UNIT 11 TORT LAW

Structure

11.0 INTRODUCTION

As a part of liability creating laws, we have discussed some important provisions of the Indian Penal Code in Unit-10. We will now focus on the law of tort in Unit-11 here. Tort has some similarities and differences with crime, and creates a liability on those responsible for tort. We will, therefore, discuss the concept of tort, theories of tort, the similarities and differences between crime and tort, ingredients of tort, its general conditions, rules, damages and defences as well as the special torts.

11.1 OBJECTIVES

After going through this unit, we expect you to be able to:

- Explain the concept of tort and define it;
- Distinguish between crime and tort;
- Identify the essential ingredients of tort and the special torts;
- Describe the theories of tort;
- Discuss the general conditions, rules and defences of tort; and
- Analyse the nature of damages.

11.2 LAW OF TORT: CONCEPT AND THEORIES

In this section, we attempt to present you the concept and rationale of tort along with relevant theories. We will also touch upon the similarities and differences between crime and tort.

11.2.1 Concept and Meaning

The term 'tort' is the French equivalent of the English word 'wrong' and of the Roman law term 'delict'. The word tort is derived from the Latin word *'tortum'* which means twisted or crooked or wrong.

Tortuous liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is repressible by an action for unliquidated damages (Winfield and Jolowicz, 2002). In the words of Salmon (2009), a tort is a civil wrong for which the remedy is a common action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other mere equitable obligation.

The person who has committed a tort, i.e. violated the legal right of another person thereby does a wrong directly or indirectly to him is called ***Tortfeasor***. If the person is found to be guilty, he will have to compensate for the damages. If two tortfeasors commit a tort independently, they are called *independent tortfeasors*. If they commit a 'tort' together, they are called *joint tortfeasors*.

11.2.2 Theories of Tort: Rationale of Tort

There are two theories with regard to the basic principle of liability in the law of torts or tort. These theories, in fact, explain the rationale of tort. They are: i) Wider and narrower theory, and ii) Pigeon-hole theory.

i) ***Wider and narrower theory:*** According to this theory, all injuries done by one person to another are torts, unless there is some justification recognized by law. This theory was propounded by Winfield (1963). According to him, if I injure my neighbor, he can sue me in tort, whether the wrong happens to have a particular name like assault, battery, deceit or slander, and I will be liable if I cannot prove lawful justification. This leads to the wider principle that all unjustifiable harms are tortuous.

ii) ***Pigeon-hole theory:*** This theory was proposed by Salmon (1910). According to this theory, there is a definite number of torts outside which liability in tort does not exist. According to this theory, I can injure my neighbor as much as I like without fear of his suing me in tort provided my conduct does not fall under the rubric of assault, deceit, slander or any other nominate tort. The law of tort consists of a neat set of pigeon holes, each containing a labeled tort. If the defendant's wrong does not fit any of these pigeon holes he has not committed any tort.

There is, however, no recognition of either theory. On the whole, if we are asked to express our preference between the two theories, in the light of recent decisions of competent courts, we will have to choose the first theory of liability than the subsequent one. Thus, it is a matter of interpretation of courts so as to select between the two theories. The law of torts has mainly been developed by courts proceeding from the simple problems of primitive society to those of our present complex civilization.

11.2.3 Tort and Crime: Similarities and Differences

Historically, tort had its roots in criminal procedure. Even today there is a punitive element in some aspects of the rules on damages. However, *tort is a species of civil injury or wrong*. The distinction between civil and criminal wrongs depends on the nature of the remedy provided by law. A civil proceeding concerns with the enforcement of some right claimed by the plaintiff as against the defendant, whereas criminal proceedings have for their object the punishment of the defendant for some act of which he is accused. Sometimes, the same wrong is capable of being made the subject of proceedings of both kinds – civil and criminal. For example, assault, libel, theft, malicious injury to property, etc. In such cases, the wrong doer may be punished criminally and also compelled in a civil action to make compensation or restitution.

Not every civil wrong is a tort. A civil wrong may be labeled as a tort only where the appropriate remedy for it is an action for unliquidated damages. However, it has to be born in mind that a person is liable in tort irrespective of whether or not an action for damages has been taken against him. The party is liable from the moment he commits the tort. Although an action for damages is an essential mark of tort and it is the characteristic remedy, often there may be other remedies also.

a) ***Similarities between Crime and Tort:*** There is a similarity between tort and crime at a primary level. In criminal law, there is primary duty, like not to commit an offence, for example, murder; but this primary duty in tort is *in rem* and is imposed by law. In fact, the same set of circumstances will, from one point of view, constitute a crime and, from another point of view, a tort. For example, every man has the right that his bodily safety shall be respected. Hence, in an assault, the sufferer is entitled to get damages. Also, the act of assault is a menace to the society and hence will be punished by the State. However, where the same wrong is both a crime and a tort, its two aspects are not identical. *Firstly*, its definition as a crime and a tort may differ, and *secondly*, the defences available for both crime and tort may differ. Therefore, the wrong doer may be ordered, in a civil action, to pay compensation and also be punished criminally by imprisonment or fine. If a person publishes a defamatory article about another in a newspaper, both a criminal prosecution for libel as well as a civil action claiming damages for the defamatory publication may be taken against him.

b) ***Differences between crime and tort:*** Being a civil injury, tort differs from crime in all respects in which a civil remedy differs from a criminal one. There are, thus, certain essential marks of difference between crime and tort such as the following.

- Tort is an infringement or deprivation of private or civil rights belonging to individuals, whereas crime is a breach of public rights and duties which affect the whole community.
- In tort, the wrong doer has to compensate the injured party, whereas in crime, he is punished by the State in the interest of the society.
- In tort, the action is brought about by the injured party, whereas, in crime, the proceedings are conducted in the name of the State.

- Damages, in tort, are paid for compensating the injured, and, in crime, it is paid out of the fine which is paid as a part of punishment. Thus, the primary purpose of awarding fine in a criminal prosecution is punitive rather than compensatory.
- The damages in tort are unliquidated and, in crime, they are liquidated.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

1) What are the two competing theories of tortuous liability?

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11.3 LAW OF TORT: ESSENTIAL INGREDIENTS AND GENERAL DEFENCES

In this section, the focus of our discussion will be on essential ingredients, capacity to sue or to be sued, and general conditions, rules and defences of tort.

11.3.1 Essential Ingredients

Every want or desire of a person cannot be protected nor can a person claim that. However, whenever he suffers loss he should be compensated by the person who is the author of the loss. The law, thus, determines what interests need protection and it also holds the balance when there is a conflict of protected interests. Therefore, in brief, the ingredients of tort include the following:

i) There must be a wrong act committed by a person;

ii) The wrongful act must be of such a nature as to give rise to a legal remedy; and

iii) Such legal remedy must be in the form of an action for unliquidated damages.

11.3.1.1 Wrongful Act

An act which prima facie looks innocent may become tortuous, if it invades the legal right of another person. That is, it must prejudicially affect him in some legal right; merely that it will however directly do harm to him or his interest is not enough. Liability for tort, therefore, arises 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.

11.3.1.2 Damages

In general, a tort consists of some act done by a person who causes injury to another, for which damages are claimed by the latter against the former. In this connection, we must have a clear notion with regard to the words, 'damage' and 'damages'. The word *damage* is used in the ordinary sense of injury or loss or deprivation of some kind, whereas *damages mean the compensation* claimed by the injured party and awarded by the court. Thus, damages are claimed by the parties and awarded by the court to the parties. The word *injury* is strictly limited to an actionable wrong, while *damage* means loss or harm occurring in fact, whether actionable as an injury or not.

Damages are the compensation which the tortfeasor, if found guilty of the act committed by him, will be liable to pay for the injuries sustained by the plaintiff. The damages are, most commonly, monetary in nature, though they are not the only remedies in torts. Though damages are the most common remedy in tort they are not the only remedy. The court can also award an 'injunction'. An injunction is an order, by which the court tells the tortfeasor to committing or not committing an act. For example, when your neighbor troubles you in the night by playing loud music, the court can order your neighbor to stop playing loud music every night, apart from awarding you damages for your injuries.

Liquidated and unliquidated damages: In the context of tort liability, it is essential for us to have clarity on liquidated damages and unliquidated damages.

- *Liquidated damages:* These are damages which are *predetermine*d by the parties if either one of them causes the other injury or the breach of contract.
- *Unliquidated damages:* The damages whose amount is *not predetermined before tort was committed* are called unliquidated damages. In the cases involving unliquidated damages there are no agreements, so the courts decide the amount or the extent of damages the defendant will have to pay.

The real significance of a legal damage is illustrated by two maxims, namely, *Damnum Sine Injuria* and *Injuria Sine Damno.*

- **Damnum sine injuria (damage without injury):** There are many acts which though harmful are not wrongful and give no right of action to a person who suffers from the effects of such acts. Damage so done and suffered is called *Damnum Sine Injuria or damage without injury*. Damage without breach of a legal right will not constitute a tort. In *Gloucester Grammar School Master Case* (1410, p.11), it had been held that the plaintiff school master had no right to complain of the opening of a new school. The damage suffered was mere damnum absque injuria or damage without injury.

- **Injuria sine damno (injury without damage):** This means an infringement of a legal private right without any actual loss or damage. In such a case, the person whose right has been infringed has a good cause of action. It is not necessary for him to prove any special damage because every injury imports a damage when a man in hindered of his right. It is sufficient to show the violation of a right in which case the law will presume damage. This principle was firmly established by the election case of *Ashby v White* (1703, p.938), in which the plaintiff was wrongfully prevented from exercising his vote by

the defendants, returning officers in parliamentary election. The candidate for whom the plaintiff wanted to give his vote had come out successful in the election. Still the plaintiff brought an action claiming damages against the defendants for maliciously preventing him from exercising his statutory right of voting in that election. The plaintiff was allowed damages by Lord Holt saying that there was the infringement of a legal right vested in the plaintiff.

11.3.1.3 Remedy

The law of torts is said to be a development of the maxim 'ubi jus ibi remedium' or 'there is no wrong without a remedy'. If a man has a right, he must of necessity have a means to vindicate and maintain it and also 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 remedy; want of right and want of remedy are reciprocal. Where there is no legal remedy there is no wrong. But, even so, the absence of a remedy is evidence but is not conclusive that no right exists.

11.3.2 Capacity to Sue or to be Sued

The general rule in the law of torts is that every person is entitled to sue and is also liable to be sued. But, this rule is not absolute. Depending upon certain laws and circumstances there are exceptions to this rule which are briefly discussed below.

11.3.2.1 Who Can Sue and Who Cannot Sue?

The discussion below provides us clear understanding of as to who can sue and who cannot sue.

i) ***Convicts and persons in custody:*** A felon or convict is a person against whom judgment of death or penal servitude has been awarded on any charge of treason or felony. It was observed in the case of *Sunil Batra v Delhi Administ*ration (1978) that 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. So, he is competent to sue.

ii) ***Alien enemy:*** Alien enemy is a person of enemy nationality or a person residing in or carrying on business in enemy territory, whatever his nationality. Since, the residence in enemy territory is the real test, even a citizen of India resident there will fall within the description. An alien enemy who is residing outside Indian court jurisdiction cannot sue. He can sue only if he is residing there with the permission of the Government.

iii) ***Married woman:*** A married woman can not sue without her husband being joined as a party. But, under the Law Reform (Married Woman and Tortfeasors) Act, 1935, she can sue if she were a feme sole. Under section 7 of the Married Women's Property Act, 1874, a married woman may sue in tort just as a feme sole and in process if she recovers any damage, it becomes her sloe property and any damage recovered against her are payable out of her separate property. But, this Act doesn't apply to Hindus, Sikhs, Jains and Muslims and these communities are governed by their personal laws. According to personal laws of these communities, a woman can sue in respect of her separate property without joining her husband in the suit.

iv) ***Husband and wife:*** Prior to Married Women's Property Act, 1882 and the Law Reform (Married Women and Tortfeasors) Act, 1935, a married women could not sue for any tort committed by a third person unless her husband joined her as a plaintiff. It was also not possible to sue against her without making her husband a defendant. But, after these Acts, it has become possible that married women can sue or can be sued without making her husband a joint party. After the Law Reform (Husband and Wife) Act 1962, each of the parties to a marriage has the same right of action in tort against each other as if they were not married but it also depends on court to stay the proceedings if it feels that the matter relates to trivial issues.

In India, the wife cannot sue her husband for personal injuries on the basis of personal laws of different communities, but she can sue her husband's employer if husband has committed a tort against her during the course of employment. Similarly, a husband may also recover against her employer if she has committed a tort against her husband during the course of her employment.

v) ***Bankrupt or insolvent:*** If an insolvent commits a tort, his liability is not a debt provable in insolvent and is not discharged by insolvency. An insolvent may be sued for a tort committed by him either before or during insolvency and in case of degree against him, the amount thus awarded is a debt provable in insolvency. But, a bankrupt or insolvent cannot sue for wrongs in respect of his property since all his property vests in a Trustee in bankrupt according to English Law, or the Official Assignee or the Official Receiver in India.

vi) ***Infant / minor:*** An infant or minor may sue with the help of his next friend (usually father) if any wrong has been done to him. But, if an infant who has sustained injuries when he was in the womb of his mother, whether he can maintain an action for injuries is yet to be answered. In India, though such Act is lacking, since the rights of an unborn child are recognized in Hindu Law, the child in womb has right to share in the property. Causing death to an unborn child through an abortion and miscarriage are also made penal offences under Sections 312, 313 and 316 of the Indian Penal Code.

In India, a child, a boy or girl, below the 18 years of age is called a minor. A minor or infant is equally liable for his torts as an adult person. Knowledge, intention or malice is a necessary ingredient in constituting a tort and infancy is a good defence in case he has not attained sufficient maturity of understanding.

vii) ***Corporation:*** Corporation is vicariously liable for torts committed by its agents or servants, when the tort is committed in the course of doing an act within the scope of the powers of the corporation. It may, thus, be liable for assault, false imprisonment, trespass, conversion, libel or negligence of its servants.

viii) ***Lunatic:*** Liability that lies with a lunatic is same as with an infant. It has been said that insanity by itself is not a defence in tort. But, in malice, insanity presents a good defence to the existence of such malice or intent. The degree of insanity has to be decided in each case and it depends on the facts and circumstances of the case, and then accordingly requires decision about the liability.

ix) ***Drunkard:*** In the law of tort, drunkenness is not considered as a good defence. It is every man's sense to know the consequences of what he does. If a man drinks and does the things and thinks that he would not be liable for his act in this state then he is wrong. But, if A administers intoxicants in B's drinks against his will, or by fraud, or by mistake, then B may not be held liable in tort provided he is unable to differentiate between right and wrong.

x) ***Trade Union:*** A trade union can be a body corporate if it is registered under Section 13 of the Indian Trade Unions Act, 1926 and can sue and be sued. If a trade union is not registered then under Order 1, rule 8 of the Code of Civil Procedure, 1908 any one or more of its members may be sued as representing the trade union. Members of a registered trade union are exempted from liability in respect of certain torts.

11.3.2.2 Who Cannot be Sued?

Who cannot be sued is discussed below.

i) ***Sovereign or King:*** 'The King can do no wrong' is the maxim on which the immunity of the crown from civil liability is based. So, an action for personal wrong will not be against the Crown. By, 'the Crown Proceedings Act, 1947', while changing the old law, it also preserved the rule that no proceedings can be brought in tort against the crown in a private capacity.

In our country, there is no King. As per the provisions enshrined in the Constitution of India, the President and the Governors shall not be answerable to any court (i) for the exercise and performance of the powers and duties of their office, or (ii) for any act done or purporting to be done by them in the exercise and performance of those powers and duties. Under Section 87-B of the Civil Procedure Code, no ruler of any former Indian State may be sued in any court except with the permission of the Government of India.

ii) ***Act of State:*** If an act is done in exercise of sovereign power in relation to another State or subjects of another State, it cannot be questioned by the courts. Acts done by rulers in exercise of political power to the people of another State are acts of State. Some salient features of an act of State are:

- The act is done by State's representative,
- The act is injurious to other State or its subject, and
- Such acts are done either with the prior sanction or are subsequently ratified by the State.

Such acts are exempted from liability. However, if a foreign national gets injured in course of exercising some sovereign power, he can get remedy through diplomatic means.

iii) ***Foreign Sovereign and Ambassador:*** No action lies against any foreign sovereigns. 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.

11.3.3 General Defences

Even when a plaintiff provides proof for the existence of all the essential elements of a tort, it is possible in some cases for the defendant to take certain defences which can remove his liability. These defences are nothing but specific situations or circumstances in which a defendant is given a waiver for his tortuous action. These are as follows.

11.3.3.1 Volenti non fit Injuria

When person consents for infliction of harm upon himself, he has no remedy for that in Tort. That means, if a person has consented to do something or has given permission to another to do certain thing, and if he is injured because of that, he cannot claim damages. Such consent may be implied or express.

In *Wooldridge v Sumner* (1963, p.43), it was held that the defendants had taken proper care during the horse show and the plaintiff, by being in the show, agreed to take the risk of such an accident that happened to him. The defendants were not held liable.

Exceptions to this defence: In the following conditions, this defence cannot be taken even if the plaintiff has consented.

i) *Rescue Conditions:* When the plaintiff suffers injury while saving someone. For example, A's horse is out of control and is galloping towards a busy street. B realizes that if the horse reaches the street it will hurt many people and so he bravely goes and control's the horse. He is injured in doing so and Sue's A. Here, A cannot take the defence that B did that act upon his own consent. It is considered as a just action in public interest and the society should reward it instead of preventing him from getting compensation.

ii) *Unfair Contract Terms:* Where the terms of a contract are unfair, the defendant cannot take this defence. For example, even if a laundry, by contract, absolves itself of all liability for damage to clothes, a person can claim compensation because the contract is unfair to the consumers.

11.3.3.2 Plaintiff the Wrongdoer

A person cannot take advantage of his own wrong. This principle has been in use since long time as it is just and equitable. This defence exists only if the injury happens because of a wrongful act of the plaintiff. It does not exist if the injury happens because of a wrongful act of the defendant even if the plaintiff was doing a wrongful but unrelated act. For example, in *Bird v Holbrook* (1828, p.628), the plaintiff was trespassing on the defendant's property and he was hurt due to a spring gun. The defendant had put spring guns without any notice and was thus held liable.

11.3.3.3 Inevitable Accident

Inevitable accident means an unexpected occurrence of something that could not have been predicted or prevented. In such a case, the defendants will not be liable if they had no intention to cause it and if the plaintiff is injured because of it. For example, in *Stanley v Powell* (1891, p.86), the plaintiff and the defendant were members of a shooting party. The defendant shot a bird, but the bullet ricocheted off a tree and hit the plaintiff. The defendant was not held liable because it was an accident and the defendant did not intent it and could neither have prevented it.

11.3.3.4 Act of God

An act of God, in a legal sense, is an extraordinary occurrence of circumstance which could not have been predicted or prevented and happens because of natural causes. For example, no body can predict, prevent, or protect from a natural disaster such as an earthquake or flood. Thus, it is unreasonable to expect a person to be liable for damages caused by such acts of God. There are two essential conditions for this defence; the event must be due to a natural cause, and it must be extraordinary or some thing that could not have been anticipated or expected.

11.3.3.5 Private Defence

As per Section 96 of IPC, nothing is an offence that is done in exercise of the right of private defence. Thus, law permits the use of reasonable and necessary force in preventing harm to human body or property and injuries caused by the use of such force are not actionable. However, the force must be reasonable and not excessive. In *Bird v Hollbrook* (1828, p.628), the defendant used spring guns in his property without notice. It was held that he used excessive force and so was liable for plaintiff's injury even though the plaintiff was trespassing on his property.

11.3.3.6 Mistake

Generally, mistake is not a valid defence against an action of tort. Thus, hurting a person under the mistaken belief will not be defensible. However, in certain cases, it could be a valid defence. For example, in the case of malicious prosecution, it is necessary to prove that the defendant acted maliciously and without a reasonable cause. If the prosecution was done only by mistake, it is not actionable. Further, honest belief in the truth of a statement is a defence against an action for deceit.

11.3.3.7 Necessity

'Salus Populi Supreme Lex' means, welfare of the people is the supreme law. If the act causing damage is done to prevent a greater harm, it is excusable. For example, a ship ran over a small boat hurting 2 people in order to prevent collision with another ship which would have hurt hundreds of people is excusable. Thus, in *Leigh v Gladstone* (1909, p.139), force-feeding of a hunger striking prisoner to save her was held to be a good defence to an action for battery.

11.3.3.8 Statutory Authority

An act that is approved by the legislature or is done upon the direction of the legislature is excused from tortuous liability even though in normal circumstances it would have been a tort. When an act is done under the authority of an Act, it is a complete defence and the injured party has no remedy except that is prescribed by the statute.

A few examples are given below.

i) A punches B, but not causing any physical injuries. B can still sue A, because while A has not caused any physical injury, he has caused a legal injury.

ii) A publishes false claims about B in a magazine. B can claim damages from A for injuring his reputation i.e. defamation.

In *Vaughan v Taff Valde Rail Co* (1860, p.5), sparks from an engine caused fire in appellant's woods that existed in his land adjoining the railway track. It was held that since the company was authorized to run the railway and, thus, the company had taken proper care in running the railway, it was not liable for the damage.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

2) What are the essentials of a tort?

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3) List out general defences available against tortuous liability.

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11.4 GENERAL RULES OF LAW OF TORT

There are some general rules of law of torts. These rules deal with how, when and what type of liability arises and who can sue, who can be sued and who cannot be sued under what circumstances. In this section, we will discuss the rules related to these important aspects of torts. Let us first look at strict liability.

11.4.1 Strict Liability

Strict liability means liability of a person for the wrong he does. It means he is liable for any fault of his own; for any care or precaution that he is expected to take but has not taken. There may be many instances when strict liability will arise and also make him absolutely liable for all the consequences. Some of the important instances are discussed below.

11.4.1.1 Rule of Strict Liability

The strict principle of law is: *sics utere tuo ut alienum non laedas;* it means, everyone must so use his own as not to do damage to another. When this maxim is applied to landed property, it is necessary for the plaintiff to show not only that he has sustained damage but also that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.

The owner or occupier of land may lawfully use it for any purpose for which it might, in the ordinary course of the employment of land, be used. And for such natural uses of land, an owner will not, in the absence of negligence, be liable, though damage results to the neighbor. But, for any non-natural user, such as the introduction on to the land of something which, in the natural condition of the land, is not upon it, he is liable if damage results to his neighbour.

Rylands v Fletcher (1868, p.330) — *the water reservoir case*: Fletcher was working in a coal mine under a lease. On the neighboring land, Rylands desired to erect a reservoir for storing water, and for this purpose, he employed a competent independent contractor whose workmen, while excavating the soil, discovered some disused shafts and passages communicating with old workings and the mine in the adjoining land. The shafts and passages had been filled with loose earth and rubbish. The contractor did not take the trouble to pack these shafts and passages with earth, so as to bear pressure of water in the reservoir, when it is filled. Shortly after the construction of the reservoir, whilst it was partly filled with water, the vertical shafts gave way and burst downwards. The consequence was that the water flooded the old passages and also the plaintiff's mine, so that the mine could not be worked. The plaintiff sued for damages. No negligence on the part of the defendant was proved. The only question was whether the defendant would be liable for the negligence of the independent contractor who was admittedly a competent engineer. The Court held that the question of negligence was quite immaterial. The defendant, in bringing water into the reservoir, was bound to keep it there at his peril, and was, therefore, liable.

In this case, it was ruled as follows: A 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 and at his peril; and if he does so, he is prima facie answerable for all the damage which is the natural consequence of its escape. This is known as the rule in *Rylands v Fletcher* (also known as *"the wild beast theory")*.

Indian Law: It has been held in several cases that the principle of *Rylands v Fletcher* applies in India.

11.4.1.2 Essential Ingredients of Strict Liability

The essential ingredients of strict liability include the following.

- There should be dangerous thing.
- There should be escape of dangerous thing.
- There should be some damage out of this escape
- There should be a non-natural use of the land or property.

11.4.1.3 Exceptions to the Rule of Strict Liability

The following are five important exceptions to the principle/rule laid down in *Rylands v Fletcher's case.*

i) ***Vis Major or act of God:*** An act of God (vis major) is defined to be such a direct, violent, sudden and irresistible act of nature, as could not, by any amount of ability, have been foreseen, or if foreseen, could not, by any amount of human care and skill, have been resisted.

ii) ***Wrongful or malicious act of a stranger:*** The rule is also not applicable where the damage is due to the wrongful or malicious act of a stranger. If, however, the act of the stranger is such that it ought to have been anticipated and guarded against, the defendant will be liable for failure to take reasonable care.

iii) ***Plaintiff's own fault:*** The rule also does not apply where the escape is due to the plaintiff's own fault.

iv) ***Common benefit:*** The rule does not apply where the escape is due to artificial works maintained with the plaintiff's consent and for the common benefit of the plaintiff and the defendant.

v) ***Statutory authority:*** The last exception to the rule in *Rylands v Fletcher* is where the defendant is empowered or authorized or required under the law or a statue to accumulate, keep or collect the dangerous thing, which escapes and causes mischief and injury to the plaintiff, persons empowered by statute to bring or keep upon their land, a dangerous substance are not liable in the absence of negligence or an express provision in the statute to the contrary for the damage caused by its escape.

Statutory authority is, however, of two kinds: i) absolute and ii) discretionary. The former confers absolute immunity for the consequences of acts which would otherwise amount to torts. The latter must be exercised with due care and regard to the rights of others.

11.4.2 Absolute Liability

What is absolute liability? Wrongs of absolute liability imposes a kind of liability on a person which is somewhat peculiar in the sense that a person becomes liable without there being any fault on his/her part. It is absolute, meaning thereby, that it is not necessary for the injured party to prove any intention or negligence on the part of the injuring party, and no amount of care and caution expended by the latter to prevent the damage done to the former will excuse him.

The Supreme Court in *M. C. Mehta v Union of India* (1987) recognized another rule (*Rule of absolute liability*) in which the liability was absolute, more stringent than that under the Strict Liability rule, and also not subject to the exceptions to the rule in Rylands v Fletcher.

In *M. C. Mehta case*, there was leakage of oleum gas from one of the units of Shriram Food and Fertiliser Industries in the city of Delhi on 4th and 6th December 1985 resulting in the death of an advocate practising in a Court and all the ill-effects caused damage to various other persons. There was claim of compensation through a writ petition filed in the Supreme Court by way of public interest

litigation. The Court found that victims of the leakage of dangerous substances could not be provided relief by applying the Rule of Strict Liability laid down in *Rylands v Fletcher.* This was so, mainly because of the various exceptions to that rule, whereby the defendant could avoid his liability. In this background, the Supreme Court held that it was not bound by the rule of English law formulated in a different context in the 19th century, and evolved a new rule, the *Rule of Absolute Liability.*

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

Environment Pollution: When certain industries by the discharges from the acid producing plants cause environment pollution, that amounts to violation of right to life enshrined in Article 21 of the Constitution. In such cases also, the Rule of Absolute Liability is applicable. Such industries can be required to pay costs of remedial measures for restoring pollution-free environment, and can also be asked to be closed down *(Indian Council for Enviro-Legal Action v Union of India,* 1996, p.1446).

The principle of absolute liability was applied when the hazardous condition of a swimming pool in a 5-star hotel in Delhi resulted in serious injuries to the users, the death of a visitor to the hotel, when he dived in the pool (*Klaus Mittelbachert v East India Hotels Ltd.,* 1997).

The Bhopal Gas Leak Disaster Case: By the leakage of MIC, a highly toxic gas, from the plant of the Union Carbide in Bhopal an unprecedented disaster was caused on the night of December 2/3, 1984, resulting in the death of over 3,000 persons, and injuries, mostly serious and permanent, to more than 6 lakh persons. Since the disaster had affected very large number of persons, mostly belonging to lower economic strata, a classic action was the only way out. The Government of India passed 'The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985' conferring an exclusive right on the Government to represent the gas victims for claiming compensation. The Union of India filed a suit against the Union Carbide Corporation (UCC) in the United Slates District Court of New York, but the same was dismissed on the ground that the Indian Courts are the more convenient and proper forum for such an action. The Government then filed a suit for compensation in the District Court of Bhopal, which ordered that the UCC should pay interim relief of Rs.350 crores to the gas victims. On a civil revision petition filed by the UCC, the Madhya Pradesh High Court reduced the amount of 'Interim relief payable to Rs.250 crores.

After a long drawn litigation for over four years, there was a settlement between the Union of India and the Union Carbide Corporation and, in terms thereof, the Supreme Court in *Union Carbide Corp. v Union of India* (1990, p.273) passed Orders on February 14 and 15, 1989 directing the payment of a 'sum of 470 million U.S. Dollars or its equivalent nearly Rs.750 crores'. The Supreme Court

again pronounced in *Union Carbide Corp. v Union of India* (1992, p.2481) that the above stated settlement was not void either on the ground that the interested parties were not given notice under the Civil Procedure Code at the time of the Settlement, or the same amounted to compounding of an offence or the stifling of the prosecution, in view of the quashing in the criminal proceedings in the Settlement case.

Unfortunately, the progress of providing compensation and medical and other relief to the gas victims and their rehabilitation has been so slow that even 14 years after the Settlement, proper arrangements for the necessary medical facilities are not yet there, and it is estimated that it will take some 15 years for the Settlement claims to be heard, at the present speed.

11.4.2.1 The Public Liability Insurance Act, 1991

The Public Liability Insurance Act, 1991 aims at providing for public liability insurance for the purpose of providing relief to the persons affected by accident occurring while handling any hazardous substance for matters connected therewith or incidental thereto.

Every owner, *i.e.* a person who has control over handling any hazardous substance, has to take insurance policy or policies so that he is insured against liability to give relief in case of death or injury to a person, or damage to any property, arising from an accident occurring while handling any hazardous substance.

11.4.3 Vicarious Liability

Since ancient times, it is the rule that a person should be held liable for his own mistake. In the words of Plato: "a person should be held for his own sins". But, in thirteenth century, in England, it was for the first time, established that the master would be liable for his servant's or slave's torts only when there is an express command of the master to the servant's wrong .

By the end of 17th century, this concept of liability was found inadequate due to rise in commercial transactions. New development took place when Sir John Holt, in the case of *Tuberville v Stamp* (1697, p.267), held that "the master would be liable for his servant's tort if he had given his implied command".

When does the vicarious liability arise? It depends on circumstances — whether liability attaches to a person for the wrongs committed by others. It arises in three ways:

i) Liability by ratification,

ii) Liability arising out of special relationships, and

iii) Liability by abetment.

11.4.3.1 Liability by Ratification

When a person commits a tort while acting on behalf of another but without his authority and that the other subsequently ratifies that act, he thereby becomes responsible for it. Such act is based on the maxim *'omnis ratihabitio retrorahituret mandato priori acquiparatur'* means every ratification of an act relates back and thereupon becomes equivalent to a previous request.

Three conditions are to be satisfied before one person can be held liable for another's tort on the ground of ratification. These are:

- only such acts bind a principal by subsequent ratification as were done at the time on his behalf. This necessarily implies that what is done by a person on his account cannot be effectually adopted or ratified by another;
- the person ratifying the act must have full knowledge of its tortuous character; and
- an act which is illegal and void cannot be ratified.

11.4.3.2 Liability Arising Out of Special Relationship

Following are some special relationships where the vicarious liability arises: i) Principal and agent, ii) Partners, iii) Master and servant, and iv) Independent contractor.

i) ***Principal and agent:*** There is a maxim *'quifacit per aliumfacit per se'* which means 'he who does an act though another is deemed in law to do it himself, on which the vicarious liability of principal for the tort of his agent is based. A principal is vicariously liable for the tort of his agent committed within the course of his authority. An *agent* is a person who, otherwise than as a servant and otherwise than as an independent contractor, whether by way of contract or only by way of request, conducts some business or performs some act or series of acts on behalf of another, *i.e.* principal.

ii) ***Partners:*** Partners are vicariously liable for torts committed by their co-partners acting in the ordinary course of the firm's business. The liability of partners is governed by section 26 of the Partnership Act, 1932: "Where, for any wrongful act or omission of any partner acting in the course of the business of the firm or with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm, the firm is liable therefor to the same extent as the partner so acting or omitting an act."

iii) ***Master and servant:*** The liability of the master for the tort which has been committed by his servant is based on the maxim 'respondent superior' i.e. superior is responsible. In law, it is established that he who employees another to do something does it himself or he who does an act through another is deemed in law to do it himself.

Who is a servant? Depending upon the control of master on the person, he is said to be the 'servant'. Under the 'contract of service' a master has the control over the servant by ordering or requiring him "what is to be done" and "how it shall be done". If a master controls a man by ordering him 'what is to be done' and 'the manner in which the work has to be done', then the man is a servant, otherwise he is not.

There are four essential elements of a 'contract of service':

i) the master's power of selection of his servant;

ii) the payment of wages or other remuneration;

iii) the master's right to control the method of doing the work; and

iv) the master's right of suspension or dismissal.

The discussion below provides us more clarity on *master-servant relationship* and *master's vicarious liability.*

a) ***Lending a servant:*** Sometimes an employer lends his servant to some other employer for a particular purpose or for a period of time. In such a case, if the servant injures a third party then the question arises: who will be vicariously liable – the first employer or the second employer? This question can be answered on the basis of an important case of *Mersey Docks and Harbour Board v Coggins and Griffiths (Liver Pool) Ltd.* (1847, p.1). In this case, the court held that the power of control, in such cases, is presumed to be in the general employer and the burden of proving the existence of that power in the hirer rests on the general employer.

b) ***The Scope of Employment:*** Master can only be held liable vicariously for such torts which are committed by the servant in the course of employment. An act is said to be done *in the course of employment* when the servant executes the order of the master: a) The master has ordered the servant to commit a wrongful act, or b) wrong may be committed due to the servant's negligence while carrying out the orders of the master. Thus, sometimes, wrong may be committed due to negligence of servant, but the master is liable for servant's negligence or carelessness.

- *Carelessness of servant:* In *Century Insurance Co. v Northern Ireland R. T. Board* (1942, p.509) and *Williams v Jones* (1865, p.602), the court held the appellants liable as the driver's negligent act was within the course of his employment.

- *Mistake of servant:* During the course of employment, if a servant commits any wrong then the master shall be held liable, e.g. *Bayley v Manchester Sheffield and Lin Rly* (1882, p.415).

- *Fraud of servant:* During the course of employment under a master, if the servant commits any fraud then the master would be liable, e.g. *Lloyd v Grace Smith & Co.* (1912, p.716) and *State of Uttar Pradesh v Hindustan Levers Ltd.* (1972, p.486).

- *Theft by servant:* Earlier, it was the rule that if a servant steals something belonging to other person, the master will not be held vicariously liable. Now, it is well established that if the theft was committed by the servant during the course of his employment, then the master will be held liable, e.g. *Morris v C. W. Martin & Sons Ltd.* (1966, p.716).

- *Lift to an employee:* In *Pushpabai Purshottam Uderhi v Ranjit Ginning & Pressing Co. Pvt. Ltd.* (1977, p.1735), the Manager of the Company going on a business trip also took another employee of company with him. The car met with an accident and that employee died. The manager was driving the car at the time of accident. It was held that the manager had authority to carry that employee with him and the Manager was acting in the course of employment.

- *Delegation of duty by servant:* A servant may delegate his duty in certain circumstances. If a servant has got the authority from his master to delegate his duty in real emergency at the time when his master is not available to give permission to the person to whom he delegates the

duty, then the master will be liable for his (such delegatee's) negligence also. Even if a servant has delegated his duty to another and that person commits negligence then the master will be held liable not because that the person who was appointed/delegated has committed the negligence but his servant has delegated his duty to another person during the course of employment.

c) ***Outside the course of employment:*** There are so many factors to be considered first before deciding that a particular act is or not within the course of employment, e.g. *Barwick v English Joint Stock Bank* (1867, p.259). In *K. B. Co. v Saad Bin Ahmad* (1977, p.326), it was observed that even though an act be done in the general course of employment still it may not render the employer vicariously liable if it is uncalled for or is excessive.

- *Express prohibition by master:* Sometimes, a master prohibits his servant to do certain acts and if the servant does the acts in defiance of the order as given by his master then his act can be said to have been done outside the course of employment and the master may not be liable, e.g. *Limpus v London General Omnibus Co.* (1862, p.526).
- *Servant and independent contractor:* As we have seen above, a servant is under the total control of his master. What he has to do and how it has to be done are decided by the master. Exceptions are, where the work is technical or professional and the master is incompetent to supervise, e.g. surgery, pilot's job, etc. Whereas an independent contractor is different from servant and agent, he is under a 'contract for service', i.e. 'what is to be done', 'how it is to be done' is in the hands of independent contractor completely. Since the independent contractor is free to choose his way to accomplish his job, his master is generally not liable for any tort committed by the independent contractor.

11.4.3.3 Liability by Abetment

In law of torts, he who abets the tortuous acts is as much liable as the tortfeasors themselves, if he knowingly induces them to commit the wrong for his own ends.

11.4.3.4 Vicarious Liability of the State

Under the English Common Law the maxim was "The King can do no wrong" and therefore, the King was not liable for the wrongs of his servants. But, this position of old common law maxim has been changed by the Crown Proceedings Act, 1947. Earlier, the King could not be sued in tort either for wrong actually authorized by him or committed by his servants in the course of their employment. With the increasing functions of the State, the Crown Proceedings Act had been passed; now the Crown is liable for a tort committed by its servants just like a private individual. Similarly, in America, the Federal Torts Claims Act, 1946 provides the principles which substantially decide the question of liability of the State.

State liability in India is defined by Article 300(1) of the Constitution that originated from Section 176 of the Government of India Act, 1935. This could be traced back to Section 32 of the Government of India Act, 1915, the genesis of which can be found in Section 65 of the Government of India Act, 1858. It

will, thus, be seen that by the chain of enactment beginning with the Act of 1858, the Government of India and Government of each State are in line of succession of the East India Company. In other words, the liability of the Government is same as that of the East India Company before, 1858.

11.4.3.5 Exceptions to the Rule of Vicarious Liability

Following are the exceptions to this rule.

i) ***Doctrine of common employment:*** The doctrine of common employment is a defence for that employer who is able to prove that the wrongdoer and the injured person are fellow-servants under him, and at the time of accident they are engaged in common employment. This doctrine was abolished by the Law Reform (Personal Injuries) Act, 1948 in England. But, this doctrine is still in vogue in India although its scope has been limited by the Employer's Liability Act, 1939; the Workmen's Compensation Act, 1923; the Employees State Insurance Act, 1948; and the Personal Injury (Compensation Insurance) Act, 1963. Although its scope has been limited by the above Acts, it needs to be abrogated.

ii) ***Sovereign functions:*** Sovereign functions are those actions of the State for which it is not answerable in any court of law. For instance, acts such as defence of the country, raising and maintaining armed forces, making peace or war, foreign affairs, acquiring and retaining territory are functions which are indicative of sovereignty and are political in nature. The entity sought to be made liable is not the government but the State. Therefore, they are not amenable to jurisdiction of ordinary civil court. The State is immune from being sued, as the jurisdiction of the courts in such matters is impliedly barred.

11.4.4 Constitutional Tort

The development of constitutional tort which began in the early eighties and was cemented into judicial precedent in *Nilabati Behe Nilabati Behera v State of Orissa* (1993, p.373) has profoundly in?uenced the direction the tort law has taken in the past decade. It has recognised state liability, and in denuding the defence of sovereign immunity the constitutional tort has taken wide arcs around previously established practices in tort law.

Constitutional torts fall under absolute liability. Some of these torts are as follows.

11.4.4.1 Custody Death

The incidence of custodial violence and custody death continues unabated. The experience of courts with cases of custodial violence appears to have moved them to regard complaints with reduced suspicion, and enhanced credulity. There is an increasing regularity in referring cases of custody death to the CBI, since it is not seen as realistic to expect that the police will carry out an unbiased investigation in a matter where the police are themselves in the dock.

The regularity with which cases of custodial violence and death reached the courts has made the courts look for reasons for increasing the credulity and lessening the disbelief, particularly when complaints are made of police violence. The doctrine of *res ipsa loquitur* (the thing speaks for itself) has been imported

into this arena. And, in *Kamla Devi v NCT of Delhi* (1970) the Delhi High Court has said: "When a person dies in police custody and the dead body bears telltale marks of violence or the circumstances are such that to indicate foul play, the court acting under Article 226 of the Constitution will be justi?ed in granting monetary relief to the relatives of the victim ..."

11.4.4.2 Police Atrocity

Excessive or unwarranted use of force by the police constitutes a ground for seeking relief – both compensatory and asking for investigation and prosecution – from the court.

11.4.4.3 Encounter Killing

The labelling of a person as a member of an extremist organization has provided a shield to the police and armed forces in cases of encounter killings or in fake encounters. The obstacles to enabling investigation in cases of alleged encounters were also set out in various surveys.

11.4.4.4 Illegal Detention

The casual treatment meted out in matters of liberty has led the courts to direct that compensation be paid to those detained beyond the prescription of the law.

In *Hussain v State of Kerala* (2000, p.139) a person was accused of an offence under the NDPS Act, 1985. Due to the ineptitude of his counsel, he was wrongfully convicted and sentenced to 10 years in prison and a ?ne of Rs.1 lakh. By the time the Supreme Court heard his appeal, aided by an amicus curiae, he had served ?ve years in jail. Acquitting the appellant, the court, however, said: "In this case, we are not considering the question of awarding compensation to the appellant but he is free to resort to his remedies under law for that purpose".

11.4.4.5 Disappearances

Cases of disappearances continue to crop up in the courtroom. The disappearance of persons picked up by the armed forces has raised presumptions of the disappeared being dead, unless the armed forces produce the person. It has also led to presumptions of the armed forces having disappeared the person. Yet, in constitutional tort, the remedy has been limited to directing the payment of compensation as an interim measure.

11.4.5 Remedy for Tort: Damages

In tort law, a remedy is in the form of monetary compensation given to the aggrieved party. Damages is the sum of money the law imposes for a breach of duty or violation of some right. More appropriately, damages are money claimed by or ordered to be paid to a person as compensation for loss or injury (Black's Law Dictionary, 2010).

Damages is the most important remedy which the plaintiff can avail of after the tort has been committed. Damages are of various kinds. Generally damages are compensatory, because the idea of civil law is to compensate the injured party for the loss he has suffered. In very exceptional cases, 'exemplary', 'punitive', or 'vindictive' damages may be awarded. Such damages may be in excess of the material loss suffered by the plaintiff and are awarded to prevent similar behaviour by the defendants in future.

11.4.5.1 Remoteness of Damages

Remoteness of damage relates to the requirement that the damage must be of a foreseeable type. In negligence claims, once the claimant has established that the defendant owes them a duty of care and is in breach of that duty which has caused damage, they must also demonstrate that the damage was not too remote. Remoteness of damage must also be applied to claims under the Occupiers Liability Acts and also to nuisance claims.

Remoteness of damage is often viewed as an additional mechanism of controlling tortuous liability. Not every loss will be recoverable in tort law. Originally, a defendant was liable for all losses which were a direct consequence of the defendant's breach of duty.

11.4.5.2 Computation of Compensation: Theories of Compensation

Compensation can also be claimed for personal injury, pain and suffering and loss of enjoyment of life. If there is probable future loss of income by reason of incapacity or diminished capacity of work, damages for the same are also recoverable.

Sometimes, damages are for the future loss, *i.e. prospective damages* may also be awarded. Since there can be only one action, and the law does not permit more than one suit for the same cause of action, damages for the likely loss can be claimed.

- *Shortening of expectation of life* of the injured party entitles him to claim *compensation for the same.* If such a person dies before he could claim compensation for the same, his legal representatives can claim compensation for the benefit of his estate.
- *Damages under the Fatal Accidents Act:* Certain dependants of the deceased are entitled to claim compensation under the (Indian) Fatal Accidents Act, 1855. A claim under the Act can be made only on behalf of certain heirs, i.e. the wife, husband, parent or child. No action can be brought by the brothers and sisters of the deceased.

Assessment of the Value of Dependency: It is generally done using the following theories.

i) ***Interest theory:*** One possible method of assessing compensation payable to the dependants could be to award such amount of compensation that the interest on fixed deposit of it could bring as income to the dependants which is equivalent to the loss of dependency. This theory (interest theory) cannot work well in practice, *firstly*, because due to erosion in the value of money in course of time specific amount of interest may not suffice to cover future loss, and *secondly*, due to illiteracy and ignorance, the claimant may not be in a position to plan a sound investment of the compensation received.

ii) ***Multiplier theory:*** According to this theory, the likely future loss is assessed by multiplying the likely future loss due to occur every year with a multiplier, which indicates the number of years for which the loss is likely to continue. On the death of a person, his dependants may sometimes receive certain payments like *gratuity, family pension, provident fund, insurance money,*

etc. Such receipts are not to be deducted from the compensation payable. The reason for not allowing such amounts to be deducted from compensation is, *firstly*, the deceased may have paid premiums to secure such benefits thereof, and he never intended that the tortfeasor should derive the benefits thereof, and *secondly*, some of the payments may have been received by the deceased or the dependants even if the death as at present had not occurred.

11.4.5.3 Forms of Remedy: Judicial and Non-judicial

The remedy can be in the form of judicial and extra-judicial or non-judicial remedies.

i) ***Judicial remedies:*** These remedies include injunction or specific restitution of property.

- *Injunction:* An injunction is an order of the court directing the doing of some act or restraining the commission or continuance of some act. An injunction may be temporary or perpetual; a *temporary injunction* is one which is continued until specified time or until further orders of the court. A *perpetual injunction* is one by which the defendant is perpetually enjoined from the assertion of right, or from the commission of an act, which would be contrary to the rights of the plaintiff. An injunction may also be prohibitory or mandatory. *Prohibitory injunction* forbids the defendant from doing of some act which will interfere with the plaintiffs lawful rights. *Mandatory injunction* is an order which requires the defendant to do some positive act. For example, an order that the wall should not be constructed is a prohibitory injunction and the order that the wall should be demolished is a mandatory injunction.

- *Compensation (Damages):* It is claimed by the plaintiff and is finally decided by the Court in view of the specific facts and circumstances of a case.

- *Specific restitution of property:* When the plaintiff has been wrongfully dispossessed of his movable or immovable property, the court may order that the specific property should he restored back to the plaintiff.

ii) ***Extra-judicial remedies:*** Apart from the above stated remedies of *damages, injunctions* and *specific restitution of property* which are also known as *judicial remedies*, a person may have a recourse to certain remedies outside the court of law and those remedies are known as *extra-judicial remedies.* A person can have these remedies by his own strength by way of self-help. The remedies are: re-entry of land, recapturing of chattels, distress damage and the abatement of nuisance.

- *The egg shell (or thin skull) rule:* A final aspect of remoteness of damage is the egg shell (or thin skull) rule. This means defendant must take their victims as they find them, i.e. if the victim is particularly vulnerable or has a pre-existing condition resulting in them suffering greater injury than would be expected in an ordinary person, the defendant remains responsible for the full extent of the injury, e.g. *Page v Smith* (1996, p.155).

In India, the law is followed usually on the English lines and most of the times, justice is done with the benefit of doubt given in favour of defendants. Whatever analysis of negligence is invoked or distinctions are made, they must stem from the ultimate desire, and the purpose of the law to achieve a just result in any given case.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

4) What are the defences available to the rule laid down in Rylands v Fletcher case?

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11.5 SPECIAL TORTS

We will, now, discuss special torts such as malicious prosecution, negligence, contributory negligence, trespass and defamation.

11.5.1 Malicious Prosecution

Malicious prosecution is the malicious institution of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause. Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. It is necessary to prove that damage was suffered as a result of the prosecution. Following are *conditions to prove* that there was malicious prosecution against a person.

i) That the plaintiff was prosecuted by the defendant.

ii) That the proceeding complained was terminated in favour of the present plaintiff.

iii) That the prosecution was instituted against him without any just or reasonable cause.

iv) That the prosecution was instituted with a malicious intention, that is, not with the mere intention of getting the law into effect, but with an intention which was wrongful in fact.

v) That he suffered damage to his reputation or to the safety of person or to security of his property.

11.5.1.1 Elements of Malicious Prosecution

Following are the elements of malicious prosecution.

- ***Institution or continuation of legal proceedings:*** One view was that a prosecution began only when process was issued and there could be no action when a magistrate dismissed a complaint under section 203 of the code of criminal procedure. The other view was that a prosecution commenced as soon as a charge was made before the court and before process was issued to the accused.
- ***Termination of the prosecution in the plaintiff's favour:*** The plaintiff must prove that the prosecution ended in his favour. He has no right to sue before it is terminated or while it is pending. The termination may be by an acquittal on the merits and a finding of his innocence or by a dismissal of the complaint for technical defects or for non-prosecution. If, however, he is convicted he has no right to sue and will not be allowed to show that he was innocent and wrongly convicted. His only remedy in that case is to appeal against the conviction. If the appeal results in his favour then he can sue for malicious prosecution. It is unnecessary for the plaintiff to prove his innocence as a separate issue.
- ***Malice:*** Malice for the purposes of malicious prosecution means having any other motive apart from that of bringing an offender to justice. Spite and ill-will are sufficient but not necessary conditions of malice. Malice means the presence of some other and improper motive, that is, to say the legal process in question was for some purpose other than the legal and appropriate one. Anger and revenge may be proper motives if channeled into the criminal justice system. The lack of objective and reasonable cause is not an evidence of malice but lack of honest belief is an evidence of malice.
- ***Damages:*** It has to be proved that the plaintiff has suffered damages as a result of the prosecution complained of. Even though the proceedings terminate in favour of the plaintiff, he may suffer damage as a result of the prosecution. The damages may not necessarily be pecuniary. There could be *three sort of damages* as mentioned below; any one of which could be sufficient to support any action of malicious prosecution.

  i) The damage to a man's fame such as the matter he is accused is scandalous;

  ii) The damage done to a person such as the man is put to a danger of losing his life, limb or liberty; or

  iii) The damage to a man's property such as he is forced to expend money in unnecessary charges, to acquit himself of the crime of which he is accused.

The damage must also be reasonable and probable results of malicious prosecution are not too remote. In assessing damage the court, to some extent, would have to consider:

- The nature of the offence the plaintiff was charged of;
- The inconvenience to which the plaintiff was charged to;
- The monetary loss he suffered; and
- The status and prosecution of the person prosecuted.

11.5.1.2 Malicious Civil Proceeding

An action will not lie for maliciously, without reasonable and propable cause. instituting suit; the reason stated to be is that "such a case does not necessarily and naturally involve damage to the party sued". The civil action which is false will be dismissed at the hearing. The defendant's reputation will be cleared against all imputations made against him and he will be awarded costs against the opponent. The law does not award damage for mental anxiety, or extra costs incurred beyond those imposed on unsuccessful parties.

11.5.2 Negligence

The concept of negligence is central to the tort system of liability. The negligence concept is centered on the principle that every individual should exercise a minimum degree of ordinary care so as not to cause harm to others.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation. Negligence, as a tort, is the breach of a legal duty to care, which results in damage undesired by the defendant to the plaintiff (Winfield, 1963).

When there is no intention of causing harm to the person complained of, it is called negligence. Carelessness on the part of defendant constitutes negligence. If, there is an unreasonable conduct followed by harm to another, it gives rise to liability for negligence.

11.5.2.1 Theories of Negligence

Theories of negligence are of two types.

i) *Subjective Theory:* As per this theory, negligence denotes 'state of mind'. It treats negligence as a specific tort and sets at rest all the controversy over this point. It has got support from Austin, Salmond and Winfield.

ii) *Objective Theory*: Negligence is a type of conduct and not a particular state of mind. It has been recognized by the House of Lords in *Donoghue v Stevenson* (1932, p.562), where negligence has been treated as a specific tort.

11.5.2.2 Essential Ingredients of Negligence

The essential ingredients of negligence include the following.

- Defendant has a legal duty to take reasonable care towards the plaintiff to avoid the damages complained of;
- The defendant committed a breach of that duty; and
- Due to breach of duty by the defendant plaintiff suffered damage.

Duty to take care: A person is supposed to behave in a reasonable manner; but if he deviates from acting as a reasonable person then he is said to be careless. But, for every careless act a man cannot be held responsible in law.

Criterion of duty: To determine whether duty to take care was there or not is upto Judge to decide. It becomes easier to decide where there is already earlier decision which has established such duty.

In the case of *Donoghue v Stevenson* (1932, p.562), Lord Atkins laid down a very important principle of determining a duty. In this case, the defendant was a manufacturer of ginger-beer who sold the beer in a sealed and opaque bottle. A person bought it and presented it to his friend Miss Donoghue. She drank the ginger-beer. In the bottle, she found decomposed body of a snail. She fell ill and sued the manufacturer for negligence. It may be noted here that there was no contract between the plaintiff and the defendant. Delivering the majority judgment Lord Catkin held that although there was no contractual duty on the part of the defendant, the defendant owed her a duty to take care that the bottle did not contain noxious matter and that he would be liable if that duty was broken.

Lord Atkins's principle has generally been accepted broadly, but it can't be accepted as a universal rule.

11.5.2.3 Burden of Proof in an Action for Negligence

Res ipsa loquitur — presumption of negligence: In the case of negligence, the onus is on plaintiff to prove the action of defendant due to which he has sustained injuries. He must prove the act or omission of the defendant so that defendant could be held liable for damages. The act or omission must also be the proximate cause of damage to the plaintiff. Where the balance is even as to which part is in fault, the one who relies on the negligence of other is bound to turn the scale.

- Proving the negligence of the defendant by the plaintiff may sometimes cause hardship to the plaintiff if he could not know what precise acts or omissions led to his injury or damage and that the cause of damage was known only to the defendant. In such a situation, the maxim *res ipsa loquitur* may be applied. It is a rule of evidence; it meant that the *thing speaks for itself,* i.e. the facts and circumstances of the plaintiff had proved to establish a prima facie case of negligence against the defendant. The crux of the matter is that *the accident should tell its own story and make a picture of negligence on the part of defendant.*

Winfield (1963) stated that there are two requirements for applying the maxim res ipsa loquitur.

i) The thing causing the damage must be under the control of the defendant or his servant;

ii) The accident must be such as could not in the ordinary course of things have happened without negligence.

Plaintiff's damage must be caused by the defendant's breach of duty and not due to any other cause. Even if the damage is caused by the defendant's breach of duty, the defendant will not be liable if the damages are too remote a consequence of it, or it may be the case of contributory negligence.

11.5.2.4 Professional Negligence: Legal and Medical

Inherent in the concept of any profession is a code of conduct, containing the basic ethics, which underlines the moral values that govern professional practice and is aimed at upholding its dignity.

- For more than a century, in England, it was held that barristers cannot be sued for breach of professional duty. It was the notion earlier that there is no contractual obligation towards their clients and the fees received by them are considered in the nature of honorarium.

In our country, section 5 of the Legal Practitioners (Fees) Act, 1926 provides that no legal practitioner i.e., advocate, vakil, pleader, mukhtar or revenue agent 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.

- Medical profession is one of the oldest professions of the world and is the most humanitarian one. Medical ethics underpins the values at the heart of the practitioner-client relationship. Medical negligence and malpractices by doctors were the grey areas in health care where legal issues operated.

Essential components of medical negligence: On the basis of various judicial pronouncements, essentials of 'Medical Negligence' are discernible, and, in brief, they are as under:

- The Doctor must owe a duty of care to the patient;
- The Doctor must have done a breach of that duty; and
- The patient must have suffered damages due to the said breach.

11.5.2.5 Defences to Negligence

Defences depend upon the conditions which, in general, are negative tortuous liability, viz. *volenti non fit injuria,* private defence, statutory authority, act of State, remoteness of damage, contributory negligence, etc. We have already explained them elsewhere above, except the contributory negligence.

11.5.2.6 Contributory Negligence

If someone has committed a negligent act and the other person is not avoiding the consequence arising out of that negligent act even when means and opportunity were afforded to do so it is called contributory negligence. It is difficult for plaintiff to claim the damages from the defendant's negligence if the plaintiff also fails in exercising ordinary care, diligence and skill to avoid the consequences of defendant's negligence. It is based on the maxim -- *volenti non fit injuria* and *in jure non remota causa sed proxima spectator.*

Contributory negligence is negligence on the part of a plaintiff which, combining with the negligence of a defendant, contributes as a cause in bringing about the injury. "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm".

- ***Contributory negligence – forgetfulness of known danger:*** If a plaintiff voluntarily proceeds into a dangerous situation of which he or she had previous knowledge, but momentarily forgot the danger, such forgetfulness is not in itself contributory negligence unless under all the circumstances it shows an absence of ordinary care not to have kept the danger in mind.

- ***Contributory negligence – minors:*** In California, a minor under the age of five years is incapable of contributory negligence as a matter of law. Contributory negligence, if any, on the part of the minor over the age of five years does not bar a recovery against the defendant but the total amount of damages to which the minor would otherwise be entitled is reduced in

proportion to the amount of negligence attributable to the minor. The negligence, if any, of the parents, or either of them, does not bar or reduce recovery of damages for injuries to the minor.

- ***Duty of passenger for own safety:*** One who is simply a passenger in a motor vehicle and has no right to the control or management of such vehicle nevertheless has the duty to exercise the same ordinary care for his or her own safety and protection as a person of ordinary prudence would take under the same or similar circumstances. The passenger has the duty of doing whatever a person of ordinary prudence in the same situation would do to inform or warn the driver in an effort to prevent an accident. Contributory negligence, if any, by the passenger does not bar recovery against the defendant but the total amount of damages to which the passenger would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the passenger.

- ***Doctrines of alternative danger:*** Res ipsa loquitur is the name of a doctrine that permits a trier of fact to infer the existence of negligence in the absence of direct evidence of negligence. For the doctrine to apply it must be shown that: *First*, it is the kind of accident or injury which ordinarily does not happen unless someone is negligent; *Second*, it was caused by an agency or instrumentality in the exclusive control of the defendant over which the defendant had the exclusive right of control originally, and which was not mishandled or its condition otherwise changed after defendant relinquished control; and *Third*, the accident or injury was not due to any voluntary action or contribution on the part of the plaintiff, which was the responsible cause of plaintiff's injury.

- ***Recovery for intentional harm not diminished by contributory negligence:*** Contributory negligence, if any, on the part of the plaintiff does not reduce any recovery by the plaintiff against the defendant for an injury caused by misconduct of the defendant, if the defendant intended to inflict harm upon the plaintiff.

11.5.3 Trespass

Trespass is an area of tort law broadly divided into *three groups*: trespass to the *person*, trespass to *chattels* and trespass to *land.*

11.5.3.1 Trespass to the Person

Generally, trespass to the person consists of *three torts:* assault, battery, and false imprisonment.

i) ***Assault:*** Under the statutes of various common law jurisdictions, assault is *both a crime and a tort.* Generally, a person commits *criminal assault;* if he purposefully, knowingly, or recklessly inflicts bodily injury upon another; if he negligently inflicts bodily injury upon another by means of dangerous weapon; or if, through physical menace, he places another in fear of imminent serious bodily injury. A person commits *tortuous assault* when he engages in "any act of such a nature as to excite an apprehension of battery or bodily injury." In some jurisdictions, there is no requirement of actual physical violence; simply the "threat of unwanted touching of the victim" suffices to sustain an assault claim.

ii) ***Battery:*** Battery is "any intentional and unpermitted contact with the plaintiff's person or anything attached to it and practically identified with it." The element of battery in common law varies by jurisdiction, e.g. in the United States, the American Law Institute's Restatement of Torts provides a general rule to determine liability for battery.

iii) ***False Imprisonment:*** False imprisonment is defined as "unlawful obstruction or deprivation of freedom or restraint of movement." In some jurisdictions, false imprisonment is a tort of strict liability: no intention on the behalf of the defendant is needed, but others require intent to cause the confinement. Physical force, however, is not a necessary element, and confinement need not be lengthy; the restraint must be complete, though the defendant does not resist.

Defences to trespass to the person: These include the following.

- *Child Correction:* Depending on the jurisdiction, corporal punishment of children by parents or instructors may be a defense to trespass to the person, so long as the punishment was "reasonably necessary under the circumstances in order to discipline a child who has misbehaved" and the defendant "exercised prudence and restraint."

- *Consent:* Perhaps the most common defense for the torts of trespass to the person is that of volenti non fit injuria, literally means, "to a willing person, no injury is done," but shortened to "consensual privilege" or "consent".

- *Self-defense/Defense of others/Defense of property:* Self-defense or non-consensual privilege is a valid defense to trespasses against the person, assuming that it constituted the use of "reasonable force which they honestly and reasonably believe is necessary to protect themselves or someone else, or property." The force used must be proportionate to the threat as ruled in *Cockroft v Smith* (1705, p.642).

11.5.3.2 Trespass to Chattels

Trespass to chattels, also known as trespass to goods or trespass to personal property is defined as "an intentional interference with the possession of personal property ... proximately causing injury." Trespass to chattels possesses the following *three elements.*

i) ***Lack of consent:*** The interference with the property must be non-consensual. A claim does not lie if, in acquiring the property, the purchaser consents contractually to certain access by the seller. "Any use exceeding the consent" authorized by the contract, should it cause harm, gives rise to a cause for action.

ii) ***Actual harm:*** The interference with the property must result in actual harm. The threshold for actual harm varies by jurisdiction. In California, for instance, an electronic message may constitute a trespass if the message interferes with the functioning of the computer hardware, but the plaintiff must prove that this interference caused actual hardware damage or actually impaired its functioning.

iii) ***Intentionality:*** The interference must be intentional. What constitutes intention varies by jurisdiction. Intention is present when an act is done for the purpose of using or otherwise intermeddling with a chattel or with the

knowledge that such an intermeddling will, to a substantial certainty, result from the act and continues, it is not necessary that the actor should know or have reason to know that such intermeddling is a violation of the possessory rights of another.

Remedies for trespass to chattel include: damages, liability for conversion, and injunction, depending on the nature of the interference.

Application of trespass to chattels: It is done in two ways.

- *Traditional applications:* Trespass to chattels typically applies to tangible property and allows owners of such property to seek relief when a third party intentionally interferes or intermeddles in the owner's possession of his personal property. "Interference" is often interpreted as the "taking" or "destroying" of goods, but can be as minor as "touching" or "moving" them in the right circumstances.

- *Modern applications:* In recent years, trespass to chattels has been expanded in the United States to cover intangible property, including combating the proliferation of unsolicited bulk email as well as virtual property interests in online worlds. In the late 1990s, American courts enlarged trespass to chattels, first to include the unauthorized use of long distance telephone lines, and later to include unsolicited bulk email.

11.5.3.3 Trespass to Land

Trespass to land involves the "wrongful interference with one's possessory rights in (real) property." It is not necessary to prove that harm was suffered to bring a claim, and is instead *actionable per se*. While most trespasses to land are intentional, British courts have held liability for trespass committed negligently. Similarly, some American courts also found liability for unintentional intrusions where such intrusions arise under circumstances evincing negligence or involve a highly dangerous activity. Exceptions exist for entering land adjoining a road unintentionally (such as in a car accident), as in *River Wear Commissioners v Adamson* (1877, p.743).

- *Interference:* The main element of the tort is "interference". This must be both direct and physical, with indirect interference instead of being covered by negligence or nuisance. "Interference" covers any physical entry to land, as well as the abuse of a right of entry, when a person who has the right to enter the land does something not covered by the permission.

- *Subsoil and Airspace:* Aside from the surface, land includes the subsoil, airspace and anything permanently attached to the land such as houses.

Defenses to trespass to land: There are several defenses to trespass to land such as license, justification by law, necessity and *jus tertii.*

- *License* is express or implied permission, given by the possessor of land, to be on that land. These licenses are irrevocable unless there is a flaw in the agreement or it is given by a contract. Once revoked, a license-holder becomes a trespasser if they remain on the land.

- *Justification by law* refers to those situations in which there is statutory authority permitting a person to go onto land, such as the England and Wales' Police and Criminal Evidence Act 1984, which allows the police to enter

land for the purposes of carrying out an arrest; or the California state constitution, which permits protests on grocery stores and strip malls, despite their presenting a general nuisance to store owners and patrons.

- *Necessity* is the situation in which it is vital to commit the trespass; in *Esso Petroleum Co. v Southport Corporation* (1956, p.28) the captain of a ship committed trespass by allowing oil to flood a shoreline. This was necessary to protect his ship and crew, and the defense of necessity was accepted. Necessity does not, however, permit a defendant to enter another's property when alternative, though less attractive, courses of action exist.

- *Jus tertii* is where the defendant can prove that the land is not possessed by the plaintiff, but by a third party, as in *Doe d Carter v Barnard* (1849, p.945). This defense is unavailable if the plaintiff is a tenant and the defendant a landlord who had no right to give the plaintiff his lease, e.g. an illegal apartment rental, an unauthorized sublet, etc.

11.5.4 Defamation

A man's reputation is his property and is more valuable than any other tangible asset. Every man has the right to have his reputation preserved. It is acknowledged as an inherent personal right of every person. It is a *jus in rem*, a right good against all the people in the world. The degree of suffering caused by loss of reputation far exceeds that caused by loss of any material wealth.

Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally, or tends to make them shun or avoid him.

Law of Defamation, like many other branches of tort law, aims at balancing the interests of the parties concerned. These are the rights that a person has to his reputation vis-à-vis the right to freedom of speech. The Law of Defamation provides defences to the wrong such as truth and privilege thus also protecting right of freedom of speech but at the same time marking the boundaries within which it may be limited. In India, tort law is obtained from British Common Law and is yet uncodified. Therefore, the existing law relating to defamation places reasonable restrictions on the fundamental right of freedom of speech and expression conferred by Article 19(1) (a) of the Constitution and is saved by clause (2) of Article 19.

11.5.4.1 Types of Defamatory Statements

There are two types of defamatory statements.

- *Libel:* It is the publication of a false and defamatory statement tending to injure the reputation of another person without lawful justification or excuse. The statement must be in a printed form, e.g. writing, printing, pictures, cartoons, statue, waxwork, effigy, etc.

- *Slander:* It is a false and defamatory statement by spoken words and/or gestures tending to injure the reputation of others. It is in a transient form. It also involves the sign language used by the physically disabled.

In Common law, a libel is a criminal offence as well as a civil wrong, but a slander is a civil wrong only. However, in Indian law, both are criminal offences under Section 499 of the IPC. Libel is more favorable to the claimant because it is actionable per se and injury to reputation will be presumed.

11.5.4.2 Constituents or Elements of Defamation

Regardless of whether a defamation action is framed in libel or slander, the plaintiff must always prove that the words, pictures, gestures, etc are defamatory. Equally, the plaintiff must show that they refer to him. Finally, he must also prove that they were maliciously published. Thus, there are three essential elements in a defamation action, viz. the following.

i) ***The statement must be defamatory:*** Any imputation which exposes one to disgrace and humiliation, ridicule or contempt is defamatory. It could be made in different ways; it could be oral, in writing, printed or by the exhibition of a picture, effigy or statue or by some other means or conduct. According to Lord Atkins (1936, p.1237), whether a statement is defamatory or not depends upon how likely the right-thinking members of the society take it. However, words spoken in anger or annoyance or in the heat of the moment are not defamatory as they no way reflect on the character of the one being abused.

ii) ***The statement must refer to the plaintiff:*** The plaintiff has to prove that the statement which is claimed to be defamatory actually refers to him/her. It is immaterial that the defendant did not intend to defame the plaintiff, if the person against whom the statement was published could reasonably infer that the statement referred to the plaintiff, the defendant is nevertheless liable. However, when the defamation refers to a class of persons, no member of that group can sue unless he can prove that the words could reasonably be considered to be referring to him.

iii) ***The statement must be published:*** Publication means making the defamatory matter known to some other third party, and unless that is done no civil action for defamation can lie in court. Communication to the plaintiff won't count because defamation is injury to the reputation which consists in the estimation in which others hold him and not a man's own opinion of himself. However, if a third party wrongfully intercepts and reads a letter sent to the plaintiff it is not defamation. However, when the defendant knows that the letter is likely to be read by someone else and it contains some personal information only meant for the recipient, then he will be liable.

When the repetition of the defamatory matter is involved, the liability of the person who repeats that defamatory matter is the same as that of the originator, because every repetition is a fresh publication giving rise to a fresh cause of action. Not only the author is liable but the editor, printer or publisher would be liable in the same way.

11.5.4.3 Defences to Defamation

Following are the defences available to defamation.

i) ***Justification by truth:*** In a civil action for defamation, truth is a complete defence. However, under criminal law, it must also be proved that the imputation was made for the public good. Under the civil law, merely proving that the statement was true is a good defence, the reason being that "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".

If a fair and bona fide comment on a matter of public interest is a defence to be available, the following essentials are required:

- It must be a comment, i.e. an expression of opinion rather than an assertion of fact;
- The comment must be fair, i.e. must be based on the truth and not on untrue or invented facts
- The matter commented upon must be of public interest.

ii) ***Privilege:*** It is of the following two kinds.

a) *Absolute Privilege:* Certain statements are allowed to be made when the larger interest of the community overrides the interest of the individual. No action lies for the defamatory statement even though it may be false or malicious. In such cases, the public interest demands that an individuals right to reputation should give way to the freedom of speech. This privilege is provided to:

- Parliamentary proceedings,
- Judicial proceedings,
- Military and Naval proceedings, and
- State proceedings.

b) *Qualified Privilege:* It is communications made in the course of legal, social or moral duty for self-protection, protection of common interest, and for public good and proceedings at public meetings, provided the absence of malice is proved. Also, there must be an occasion for making the statement. To avail this defence, the following things must be kept in mind:

- The statement should be made in discharge of a public duty or protection of an interest; or
- It is a fair report of parliamentary, judicial or other public proceedings; and
- The statement should be made without any malice.

Defamation does have great significance as it protects a right which is essential for the members of society to co-exist. Obviously, if people do not respect that right and are allowed to say and publish whatever they want without substantiating it with an honest reason to believe, then there would be no harmony in society; insecurity would be rampant and society would be in shambles.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

5) Explain the maxim, *Res ipsa loquitur.*

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6) Discuss defamation. Distinguish between libel and slander.

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11.6 LET US SUM UP

We discussed the law of tort in reasonable detail. We covered the concept, meaning, theories, essential ingredients, general conditions, rules and defences of torts. Further, we have highlighted the aspects like who are competent to sue or to be suited and who cannot be sued. We hope you would take due cognizance of all the points discussed in tort law and attempt to educate others as well, so that precautionary actions of yours and others would prevent you or them from becoming liable for any tort.

11.7 ANSWERS TO 'CHECK YOUR PROGRESS' QUESTIONS

1) The two competing theories of tortuous liability are give below.

   i) Wider and narrower theory: All injuries done by one person to another are torts, unless there is some justification recognized by law.

   ii) Pigeon-hole theory: There is a definite number of torts outside which liability in tort does not exist.

2) The essentials of tort are that:

   i) There must be a wrong act committed by a person;

   ii) The wrongful act must be of such a nature as to give rise to a legal remedy; and

   iii) Such legal remedy must be in the form of an action for unliquidated damages.

3) General defences available against tortuous liability include: *Volenti non fit injuria*, Plaintiff the wrongdoer, Inevitable accident, Act of God, Private defence, Mistake, Necessity, Statutory authority.

4) The following are five important exceptions to the principle/rule laid down in Rylands v Fletcher's case: i) Vis Major or act of God, ii) Wrongful or malicious act of a stranger, iii) Plaintiff's own fault, iv) Common benefit, and v) Statutory authority.

5) *Res ipsa loquitur* is a doctrine that permits a trier of fact to infer the existence of negligence in the absence of direct evidence of negligence. For the doctrine to apply it must be shown that:

   i) The thing causing the damage must be under the control of the defendant or his servant; and

   ii) The accident must be such as could not in the ordinary course of things have happened without negligence.

6) Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally, or tends to make them shun or avoid him.

   - *Libel*: It is the publication of a false and defamatory statement tending to injure the reputation of another person without lawful justification or excuse. The statement must be in a printed form, e.g. writing, printing, pictures, cartoons, statue, waxwork, effigy, etc.
   - *Slander:* It is a false and defamatory statement by spoken words and/or gestures tending to injure the reputation of others. It is in a transient form. It also involves the sign language used by the physically disabled.

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