inference can be drawn and the court may hold that both were to blame for the accident and liable to pay damages to the plaintiff.[12]

Exception; res ipsa loquitur.—Accidents may be of such a nature that negligence may be presumed from the mere fact of the accident, the presumption depending on the nature of the accident.[13] Pulling a wrong rein is evidence of negligence,[14] so too is the spurring of a horse when it is within kicking distance of a passer-by,[15] or the bolting of a horse which has been left unattended in a public street,[16] or the blowing of steam at a level-crossing.[17] When a public Transport vehicle plunged into a river on collapse of a culvert, presumption of negligence against the State Highways Department was raised.[18] It was also held that the explanation that there was heavy rain did not absolve the Department without indicating what anticipatory preventive action was taken.[19]

Where damage is caused by an object under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, a presumption arises, in the absence of explanation by the defendant, that the accident was due to negligence: *res ipsa loquitur* (the thing speaks for itself).[20] The maxim has not met with universal approval. As observed, by GAUDREN J. in a recent Australian case: "It is in this country (Australia) no more than a Latin phrase describing a permissible process of reasoning. The same is true in Canada. However, it may enjoy same higher status as a principle of law or evidence in the United Kingdom."[21] Indeed, in Canada it has been declared by a unanimous Supreme Court "that the law would be better served if the maxim was treated as expired and no longer used as a separate component in

11. *Roe v. Minister of Health*, (1954) 2 ALL ER 131 (CA) p. 137 : (1954) 2 QB 66 : (1954) 2 WLR 915 (DENNING, L.J.) See further *Baku v. Market Harborough Industrial Co-operative Society*, (1953) 1 WLR 1472.
12. *Sushma Mitra v. M.P. State Road Transport Corporation*, (1974) ACJ 87 (MP) pp. 91, 92. See further *Pagidimarri Suvarna v. Venkateshwarlu*, AIR 2000 AP 332.
13. *Scott v. The London Dock Co.*, (1865) 34 LJ Ex 220 : 3 H & C 596; *Byrne v. Boadle*, (1863) 2 H & C 722 : 33 LJ Ex 13; *McArthur v. Dominion Cartridge Co.*, (1905) AC 72; *Colvilles Ltd. v. Devine*, (1968) 2 All ER 53; *Chautmull v. The Rivers Steam Navign. Co.*, (1897) ILR 24 Cal 786, on appeal, (1898) ILR 26 Cal 398 (PC); *East Indian Ry. Co. v. Kirkwood*, (1919) ILR 48 Cal 757, (PC); *Tan Taik Hup v. The Irrawaddy Flotilla Co. Ltd.*, (1901) 7 Burma LR 236; *Mulchand Nemichand v. Basdeo Ram Sarup*, (1926) ILR 48 All 404; *Kali Krishna Narain v. The Municipal Board, Lucknow*; (1942) OWN 773; *Kumari Alka v. Union of India*, AIR 1993 Del 267, p. 275.
14. *Wakeman v. Robinson*, (1823) 1 Bing 213.
15. *North v. Smith*, (1861) 10 CBNS 572.
16. *Gayler and Pope Ld. v. B. Davies & Sons Ltd.*, (1924) 2 KB 75 : 131 LT 507 : 40 TLR 591 ; *Tolhausen v. Davies*, (1888) 57 LJQB 392, 394; 58 LJQB 98.
17. *Manchester S.J. Rly. v. Fullerton*, (1863) 11 WR 754.
18. *S. Vedantacharya v. Highways Department, South Arcot*, (1987) 3 SCC 400 : 1987 SCC (Cri) 559.
19. *S. Vedantacharya v. Highways Department, South Arcot*, (1987) 3 SCC 400 : 1987 SCC (Cri) 559.
20. *Byrne v. Boadle*, (1863) 2 H & C 722 : 12 WR 279 : 133 RR 761; *Scott v. London Dock Co.*, (1865) 3 H&C 596, 601. Where an accident results from defective condition of plant, the burden of disproving negligence lies on the person responsible for the defect; *Coughlan v. Monks*, (1918) 2 IR 306.
21. *Schellenberg v. Tunnel Holdings PTY Ltd.*, (2000) 74 ALJR 743, pp. 756, 757. See further p. 760 (KIRBY J).

negligence action."[22] In India the maxim has been applied in the manner it is applied in the United Kingdom.

The maxim *res ipsa loquitur* has been considered by the Supreme Court in a number of cases. Ordinarily, mere proof that an event or accident, the cause of which is unknown, has happened is no proof of negligence. The maxim applies to cases where the peculiar circumstances constituting the event or accident pro-claim that the negligence of somebody is the cause of the event or accident. In the first place, the event or accident must be of a kind which does not happen in the ordinary course of things if those who have management and control use due care; secondly, it must also be shown that the event or thing which caused the accident was within the defendant's control.[23] The maxim was applied to the collapse of a clock-tower abutting a highway in Delhi;[24] and to road accidents involving motor-vehicles where a bus hit a tamarind tree 25 feet away, after uprooting a stone on the off-side of the road;[25] when a bus overturned;[26] when a car dashed against a tree on the right extremity of the road;[27] when the engine of a truck caught fire;[28] and when a swimming pool of a hotel was not maintained and injuries were sustained on account of slippery surface of the pool.[29]

The doctrine of *res ipsa loquitur* applies not only to a case where the thing that inflicted the damage was under the sole management and control of the defendant but also where it is under the sole management and control of someone for whom he is responsible or whom he has a right to control.[30] The thing need not be in exclusive control provided the evidence shows outside influence a remote possibility.[31]

The maxim means that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and that in such a case the mere fact of the accident is *prima facie* evidence of such negligence.[32] If in the ordinary course of things a collision would not have occurred between two moving bodies in charge of two different persons if both had taken due care and had not acted negligently, the fact that there was such a collision would be *prima facie* proof that either or both of them acted negligently. But in such cases the principle of *res ipsa loquitur* may not be of any assistance in fixing the negligence of one of the two drivers.[33] Even so, if the defendants fail to place true facts showing whose negligence caused the accident, both may be held liable to a

22. *Fantaine v. British Columbia (Official Administrator)*, (1998) 1 SCR 424, p. 435 (MAJOR J. for the court).
23. *Syad Akbar v. State of Karnatak*, AIR 1979 SC 1848 (1852); *Mohammed Aynuddin v. State of Andhra Pradesh*, AIR 2000 SC 2511, p. 2512 : (2000) 7 SCC 72. See further *Klaus Mittelbachert v. The East India Hotels Ltd.*, AIR 1997 Del 201, p. 215.
24. *Municipal Corporation of Delhi v. Subhagwanti*, AIR 1966 SC 1750 : (1966) 3 SCR 649.
25. *Gobald Motor Service v. Veluswamy*, AIR 1962 SC 1 : (1962) 1 SCR 929.
26. *Krishna Bus Service v. Mangali*, AIR 1976 SC 700.
27. *Pushpabai v. Ranjit, G. & P. Co.*, AIR (1977) SC 1735; See further, *C.Kuppusamy v. Elumalai* (2010) 5 LW 715 : (2010) 4 LW 405 (Mad) (DB); *Chob Singh v. Govt. of NCT of Delhi & Another* (2012) 192 DLT 100 : (2012) 118 AIC 822; *Virendra Prasad v. B.S.E.S. Rajdhani Power Ltd.* (2012) 190 DLT 293.
28. *Shyam Sunder v. State of Rajasthan*, AIR, 1974 SC 890. See further *Basthi Kasim Sahib v. The Mysore State Road Transport Corporation*, AIR 1991 SC 487 (overturning of bus while crossing a bullock cart parked on the road).
29. *Susan Leigh Beer v. Indian Tourism Development Corporation Ltd.* (2011) 178 DLT 83 : (2011) 102 AIC 350 : ILR (2011) 6 Del 31.
30. *Narasappa v. Kamalamma*, AIR 1968 Mys 345, 349.
31. *Lloyde v. West Midlands*, (1971) 1 WLR 749 (CA).
32. PER PICKFORD, L.J., in *Cole v. De Trafford (No. 2)*, (1918) 2 KB 523, 528; *Alimuddin v. King-Emperor*, ILR 1945 Nag 566; *GNIT & State v. Dinkar Joshi*, (1955) 4 MLR 489 : ILR 1955 MB 306.
33. *Ahmedabad Municipality v. Shantilal*, AIR 1961 Guj 196.

person injured in the accident.[34] There is a distinction between the case of an accident caused by an inanimate object such as a bale of goods, and one caused by the misconduct of an animate creature.[35] In the former case the inference may be that the defendant is liable, in the latter case there is no certain inference, and the plaintiff will not have discharged the burden without proof of some negligence on the part of the defendant. The maxim *res ipsa loquitur* is applicable only where the probability that the accident is due to negligence is materially greater than that it is due to any other cause, and the circumstances contributing to the accident are within the defendant's control.

The maxim may not be applied too liberally. It must also be remembered that what is said in relation to it in one case cannot indiscriminately be applied to another case. It should not be applied as a legal rule but only as an aid to an inference when it is reasonable to think that there are no further facts to consider.[36]

"*Res ipsa loquitur* is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident, but (ii) on the evidence as it stands, *i.e.* in the absence of any evidence from the defendant, it is more likely than not that the effective cause of the accident, whatever it may have been, was some act or omission of the defendant or of someone for whom the defendant was responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. The application of *res ipsa loquitur* is not necessarily excluded merely because there has been a possibility of outside interference with the thing through which the accident happened."[37]

Where an omnibus leaves the road and an accident takes place on the off-side and this is proved without more, then the principles of *res ipsa loquitur* is at once attracted. Negligence will be presumed as the cause of the event. Unless the defendant rebuts this presumption, the plaintiff succeeds. To merely point out what the immediate cause of the bus leaving the road was, *e.g.*, there was a tyre burst or that it went into a skid is by itself no rebuttal of the presumption. To displace the presumption, the defendant must prove, or must show from the evidence either that the immediate cause was due to a specific cause which does not connote negligence on his part but points to its absence as more probable, or he must show that all reasonable care in and about the management of the vehicle was taken. The burden, in the first instance, is on the defendant to disprove his liability.[38] Having regard to the local conditions prevailing in India, when *res ipsa loquitur* is attracted, it should be given as wide an amplitude and as long a rope as possible in its application to the case of a motor accident.[39] Such an approach may not now be justified after

34. *Sushma Mitra v. M.P. State Road Transport Corporation*, (1974) ACJ 87 (MP), pp. 91, 92. See further text and footnotes 9 to 11, pp. 591, 592.
35. See the judgment of DENMAN, J. in *Manzoni v. Douglas*, (1880) 6 QBD 145.
36. *State of Punjab v. M/s. Modern Cultivators*, (1964) 2 SCJ 796 : (1971) 1 WLR 749 : 115 SJ 227; *Mangilal v. Parasram*, AIR 1971 MP 5 (FB).
37. PER MEGAW, J. in *Lloyde v. West Midland Gas Board*, (1971) 2 All ER 1240 : (1997) 1 WLR 749 : 115 SJ 227; See also, *Susan Leigh Beer v. India Tourism Development Corporation Ltd.*, ILR (2011) 6 Del 31 : (2011) 178 DLT 83 : (2011) 102 AIC 350.
38. *Swarnalata v. Jogendrapal*, AIR 1970 MP 86; *Parmeshwari v. Saman Devi*, AIR 1960 PB 1007; *Managing Director Thanthai Periyar Transport Corporation v. Meerabai Ammal*, AIR 1988 Mad 163; *State of M.P. v. Ashadevi*, AIR 1989 MP 93. For other motor accident cases see footnotes 24, 25, p. 593.
39. *Mangilal v. Parasram*, AIR 1971 MP 5 (FB).

introduction of no fault liability provisions in the Motor Vehicles Act 1988 and application of the strict liability rule in other cases of Motor accidents.[40]

The principle of *res ipsa loquitur* only shifts the onus of proof, in that a *prima faice* case is assumed to be made out, throwing on the defendant the task of proving that he was not negligent; this does not mean that he must prove how and why the accident happened; it is sufficient if he satisfies the court that he personally was not negligent.[41] Even if the defendant gives no rebutting evidence but a reasonable explanation equally consistent with the presence as well as with the absence of negligence the presumptions or inferences based on *res ipsa loquitur* cannot further be sustained.[42]

The maxim has been applied in cases of disciplinary action taken against workmen based on negligence as misconduct.[43]

The maxim does not apply when the facts are sufficiently known. But this does not necessarily mean that negligence is not proved for the facts found may by themselves give rise to an inference of negligence.[44]

In cases where the injury is caused by the use of tackle or machinery for which the defendant is responsible, there is no immediate inference that the defendant is at fault. The plaintiff must prove negligence on the part of the defendant.[45] But if the injury is traced directly to some defect in the tackle or machinery then the defendant must show that the defect was one for which he is not to blame.[46] The burden on the defendant to rebut the inference of negligence raised by the maxim *res ipsa loquitur* cannot be discharged merely by showing that there was a latent defect in a machine not discoverable by the exercise of reasonable care in inspection and maintenance; there is a further duty on him to exercise reasonable care when he first acquired the machine of which he must produce evidence.[47] Proof of proper maintenance of the machine *e.g.* a lorry must be given before a latent defect arising subsequent to its acquisition can be put forward as a defence.[48]

The applicability of the doctrine of *res ipsa loquitur* in air accidents depends on the facts and circumstances in the particular air accident under consideration by the Court. If the accident is such that it speaks for itself then in that case it applies to air accident just as much as it does in other cases. On the other hand, if the accident is such that the thing does not speak for itself, then it does not apply in the case of that particular air accident just as much as it would not apply in other case.[49]

Negligence should have connection with accident.—The mere fact of a man driving on the wrong side of a road is no evidence of negligence, in an action brought against him for running over a person who was crossing the road on foot.[50]

40. *Kusuma Begum (Smt.) v. New India Assurance Co. Ltd.*, (2001) 1 JT 375 : AIR 2001 SC 485. See pp. 590, 591, *supra*.
41. *Woods v. Duncan*, (1946) AC 401 : 147 LT 286 : 62 TLR 283.
42. *Syad Akbar v. State of Karnataka*, AIR 1979 SC 1848 (1853) : (1980) 1 SCC 30; *Colvilles Ltd. v. Davine*, (1969) 2 All ER 53 (HL) pp. 57, 58.
43. *Cholan Roadways Ltd. v. G. Thirugnanasambadam*, (2005) 3 SCC 241, pp. 249 to 251 : AIR 2005 SC 570.
44. *Backway v. South Wales Transport Co. Ltd.*, (1950) 1 All ER 392; *Henderson v. Henry E. Jenkins*, (1969) 3 All ER 756 : (1970) 1 WLR 147 : 113 SJ 1000 (HL). See also *Tan Chye Coo v. Chang Kew Moi*, (1970) 1 All ER 266 : (1970) AC 282 (PC).
45. *Macfarlane v. Thompson*, (1884) 22 Sc LR 179, followed in *Cates v. Mongini Bros.*, (1917) 19 Bom LR 778.
46. *Walker v. Oslen*, (1882) 9 R (Ct. of Sess) 946, followed in *Cates v. Mongini Bros., supra*.
47. *Pearce v. Round Oak Steel Works*, (1969) 3 All ER 680.
48. *Mewa Devi (Smt.) v. M/s Ram Parkash Rajinder Paul*, AIR 1990 HP 53.
49. *Indian Airlines v. Madhuri Chowdhuri*, AIR 1965 Cal 252.
50. *Lloyd v. Ogleby*, (1859) 5 CBNS 667.

The plaintiff's wife, having safely crossed in front of an omnibus, was startled by some other carriage, and ran back; the driver had seen her pass, and then turned round to speak to the conductor, so that he did not see her return in time to pull up and avoid mischief. The omnibus was on its right side and going at a moderate pace. Here there was no evidence of negligence on the part of the defendant, the owner of the omnibus. It was held that owner of the omnibus was not negligent.[51]

Falling of blackboard.—The plaintiff, being a scholar at a school, was injured by the fall of a blackboard that was being used by a teacher in charge of the defendant's class. It was held that the mere fall of the blackboard was not evidence of negligence on the part of the teacher.[52]

Falling of ceiling fan.—The plaintiff, who was a midwife, went to the restaurant of the defendants to take lunch and sat at a table over which an electric fan was suspended with a rod attached to the ceiling. As the fan was switched off by a waiter under her instructions it fell on her left hand causing injuries to her hand and fingers. The plaintiff brought an action for negligence against the defendants to recover Rs. 15,000 as damages alleging that she was incapacitated from following her profession and was seriously handicapped by being deprived of the use of her left hand and had suffered severe physical and mental pain. It was held that the defendants were not liable as the falling of the fan was not due to any negligence on their part but was due to an accident owing to a latent defect in the metal of the suspension rod, and that the accident could not have been averted by the exercise of ordinary care, skill and caution on the part of the defendants.[53]

Railways cases.—Where the dead body of man was found on the defendants' line of railway near a level crossing at night, the man having been killed by a train which carried the usual headlights, but did not whistle, or otherwise gave warning of its approach, it was held, in an action by his widow, that even assuming that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident. In the course of the judgment it was observed: "One may surmise, and it is 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 than that the man ran against the train?"[54] Though it was the duty of the railway company to inspect the carriage-doors and see that they were properly fastened before the train left a station, the doors were not continuously under their sole control in the sense necessary for the doctrine of *res ipsa loquitur* to apply, and the mere fact that a door came open and an infant passing through the corridor of the train fell down on the railway line was not in itself *prima facie* evidence of negligence against the railway company and the company was not liable.[55] The maxim has been applied to the case of a derailment for derailment is

51. *Cotton v. Wood*, (1860) 8 CBNS 568.
52. *Crisp v. Thomas*, (1891) 63 LT 756. See *Welfare v. London & Brighton Ry. Co.*, (1869) LR 4 QB 693, where a zinc roll fell on a person while he was looking at a time-table on a railway station and it was held that there was no evidence of negligence on the part of the defendant company.
53. *Cates v. Mongini Bros.*, (1917) 19 Bom LR 778.
54. PER LORD HALSBURY, L.C., in *Wakelin v. L. & S. W. Ry.*, (1886) 12 App Cas 41, 45 : 55 LT 709. See *Drury v. N. E. Ry.*, (1901) 2 KB 322. A mail train from Madras to Bombay passed a certain station and within a minute or two afterwards it was completely wrecked by the falling of a bridge over a watercourse, and the plaintiff's father was one of the many passengers who were then killed either by shock or by drowning in the flood which had carried the bridge away. It was held that the onus of proving that there was no negligence on the part of the railway company in keeping proper watch over the bridge lay on the company : *Madras Ry. Co. v. Ratilal Kalidas*, (1905) 4 MLT 251.
55. *Easson v. London & North Eastern Ry. Co.*, (1944) 2 All ER 425.

not a normal feature and it is more consistent with its being caused by negligence of the Railway or its employees.[56]

Storage of cotton without precaution.—Where the defendants stored a large quantity of cotton bales in a room in the plaintiff's house unwatched for months and cotton ignited with the result that the plaintiff's house was destroyed it was held that the defendants were liable.[57]

Collision by cycle.—A minor girl whilst she was passing by a road on left side along with her mother collided with the defendant who was coming on a cycle from the opposite direction and sustained severe injuries. It was alleged that the collision took place because the defendant suddenly turned his cycle on the wrong side of the road and the defendant was carrying a person on the rod of the cycle which was not permissible under the traffic rules. In a suit for damages for injury caused to the girl, it was held that none of the aforesaid elements taken individually may prove negligence as contemplated in law. But the position may differ when each of them is weighed along with other circumstances on the record which go to show that all reasonable care on the part of the defendant which should have avoided the collision was not taken by him.[58]

Breach in canal.—Where a canal was in the management of the defendant, the State of Punjab, and as a result of proper care not having been taken of it by the defendant, a breach occurred in the canal and loss was suffered by the plaintiff-cultivator by flooding of his lands, it was held by the Supreme Court that the rule of *res ipsa loquitur* applied and the breach itself was *prima facie* proof of negligence.[59]

Collapse of crane.—The appellant labourer was employed by the respondent as one of a crew engaged in pile-driving operations for which process a crane was used. The appellant was asked to climb up the lead of the crane in order to get a pile into position and as the pile was being hoisted, the crane toppled over and threw the appellant on the ground causing him serious injury. It was found that the crane toppled over because the ground had suddenly given way under one of the wheels supporting the crane. In an action for damages the appellant claimed that his injury resulted from negligence of the respondents in failing to provide a safe system of work. It was held that the mere fact that the crane fell did not inevitably entitle the appellant to succeed, for the respondents were liable only if they were negligent and as cranes did not ordinarily collapse, the principle of *res ipsa loquitur* applied, with the consequence that the burden was on the respondent to prove that they had not been negligent.[60]

Fire-explosive injuring spectator in crowd.—Where a person fires an explosive which normally flies perpendicularly into the sky before it explodes, but it flew at a tangent and fell and burst in the midst of a crowd in a maidan causing injury to a spectator, it was held that negligence on the part of the person firing the explosive substance must be presumed. Even if the negligence is not established, the principle *res ipsa loquitur* would apply.[61]

56. *Khedut Oil Cake Industries (M/s.) v. Union of India*, AIR 1988 Del 88.
57. *Mulchand Nemi Chand v. Basdeo Ram Sarup*, (1926) ILR 48 All 404.
58. *Rampeary v. Jai Prakash*, AIR 1963 Pat 316.
59. *State of Punjab v. Modern Cultivators (M/s.)*, (1964) 2 SCJ 796 : AIR 1965 SC 17.
60. *Swan v. Salisbury Construction Co. Ltd.*, (1966) 2 All ER 138 : (1966) 1 WLR 204 : 109 SJ 195.
61. *Balakrishnan v. Subramanian*, AIR 1968 Ker 151.

11. CONTRACTING OUT OF LIABILITY FOR NEGLIGENCE

By the Unfair Contract Terms Act, 1977 (U.K.) it is not open to a person by contract or notice to exclude or restrict his liability for death or personal injury resulting from negligence. In the case of other loss or damage, the Act permits exclusion or restriction of liability for negligence by a term in a contract or notice in so far as the term of notice satisfies the requirement of reasonableness.[62] The Act defines negligence as the breach (a) of any obligation arising from express or implied terms of a contract to take reasonable care or exercise reasonable skill in the performance of a contract; (b) of any common law duty to take reasonable care or exercise reasonable skill. Thus the Act covers both contractual and tortious negligence. It may not be open to apply the principles of the Act in India in so far as a contractual negligence is concerned for the law of contract in India is codified. But as regards tortious negligence the Act can be applied as embodying principles of equity, justice and good conscience.[63]

12. NEGLIGENT MISSTATEMENT

Negligent misstatement is a form of negligence but it is more conveniently discussed in Chapter XXI in company with Fraud and Malicious Falsehood.

62. On the question of reasonableness of a contractual term see *Harris v. Wyre Forest District Council*, (1988) 1 All ER 691 : (1988) QB 835 : (1986) 2 WLR 1173 (CA); on the question of reasonableness of a notice, see *Smith v. Erich S. Bush (a firm)*, (1989) 2 All ER 514 : (1990) 1 AC 831 : (1989) 2 WLR 790 (HL).
63. See Chapter 1, title 1, pp. 2, 3.

CHAPTER XX

NUISANCE

SYNOPSIS

1. GENERAL

NUISANCE has been defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another, and not amounting to a trespass.[1] The word "nuisance" is derived from the French word *nuire*, to do hurt, or to annoy. Blackstone describes nuisance (*nocumentum*) as something that "worketh hurt, inconvenience, or damage."

A nuisance may be caused by negligence, and there may be cases in which the same act or omission will support an action of either kind, but, generally speaking, these two classes of actions are distinct, and the evidence necessary to support them is different.[2] Nuisance is no branch of the law of negligence, and it is no defence that all reasonable care to prevent it is taken.[3]

Where undertakers act under a mandatory obligation (*e.g.* statutory obligation) whether or not there is a saving clause not exempting them from liability in nuisance, there is no liability in nuisance if what has been done is that which was expressly required to be done, or was reasonably incidental thereto.[4] There is a distinction in this context between statutory obligation or duty and statutory power which is permissive in nature. In case of the former, there is immunity from an action based on nuisance but in case of the latter, there is no immunity and power must be exercised in strict conformity with private rights; but even in the former case there will be no immunity if the power is negligently exercised.[5] It is also obvious that there will be no immunity in either of the cases when the action taken is *ultra vires* the statute.[6]

Nuisance is of two kinds: (a) Public, general, or common, and (b) Private.

1. Stephen, iii, 499.
2. *Cunard v. Antifyre Ltd.*, (1933) 1 KB 551, 558 : 148 LT 287 : 49 TLR 183.
3. *Rapier v. London Ramways Co.*, (1893) 2 Ch 588, 599 : 69 LT 361 : 63 LJ Ch 36; *Newsome v. Darton Urban District Council*, (1938) 1 All ER 79, 81.
4. *Dunne v. North Western Gas Board*, (1964) 2 WLR 164, 181 : (1963) 3 All ER 916.
5. *Allen v. Gulf Oil Refining Ltd.*, (1981) 1 All ER 353 (HL), p. 356 : (1980) QB 156; *Department of Transport v. North West Water Authority*, (1983) 3 All ER 273 (HL), pp. 275, 276 : (1984) AC 336 : (1983) 3 WLR 707. See further text and footnotes 16 to 20, pp. 87, 88, Chapter V.
6. *Home Office v. Dorset Yacht Co. Ltd.*, (1970) AC 1004 (HL) pp. 1064-1071 : (1970) 2 WLR 1140 : 114 SJ 375 : (1970) 2 All ER 294.

2. PUBLIC, GENERAL OR COMMON NUISANCE

A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance, to the public or to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. [See, Indian Penal Code, section 268.]

Public nuisance is an act affecting the public at large, or some considerable portion of it; and it must interfere with rights which members of the community might otherwise enjoy. Acts which seriously interfere with the health, safety, comfort or convenience of the public generally or which tend to degrade public morals have always been considered public nuisance, *e.g.* carrying on trades which cause offensive smells,[7] or intolerable noises,[8] keeping an inflammable substance like gunpowder in large quantities;[9] drawing water in a can from a filthy source.[10] They are dealt with by, or in the name of, the State.

Public nuisance can only be the subject of one action; otherwise a party might be ruined by a million suits. It depends in a great measure upon the number of houses and the concourse of people in the vicinity. An indictment will fail if the nuisance complained of only affects one or a few individuals. Again, no length of time can legalize a public nuisance, though it may supply a defence to an action by a private person.[11]

Public nuisance does not create a civil cause of action for any person. In order that an individual may have a private right of action in respect of a public nuisance—

(1) He must show a particular injury to himself beyond that which is suffered by the rest of public. If the alleged nuisance is, for instance, the obstruction of a highway, it is not enough for him to show that he suffers the same inconvenience in the use of the highway as other people do.[12] He must show that he has suffered some damage more than what the general body of the public had to suffer.[13]

(2) Such injury must be direct, and not a mere consequential injury; as, where one way is obstructed, but another is left open. In such a case the private and particular injury is not sufficiently direct to give a cause of action.

(3) The injury must be shown to be of a substantial character, not fleeting or evanescent.[14]

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7. *Malton Board of Health v. Malton Manure Co.*, (1879) 4 Ex D 302.
8. *Lambton v. Mellish*, (1894) 3 Ch 163.
9. *Lister's* Case, (1856) 1 D & B 118.
10. *Att-Genl. v. Proprietors of the Bradford Canal*, (1866) LR 2 Eq 71.
11. *Weld v. Hornby*, (1806) 7 East 195. See section 268 of the Indian Penal Code as to nuisance punishable as a crime.
12. *Ireson v. Moore*, (1699) 1 Ld Raym 486; *Hubert v. Groves*, (1794) 1 Esp 148; *Winterbottom v. Lord Derby*, (1867) LR 2 Ex 316; *Vanderpant v. Mayfair Hotel Co.*, (1930) 1 Ch 138 : 142 LT 198 : 99 LJ Ch 84. Frontagers on a road not repairable by the inhabitants at large, have such an interest, over and beyond that of the general public, in preventing damage to the road, as to entitle them to sue for an injunction : *Medcalf v. R. Strawbridge, Ld.*, (1937) 2 KB 102; *Bhawan Singh v. Narottam Singh*, (1909) ILR 31 All 444; *Ram Chandra v. Joti Prasad*, (1910) ILR 33 All 287; *Ganga Din v. Jagat*, (1914) 12 ALJR 1026; *Ramghulam Khatik v. Ramkhelawan Ram*, (1936) ILR 16 Pat 190. In this case it was also held that the right of the resident of a village to sue for removal of an obstruction to a village path or to a well does not amount to a public nuisance and a suit was maintainable without proving special damage. *GMM Pfaudler Ltd. v. TATA AIG Life Insurance Company Limited & Others* (2011) 1 Bom CR 670 : (2010) 7 Mah LJ 541 : (2010) 6 AIR Bom R 131.
13. *The Municipal Board, Lucknow v. Mussammat Ram Dei*, ILR (1940) 16 Luck 173.
14. *Benjamin v. Storr*, (1874) LR 9 CP 400, 407; *Sadu v. Suka*, (1902) 5 Bom LR 116.

Thus, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct and substantial.[15] The object of this rule is to avoid multiplicity of litigation.

In India under section 91 of the Civil Procedure Code, in the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case.[16]

Ringing of bells.—The plaintiff resided in a house next to a Roman Catholic Chapel of which the defendant was the priest and the chapel bell was rung at all hours of the day and night. It was held that the ringing was a public nuisance and the plaintiff was held entitled to an injunction.[17]

Smoke and noise of cotton mills.—The plaintiffs were owners of a building containing a large number of rooms and had derived a considerable income by letting them. The defendants were owners of an adjacent cotton mill which was erected after the occupation by the plaintiffs of their building. Owing to the noise and smoke of the mill certain rooms in the building remained unlet. In an action against the defendants, the plaintiffs obtained compensation and an injunction prohibiting any increase of smoke, cotton-fluff, or noise of machinery, beyond what subsisted at the time of the decree.[18]

Obstruction of view.—The plaintiff was in possession of a house in London from the windows of which there was an uninterrupted view of part of a certain main thoroughfare along which it was announced that the funeral procession of King Edward VII was to pass. One G agreed to take and pay for seats on the first and second floors of the house in order to see the procession. The defendants caused a stand to be erected across a certain highway to enable the members of the Council and their friends to view the procession. This stand was a public nuisance, and it obstructed the view of the main thoroughfare from the windows of the first floor of the plaintiff's house. G, when he saw the stand in process of erection, asked to be released from his contract as to the seats on the first floor, and the plaintiff, thinking it would be unfair to hold him bound, released him. Several other persons refrained from taking seats owing to the obstruction. In an action by the plaintiff to recover damages for the wrongful interference with the use and enjoyment of her house and the special loss she had sustained, it was held that she was entitled to recover as damages the profit which but for the defendants' act she might have made by letting seats.[19]

Falling of glass from window.—The plaintiff, while walking on the highway was injured on a Tuesday by glass falling from a window in an unoccupied house belonging to the defendant, the window having been broken in an air-raid during the previous Friday night. Owing to the fact that the offices of the defendant's agents were shut on the Saturday and the Sunday and to the difficulty of getting labour during the week-end, no steps to remedy the risk to passers-by had been taken until the Monday. The owner had no actual knowledge of the state of the premises. It was held that the defendant must be presumed to have knowledge of the existence of the

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15. *Benjamin v. Storr, supra.*
16. See *Advocate-General v. Haji Ismail Hasham*, (1909) 12 Bom LR 274.
17. *Soltau v. De Held*, (1851) 2 Sim NS 133.
18. *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy and Kesowram Ramanand*, (1883) ILR 8 Bom 35.
19. *Campbell v. Padington Corporation*, (1911) 1 KB 869 : 104 LT 394 : 27 TLR 232.

nuisance, that he had failed to take reasonable steps to bring it to an end although he had ample time to do so, and that, therefore, he had "continued" it and was liable to the plaintiff.[20]

Obstruction by formation of queue.—The defendant, a shopkeeper, had a licence to sell vegetables and fruits. At a time when there was a scarcity of potatoes, he sold only 1 lb. per ration book. Queues of customers at the defendant's shop formed which, at time, extended on the highway in front of the neighbouring shops. In an action by the keepers of those shops against the defendant, the Judge found that neither nuisance nor damage to the plaintiffs had been proved. It was held also that even if a nuisance had been established, since the defendant in distributing food essential for the public, had been carrying on his business in a normal and proper way, without doing anything unreasonable or unnecessary, the defendant could not be said to have created and so to be responsible for the nuisance; the queues at the time were due to the short supply of potatoes.[21]

Dust and vibration from quarry.—Some quarry-owners conducted their operations in such a manner that personal discomfort was caused to the neighbouring householders by vibration and by dust coming from the quarry which settled on their houses and garden. It was held in action at the instance of the Attorney General that the nuisance from vibration causing personal discomfort was sufficiently widespread to amount to a public nuisance and that injunction was rightly granted against the quarry-owners restraining them from carrying on their operations in the above manner.[22]

2A. PRIVATE NUISANCE

Private nuisance is the using or authorising the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or affecting its enjoyment by interfering materially with his health, comfort or convenience.[23]

The essentials of nuisance thus are (1) an unlawful act; and (2) damage actual or presumed. Damage actual or presumed is an essential element for an action on nuisance. Further, the damage must be substantial and not merely sentimental, speculative trifling, fleeting or evanescent.[24]

Private nuisances are of three kinds: (1) nuisance by encroachment on a neighbour's land; (2) nuisance by a direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land *e.g.*, by wrongful escape of smoke.[25] The essence of private nuisance is the same in all the three cases namely interference with land or enjoyment of land.[26] In the case of class (1) or (2) the measure of damages is the diminution in the value of the land and in case of class (3) loss of amenity value, if there be no diminution in market value.[25] If the occupier of land suffers personal injury as a result of inhaling the smoke he may have a cause of action in negligence but he will have no cause of action in nuisance

20. *Leanse v. Egerton (Lord)*, (1943) 1 KB 323. See further title 3(F), p. 515, Chapter XIX.
21. *Dwyer v. Mansfield*, (1946) 1 KB 437 : (1996) 2 All ER 247 : 62 TLR 400.
22. *Attorney General v. P.Y.A. Quarries*, (1957) 1 All ER 894 : (1957) 2 QB 169 : (1957) 2 WLR 770.
23. WINFIELD defines private nuisance as "unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it." WINFIELD AND JOLOWICZ, Tort, 12th edition, p. 380; *Bhanwarlal v. Dhanraj*, AIR 1973 Raj 212 (216). See further *Usha Ben v. Bhagya Laxmi Chitra Mandir*, AIR 1978 Guj 13.
24. *Rafat Ali v. Sugjani Bai*, AIR 1999 SC 283, pp. 285, 286 : (1999) 1 SCC 133.
25. *Hunter v. Canary Wharf Ltd.*, (1997) 2 All ER 426 (HL), p. 441 : (1997) AC 655 : (1997) 2 WLR 684.
26. *Hunter v. Canary Wharf Ltd.*, (1997) 2 All ER 426, p. 442.

for his personal injury.[27] Thus the quantum of damages in private nuisance does not depend on the number of those enjoying the land in question.[27] It also follows that the only persons entitled to sue for loss in amenity value as in the case of diminution in the value of the land are the owner or the occupier with the right to exclusive possession.[27] Thus persons merely residing with the owner but having no right in the land *e.g.* wife and children have no cause of action in nuisance.[27]

Private nuisances include acts leading to (a) wrongful disturbances of easements or servitudes, *e.g.* obstruction to light and air, disturbance of right to support; or (b) wrongful escape of deleterious substances into another's property, such as smoke, smell, fumes, gas, noise, water, filth, heat, electricity, disease-germs, trees, vegetation, animals, etc.[28] "The forms of this (nuisance) are innumerable. But whatever be the type, it does not follow that any harm constitutes a nuisance. The whole law on the subject really represents a balancing of conflicting interests. In fact the law repeatedly recognises that a man may use his own land so as to injure another without committing a nuisance. It is only if such use is unreasonable that it becomes unlawful. Reasonableness plays an important part in determining whether or not there has been a nuisance."[29]

The liability for nuisance "has been kept under control by the principle of reasonable user the principle of give and take as between neighbouring occupiers of land, under which those acts necessary for the common and ordinary use may be done, if conveniently done, without subjecting those who do them to action."[30] Normal activities of tenants of a neighbouring flat do not amount to a nuisance even though the noise from them is heard because of inadequate sound proofing. In such a case neither the tenants nor the landlord can be held liable for nuisance.[31]

Private nuisance in contrast to public nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. It cannot be made the subject of an indictment, but may be the ground of a civil action for damages or an injunction or both.

A right to commit a private nuisance may be acquired by prescription as an easement.[32] But user which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement. This is applicable both to the affirmative and negative easements. Thus the right to make a noise so as to annoy a neighbour cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance.[33]

In an action for nuisance it is no defence that the plaintiff himself came to the nuisance;[34] or that the act causing nuisance is beneficial to the public;[35] or the place where the nuisance is created is the only place suitable for the purpose;[36] or that the defendant is merely making a reasonable use of his property.[37]

27. *Hunter v. Canary Wharf Ltd.*, (1997) 2 All ER 426 (HL), p. 441 : (1997) AC 655 : (1997) 2 WLR 684.
28. See *Dhanusao v. Sitabai*, ILR (1948) Nag 698.
29. *Bhanwarlal v. Dhanraj*, AIR 1973 Raj 213 (216, 217.)
30. *Cambridge Water Co. Ltd. v. Eastern Counties Leather plc.*, (1994) 1 All ER 53, pp. 70, 71 : (1994) 2 AC 266 : (1994) 2 WLR 53 (HL); *Southwork London Borough Council v. Mills*, (1999) 4 All ER 449, p. 460 (HL).
31. *Southwork London Borough Council v. Mills, supra.*
32. *Leconfiled v. Lansdale*, (1870) LR 5 CP 657.
33. *Sturges v. Bridgman*, (1879) 11 Ch D 852; *Murgatroyd v. Robinson*, (1857) 7 El & Bl 391 : 48 LT Ch 785: 41 LT 219.
34. *Elliotson v. Feetham*, (1835) 2 Bing NC 134; *Bliss v. Hall*, (1838) 4 Bing NC 183.
35. *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch 287, 316 : 72 LT 34 : 43 WR 238.
36. *St. Helen's Smelting Co. v. Tipping*, (1865) 11 HLC 642; *Bamford v. Turnley*, (1860) 3 B & S 62.
37. *Broder v. Saillard*, (1876) 2 Ch D 692, 701 : 24 WR 1011; *Reinhardt v. Mentasti*, (1889) 42 Ch D 685.

A person is not liable for a nuisance constituted by the state of his property unless (a) he causes it; or (b) by the neglect of some duty he allows it to arise; or (c) when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he became or ought to have become aware of it.[38]

A man may become responsible for a nuisance by erecting and working a noisy Smith's forge or workshop;[39] or a striking tallow furnace;[40] or a privy;[41] or by making cesspool, the filth of which percolates through the soil and contaminates the water of his neighbour's well or spring;[42] or by keeping a number of vans waiting before a shop-door.[43]

3. HIGHWAYS

If nuisance is created as a result of something which has been done by the highway authority, then liability will arise. "The moment the structure of the road is interfered with and it comes within the ambit of the operation commenced by the person who is entitled to interfere with the structure of the road, then, until that road is restored into the condition in which it was before that alteration of its structure began, it seems to me the person who interfered with it is responsible for a misfeasance."[44] Under the Highways (Miscellaneous Provisions) Act, 1961, the common law rule that a highway authority is not liable for non-feasance is abolished. Therefore, the distinction between misfeasance and non-feasance by local authorities is now abrogated. The law is to be found now in the Highways Act, 1980. In any action against a Highway Authority for its failure to maintain a highway, it is a defence to prove that the authority had taken such care as in all the circumstances was reasonably required.[45]

If a nuisance is created on a highway by a private individual liability would arise if any person is injured as a result of what has been done irrespective of negligence.[46] If anything is placed on the highway which is likely to cause an accident being an obstruction to those who are using the highway on their lawful occasion (such as a vehicle unlighted and unguarded standing there at night) and an accident results, there is an actionable nuisance.[47] In the absence of evidence to establish *prima facie* that a highway is dangerous to traffic and where there is no breach of obligation on the part of the highway authority to keep the pavement which is part of the highway in repairs, users of the highway must take account of the possibility of unevenness in the pavement.[48]

A tramway company after a heavy snowstorm cleaned their track by means of a snow-plough, and thereby increased the deposit of snow in certain portions of the

38. *Cunliffe v. Bankes*, (1945) 1 All ER 459. See further *Lippiatt v. South Gloucestershire Council*, (1999) 4 All ER 149 (CA).
39. *Bradley v. Gill*, (1862) 125 Eng Rep 1, Lutw 69. See *Sadashiva Chetty v. Rangappa Raju*, (1918) MWN 293 : 24 MLT 17 where an Oil-mill which was causing noise and emitting foul smell was held to be a nuisance.
40. *Bliss v. Hall*, (1838) 5 Scott 500.
41. *Jones v. Powell*, (1629) Hutt 135.
42. *Norton v. Schoolefield*, (1842) 9 M & W 655.
43. *Attorney General v. Brighton and Have Cooper Supply Association*, (1900) 1 Ch 276.
44. PER LORD HALSBURY in *Mayor and Corporation of Shoreditch v. Bull*, (1904) 90 LT 210, 211; *Newsome v. Darton Urban District Council*, (1938) 1 All ER 79, affirmed in (1938) 3 All ER 93.
45. For actions against Highway Authority, see *Griffiths v. Liverpool Corporation*, (1967) 1 QB 374; *Haydon v. Kent County Council*, (1978) QB 343 : (1978) 2 WLR 485 : (1978) 2 All ER 97. See further title 4A Chapter III, p 38.
46. *Midwood and Co. Ltd. v. Manchester Corporation*, (1905) 2 KB 597.
47. *Ware v. Garston Haulage Co., Ltd.*, (1944) KB 30.
48. *Meggs v. Liverpool Corpn.*, (1968) 1 All ER 1137.

street, and, in order to prevent the snow or snow-water from freezing in the grooves, they scattered salt upon the rails and their vicinity. The snow and salt in combination formed a wet briny amalgam, and the slush thus formed was left to remain in the street without being removed then and there. It was held that those acts of the tramway company amounted to an unauthorised nuisance, and that they were responsible for it, notwithstanding the fact that the duty of removing any obstruction in the street rested with the Town Council as the street authority.[49] A motor omnibus of the defendants, in which the plaintiff was a passenger, "skidded" upon a road the surface of which was greasy from rain, and ran into an electric light standard, and the plaintiff was injured. It was assumed without dispute that motor omnibuses, however well constructed, had a tendency to skid, when the road was greasy. It was held that there was no evidence that the defendants' allowing the motor omnibus to run constituted a nuisance.[50]

Leaving unlighted vehicle on road at night.—A motor-cyclist at night ran into the back of a trailer which was attached to a stationary lorry standing on the near side of a highway. The lorry and trailer were unattended and no rear light showed from the trailer. It was held that the lorry and trailer were an obstruction on the highway, and as such constituted an actionable nuisance. There was a dangerous obstruction in the highway and consequently there was an absolute duty on the defendants to light it or otherwise efficiently guard it to prevent accidents.[51]

Injury caused by subsistence of highway.—The defendants had made a trench in a highway for the purpose of laying a drain. The trench was filled in, but after three years a subsidence occurred at the site of the excavation. The plaintiff, while riding a bicycle, passed over the subsidence, and was thrown from his machine and injured. It was found that the subsidence was the result of the work, though the work had not been done negligently. It was held that (1) the defendants, having brought a nuisance on the highway, were liable to the plaintiff; (2) the defendants, being under a duty to make good the inevitable subsidences resulting from the excavation were also liable on the ground of negligence in not discovering and remedying the danger.[52]

4. DISTINCTION BETWEEN INJURY TO PROPERTY AND PHYSICAL DISCOMFORT

There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing *personal discomfort*. As to the latter a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him; as to the former the same rule would not apply.[53] LORD WESTBURY, L.C., observed: "In matters of this description it appears to me that it is a very desirable thing to make the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of

49. *Ogston v. Aberdeen District Tramways Co.*, (1897) AC 111.
50. *Wing v. London General Omnibus Co.* (1909) 2 KB 652. See *McGowan v. Stott*, (1923) 143 LT 217, where this case is commented on.
51. *Ware v. Garston Haulage Co. Ltd.*, (1944) KB 30.
52. *Newsome v. Darton Urban District Council*, (1938) 1 All ER 79.
53. *St. Helen's Smelting Company v. Tipping*, (1865) 11 HLC 642.

actually occurs. If a man lives in a town, it is necessary, that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration... in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."[54]

"Although when you once establish the fact of actual substantial damage it is quite right and legitimate to have recourse to scientific evidence as to the causes of that damage, still if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purposes of establishing the damage itself, that evidence will not suffice. The damage must be such as can be shown by a plain witness to a plain common juryman.

"The damage must also be substantial, and it must be, in my view, actual; that is to say, the court has, in dealing with questions of this kind, no right to take into account contingent, prospective, or remote damages... The law does not take notice of the imperceptible accretions to a river bank or to the seashore, although after the lapse of years they become perfectly measurable and ascertainable; and if, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not afford a ground for interfering, although after the lapse of a million minutes the grains of poison or the grains of dust could be easily detected.

"It would have been wrong, as it seems to me, for this court in the reign of *Henry VI* to have interfered with the further use of sea coal in *London*, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen *Victoria* both white and red roses would have ceased to bloom in the *Temple Gardens*. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds, and smells of a common seaport and ship-building town, which would drive the Dryads and their masters from their ancient solitudes."[55]

Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.[56] Thus interference with television reception by

54. *St. Helen's Smelting Co. v. Tipping*, (1865) 11 HLC 642, 650; *Bihari Lal v. James Maclean*, (1924) ILR 46 All 297.
55. PER JAMES, L.J., in *Salvin v. North Brancepeth Coal Co.*, (1874) LR 9 Ch 705, 709.
56. PER LORD WENSLEYDALE in *St. Helen's Smelting Co. v. Tipping*, (1865) 11 HLC 642, 653; *Salvin v. North Brancepeth Coal Co.*, (1874) LR 9 Ch 705, 709; *Philip v. Subbammal*, ILR 1956 TC 1306.

erection of a tall building like loss of visual prospect caused by a tall building is not such an interference with the use and enjoyment of land as to constitute actionable public or private nuisance.[57]

It appears that the degree of harm, in an action for personal discomfort, must be greater than in an action for injury to property. As to the degree of discomfort which constitutes a nuisance, KNIGHT BRUCE, V. C., said in *Walter v. Selfe*.[58]

"Both on principle and authority the important point next for decision may...be thus put: ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"

5. INJURY TO PROPERTY

Any nuisance whereby sensible injury is caused to the property of another is actionable.

Trade

In considering whether any act is a nuisance, regard must be had not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one locality might not be so in another.[59] THESIGER, L.J., said:[60] "Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in *Belgrave Square* would not necessarily be so in *Bermondsey*; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance,.....the trade or manufacture so carried on in that locality is not a private or actionable wrong." Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages in respect of injury created by it to property in the neighbourhood.[61] The grant of the right to carry on a particular trade does not authorize the committal of a nuisance, in the absence of proof that the trade could not be carried on otherwise.[62]

One A had bought an estate in a neighbourhood where many manufacturing works were carried on. Among others there were works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapours from these works, when they were in operation, were proved to be injurious to the trees on A's estate. It was held that A was entitled to damages.[63]

57. *Hunter v. Canary Wharf Ltd.*, (1996) 1 All ER 482 : (1997) AC 655 : (1997) 2 WLR 684 (CA) : (1997) 2 All ER 426 (HL).
58. (1851) 4 De G & S 315, 322.
59. *Sturges v. Bridgman*, (1879) 11 Ch D 852 : 41 LT 219 : 48 LJ Ch 785.
60. *Sturges v. Bridgman*, (1879) 11 Ch D 852, p. 865.
61. *St. Helen's Smelting Co. v. Tipping*, (1865) 11 HLC 642.
62. *Pwllbach Colliery Company Limited v. Woodman*, (1915) AC 634.
63. *St. Helen's Smelting Co. v. Tipping*, (1865) 11 HLC 642, applied in *Halsey v. Esso Petroleum Company Ltd.*, (1961) 2 All ER 145 : (1961) 1 WLR 683 :105 SJ 209, where the plaintiff was awarded damages for the nuisance caused by acid smuts and granted an injunction against the nuisance caused by smell and noise.

The plaintiff was the owner of a house and park which adjoined the defendants' gas-works. Immediately adjoining the defendants' premises was a plantation of trees which had been planted by the plaintiff to screen off the gas-works. The fumes and smoke from the gas-works were carried by wind across the plantation and had injuriously affected the trees to such an extent that the tops of some of the trees were dying whilst others were dead. It was held that the plaintiff was entitled to an injunction restraining the defendants from carrying on their works so as to cause injury to the plaintiff's property.[64]

Sewers, Drains, etc.

The *prima facie* right of every occupier of a piece of land is to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on adjoining land. He may be bound by prescription or otherwise to receive such matter. Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it.[65]

A person cannot claim a right to foul an ordinary drain by discharging into it what it was not intended to carry off and then throw on other persons an obligation to alter the drain in order to remedy the nuisance that he has produced; nor can he say that any other person must meanwhile put up with such nuisance.[66]

A company operating a sewerage system on a commercial basis will become liable in nuisance if the sewerage system becomes inadequate and the plaintiff's property is flooded with surface and foul water unless the company, in case it has a statutory authority shows that there was absence of negligence on its part; or in any other case that it took all necessary steps to prevent the nuisance. On the above reasoning the Court of Appeal in *Marcie v. Thames Water Utilities Ltd.*[67] held the defendant company a sewerage undertaker liable. But the decision was reversed by the House of Lords[68] on the ground that under the statutory regime in the Water Industry Act, 1991 it was for the regulator of the Water Industry to secure that the companies appointed as water undertakers properly carried out their functions and the regulator could enforce the obligation of a sewerage undertaker by an enforcement order, therefore a person who sustained loss or damage as a result of a sewerage undertakers contravention of his general duty had no direct remedy under the Act. Such a person could only bring proceedings against a sewerage undertaker in respect of his failure to comply with an enforcement order, if one had been made.

Trees

A person can bring an action for damage caused to his property by overhanging branches[69] of a tree on his neighbour's land or by its roots which burrow under the

64. *Wood v. Conway Corporation*, (1914) 2 Ch 47.
65. *Humphries v. Cousins*, (1877) 2 CPD 239; *Smith v. Kenrick*, (1849) 7 CB 515; *Baird v. Williamson*, (1863) 15 CBNS 376; *Broder v. Saillard*, (1876) 2 Ch D 692; *Hurdman v. North Eastern Ry. Co.*, (1878) 3 CPD 168, 173; *Ramasubbier v. Mahomed Khan Saheb*, (1937) 46 MLW 466.
66. *Galstaun v. Doonia Lal Seal*, (1905) ILR 32 Cal 697. In this case the defendant, the owner of a shellac factory, discharged into the municipal drain liquid refuse of an offensive character and he was restrained from doing so as it interfered with the plaintiff's ordinary comfort.
67. (2002) 2 All ER 55 (CA).
68. (2004) 1 All ER 135 (HL).
69. *Lemmon v. Webb*, (1894) 3 Ch 1.

ground.[70] In *Dilaware Ltd. v. Westminister City Council*,[71] the respondent was owner of a tree growing in the footpath of a highway. The roots of the tree caused cracks in the neighbouring building. The transfree of the building, after the cracks were detected, was held entitled to recover reasonable remedial expenditure in respect of the entire damage from the continuing nuisance caused by the trees. No distinction was to be drawn between trees that were planted and those that were self-sown, and it was no defence to say that damage was caused by natural growth.[72] The owner of a tree which overhangs the neighbour's land is not entitled to go on the latter's land in order to gather the fruits that fall there from the overhanging branch.[73] The person aggrieved can himself cut off the overhanging branches and abate the nuisance without entering upon the neighbour's land. No prescriptive right can be acquired to have an overhanging tree as an old nuisance does not become by passage of time a respectable nuisance.[74]

Nuisance due to Smoke

The second defendants owned and operated coke ovens situate 50 yards away from a road. The process of manufacturing coke involved the production at intervals of clouds of smoke and steam which, under certain conditions of wind and weather, passed low over the road so as to obscure the view of passengers thereon. While one of these clouds was so passing a collision occurred between a motor-car and a motor omnibus driven by a servant of the first defendants, both of which vehicles were travelling along the road, two passengers in the car sustaining fatal injuries. It was found that the omnibus was being driven negligently at the time of the accident. It was held that the discharge of smoke and steam across the road on the occasion of the accident was a nuisance caused by the second defendants, and the second defendants were also guilty of negligence in not posting a man at each end of the area affected to warn approaching vehicles as soon as a discharge was imminent.[75]

6. PHYSICAL DISCOMFORT

Acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action, *e.g.*, burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisance if done wantonly and maliciously. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live. The above principle will not apply if what has been done was not the using of land in a common and ordinary way, but in an exceptional manner; not unnatural, nor unusual, but not the common and ordinary use of lands. But anything which under any circumstances lessens the comfort or endangers the health or safety of a neighbour is not necessarily an actionable nuisance. Whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to

70. *Bulter v. Standard Telephones and Cables, Ltd.*, (1940) 1 KB 399 : 163 LT 145 : (1940) 1 All ER 121.
71. (2001) 4 All ER 737 (HL).
72. *Davey v. Harrow Corporation*, (1958) 1 QB 60 : (1957) 2 WLR 941 : (1957) 2 All ER 305.
73. *Navan Goundan v. Mambattanveetu Kannan*, (1950) 1 MLJ 179 : (1950) 63 MLW 81.
74. *Batcha Rowther v. Alagappan Servai*, AIR 1959 Mad 12 : (1958) 2 MLJ 157.
75. *Holling v. Yorkshire Traction Co. Ltd.*, (1948) 2 All ER 662.

amount to a nuisance an action will lie whatever the locality may be.[76] Thus noise from ordinary use of neighbouring flats does not constitute nuisance.[77]

The interference with a man's comfort which will justify the intervention of the courts must be a material interference with an ordinary and reasonable standard of comfort, and must be considered in the light of the circumstances of time and place. It is not necessary that the acts or state of things complained of should be noxious in the sense of being injurious to health. Smoke, noise and offensive odours, although not injurious to health, may constitute a nuisance.[78] It has been held that severe and recurrent interference with enjoyment of television by an ordinary householder using an aerial on his house need not constitute an actionable nuisance.[79] Subject to building regulatory laws a person was free to build on his land unrestricted by the fact that the presence of his building might of itself interfere with his neighbour's enjoyment of his land. Therefore, interference with television reception caused by the mere presence of a building was not capable of constituting an actionable private nuisance.[80] "A man may, without being liable to an action, exercise a lawful trade as that of a butcher, brewer, or the like, notwithstanding it be carried on so near the house of another as to be annoyance to him in rendering his residence there less delectable or agreeable; provided the trade be so conducted that it does not cause what amounts in point of law to nuisance to the neighbouring house.[81]

Carrying on an offensive trade so as to interfere with another's health and comfort or his occupation of property is a legal nuisance.[82]

Nuisances of this class for the most part arise in respect of—

(1) Obstruction of light.

(2) Pollution of air or water.

(3) Noise.

Light.—With regard to obstruction of light, see Chapter XV, title 7(H).

Air.—If smoke, vapour, and noisome gases are communicated to the air which surrounds and enters the plaintiff's house, so as to cause inconvenience to the occupiers thereof, and render the house manifestly less comfortable, the act will be a nuisance.

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76. *Bamford v. Turnley*, (1862) 31 LJQB 286. The defendant kept a hotel adjoining the plaintiff's residence, and put a kitchen stove in a place where no stove had previously been, and so near the wine-cellar of the plaintiff as to damage the wine. It was admitted that the stove was one of an ordinary character, well constructed, and that precaution had been taken to prevent its being obnoxious, but an injunction was granted : *Reinhardt v. Mentasti*, (1889) 42 Ch D 685. This decision may be supported on the assumption of a finding that the placing for the first time of a large stove against a neighbour's cellar, when it might be placed elsewhere is not a reasonable user conveniently exercised.
77. *Baxter v. Camden London Borough Council*, (1999) 1 All ER 237 : (2001) QB 1 : (1999) 2 WLR 566 (CA).
78. *Crump v. Lombert*, (1867) LR 3 Eq 409, applied in *Halsey v. Esso Petroleum Company Ltd.*, (1961) 2 All ER 145 : (1961) 1 WLR 683 : 105 SJ 209. If the door of a privy, which opens on a public street, is left open and constitutes nuisance, an action lies: *Krishna Chandra v. Gopal Chand*, (1937) 39 PLR 664.
79. *Bridlington Relay v. Yorkshire Elec. Board*, (1965) 1 All ER 264 : (1965) Ch 436 : (1965) 2 WLR 349 : 109 SJ 12.
80. *Hunter v. Canary Wharf Ltd.*, (1997) 2 All ER 426 (HL).
81. *Bamford v. Turnley*, (1862) 31 LJ QB 286.
82. *Galstaun v. Doonia Lal Seal*, (1905) ILR 32 Cal 697; *Sadasiva Chetty v. Rangappa Rajoo*, (1918) MWN 293 : 24 MLT 17.

In India, voluntarily vitiating the atmosphere so as to make it noxious to the public health is indictable as an offence under section 278 of the Indian Penal Code. The Air (Prevention and Control of Pollution) Act 1981 requires scheduled industries located anywhere in the country and any industry located within the control areas to abide by the standards laid down by the Central or State Board and provides penalties for non-compliance. Proceedings under the Criminal Procedure Code can also be taken for removing a public nuisance caused by Air, water, noise or environmental pollution.[83] The 1981 Air Act did not include the provision relating to control of noise pollution but by amendment in 1987, noise present in the atmosphere has been brought within the definition of air pollutant. The Central Pollution Control Board has laid down certain noise standards under section 16 of the Act. The Central Government has also brought into existence the Noise Pollution (Regulation and Control) Rules, 2000 under the Environment Protection Act, 1986 for preventing adverse impact of noise on human health including harmful psychological and physiological effects.[84]

An injunction was granted to prevent a gas company from manufacturing gas in such close proximity to the premises of the plaintiff, a market gardener, and in such a manner as to injure his garden produce by the escape of noxious matter,[85] to prevent a company from carrying on calcining operations in any manner whereby noxious vapours would be discharged, on the pursuer's land, so as to do damage to his plantations or estate;[86] and to prevent a person from turning a floor underneath a residential flat into a restaurant and thereby causing a nuisance by heat and smell to the occupier of the flat.[87]

Water.—As regards nuisance from pollution of water, see Riparian Rights, Chapter XV, title 7(c).

Pollution of a public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used is a public nuisance, and is punishable as an offence.[88]

*Noise.**—Quietness and freedom from noise are indispensable to the full and free enjoyment of a dwelling-house. No proprietor has an absolute right to create noises upon his own land, because any right which the law gives is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public.[89] Damages were awarded to the proprietor of a hotel for the inconvenience caused by dust and noise in demolition and building operations unreasonably carried on in the neighbourhood by the defendants.[90] As to what amount of noise, or annoyance from noise, will be sufficient to sustain an action, there is no definite legal rule or measure. It is a question of fact in each case, having regard to all the surrounding circumstances. The question so entirely depends on the surrounding circumstances—the place where, the time when, the alleged nuisance,

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83. *Municipal Council Ratlam v. Vardhichand*, AIR 1980 SC 1622 : (1980) 4 SCC 162; *Krishna Gopal v. State of M.P.*, 1986 Cr LJ 396 (MP); Followed in, *R. Kumaravel Gounder v. Sub-Divisional Executive Magistrate/Sub-Collector*, (2012) 4 CTC 661.
84. See *Dr. Nazhat Praveen Khan 'Noise Pollution and Problem of its Legal Control'*, AIR 2004 Journal 357; *Noise Pollution, In re*, (2005) 5 SCC 733 (paras 14, 94, 103) : AIR 2005 SC 3136.
85. *Broadbent v. Imperial Gas Co.*, (1856) 7 De GM & G 436.
86. *Shotts Iron Co. v. Inglis*, (1882) 7 App Cas 518. Erection of chimney with holes emitting smoke actionable as a nuisance, *B. Venkatappa v. B. Lovis*, AIR 1986 AP 239.
87. *Sanders Clark v. Grosvenor Mansions Co.*, (1900) 16 TLR 428.
88. See the Indian Penal Code, section 277.
* The principles enunciated in English and Indian cases relating to nuisance (Private) caused by noise are summarised in *Dhannalal v. Chittar Singh*, AIR 1959 MP 240, (at pp. 243-244.) See also *Ram Lal v. Mustafabad O.& C.G. Factory*, AIR 1968 Punj 399, (at pp. 402-403,) where the principles relating to actionable nuisance are deduced from a review of case-law.
89. *Allen v. Flood*, (1898) AC 1, 101; *Ismail Sahib v. Venkatanarasimhulu*, ILR 1937 Mad 51.
90. *Andreae v. Selfridge & Co.*, (1938) 1 Ch 1 : 151 LT 317 : (1973) 3 All ER 255 (CA).

the mode of committing it, how, and the duration of it, whether temporary or permanent, occasional or continual—as to make it impossible to lay down any rule of law applicable to every case.[91] Noise will create an actionable nuisance only if it materially interferes with the ordinary comfort of life, judged by ordinary, plain and simple notions, and having regard to the locality; the question being one of degree in each case.[92] The law as stated above relating to actionable nuisance by noise has been expressly approved by the Supreme Court.[93] The standard of judging it is according to that of men of ordinary habits, and not of men of fastidious tastes or of over-sensitive nature, whether due to religious sentiment or not.[94] In *Colls'* case EARL OF H ALSBURY, L.C., said: "A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action."[95]

A person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of property and the class of people who inhabit it.[96] To give a house-holder a right to an injunction against a neighbour for carrying on a noisy business in a trade district, the noise must amount to a nuisance, regard being had to the nature and habits of the neighbourhood and to the pre-existing noises.[97] In a locality devoted to noisy trades, such as the printing and allied trades, if a printing house or factory subjects the occupier of an adjoining residence to such an increase of noise as to interfere substantially with the ordinary comfort of human existence

91. *Bamford v. Turnley*, (1860) 3 B & S 62, 72.
92. *Vanderpant v. Mayfair Hotel Co.*, (1930) 1 Ch 138 : 142 LT 198. Where the defendant established an electric flour-mill adjacent to the plaintiff's house in a bazar locality and the running of the mill produced such noise and vibrations that the plaintiff and his family did not get peace and freedom from noise to follow their normal avocations during the day and did not have a quiet rest at night, *held*, that the running of the mill amounted to a private nuisance which should not be permitted. In a case like this it is not necessary to prove that the health of the inhabitants of the plaintiff's house has been impaired: *Datta Mal Chiranji Lal v. Lodh Prasad*, AIR 1960 All 632. See further *Radhey Shiam v. Gur Prasad*, AIR 1978 All 86.
93. *Noise Pollution (v) In re*, (2005) 5 SCC 733 (Paras 10 and 102) : AIR 2005 SC 3136. See further text and footnotes 24, 25, p. 407.
94. *Muhammad Jalil Khan v. Ram Nath Katua*, (1930) ILR 53 All 484. See *Janki Prasad v. Karamat Husain*, (1931) ILR 53 All 836, where the question whether music in a temple amounts to a private nuisance is discussed at length; See also, *GMM Pfaudler Ltd. v. TATA AIG Life Insurance Company Limited & Others* (2011) 1 Bom CR 670 : (2010) 7 Mah LJ 541 : (2010) 6 AIR Bom R 131, wherein a 'chiller plant' of the defendants caused vibrations and noise in the office premises of the plaintiff. A suit for injunction on grounds of nuisance was filed by the plaintiff. The Court, after discussing at length, English and Indian law on the point of nuisance, held that reasonable noise of vibration would not constitute an actionable tort of nuisance.
95. *Colls v. Home and Colonial Stores, Ltd.*, (1904) AC 179, 185. See *Hari v. Vithal*, (1905) 8 Bom LR 89, where some coppersmiths were restrained from carrying on their *kirtans* in a way so as to cause disturbance to the conducting of *bhajan* (hymns) in a temple. See *Ismail Sahib v. Venkatanarasimhulu*, ILR 1937 Mad 51, where during the performance of a ceremony, noise was produced by tomtom, cymbals, *etc.* long after the hour when people would ordinarily go to sleep, and it was held that this amounted to a nuisance.
96. *Rushmer v. Polsue & Alfieri, Ltd.*, (1906) 1 Ch 234, 250. See *Ball v. Ray*, (1873) LR 8 Ch 467, where the principles applying to a person who turns his house to unusual purpose are discussed.
97. *Polsue & Alfieri, Ltd. v. Rushmer*, (1907) AC 121 : 76 LJ Ch 365 : 96 LT 510.

according to the standard of comfort prevailing in that locality, that is sufficient to constitute an actionable wrong entitling the occupier to an injunction.[1]

In considering the rights of the parties, it is immaterial whether the persons whose actions are objected to have come recently to the neighbourhood, or have been occupying the place for a long time.[2]

A *prescriptive right* to the exercise of a noisome trade on a particular spot may be established by showing twenty years' user by the defendant.[3]

Constant daily noise in an adjoining house.—The constant daily ringing of a peal of heavy bells in a house actually adjoining a private residence was held to be an actionable nuisance and an injunction was granted to restrain it.[4] Injunction was granted to prevent building operations from being proceeded with during the night to the annoyance and discomfort of an adjoining occupier.[5] Sending up of fire-works and causing a band to play for several hours twice a week within one hundred yards of a dwelling-house;[6] the performance of a circus erected near the plaintiff's house, making a loud noise heard through the plaintiff's house;[7] the collection of crowds outside a club established for pugilistic encounters;[8] the establishment of a rifle gallery, organ, and roundabout, in proximity to the plaintiff's house;[9] erection of a stable in such close proximity to a house as to interfere by reason of the noise of the horses with the enjoyment of the owner of the house;[10] noise from the kitchen of an hotel erected close to the plaintiff's residence,[11] were restrained by injunction.

The plaintiffs carried on the business of breeding silver foxes on their land, during the breeding season the vixens are very nervous, and liable, if disturbed, either to refuse to breed, to miscarry, or to kill their young. The defendant, an adjoining landowner, maliciously caused his son to discharge guns on his own land as near as possible to the breeding pens for the purpose of injuring the plaintiffs. It was held that the plaintiffs were entitled to an injunction and damages, although the firing took place on the defendant's land over which he was entitled to shoot.[12]

Music.—Where a nuisance was caused to a tenant of a room in a house by reason of the floor above being used for dancing and other entertainment causing noise and vibration, the court gave nominal damages but declined to grant an injunction on the ground of balance of convenience.[13] Giving of numerous music lessons by the

1. *Polsue & Alfieri, Ltd., v. Rushmer, supra*. It has been held that a concentration of moving vehicles in a small area of a public highway, *e.g.* outside a depot, was a public nuisance : *Halsey v. Esso Petroleum Company Ltd.*, (1961) 2 All ER 145 : (1961) 2 WLR 683.
2. *Janki Prasad v. Karamat Husain*, (1931) ILR 53 All 836.
3. *Elliotson v. Feetham*, (1835) 2 Bing NC 134; *Flight v. Thomas*, (1839) 10 A & E 590. See *Goldsmid v. Turubridge Wells Improvement Commissioners*, (1865) LR 1 Eq 161, where it was held that no prescriptive right could be obtained to discharge sewage into a stream passing through plaintiff's land and feeding a lake therein perceptibly increasing quantity. No right to hold *kirtan* upon another's land can be acquired as an easement. Such a right may be acquired by custom: *Mohini Mohan v. Kashinath Roy*, (1909) 13 CWN 1002.
4. *Soltau v. De Held*, (1851) 2 Sim NS 133.
5. *Webb v. Barker*, (1881) WN 158.
6. *Walker v. Brewster*, (1867) LR 5 Eq 25.
7. *Inchbald v. Robinson*, (1869) LR 4 Ch 388.
8. *Bellamy v. Wells*, (1890) 60 LJ Ch 156.
9. *Winter v. Baker*, (1887) 3 TLR 569.
10. *Ball v. Ray*, (1873) LR 8 Ch 467; *Broder v. Saillard*, (1876) 2 Ch D 692.
11. *Vanderpant v. Mayfair Hotel Co.*, (1930) 1 Ch 138 : 142 LT 198.
12. *Hollywood Silver Fox Farm, Ltd. v. Emmett*, (1936) 2 KB 468 : 155 LT 288 : (1936) 1 All ER 825.
13. *Jenkins v. Jackson*, (1888) 40 Ch D 71. But where the proprietors of an hotel applied for an injunction to restrain the proprietor of tea rooms and a restaurant on the opposite side of the street, from using his premises for the purpose of music, dancing, or other entertainments, so as to cause a

(Footnote No. 13 Contd.)

defendant in a house separated from the plaintiff's house by a thin party-wall, varied by practising and singing, and evening musical entertainments, was held not to be a nuisance for which an injunction could be granted; and, moreover, the court restrained the plaintiff from making noises by way of reprisal.[14]

Prescription.—A confectioner had for upwards of twenty years used, for the purposes of his business, a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt to be a nuisance or complained of until 1873, when the physician erected a consulting room at the end of his garden, and then the noise and vibration, owing to the increased proximity, became a nuisance to him. The question for the consideration of the court was whether the confectioner had obtained a prescriptive right to make the noise in question. It was held that he had not, inasmuch as the user was not physically capable of prevention by the owner of the servient tenement, and was not actionable until the date when it became by reason of the increased proximity a nuisance in law, and under these conditions, as the latter had no power of prevention, there was no prescription by the consent or acquiescence of the owner of the servient tenement.[15]

7. WHO CAN SUE FOR NUISANCE?

The actual occupier of premises can alone bring an action for nuisance of a temporary character. If the injured property is in the occupation of tenants, the landlord or reversioner has no right of action. The latter can bring an action only if the injury complained of is of a permanent nature[16] (*e.g.*, obstruction of light, but not such as noise of machinery in adjacent premises[17]) and injurious to the property and detrimental to the letting value of the house.[18]

If a person takes as tenant an unfurnished house, he cannot, in the absence of a warranty or other special circumstances, hold the landlord liable because of damages arising to him during and by reason of his occupancy as tenant through the house being out of repair or dilapidated. If the tenant brings his wife with him to live in the house, she cannot be in a better position than her husband by reason of her occupancy of the house.[19] A person who has no interest in the property, no right of occupation in the proper sense of the term, cannot maintain an action for a nuisance. The wife of a tenant was held not entitled to maintain an action for injury caused by a tank falling on her owing to vibrations caused by the defendant.[20] This has been approved by the House of Lords and it has been held that a person who had no right to the land affected by a nuisance could not sue in private nuisance. Only a person

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(Footnote No. 13 Contd.)
nuisance to the plaintiff's, their servants and guests, the Court granted a limited injunction restraining the defendant from causing a nuisance by keeping the windows open after midnight while the music and dancing were going on : *New Imperial & Winsudsor Hotel Co. v. Johnson*, (1912) 1 IR 327.

14. *Christie v. Davey*, (1893) 1 Ch 316 : 62 LJ Ch 439.
15. *Sturges v. Bridgman*, (1879) 11 Ch D 85 : 41 LT 219.
16. *Mumford v. O.W. & W. Ry. Co.*, (1856) 1 H & N 34. In this case it was held that a reversioner could not maintain an action against a railway company for making hammering noises in a shed adjoining his house by reason whereof the tenant quitted, and he was unable to let the house except at a lower rent. See *Mott v. Schoolbred*, (1875) LR 20 Eq 22, where a public street was improperly used as a stable yard.
17. *Jones v. Chappell*, (1875) LR 20 Eq 539; *Cooper v. Crabtree*, (1882) 20 Ch D 589 : 51 LJ Ch 544.
18. *Alwar Chetty v. Madras Electric Supply Corporation Ltd.*, (1932) ILR 56 Mad 289.
19. *Cavalier v. Pope*, (1905) 2 KB 757 : (1906) AC 428. The decision in this case has been reversed by the Occupier's Liability Act, 1957, (5 & 6 Eliz. II, Ch. 31).
20. *Malone v. Laskey*, (1907) 2 KB 141 : 76 LJ KB 1134.

with a right to exclusive possession of the land affected could sue but exceptionally a person who was in exclusive possession but who was unable to prove his title could also sue.[21]

8. WHO IS LIABLE FOR NUISANCE?

The action must be brought "against the hand committing the injury, or against the owner for whom the act was done."[22] It will lie against the person (1) who creates or continues a nuisance or authorizes or suffers the creation of a nuisance; or (2) who lets or sells property with a nuisance on it. A person is liable for a nuisance constituted by the state of his property (1) if he causes it; (2) if by the neglect of some duty he allowed it to arise; and (3) if, when it has arisen, without his own act or default, he omits to remedy it within a reasonable time after he became or ought to have become aware of it.[23] Nuisance arising from escape of things naturally on his land may also make the occupier liable if he has failed to take reasonable care with regard to them.[24]

The question of liability when the nuisance affecting neighbours land and buildings was not created by the defendant was elaborately considered by the court of appeal in *Holback Hotel Ltd. v. Scarborough Borough Council*[25] and the following proposition may be said to have been laid down: (1) The duty to abate the nuisance arose from the defendant's knowledge of the hazard and the liability arose only when the defendant was guilty of negligence in abating the nuisance; and (2) The existence of duty and its scope in a nonfeasance case will be determined by applying the test whether it was fair just and reasonable to impose a duty or the extent of that duty. In this case the claimants were the freehold owners and lessees of a hotel which stood on a cliff overlooking the sea. The land between the hotel grounds and the sea was owned by the defendant Borough Council which as owner of the servient tenement was under a duty to provide support to the Hotel grounds. Due to maritime erosion the cliff was inherently unstable. Land slips had occurred in 1982 and 1986 on the council's land below the hotel grounds and the council's chief engineer had expressed the fear after the second slip that the slip if not checked could affect part of the hotel's land. In 1993 there was a massive slip far greater in magnitude than the earlier slips as a result the ground under the seaward wing of the hotel collapsed and the rest of the hotel had to be demolished for safety reasons. In a suit for damages against the council it was held that the council could not have foreseen a danger of the magnitude that occurred in 1993 and it was not just and reasonable to impose liability for damage which was greater in extent than anything that was foreseen or foreseeable without further geological investigation. Moreover it was not incumbent on the council to carry out extensive and expansive remedial work to prevent damage which it ought to have foreseen.

An occupier of land is liable for the continuation of a nuisance created by others (*e.g.* by trespassers or by persons without his authority or permission) if he continues or adopts it. He "continues" a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with

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21. *Hunter v. Canary Wharf Ltd.*, (1997) 2 All ER 426 : (1997) AC 655 (HL). See further, pp. 624, 625, *ante*.
22. PER LORD KENYON in *Stone v. Cartwright*, (1795) 6 TR 411, 412; *Wilson v. Peto*, (1821) 6 Moore 47.
23. *Noble v. Harrison*, (1926) 2 KB 332, 338.
24. *Goldman v. Hargrave*, (1967) 1 AC 645. For this case see p. 559, *ante*.
25. (2000) 2 All ER 705 (CA).

ample time to do so. He "adopts" it if he makes any use of the erection or artificial structure which constitutes the nuisance.[26]

The acts of two or more persons may, taken together, constitute such a nuisance that the court will restrain all from doing the acts constituting the nuisance although the annoyance occasioned by the act of any one of them, if taken alone, would not amount to a nuisance. For instance, if one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent, and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant.[27]

If, owing to want of repair, premises on a highway become dangerous and constitute a nuisance, so that they collapse and injure a passer-by or an adjoining owner, the occupier or owner of the premises, if he has undertaken the duty to repair is answerable, whether he knew or ought to have known of the danger or not. If the nuisance is created, not by want of repair, but by the act of a trespasser, or by a secret and unobservable process of nature, neither the occupier nor the owner responsible for repair is answerable, unless with knowledge or means of knowledge he allows the danger to continue.[28]

An extraordinarily severe snow-storm caused snow and ice to accumulate on the roof of the defendant's premises. No steps were taken to remove the snow or to warn the public of its presence. The plaintiff was standing on the highway outside the defendant's premises looking through the window of the defendants' shop when she was injured by a fall of snow. She claimed damages, alleging nuisance, or, alternatively, negligence. It was held that as the defendants had done nothing to abate the nuisance they were liable both in nuisance and in negligence and that the plea that the storms were an act of God was no defence as it was the snow, and not the storms, which directly caused the injury.[29]

Falling of slate from roof.—A slate fell from the roof of certain premises and injured the plaintiff. It was found that the slate was loosened by blast from an enemy bomb but it was not known to the occupier of the premises that it was so and on inspection of the roof it did not appear that it had loosened. The cause of the fall was high wind. It was held that the defendants were not liable for having continued a nuisance the existence of which they ought to have known.[30]

Overhanging branch.—The defendants were the owners and occupiers of a farm adjoining which there was a public road. On the farm and growing on the grass verge near the road was an oak tree of considerable age one substantial branch of which was going at right angles towards the road for about two feet before turning straight upwards. The oak had grown before the defendants came to own and occupy the farm. Neither the defendants nor the highway authorities nor the plaintiff's driver who frequently passed along the road had considered the branch to be a hazard. A lorry belonging to the plaintiffs and carrying a high load of packing cases was being

26. *Sedleigh-Denfield v. O'Callaghan*, (1940) AC 880, applied in *Pemberton v. Bright*, (1960) 1 All ER 792 : (1960) 1 WLR 436 : 104 SJ 349.
27. *Lambton v. Mellish*, (1894) 3 Ch 163 : 71 LT 385 : 58 JP 835. In *Jawand Singh v. Muhammad Din*, (1919) PWR No. 89 of 1920, the defendants, Hindus, were prevented from blowing conches and beating drums when the plaintiffs, Mahomedans, called out the *azan* from a mosque.
28. *Wringe v. Cohen*, (1940) 1 KB 229 : (1939) 4 All ER 241, *Wilchick v. Marks and Silverstone*, (1934) 2 KB 56 : 78 SJ 277 : 50 TLR 28, not approved.
29. *State of Worthington's Cash Store*, (1941) 1 KB 488.
30. *Cushing v. Peter Walker & Son*, (1941) 2 All ER 693. Compare case in text and footnote 20, p. 602, *supra* and title 3(F) Chapter XIX, p. 515.

driven along the road at night by the driver, who pulled in to his near side to allow another lorry of the plaintiffs coming in the opposite direction to pass, with the result that the load struck the overshadowing branch and one of the packing cases fell on the road. The lorry coming in the opposite direction also sustained damages when trying to avoid the packing case. It was held that the plaintiff's claim failed as although the overshadowing branch was a nuisance, the defendants could not be presumed to know of the nuisance and could not be held liable for continuing it.[31]

Liability of landlord.—Generally no action will lie against a landlord for any nuisance existing on premises in occupation of a tenant. The action should be brought against the tenant.[32]

The landlord will be liable for nuisance (1) if he lets the premises in a ruinous condition, provided that he knew of their condition,[33] (2) when it has been created before the premises were let by him,[34] *e.g.* obstruction caused to the ancient lights of a neighbour; (3) if he expressly or impliedly authorises his tenant to create or continue the nuisance;[35] (4) when the nuisance is due to a breach by him of the covenants of the lease,[36] *e.g.* if he neglects to repair the premises.

A landlord who lets an unfurnished house in a dangerous condition, he being under no liability to keep it in repair, is not liable in the absence of express contract to his tenant, or to a person using the premises, for personal injuries happening during the term, and due to the defective state of the house.[37] The only duty which the landlord owes to the customers or guests of the tenants is not to expose them to a concealed danger or trap.[38] If there is a defect in the premises likely to cause injury, but known both to the landlord and the tenant, the landlord is not responsible for injuries caused to the tenant.[39]

The owner of a dilapidated house contracted with his tenant to repair it but failed to do so. The tenant's wife, who lived in the house and was well aware of the danger, was injured by an accident caused by the want of repair. It was held that the wife, being a stranger to the contract, had no claim for damages against the owner.[40]

The plaintiff was a tenant of defendant's farms. The right of sporting and preserving game was reserved to the landlord. The defendant had shooting rights over 4230 acres of which 2326 were let to the plaintiff. During the season 1947-48 the defendant's coverts were filled with an inordinate number of wild pheasants which in their search for food gravely damaged the plaintiff's crops. In an action by the plaintiff it was held that the presence of the large number of pheasants in the defendant's coverts was not due to any "unreasonable action" by the defendant but was due to exceptional weather conditions prevailing in the summer of 1947; that the

31. *British Road Services Ltd. v. Slater*, (1964) 1 All ER 816 : (1964) 1 WLR 498. Compare case in text and footnote 20, p. 602, *supra* and title 3(F) Chapter XIX, p. 515.
32. *R v. Pedley*, (1834) 1 Ad & E 822; *Rich v. Basterfield*, (1847) 4 CB 783; *Pretty v. Bicknore*, (1873) LR 8 CP 401.
33. *Todd v. Flight*, (1860) 9 CB (NS) 377.
34. *Roswell v. Prior*, (1701) 12 Mod 635.
35. *Harris v. James*, (1876) 45 LJ QB 545.
36. *Wilchick v. Marks and Silverstone*, (1934) 2 KB 56 : 78 SJ 277 : 50 TLR 281.
37. *Lane v. Cox*, (1897) 1 QB 415; *Cavalier v. Pope*, (1906) AC 428; *Dobson v. Horsley*, (1915) 1 KB 634; *Shirvell v. Hackwood Estates Company, Limited*, (1938) 2 KB 577; *Davis v. Foots*, (1940) 1 KB 116.
38. *Fairman v. Perpetual Investment Building Society*, (1923) AC 74 : 87 JP 21 : 39 TLR 54, overruling *Miller v. Hancock*, (1893) 2 QB 177.
39. *Lucy v. Bawden*, (1914) 2 KB 318.
40. *Cavalier v. Pope*, (1906) AC 428 : 95 LT 65 : 22 TLR 648. This decision is now reversed by the Occupiers' Liability Act, 1957.

defendant was not under a legal obligation to the plaintiff to reduce or disperse the pheasants. They were *feroe naturea* and the fact that the plaintiff had no right to shoot them, did not impose any duty in law on the defendant to shoot them himself.[41]

9. REMEDIES

The remedies for private nuisances are (1) Abatement, (2) Damages, and (3) Injunction.

Abatement, that is removal of the nuisance by the party injured without recourse to legal proceedings. The removal must be (i) peaceable, (ii) without danger to life or limb, and (iii) if it is necessary to enter another's land to abate the nuisance, or where the nuisance is a dwelling-house in actual occupation on a common, after notice to remove the same, unless it is unsafe to wait. No more damage may be done than is necessary. It is lawful to remove a gate or barrier which obstructs a right of way but not to break or deface it beyond what is necessary for the purpose of removing it. If a party who has a right to a stone weir were to erect buttresses, one who should oppose the erection of the buttresses could not justify demolishing the weir as well as the buttresses.[42] The abatement of a nuisance by a private individual is a remedy which the law does not favour.[43] The courts have confined the remedy by way of self redress to simple cases of overhanging branch or an encroaching root, which would not justify the expense of legal proceedings; and urgent cases which require an immediate remedy.[44] When the nuisance arises merely from omission on the part of the wrong-doer the law is not clear.

The owner of a particular land has no right to allow his trees to overhang on the lands of his neighbour and he cannot acquire any right by prescription and the aggrieved person can abate the nuisance.[45]

Local Bodies like a municipality have generally statutory powers to abate a public nuisance and when they unreasonably refuse to exercise these powers a petition under Article 226 can be filed for directing them to exercise the statutory power for abating the nuisance.[46]

Notice.—In the case of nuisances by an act of commission the injured party may abate them, without notice to the person who committed them, as they are committed in defiance of those whom such nuisances injure. In the case of nuisances by an act of omission notice is necessary, except (a) where branches of trees overhanging on one's property are to be cut, and (b) where the security of lives and property requires a speedy remedy.[47]

Tree overhanging another person's boundary.—If a tree overhangs the land of another person, then that person can lawfully cut the overhanging branches even without giving notice, however long they may have overhung his land.[48] A person

41. *Seligman v. Dockers*, (1949) Ch 53 : (1948) 2 All ER 887.
42. *Greenslade v. Halliday*, (1830) 6 Bing 379; *Mayor of Colchester v. Brooke*, (1845) 7 QB 339.
43. *Lagan Navigation Co. v. Lambeg Bleaching, Dyeing and Finishing Co.*, (1927) AC 226 : 91 JP 46 : 136 LT 417. A person who removed a dam erected to obstruct his right of way was convicted of mischief under section 426 of the Indian Penal Code. *Emperor v. Zipru*, (1927) 29 Bom LR 484, 51 Bom 487.
44. *Burton v. Winters*, (1993) 3 All ER 847 (CA), pp. 851, 852 : (1993) 1 WLR 1077.
45. *Sheik Batcha Rowther v. Alagappan*, (1958) MWN 313 : (1958) 2 MLJ 157.
46. *Anil Krishna Pal v. State of West Bengal*, AIR 1989 Cal 102.
47. *The Earl of Lonsdale v. Nelson*, (1823) 2 B & C 302; *Jones v. Williams*, (1843) 11 M & W 176; *Lagan Navigation Co. v. Lambeg Bleaching, Dyeing and Finishing Co.*, (1927) AC 226 : 91 JP 46 : 136 LT 417.
48. *Norrice v. Baker*, (1613) Roll R 393; *Lemmon v. Webb*, (1895) AC 1 : 11 TLR 81; *Hari Krishna Joshi v. Shankar Vithal*, (1894) ILR 19 Bom 420; *Arumugha Goundan v. Rangaswami Goundan*,

(Footnote No. 48 Contd.)

cannot acquire as easement the right of projecting the branches of trees growing on his land over the land of another person.[49] But the right to lop the branches does not carry with it the right to pick and appropriate the fruit that grows on it. If a person appropriates the fruit he will be guilty of conversion.[50] A person cannot cut off the overhanging branches of a tree standing partly on his own land and partly on the land of his neighbour who is entitled to its fruits.[51]

Damages.—The principle to be applied in cases of nuisance is not whether the defendant is using his own property reasonably or otherwise, but whether he injures his neighbour.[52] The measure of damage is the diminution in value of the property in consequence of the nuisance. The plaintiff must prove some special damage. Where the proximity of a nuisance is one of the main reasons, though not the whole reason, for a house becoming unlettable, the damages will be the amount of loss in monthly rental value due to the nuisance.[53]

In cases of continuing nuisance, the court cannot lawfully give damages in respect of any injury subsequent to the day of the commencement of the action, for every day that the nuisance continues there is a fresh cause of action in respect of which further damages are recoverable. But if substantial damages are once given and a fresh action is brought for the continuance of the nuisance, exemplary damages may be given to compel abatement.[54]

Special damage is that damage which by reason of a nuisance would be suffered by some individual beyond what is suffered by him in common with other persons affected by that nuisance.[55]

Injunction.—In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages. If the injury is continuous the court will not refuse an injunction because the actual damage arising from it is slight.[56]

(Footnote No. 48 Contd.)
(1938) 47 MLW 324. An injunction was granted to restrain defendants from obstructing plaintiff to cut off the branches of a tree which was regarded as an object of veneration by Hindus: *Behari Lal v. Ghisa Lal*, (1902) ILR 24 All 499. It is open to the Court to grant a mandatory injunction for the removal of such nuisance : *Lakshmi Narain Banerjee v. Tara Prosanna Banerjee*, (1904) ILR 31 Cal 944; *Vishnu v. Vasudeo*, (1918) 20 Bom LR 826; ILR 43 Bom 164. The fact that the party complaining has merely a leasehold and not a freehold would not in any manner alter the case : *Maung Po Thaung v. Mg. Gyi*, (1923) ILR 1 Ran 281. See *Smith v. Giddy*, (1904) 2 KB 448 : 20 TLR 596, where an adjoining landowner was held liable for allowing his trees to overhang his boundary to the damage of the plaintiff's crops. See *Crowhurst v. Amersham Burial Board*, (1878) 4 Ex D 5.

49. *Keshav v. Shankar*, (1925) 27 Bom LR 663. Where a person sold a portion of his land with a tree on it, the branches of which overhung on the remaining land of vendor, and the vendor wanted to cut off the overhanging branches, it was held that as the vendor had not expressly reserved to himself a right to cut off the branches, the right to project the branches must be deemed to have been transferred by common intention of the parties; *Arumugha Goundan v. Rangaswami Goundan*, (1938) 47 MLW 324.
50. *Mills v. Broker*, (1919) 1 KB 555 : 121 LT 254 : 35 TLR 261.
51. *Someshvar v. Chunilal*, (1919) 22 Bom LR 790, ILR 44 Bom 605.
52. *Reinhardt v. Mentasti*, (1889) 42 Ch D 685, 690.
53. *S.A Basil v. Corporation of Calcutta*, ILR (1940) 2 Cal 131.
54. *Battishill v. Reed*, (1856) 18 CB 696; *Galstaun v. Doonia Lal Seal*, (1905) ILR 32 Cal 697.
55. *Khirsingh v. Brijlal*, ILR 1949 Nag 94.
56. *Att-Gen. v. Sheffield Gas Consumers Co.*, (1853) 3 De G M & G 304; *Att-Genl. v. Cambridge Consumer Gas Co.*, (1868) LR 4 Ch 71; *Wood v. Conway Corporation*, (1914) 2 Ch 47; *Kuldip Singh v. Subhash Chander Jain*, AIR 2000 SC 1410, p. 1413 : (2000) 4 SCC 50 (22nd edition of this book (pp. 522-524) is referred). For the form of permanent injunction in a case of nuisance by noise in running a machine, see *Veerabhadrappa v. Nagamma*, AIR 1988 Knt 217.

The normal remedy in case of continuing nuisance is injunction which cannot be lightly denied and damages granted in lieu thereof. The principles bearing upon this question were laid down in *Shelfer v. City of London Elec. Light Co.*[57] which is still good law. The case of *Shelfer* was a case of nuisance in the form of noise and vibrations but the principles laid down therein are generally applicable to any case of continuing nuisance. The principles were culled out from *Shelfer* in *Regan v. Paul Properties*[58] which was a case of continuing nuisance arising from obstruction of light. These principles are[59]:

"(1) A claimant is prima facie entitled to an injunction against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's legal right.

(2) The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's rights on payment of damages assessed by the court.

(3) The court has jurisdiction to award damages instead of an injunction, even in cases of a continuing nuisance; but the jurisdiction does not mean that the court is 'a tribunal for legalizing wrongful acts' by a defendant, who is able and willing to pay damages.

(4) The judicial discretion to award damages in lieu should pay attention to well-settled principles and should not be exercised to deprive a claimant of his *prima facie* right 'except under very exceptional circumstances'.

(5) Although it is not possible to specify all the circumstances relevant to the exercise of the discretion or to lay down rules for its exercise, the judgments indicated that it was relevant to consider the following factors: whether the injury to the claimant's legal rights was small; whether the injury could be estimated in money; whether it could be adequately compensated by a small money payment; whether it would be oppressive to the defendant to grant an injunction; whether the claimant had shown that he only wanted money; whether the conduct of the claimant rendered it unjust to give him more than pecuniary relief; and whether there were any other circumstances which justified the refusal of an injunction."

No mandatory injunction against a private individual for what is a mere nuisance in law will be granted except where it has been created and persisted in defiance of local authority and that local authority has no sufficient power to enforce compliance with the law.[60]

An injunction to prevent an apprehended or future nuisance will generally not be granted unless the threat be imminent or likely to cause such damage as would be irreparable once it is allowed to occur.[61] Another category of future nuisance may be when the likely act of the defendant is inherently dangerous or injurious such as digging a ditch across a highway or in the vicinity of a children's school or opening a shop dealing with highly inflammable products in the midst of a residential locality.[62]

57. (1895) 1 Ch.287 (CA).
58. (2007) 4 All ER 48 (CA).
59. (2007) 4 All ER 48, p.54 para 36.
60. *Advocate General v. Haji Ismail Hasham*, (1909) 12 Bom LR 274.
61. *Kuldip Singh v. Subhash Chander Jain*, AIR 2000 SC 1410, p. 1413 : (2000) 4 SCC 50.
62. *Kuldip Singh v. Subhash Chander Jain*, AIR 2000 SC 1410, p. 1413 : (2000) 4 SCC 50.

10. BURDEN OF PROOF

In an action for a public nuisance, once the nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted on to the defendant to justify or excuse himself. If he fails to do so, he is held liable, whereas in an action for negligence the legal burden in most cases remains throughout on the plaintiff.[63] Similar is the position in case of private nuisance, once a claimant has proved that a nuisance has emanated from the defendant's land, the onus shifts to the defendant to show that he has a defence to the claim, whether this be absence of negligence in a case of statutory authority or that he took all reasonable steps to prevent the nuisance.[64]

63. *Southport Corp. v. Esso Petroleum Co. Ltd.*, (1954) 2 All ER 561, p. 571 (CA); *Marcie v. Thomes Water Utilities Ltd.*, (2002) 2 All ER 55, p. 73 (CA).
64. *Marcie v. Thomes Water Utilities Ltd.*, *supra*, p. 79 (LORD PHILLIPS MR).