

CHAPTER 3**LAW RELATING TO TORTS**

Q: Discuss the scope and conditions of liability for tort

The term 'tort' is a French equivalent of English word 'wrong'. Simply stated 'tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.

Section 2(m) of the Limitation Act, 1963, states: "Tort means a civil wrong which is not exclusively a breach of contract or breach of trust." Thus, two important elements can be derived from above definitions, are: (i) that a tort is a species of civil injury of wrong as opposed to a criminal wrong, and (ii) that every civil wrong is not a tort.

GENERAL CONDITIONS OF LIABILITY FOR A TORT

In general, a tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute tort, there must be:

- a wrongful act or omission of the defendant;
- the wrongful act must result in causing legal damage to another; and
- the wrongful act must be of such a nature as to give rise to a legal remedy.

(i) **Wrongful act:**

The act complained of, should under the circumstances, be legally wrongful as regards the party complaining. Thus, every person whose legal rights, e.g., right of reputation, right of bodily safety and freedom, and right to property are violated without legal excuse, has a right of action against the person who violated them, whether loss results from such violation or not.

(ii) **Legal damages:**

It is not every damage that is a damage in the eye of the law. It must be a damage which the law recognizes as such. In other words, there should be legal injury or invasion of the legal right. In the absence of an infringement of a legal right, an action does not lie. Also, where there is infringement of a legal right, an action lies even though no damage may have been caused.

Two maxims, namely:

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

Damnum Sine Injuria

Damnum means harm, loss or damage in respect of money, comfort, health, etc. *Injuria* means infringement of a right conferred by law on the plaintiff. The maxim means that in a given case, a man may have suffered damage and yet have no action in tort, because the

damage is not to an interest protected by the law of torts. Therefore, causing damage, however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff. Thus, if I own a shop and you open a shop in the neighbourhood, as a result of which I lose some customers and my profits fall off, I cannot sue you for the loss in profits, because you are exercising your legal right.

Injuria Sine Damnum

It means injury without damage, i.e., where there is no damage resulted yet it is an injury or wrong in tort, i.e. where there is infringement of a legal right not resulting in harm but plaintiff can still sue in tort. Some rights or interests are so important that their violation is an actionable tort without proof of damage. Thus when there is an invasion of an “absolute” private right of an individual, there is an *injuria* and the plaintiff’s action will succeed even if there is no *Damnum* or damages. Where a person was wrongfully not allowed to vote and even though it has not caused him any damage, since his legal right to vote was denied, he was entitled to compensation. An absolute right is one, the violation of which is actionable *per se*, i.e., without the proof of any damage (*Ashby v White*).

(iii) Legal remedy:

This means that to constitute a tort, the wrongful act must come under the law. The main remedy for a tort is an action for unliquidated damages. Some other remedies i.e. Injunction, Damages or Specific Restitution may also be claimed.

Mens Rea

The General principle lies in the maxim “*actus non facit reum nisi mens sit rea*” i.e. the act itself creates no guilt in the absence of a guilty mind. It does not mean that for the law or Torts, the act must be done with an evil motive, but simply means that mind must concur in the Act, the act must be done either with wrongful intention or negligence. However, to this principle cases of absolute or strict liability are exceptions.

Q: What are the various kinds of tortious liability?

STRICT OR ABSOLUTE LIABILITY

In some torts, the defendant is liable even though the harm to the plaintiff occurred without intention or negligence on the defendant’s part. In other words, the defendant is held liable without fault.

Rule in Rylands v. Fletcher

The rule in *Rylands v. Fletcher* is that a man acts at his peril and is the insurer of the safety of his neighbour against accidental harm. Such duty is absolute because it is independent of negligence on the part of the defendant or his servants. It was held in that case that: “If a person brings or accumulates on his land anything which, if it should escape may cause damage to his neighbours, he does so at his own peril. If it escape and cause damage he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage.”

Exceptions to the Rule of Strict Liability

The following exceptions to the rule of strict liability have been introduced in course of time, some of them being inherent in the judgment itself in *Ryland v. Fletcher*:

a) *Damage due to Natural Use of the Land*

In *Ryland v. Fletcher* water collected in the reservoir in such large quantity, was held to be nonnatural use of land. Keeping water for ordinary domestic purpose is 'natural use'. Things not essentially dangerous which is not unusual for a person to have on his own land, such as water pipe installations in buildings, the working of mines and minerals on land, the lighting of fire in a fire-place of a house, and necessary wiring for supplying electric light, fall under the category of "natural use" of land.

b) *Consent of the plaintiff*

Where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule in *Ryland v. Fletcher* does not arise. Such consent is implied where the source of danger is for the 'common benefit' of both the plaintiff and the defendant.

c) *Act of Third Party*

If the harm has been caused due to the act of a stranger, who is neither defendant's servant nor agent nor the defendant has any control over him, the defendant will not be liable.

d) *Statutory Authority*

Sometimes, public bodies are by statute, exempted from liability so long as they have taken reasonable care. This is based on the principle that they act in public interest.

e) *Act of God*

If an escape is caused, through natural causes and without human intervention circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility, there is then said to exist the defence of Act of God.

f) *Escape due to plaintiff's own Default*

Damage by escape due to the plaintiff's own default was considered to be good defence in *Rylands v. Fletcher* itself. Also, if the plaintiff suffers damage by his own intrusion into the defendant's property, he cannot complain for the damage so caused.

VICARIOUS LIABILITY

Normally, the tortfeasor is liable for his tort. But in some cases a person may be held liable for the tort committed by another. A master is vicariously liable for the tort of his servant, principal for the tort of his agent and partners for the tort of a partner. This is known as vicarious liability in tort. The common examples of such a liability are:

a) Principal and Agent [Specific authority]

Qui facit per alium facit per se – He who acts through another is acting himself, so that the act of the agent is the act of the principal. When an agent commits a tort in the ordinary course of his duties as an agent, the principal is liable for the same.

In *Lloyd v. Grace, Smith & Co.*, the managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud, against a lady client by fraudulently inducing her to sign documents transferring her property to him. He had done so without the knowledge of his principal who was liable because the fraud was committed in the course of employment.

b) Partners

For the tort committed by a partner in the ordinary course of the business of the firm, all the other partners are liable therefore to the same extent as the guilty partner. The liability of the partners is joint and several.

In *Hamlyn v. Houston & Co.*, one of the two partners bribed the plaintiff's clerk and induced him to divulge secrets relating to his employer's business. It was held that both the partners were liable for the tort committed by only one of them.

c) Master and Servant [Authority by relation]

A master is liable for the tort committed by his servant while acting in the course of his employment. The servant, of course, is also liable; their liability is joint and several. A master is liable not only for the acts which have been committed by the servant, but also for acts done by him which are not specifically authorized, in the course of his employment. The basis of the rule has been variously stated: on the maxim *Respondeat Superior* (Let the principal be liable) or on the maxim *Qui facit per alium facit per se* (he who does an act through another is deemed to do it himself). The master is liable even though the servant acted against the express instructions, for the benefit of his master, so long as the servant acted in the course of employment.

d) Employer and Independent Contractor

It is to be remembered that an employer is vicariously liable for the torts of his servants committed in the course of their employment, but he is not liable for the torts of those who are his independent contractors. An *independent contractor* is one who works for another but who is not controlled by that other in his conduct in the performance of that work.

e) Where Employer is Liable for the acts of Independent Contractor

The employer is not liable merely because an independent contractor commits a tort in the course of his employment; the employer is liable only if he himself is deemed to have committed a tort. This may happen in one of the following three ways:

- When employer authorizes him to commit a tort.
- In torts of strict liability
- Negligence of independent contractor

f) Where Employer is not Liable for the acts of an Independent Contractor

An employer is not liable for the tort of an independent contractor if he has taken care in the appointment of the contractor.

g) Liability for the acts of Servants

An employer is liable whenever his servant commits a tort *in the course of his employment*. An act is deemed to be done in the course of employment if it is either:

- a wrongful act authorized by the employer, or
- a wrongful and unauthorized mode of doing some act authorized by the employer.

Q: What are the torts or wrongs to personal safety and freedom under law relating to torts?

TORTS OR WRONGS TO PERSONAL SAFETY AND FREEDOM

An action for damages lies in the following kinds of wrongs which are styled as injuries to the person of an individual:

(a) Battery

Any direct application of force to the person of another individual without his consent or lawful justification is a wrong of battery. To constitute a tort of battery, therefore, two things are necessary:

- Use of force, however, trivial it may be without the plaintiff's consent, and
- Without any lawful justification.

Even though the force used is very trivial and does not cause any harm, the wrong is committed. Thus, even to touch a person in anger or without any lawful justification is battery.

(b) Assault

Assault is any act of the defendant which directly causes the plaintiff immediately to apprehend a contact with his person. Thus, when the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him, the tort of assault is committed. The law of assault is substantially the same as that of battery except that apprehension of contact, not the contact itself has to be established. Usually when there is a battery, there will also be assault, but not for instance, when a person is hit from behind.

(c) Bodily Harm

A willful act (or statement) of defendant, calculated to cause physical harm to the plaintiff and in fact causing physical harm to him, is a tort.

(d) False Imprisonment

False imprisonment means unauthorized restraint on a person's body. What happens in false imprisonment is that a person is confined within certain limits so that he cannot move about and so his personal liberty is infringed. If a man is restrained, by a threat of force from leaving his own house or an open field there is false imprisonment.

(e) Malicious Prosecution

Malicious prosecution consists in instigating judicial proceedings (usually criminal) against another, maliciously and without reasonable and probable cause, which terminate in favour of that other and which results in damage to his reputation, personal freedom or property. The following are the essential elements of this tort:

- There must have been a *prosecution* of the plaintiff by the defendant.
- There must have been *want of reasonable and probable cause* for that prosecution.
- The defendant must have *acted maliciously* (i.e. with an improper motive and not to further the end of justice).
- The plaintiff must have suffered *damages* as a result of the prosecution.
- The prosecution must have terminated *in favour of the plaintiff*.

(f) Nervous Shock

It provides relief when a person may get physical injury not by an impact, e.g., by stick, bullet or sword but merely by the nervous shock through what he has seen or heard.

(g) Defamation

Defamation is an attack on the reputation of a person. It means that something is said or done by a person which affects the reputation of another. Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person.

Defamation may be classified into two heads: Libel and Slander.

- **Libel** is a representation made in some permanent form, e.g. written words, pictures, caricatures, cinema films, effigy, statue and recorded words.
- **Slander** is the publication of a defamatory statement in a transient form; statement of temporary nature such as spoken words, or gestures.

Generally, the punishment for libel is more severe than for slander. Defamation is tort as well as a crime in India. In India both libel and slander are treated as a crime. Section 499 of the Indian Penal Code recognizes both libel and slander as an offence.

Q: What are the remedies in tort under law relating to torts?**REMEDIES IN TORTS****Judicial Remedies**

- Damages or Compensation,
- Injunction, and
- Specific Restitution of Property.

Extra Judicial Remedies

In certain cases it is lawful to redress one's injuries by means of self help without recourse to the court. These remedies are:

(a) Self Defence

It is lawful for any person to use reasonable forces to protect himself, or any other person against any unlawful use of force.

(b) **Prevention of Trespass**

An occupier of land or any person with his authority may use reasonable force to prevent trespassers entering or to eject them but the force should be reasonable for the purpose.

(c) **Re-entry on Land**

A person wrongfully disposed of land may retake possession of land if he can do so in a peaceful and reasonable manner.

(d) **Re-capture of Goods**

It is neither a crime nor a tort for a person entitled to possession of a chattel to take it either peacefully or by the use of a reasonable force from one who has wrongfully taken it or wrongfully detained it.

(e) **Abatement of Nuisance**

The occupier of land may lawfully abate (i.e. terminate by his own act), any nuisance injuriously affecting it.

(f) **Distress Damage Feasant**

An occupier may lawfully seize any cattle which are unlawfully on his land doing damage there and detain them until compensation is paid for the damage. The right is known as that of distress damage feasant-to distrain things which are doing damage.

OTHER IMPORTANT CONCEPT

Applicability of the rule in Rylands v. Fletcher in cases of enterprises engaged in a hazardous or inherently dangerous industry.

The Supreme Court has discussed the applicability of the rule of Rylands v. Fletcher in the case of M.C. Mehta v. Union of India and Others (1987) 1. Comp. L.J. p. 99 S.C. while determining the principles on which the liability of an enterprise engaged in a hazardous or inherently dangerous industry depended if an accident occurred in such industry.

“We have to evolve new principle and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that, in any other foreign country”.

On the question of the nature of liability for a hazardous enterprise the court while noting that the above rule as developed in England recognizes certain limitations and responsibilities recorded it's final view as follows:

The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged, must be conducted with the highest standards of safety; and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm; and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without negligence on its part.”

Thus, while imposing absolute liability for manufacture of hazardous substances, the Supreme Court intended that the requirement of non-natural use or the aspect of escape of a dangerous substance, commonly regarded as essential for liability under Rylands v. Fletcher, need not be proved in India.

CASE STUDY

A mill owner employed an independent contractor to construct a reservoir on his land to provide water for his mill. There were old disused mining shafts under the site of the reservoir, which the contractor failed to observe because they were filled with soil. Therefore, the contractor did not block them. When water was filled in the reservoir, it burst through the shaft and flooded the plaintiff's coal mines on the adjoining land. Is the mill owner liable to compensate for loss or damage caused to the plaintiff? Give reasons.

Answer: This is category of tort known as "nuisance", which implies causing something so as to disrupt the "right of quiet enjoyment" to such an extent that a tort is being committed.

The rule that is most often followed in this is the 'rule in Rylands vs. Fletcher. In this case a dam burst into a coal mine shaft, causing flooding of the neighbour's property. A dangerous escape of some hazard, including water, fire, or animals causes' strict liability in the tort of nuisance. The only defense is when the event is unseal and unpredictable.

Moreover this is a "private nuisance", which means the interference with the right of specific people. Hence, the mill owner is liable to compensate for loss or damage caused to the plaintiff.

Rule in M.C. Mehta vs. Union of India: The Rule of absolute Liability

A more stringent rule of strict liability than the rule in Rylands vs. Fletcher was laid down by the Supreme Court in the case of M.C. Mehta vs. U.O.I. AIR 1987 SC 1086.

The case related to the harm caused by escape of oleum gas from one of the units of Shriram Foods and Fertilizer Industries in the city of Delhi. The court held that rule of Rylands vs. Fletcher evolved in the 19th century did not fully meet the needs of a modern industrial society and evolved a new rule of 'Absolute Liability'.

The court pointed out that the enterprise cannot escape liability by showing that it had taken all reasonable care and there was no negligence own its part. The new rule in Mehta's case is not only strict but absolute and is subject to no exception.

Absolute liability**M.C. Mehta vs. UOI, 1987**

- ◆ Absolute liability with no exception
- ◆ Employer can't escape even though taken reasonable care

Vicarious Liability of the State**(a) The Position in England**

At Common Law the Crown could not be sued in tort, either for wrongs actually authorized by it or committed by its servants, in the course of their employment. With the passing of the Crown Proceeding Act, 1947, the Crown is liable for the torts committed by its servants just like a private individual. Thus, in England, the Crown is now vicariously liable for the torts of its servants.

(b) The Position in India

Unlike the Crown Proceeding Act, 1947 of England, we have no statutory provision with respect to the liability of the State in India.

When a case of Government liability in tort comes before the courts, the question is whether the particular Government activity, which gave rise to the tort, was the sovereign function or non-sovereign function. If it is a sovereign function it could claim immunity from the tortious liability, otherwise not. Generally, the activities of commercial nature or those which can be carried out by the private individual are termed as non-sovereign functions.