

LL.B 1ST SEMESTER

PAPER--IV

LAW OF TORTS, CONSUMER PROTECTION AND MOTOR VEHICLES ACT

Unit-III ---SPECIFIC TORTS

In this Unit following, specific torts will be discussed;

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

DEFAMATION

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

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

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

the man Rasputin, a man of worst possible character. It was observed that so far as photographic part of the exhibition is concerned, that is the permanent matter has to be seen by the eye, and it is proper subject of an action for libel, if defamatory.

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

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

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

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

Requisites of Defamation:

The constituent elements of defamation are:

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

(a) Defamatory Words:

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

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

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

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

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

b. Words Must Refer To The Person Defamed:

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

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

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

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

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

(c) Publication of Defamatory material:

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

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

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

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

Defences to Defamation:

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

1. Justification or truth:

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

2. Fair comment:

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

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

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

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

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

3.Privilege

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

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

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

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

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

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

The following are considered as privileged occasions:

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

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

NEGLIGENCE

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

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

Negligence has two meanings in law of torts:

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

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

Essentials of Negligence

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

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

1. Duty of care to the plaintiff

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

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

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

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

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

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

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

To establish negligence it is not enough to prove that the injury was foreseeable. But a reasonable likelihood of the injury has also to be shown. The duty is to guard against reasonable probabilities rather than bare or remote or fantastic possibilities. In *Fardon v. Harcourt* (1932 L.T.391), the defendant parked his car by the roadside and left a dog inside the car. The dog jumped out and smashed a glass panel. A splinter from this glass injured the plaintiff while he was walking past the car. Held that the accident being very unlikely, the defendant was not liable. In *Balton v. Stone* (1951 A.C.850), a person on road was injured by a ball hit by a player on a cricket ground abutting on that highway. The ground had been used for 90 years and during the last 30 years the ball had been hit in the highway on about six occasions but no one had been injured. Held that the defendant (committee and members of cricket club) were not negligent.

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

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

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

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

2. Breach of Duty

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

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

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

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

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

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

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

3. Damages

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

Proof of Negligence (*Res Ipsa Loquitur*)

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

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

- (1) The maxim is not a rule of law. It is a rule of evidence benefiting the plaintiff because the true cause of accident may lie solely within the defendant's knowledge.
- (2) The maxim applies when- (i) the injurious agency was under the management or control of the defendant, and (ii) the accident is such as in the ordinary course of thing, does not happen if those who have the management use proper care.
- (3) The maxim has no application when the accident is capable of two explanations. Also, it does not apply when the facts are sufficiently known.

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

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

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

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

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

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

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

Medical and Professional Negligence

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

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

Under English law as laid down in *Bolam v. Friern Hospital Management Committee*, (1957) 2 All ER 118, a doctor, who acts in accordance with a practice accepted as proper by a responsible body of medical men, is not negligent merely because there is a body of opinion that takes a contrary view. MC NAIR, J., in his summing up to jury observed:

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

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

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

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

Contributory Negligence

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

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

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

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

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

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

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

Composite Negligence

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

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

NUISANCE

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

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

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

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

Kinds of Nuisance

Nuisance is of two kinds:

- i. Public or Common Nuisance
- ii. Private Nuisance or Tort of Nuisance

Public Nuisance

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

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

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

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

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

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

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

Private Nuisance or Tort of nuisance

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

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

1. Unreasonable interference:

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

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

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

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

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

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

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

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

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

2. Interference with the use or enjoyment of land

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

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

Nuisance to incorporeal Property

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

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

(ii) Interference with Right to Light and Air

England

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

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

INDIA

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

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

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

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

3. Damages

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

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

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

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

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

Defences:

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

Effectual defences

1. Prescriptive right to commit nuisance

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

2. Statutory Authority

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

or the value of the adjoining property is depreciated by the noise, vibrations and smoke by the running of trains *Hammersmith Ry.Co. v. Brand*, (1869) 4 H.L. 171. If there is negligence in the running of trains, the railway co., even though run under a statutory authority will be liable. See *Smith v. L. and S.S. Ry. Co.*, (1870), L.R. 6 C.P. 14. According to Lord Halsbury quoted in *London Brighton and south Coast Rail Co. v. Turman*, (1885) 11 A.C. 45 at p. 50: "It cannot now be doubted that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at Common Law.

Ineffectual defences

1. Nuisance due to acts of others

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

2. Public Good

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

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

3. Reasonable care

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

4. Plaintiff Coming to nuisance

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

TRESPASS TO THE PERSON

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

Assault

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

Battery

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

False Imprisonment

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

Defences to Trespass to the Person

1. Consent

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

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

2. Necessity

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

3. Self-Defence

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

4. In Defence of Others

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

5. Defence for False Imprisonment

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

MALICIOUS PROSECUTION

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

Essentials:

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

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

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

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

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

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

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

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

NERVOUS SHOCK/EMOTIONAL DISTRESS/PSYCHIATRIC INJURY

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

"Sudden assault on the nervous system."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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