KLE LAW ACADEMY BELAGAVI

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STUDY MATERIAL

for

LAW OF TORTS

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

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LAW OF TORTS

UNIT-I

Evolution of law of torts- Nature and scope of law of torts- Meaning- Torts distinguished from Contract- Crime- Development of *Ubi jus ibi Remedium*- Mental elements-Intention, Motive, Malice in Law and in Fact.

UNIT-II

General Defences, Vicarious Liability.

UNIT-III

Negligence; Nuisance; Absolute and Strict liability.

Legal Remedies-Awards-Remoteness of damage.

UNIT-IV

Torts against person: Torts affecting body- Assault, Battery, Mayhem and False Imprisonment; Torts affecting reputation-Libel and Slander, Torts affecting freedom-Malicious Prosecution, Malicious Civil Action and Abuse of Legal Process; Torts affecting domestic and other rights-Marital Rights, Parental Rights, Rights to Service, Contractual Rights, Intimidation and Conspiracy; Torts against property.

UNIT – V

Salient features of Consumer Protection Act, 1986, Who is consumer, Defect in goods, Deficiency in services, Medical services, Remedies to consumers, Consumer Disputes Redressal Agencies, Limitation for filing complaints, Penalties.

Salient features of MV Act, 1988, Liability without fault in certain cases, Insurance of Motor Vehicles against third party risks, Claims Tribunal, Offences, Penalties and Procedure.

Referred Books:

Ratanlal and Dhirajlal – The Law of Torts

Singh Avtar- Introduction to the Law of Torts

Saraf D.N.-Law of Consumer Protection in India

Gurubax Singh- Law of Consumer Protection

Shukla M.N.- The Law of Torts

Statutes:

The Consumer Protection Act, 2019

The Indian Penal Code, 1860

The Indian Contract Act,1872

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UNIT-I

LAW OF TORTS

Introduction-

Law is bundle of rules which regulates the external behavior of individuals in society. Law of Torts is the branch of law controlling the behavior of people in the society. It is a growing branch of law and its main object is to define individual rights and duties in the light of prevalent standards of reasonable conduct and public convenience. It provides pecuniary remedy for violation against the right of individuals. The entire Law of Torts is founded and structured on the principle that, 'no one has a right to injure another intentionally or even innocently.

Meaning:-

The word 'Tort' is derived from latin term 'tortum' which means 'to twist' or a deviation from straight or right conduct and includes that conduct which is not straight or lawful.

DEFINITIONS BY RENOWNED JURISTS

'Tort' is defined by various jurists as under:

"A tort is a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract, or the breach of a trust, or the breach of other merely equitable obligation".
– Salmond.

"A tort is an infringement of a right in rem of a private individual, giving a right of compensation at the suit of the injured party". – Fraser

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

STATUTORY DEFINITION:-

'Tort' is defined in Section 2(m) Limitation Act, 1963 as:

"Tort is a civil wrong which is not exclusively breach of contract or breach of trust".

- **Distinction Between Torts and Other branches of Law**

-Distinction between 'Tort' and 'Crime'

Tort differs both in principle and procedure from a crime and there are basic differences between a tort and a crime which are as follows,

First on the basis of nature of wrong,

Tort is a private wrong. Private wrong is the infringement of civil right of an individual. It is comparatively less serious and labeled as civil wrong. Whereas crime is a public wrong. Public wrong is a violation or breach of rights and duties which affect the community, as a whole. It is a more serious wrong.

Second on the basis of nature of remedy,

The remedy in law of tort is damages where as the remedy in crime is punishment

Third on the basis of parties to suits,

In case of tort the suit is filed by injured or aggrieved party where as In case of crime the complaint is filed in the name of State.

Fourth on the basis of withdrawal of suits,

In case of tort the suit can be withdrawn at any time and compromise can be done with wrongdoer where as In case of crime the complaint cannot be withdrawn except in certain circumstances.

Fifth on the basis of codification,

There is no codification in Law of Torts where as The Criminal law is codified.

Sixth on the basis of bar of limitation,

There is bar of limitation of prosecution in Law of torts where as There is no bar of limitation of prosecution in crime.

Seventh on the basis of survival of action,

In case of death of tort-feaser his legal representative can be sued except when the tort is defamation, personal injury not causing a death where as In case of death of offender, the suit is put to an end.

Eighth on the basis of application of law,

There is no separate statute deals with tort. Tort is based on judicial decisions where as the crimes are dealt in Indian Penal Code, 1860.

Ninth on the basis of intention,

In tort, Intention is important but not in all cases, for example, in cases of negligence where as in crime, Intention is the crux of the offence Despite of these differences, the injunction may be granted in tort as well as in crime. There are various wrongs which fall under law of torts as well as under criminal law, for example, Assault, Defamation, Negligence, Nuisance and Conspiracy.

Distinction between Tort and Breach of Contract

First on the basis of fixation of duty

In tort, the duty is fixed by the law itself where as In contract, the duty is fixed by the party themselves.

Second on the basis of attribution of duty,

In tort, the duty is towards every person of the community or society where as In contract, the duty is towards specific person or persons.

Third on the basis of violation of rights,

A tort is a violation of a right in rem (that is, a right vested in some determinate person and available against the world at large) where as A breach of contract is an infringement of a right in personam (that is, of a right available only against some determinate person or party.

Fourth on the basis of need of privity,

In an action for tort, no Privity is needed or is required to be proved where as In a breach of contract, Privity between the parties must be proved.

Fifth on the basis of motive,

In tort, motive is often taken into account where as In breach of contract motive is not relevant.

Sixth on the basis of damages,

In tort, measure of damages is different in different circumstances which may be nominal or exemplary where as In Breach of contract, damages are awarded in the form of compensation for pecuniary loss suffered.

Seventh on the basis of suit by third party,

A third party can sue for tort even though there was no contract between the person causing injury and the person injured where as A third party to a contract cannot sue for breach of contract except in some exceptional cases.

Eighth on the basis of intention,

Intention is sometimes taken into consideration where as Intention, in case of breach of contract, is of no relevance.

Ninth on the basis of concern,

Law of tort is concerned with losses where as Contract law is concerned with promises.

Tenth on the basis of period of limitations,

Limitation begins to run from the date when damages occurs where as Limitation commences when the breach of obligation takes place.

Distinction between Tort and Breach of Trust

First on the basis of damages,

Damages in a tort are unliquidated where as Damages in breach of trust are liquidated.

Second on the basis of origin,

Law of torts has its origin as part of common law where as Breach of trust could be redressed in the court of Chancery.

Third on the basis of law of property,

Law of tort is not regarded as a division of the law of property where as Law of trust can be and is regarded as a division of the law of property.

Distinction between Tort and Quasi-Contract

When a person gains some advantage or benefit to which some other person was entitled to, or by such advantage another person suffers an undue loss, the law may compel the former to compensate the latter in respect of advantage so gained, even though there is no such contract. The law of quasi-contracts covers such obligations.

Distinction between Tort and Quasi-Contract

First on the basis of damages,

A claim for damages under law of tort is always for an unliquidated sum of money where as A claim for damages is for liquidated sum of money.

Second on the basis of attribution of duty,

Under law of torts the duty is towards persons generally where as In a quasi-contract, the duty is always towards a particular person.

The common point between tort and quasi-contract is that the duty in each case is imposed by the law. However, in certain cases, where a tort has been committed, the injured party has a choice of not bringing an action for damages in tort, but of suing the wrongdoer in quasi- contract to recover the value of the benefit obtained by the wrongdoer. When the injured party elects to sue in quasi-contract instead of tort, he is said to have 'waived the tort'.

Essential Elements of Torts

Wrongful act or omission

The first essential ingredient in constituting a tort is that a person must have committed a wrongful act or omission that is, he must have done some act which he was not expected to do, or, he must have omitted to do something which he was supposed to do. There must have been. Breach of duty which has been fixed by law itself. If a person does not observe that duty like a reasonable and prudent person or breaks it intentionally, he is deemed to have committed a wrongful act. In order to make a person liable for a tort he must have done some legal wrong that is, violates the legal right of another person for example, violation of right to property, right of bodily safety, right of

good reputation. A wrongful act may be positive act or an omission which can be committed by a person either negligently or intentionally or even by committing a breach of strict duty for example, driving a vehicle at an excessive speed.

The wrongful act or a wrongful omission must be one recognized by law. If there is a mere moral or social wrong, there cannot be a liability for the same. For example, if somebody fails to help a starving man or save a drowning child. But, where legal duty to perform is involved and the same is not performed it would amount to wrongful act. In *Municipal Corporation of Delhi v.Subhagwati*, where the Municipal Corporation, having control of a clock tower in the heart of the city does not keep it in proper repairs and the falling of the same results in the death of number of persons, the Corporation would be liable for its omission to take care. Similarly failure to provide safe system would, also amount to omission, held in *General Cleaning Corporation Limited v. Christmas.*

Legal Damage

The second important ingredient in constituting a tort is legal damage. In order to prove an action for tort, the plaintiff has to prove that there was a wrongful act, an act or omission which caused breach of a legal duty or the violation of a legal right vested in the plaintiff. So, there must be violation of a legal right of a person and if it is not, there can be no action under law of torts. If there has been violation of a legal right, the same is actionable whether the plaintiff has suffered any loss or not. This is expressed by the maxim, "Injuria sine damnun 'Injuria' refers to infringement of a legal right and the term 'damnum' means substantial harm, loss or damage. The term 'sine' means without.

However, if there is no violation of a legal right, no action can lie in a court despite of the loss, harm or damage to the plaintiff caused by the defendant. This is expressed by the maxim 'Damnum sine injuria The detailed discussion of these two maxims is as follows.

Injuria Sine Damno and Damnum Sine Injuria

Injuria Sine Damno

This maxim means infringement or violation of a legal private right of a person even if there is no actual loss or damage. In such a case the person whose right is infringed has

a good cause of action. It is not necessary for him to prove any special damage. The infringement of private right is actionable per se. What is required to show is the violation of a right in which case the law will presume damage. Thus, in cases of assault, battery, false imprisonment, libel etc., the mere wrongful act is actionable without proof of special damage. The Court is bound to award to the plaintiff at least nominal damages if no actual damage is proved.

Thus, this maxim provides for,

1) Infringement of a legal right of a person.
2) No actual loss or damage is required to prove.
3) Infringement of a private right is actionable per se.

In Ashby v. White, the plaintiff was a qualified voter at a Parliamentary election, but defendant, a returning officer, wrongfully refused to take plaintiffs vote. No loss was suffered by such refusal because the candidate for whom he wanted to vote won the election. Plaintiff succeeded in his action. Lord Holt, C.J., observed as follows, "If the plaintiff has a right he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal". "Every injury imports a damage, though it does not cost a party one penny and it is impossible to prove the contrary, for the uamage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking of them, yet he shall have an action. So, if a man gives another a cuff on his car, though it costs him nothing, not so much as a little diachylon (plaster), yet he shall have his action. So, a man shall have an action against another for riding over his ground, though it does him no damage, for it is an invasion of the property and the other has no right to come there."

In *Municipal Board of Agra v Asharfi Lal*, the facts are, the Plaintiff (Asharfi Lal) was entitled to be entered as an elector upon the electoral roll. His name was wrongfully omitted from the electoral roll and he was deprived of his right to vote. It was held by the court that if any duly qualified citizen or person entitled to be on the electoral roll of an constituency is omitted from such roll so as to be deprived of his right to vote, he has suffered a legal wrong, he has been deprived of a right recognised by law and he has against the person so depriving him, a remedy, that is, an action lies against a person depriving I him of his right.

Similarly, in Bhim Singh v. State of J&K, the petitioner, an M.L.A. of Jammu & Kashmir Assembly, was wrongfully detained by the police while he was going to attend the Assembly session. Thus, he was deprived of his fundamental right to personal liberty and constitutional right to attend the Assembly session. The court awarded exemplary damages of Rs. Fifty thousand by way of consequential relief.An action will lie against a banker, having sufficient funds in his hands belonging to the customer, for refusing to honour his cheque, although the customer has not thereby sustained any actual loss or damage, *Marzetti v. Williams Bank*

Damnum sine injuria

Damnum sine injuria means an actual and substantial loss without infringement of any legal right. In such a case no action lies. There are many harms of which loss takes no account and mere loss of money's worth does not by itself constitute a legal damage. The essential requirement is the violation of a legal right.

There are many forms of harm of which the law takes no account,

1) Loss inflicted on individual traders by competition in trade,
2) Where the damage is done by a man acting under necessity to prevent a greater evil,
3) Damage caused by defamatory statements made on a privileged occasion,
4) Where the harm is too trivial, too indefinite or too difficult of proof,
5) Where the harm done may be of such a nature that a criminal prosecution is more appropriate for example, in case of public nuisance or causing of death,
6) There is no right of action for damages for contempt of court.

Gloucester Grammer School Case, Held. The defendant, a schoolmaster, set up a rival school to that of the plaintiff. Because of the competition, the plaintiff had to reduce their fees. Held, the plaintiff had no remedy for the loss suffered by them. Hanker J. said "Damnum may be absque injuria as if I have a mill and my neighbour builds another mill whereby the profits of my mill is diminished... but if a miller disturbs the water from going to my mill, or does any nuisance of the like sort, I shall have such action as the law gives."

*Chesmore v.Richards***,** The plaintiff, a mill owner was using water for over 60 years from a stream which was chiefly supplied by the percolating underground water. The defendants dug a well on their land deep enough to stop the larger volume of water

going to plaintiff's stream. Held, that the plaintiff has no right of action since it was a case of damnum sine injuria.

*Bradford Corporation v. Pickles***,** In this case, the defendant was annoyed when Bradford Corporation refused to purchase his land in connection with the scheme of water supply for the inhabitants of the town. In the revenge the defendant sank a shaft over his land intentionally and intercepted the underground water which was flowing to the reservoir of the plaintiffs. Held that the plaintiffs have no cause since the defendant was exercising his lawful right although the motive was to coerce the plaintiff to buy his land. The House of Lords approved the ruling in *Chesmore v. Richards*.

Moghul Steamship Company v. McGregor Gow &Co, A number of steamship companies acting in combination agreed to regulate the cargoes and freight charges between China and Europe. A general rebate of 5 per cent was allowed to all suppliers who shipped with the members of the combination. As a result of this action, the plaintiffs had to bring down their rates to that level which was un remunerative to them. 'Held, that there was no cause of action as the defendants had acted with lawful means to increase their trade and profits. No legal injury was caused and the case fell within the maxim *damnum sine injuria.*

*Dickson v. Renter's Telegraph Company***,** 'A' sent a telegram to 'B' for the shipment of certain goods. The telegraph company mistaking the registered address of 'C' for that of 'B', delivered the telegram to 'C'. 'C', acting on the telegram sent the goods to 'A' who refused to accept the goods stating that he had ordered the goods not from 'C' but from 'B'. 'C' sued the Telegraph Company for damages for the loss suffered by him. Held, that 'C' had no cause of action against the company for the company did not owe any duty of care to 'C' and no legal rights to 'C' could, therefore, be said to have been infringed.

*Rogers v.. Rajendera Dutt***,** The plaintiff owned a tug which was employed for towing the ships in charge of Government Pilots in Hoogly. The plaintiff demanded exorbitant price for towing the ship. Consequently, the Superintendent of Marine issued an order prohibiting the use of that tug in future whereby the owner was deprived of the profits. Held, that they had no legal right to have their tug employed by the Government.

*Town Area Committee v. Prabhu Dayal***,** A legal act, though motivated by malice, will not make the defendant liable. The plaintiff can get compensation only if he proves to have suffered injury because of an illegal act of the defendant. The plaintiff constructed 16 shops on the old foundations of a building, without giving a notice of intention to erect a building under section 178 of the Uttar. Pradesh Municipalities Act and without obtaining necessary sanction required under section 108 of that Act. The defendants (Town Area Committee) demolished this construction. In an action against the defendant to claim compensation for the demolition the plaintiff alleged that the action of the defendants was illegal as it was malifide, the municipal commissioner being an enemy of his. It was held that the defendants were not liable as no "injuria" (violation of a legal right) could be proved because if a person constructs a building illegally, the demolition of such building by the municipal authorities would not amount to causing "injuria" to the owner of the property.

*In Action v. Blundell***,** the defendants by digging a coal pit intercepted the water which affected the plaintiff's well, less than 20 years old, at a distance of about one mile. Held, they were not liable. It was observed, "The person who owns the surface may dug therein and apply all that is there found to his own purposes, at his free will and pleasure, and that in the exercise of such rights he intercepts or drains off the water collected from underground springs in the neighbor's well, this inconvenience to his neighbour falls within description damnum sine injuria which cannot become the ground of action."

Distinction between *Injuria sine damnum* and *Damnum sine injuria*

First on the basis of meaning,

Injuria sine damunm means violation of a legal right without actual loss or damages where as Damnum sine injuria means actual or substantial Damages without infringement of a legal right.

Second on the basis of action,

Injuria sine damunm is always actionable where as Damnum sine injuria is never actionable.

Third on the basis of nature of wrong,

Injuria sine damunm contemplates legal wrongs where there is a remedy where as Damnum sine injuria contemplates only moral wrongs without any remedy.

Legal Remedy

***Ubi jus ibi remedium* (Where there is a right there is a remedy)**

Right without a remedy is of no use. Right is a person's capacity to compel another person to do or to abstain from doing an act, and capacity to compel means legal capacity to compel. Unless there is a legal remedy, there cannot be legal compulsion. Therefore, a right without a remedy would be redundant.
Therefore, right and remedy are correlated. If there is no right there will be no remedy. In this regard there are two types of rights.

1. **Absolute rights:** An absolute right is a right the violation of which amounts to a wrong and gives rise to cause of action. There is no further requirement of showing any loss or injury. The tort which is based on the violation of an absolute right is actionable per se.

2. **Conditional rights:** A conditional right is a right the violation of which by itself does not amount to a wrong so as to give rise to cause of action. The plaintiff has to further show that he has suffered loss due to the violation of that right. Loss is a condition precedent for giving rise to cause of action.

MENTAL ELEMENTS IN LAW OF TORTS

As already seen, Criminal Law seeks to punish the wrong-doer, i.e., an offender. Therefore, one of the cardinal principles of Law of Crimes is well expressed by the Latin legal maxim actus non facit reum nisi mens sit rea, which is vaguely translated as "to constitute a crime act and intent must concur". In other words, to hold a person liable in Criminal Law, the prosecution has to prove both act usreus (effect of the offender's act) and mens rea(guilty mind on the part of the offender).

Mens rea may take any one of the following three forms:

1. Intention
2. Rashness (Recklessness)
3. Negligence.

On the other hand, Civil Law of Obligations, of which Law of Torts is a part, seeks mainly to compensate the victim of a wrong committed by another person. Therefore, the question as to whether the wrong-doer had committed the wrong with a guilty mind is not relevant to Law of Torts.

The obligation to make reparation for the damage caused wrongful act arises from the fault, and not from the intention. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent.

It is no defence to an action in tort for the wrong-doer to plead that he did not intend to cause damage, if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. A want of knowledge of the illegality of his act or omission affords no excuse. Every man is presumed to intend and to know the natural and ordinary consequences of his acts (*Guille v. Swan*, the balloon case. *Scott v. Shepherd the lighted squib case*.) But in some cases fraud or malice are the essence of that act or omission. Only in such cases knowledge of facts will be relevant to hold the alleged wrong-doer guilty or otherwise.

INTENTION

Where a person can foresee the natural consequences of his own act and also desires those natural consequences, he is said to have committed that act intentionally. For example, A shoots at B knowing full well that by doing so he may injure or even kill B, and with a desire that B should be injured or killed. Here A has intentionally shot at B. If the defendant must has acted consciously and of his own free will and has intended some injury to the plaintiff's interest, the he is said to have committed a wrong intentionally.

1. Conduct is not intentional where it results from unconscious or involuntary movement.
2. Nor is it intentional for the purpose of Law of Torts where although the defendant has acted of his own free will, yet he intended no harm to the plaintiff.
Two points need to be noted, however, which diminish the importance of this rule.
1. In law a man's intention are adjudged by objective standards.
2. A man is taken to intend to harm the plaintiff when the consequence which he intends would constitute an injury to a legally protected interest of the plaintiff, regardless of whether he realizes that such a consequence would constitute such injury or not.

Thus, if A sees B sitting in front of him in the bus and taps him on the head to attract his attention, then A commits the tort of battery. A consciously and voluntarily moves his hand over B's head and taps it. A intends both the act, and the consequence—the application of force, to B's person. Technically, there is a tort committed. This is equally true if A taps C's head in mistake for B's. If the defendant must have acted consciously and of his own free will and must have intended some injury to the plaintiff's interest.

RASHNESS

But where he can foresee those consequences but does not desire them, he is said to have acted rashly or recklessly. For example, A drives a vehicle at an excessive speed on a crowded street knowing full well that he may cause accident and injure somebody, but without desiring that accident should take place and hoping that no one will be injured. Here A is driving the vehicle rashly or recklessly.

NEGLIGENCE

In case of negligence, there is neither foresight nor desire of the consequences of one's own natural acts. However, there is failure to take adequate care as demanded by the circumstances in which the act is done.

Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or by doing something which a prudent and reasonable man would not do, whereby damage has resulted to a person.

The word “negligence” is used in two senses.

1. It is the name of a tort, so that the plaintiff can sue in negligence where an interest of his which the law protects by that tort is injured.
2. Negligence is itself sometimes an ingredient of other torts.

It is therefore both a tort and a concept of the law of torts. Here we look at negligence as a concept. Negligence is a type of behaviour. It is distinguishable from other behaviour by the notional mental attitude of the defendant. Negligence exists where the defendant did not intend to injure the plaintiff, and yet he disregarded or did not fulfill a duty imposed upon him by the law. It is akin to carelessness, but is a vastly more complicated concept.

As observed by Lord Wright, “In strict legal analysis negligence means more than needless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered to the person to whom the duty was owing.”

An action for negligence proceeds upon the idea of an obligation or duty on the part of the defendant to use care, and a breach of it to the plaintiff's injury. It is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and defendants. However the duty may arise, whether by a statute or otherwise, if it exists and is neglected to the injury of the plaintiff, he has a right to sue for damages. There cannot be a liability for negligence unless there is a breach of some duty.

Mere omission to exercise active interference on behalf of another to prevent harm, however open to moral censure, is not a civil wrong. There is no absolute or intrinsic negligence; it is always relative to some circumstances, of time, place, or person.

The test is not whether this particular defendant actually foresaw the possibility of harm to the plaintiff. It is whether a hypothetical reasonable man would have foreseen it had he been in the defendant’s position. This means that a defendant must sometimes foresee even acts of stupidity or forgetfulness on the part of the plaintiff.

MOTIVE

Motive is defined as ulterior intention. If we say that A has intentionally shot at and killed B, the next question would be why did A intend to kill B? In other words, what was the reason behind A’s intention to kill B? It may be because Was the legal heir of B

and wanted to inherit the property quickly by killing B. Or, it may be that A had some enmity against B and due to that hatred he killed B. Or, may be A wanted to take some revenge against B. Such intention to acquire B's property through inheritance, enmity or hatred, or intention to take revenge are said to be motive behind the killing of B by A. Motive is almost always irrelevant in the English law of tort. A man's reasons for doing an act do not make a lawful act unlawful, nor vice versa.

MALICE

Malice is a term with many meanings. Firstly, it is often used to mean spitefully or with ill-will. Like other motives, malice in this sense is invariably irrelevant in Law of Torts, and therefore, is not essential to the maintenance of an action for tort.

Bradford Corporation v. Pickles, Mr. Pickles was annoyed at the Bradford Corporation's refusal to purchase some land from him at the inflated price he demanded. In order to force their hand, he sank a shaft on his land, which interfered with water percolating from higher land belonging to the Corporation. The Corporation unsuccessfully sought an injunction to restrain him from polluting and diminishing their water. The House of Lords rejected the claim, Lord McNaughton remarking that "It is the act, not the motive for the act that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element."

In this first sense, malice is occasionally relevant as a necessary element required to establish the defendant's liability, e.g. to rebut the defence of qualified privilege in libel or slander.

Malice has a second meaning. In this legal sense, malice means the intentional commission of an act with any improper motive. This is much wider than the layman's use of the word malice. Malice is usually used in this sense in the few contexts in which it is relevant in tort. For example, in the tort of malicious prosecution, malice is constituted by any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice.

Sometimes malice is used in it archaic sense to mean simply an intentional performance of a tortuous act. It is in this sense that pleaders in libel and slander actions traditionally allege that the defendant "falsely and maliciously…" In fact, this means merely that the

defendant's publication of the defamatory matter was either intentional or negligent. Malice in this sense would appear to be a confusing and unhelpful use of the word, and hence, should be avoided.

Malice in Fact and Malice in Law

It is of two kinds, 'malice in fact' (or express malice or actual malice) and 'malice in law' (or implied malice). The first is what is called malice in common acceptation, and means ill-will against a person. The second means a wrongful act done intentionally without just cause or excuse where a man has a right to do an act; it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense. An act not otherwise unlawful cannot generally be made actionable by an averment that it was done with evil motive. A malicious motive per se does not amount to an injuria or legal wrong.

UNIT-II

DEFENCES AGAINST TORTIOUS LIABILITY

Under certain conditions an act ceases to be wrongful, although in absence of those conditions the same act would amount to be a wrong. Under such conditions the act is said to be justified or excused. These conditions which excuse or justify an act which would, otherwise, have been a tort may be divided into two categories. First, those conditions which excuse or justify some specific tort but do not excuse or justify torts generally. for example truth and fair comment are defences available for the tort of defamation only. Second, those conditions which are applicable to all torts equally. for example, defence of consent can excuse any tort. Thus, the second category covers those "rules of immunity which limit the rules of liability" in general and are called general exceptions.

A ‘defence’ is a ground on which the defendant seeks to avoid or reduce his liability. Defences in cases of torts may be

1) General defences, or

2) Special defences

‘General defences’ are those defences which do not depend upon the nature of tort. They are available in all types of torts.

‘Special defences’ are those defences which depend upon the nature of the tort. They are available for that tort only.

These general exceptions, or conditions, or justification of torts are,

1) Consent or Leave and Licence. (Volenti nonfit injuria),

2) Act of God,

3) Inevitable accident,

4) Necessity,

5) Private Defence,

6) Acts causing slight harm,

7) Statutory Authority,

8) Plaintiff the wrongdoer

9) Judicial or Quasi-Judicial acts,

10) Parental and quasi parental acts,

Volenti Non fit Injuria(Consent or Leave and Licence)

The maxim is based on the principle of common sense. If I invite you to my house, can I sue you for trespass? Answer is no, because I have consented to your entry upon my land. But if a guest who is to be entertained in the drawing room enters into my bedroom without my permission, he can be sued for trespass, because his entry into the bedroom is unauthorised. A postman entering into the house for delivering a letter cannot be sued if he remains within a permissible limit, because in such a case the consent is inferred but if the postman crosses that permissible limit he can be sued.

The consent may be either - (1) express, or (2) implied.

In Dr. Laxman Balkrishan v Trimbak Bapu, the Supreme Court held that if a doctor does not apply due care during the operation, he will be liable even after the patients' consent for suffering loss during operation. In the case the patient died because proper primary care was not taken while giving anesthesia.

Essential Conditions of Doctrine of Volenti Non fit Injuria

For the application of the maxim the following conditions should be fulfilled, Consent must be freely given, It is necessary for the application of this maxim that the consent must be freely given. The consent is not free, if it has been obtained by undue influence, coercion, fraud, misrepresentation, mistake or the like elements which adversely affects a free consent.

In White v Blackmore, the plaintiffs husband paid for admission of his family for witnessing a car race. During the race a car got entangled in the safety rope and the plaintiff was catapulated some twenty feet and died consequently. It was held that

since the deceased did not have full knowledge of the risk he was running from the faulty lay out of the ropes, he did not willingly accept the risk.

Consent cannot be given to an illegal act, No consent can legalise an unlawful act or an act which is prohibited by law and when the tort, is of such a character as to amount to a crime, for example, fighting with naked fists, duel with sharp swords are unlawful, and even though the parties may have consented, yet the law will permit an action at the instance of the plaintiff.

Knowledge of risk is not the same thing as consent to run the risk, The maxim is volenti nonfit injuria and not the scinti non-fit injuria — knowledge of danger does not necessarily imply a consent to bear that danger. This doctrine was for the first time enunciated in *Smith v.Baker*. In this case, the plaintiff worked in a cutting on the top of which a crane was carrying heavy stone over his head while he was drilling the rock face in the cutting. Both he and employers knew that there was a risk of stones falling, but no warning was given to him of the moment at which any particular jibbing commenced. A stone from the crane fell upon him and injured. The House of Lords held that defendants were liable.

Thus, for the maxim volenti nonfit injuria to apply two things are necessary,

1) Knowledge that risk is there, and

2) Voluntary acceptance of the risk.

Exceptions

There are three exceptions to the rule of volenti non fit injuria.

1) Employment Relations
2) Rescue cases

3) Drunk drivers

1) Employment Relations: An employee who complained of unsafe practice, but nevertheless continued to work could not truly be said to have voluntarily agreed to waive their legal rights.

Smith v. Charles Baker & Co. The plaintiff was employed to hold a drill in position whilst two other workers took it in turns to hit the drill with a hammer. Next to where he was working another set of workers were engaged in taking out stones and putting them into a steam crane which swung over the place where the Claimant was working. The Claimant was injured when a stone fell out of the crane and struck him on the head. The Defendant raised the defence of volenti non fit injuria in that the Claimant knew it was a dangerous practice and had complained that it was dangerous but nevertheless continued. It was held that though the Claimant might have been aware of the danger of the job, but had not consented to the lack of care. He was therefore entitled to recover damages.

2) Rescue Cases: Doctrine of assumption of risk does not apply where plaintiff has under ran exigency caused by defendant's wrongful misconduct, consciously and deliberately, faced a risk, even of death to rescue another from imminent danger of personal injury or death, the defence of leave and licence is not applicable to the plaintiff, whether the person endangered was one to whom he owed a duty of protection as a member of his family, or was a mere stranger to whom he owed no such duty.

For reasons of policy, the courts are reluctant to criticise the behaviour of rescuers. A rescuer would not be considered volens if:

a. He was acting to rescue persons or property endangered by the defendant's negligence;

b. He was acting under a compelling legal, social or moral duty; and

c. His conduct in all circumstances was reasonable and a natural consequence of the defendant's negligence.

Haynes v.Harwood, The defendant negligently left his horses unattended in a crowded street, a boy threw a stone at them and they ran helter-skelter. The plaintiff, constable on duty, perceiving the danger to the lives of the persons, ran out and stopped the horses but was seriously injured. It was held: That he was entitled to recover damages, as the defendant was grossly negligent, and That the defence of volenti non fit injuria was held not to apply to the rescue cases, the act of a third party also intervening and the voluntarily undertaking the risk by the plaintiff were

not open to the defendant.

Baker v. T. E. Hokins and Sons, A well was filled with poisonous fumes of petrol driven pump on account of negligence of the employer, as a result of which two workmen were overcome by fumes. Dr. Baker was called to rescue their lives but he was told not to enter the well in view of the risk involved. Still he preferred to enter the well with a view to save their lives. In the attempt of saving them he himself was overcome by the fumes and he died. The widow of Dr. Baker sued the employer to claim compensation for her husband's death. The defendants pleaded volenti non fit injuria. It was held that the act of rescuer was the natural consequence of the defendant's negligent act which he could have foreseen and therefore, the defence of volenti non fit injuria did not apply. The defendants were, thus, held liable.

Dr. J. N. Srivastava v. Ram Bihari Lal and Others, The doctor observed after opening the abdomen cavity that patient's appendix was all right but the operation of gall-bladder was needful. He proceeded with the operation- later on the patient died. The Court held that it was not possible to seek the consent for the Gall- bladder operation. In such circumstances doctor was not responsible. If however, there is no real need to rescue, the Claimant may be held volens.

Cutler v. United Dairies, A man who was injured trying to restrain a horse was held to be volens because in that case no human life was in immediate danger and he was not under any compelling duty to act.

3) Drunk Drivers: A person accepting a lift from a drunk driver was not to be treated as volens unless the drunkenness was so extreme and so glaring that accepting a lift would be equivalent of to intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff.

Dann v. Hamilton: The plaintiff was injured when she was a willing passenger in the car driven by the Mr Hamilton. He had been drinking and the car was involved in a serious crash which killed him. In a claim for damages the Defendant raised the defence of volenti non fit injuria in that in accepting the lift knowing of his drunken condition she had voluntarily accepted the risk. The defence was rejected and the plaintiff was held to be entitled to damages.

Asquith, J. held,"There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff. It is not necessary to decide whether in such a case the maxim volenti non fit injuria would apply, for in the present case I find as a fact that the driver's degree of intoxication fell short of this degree".But in another case, defence of volenti non fit injuria was accepted.

Morris v. Murray, The Claimant and Defendant had been drinking all day. The Defendant, who had a pilot licence and a light aircraft, suggested that they took the aircraft for a flight. The Claimant agreed and drove them both to the airfield. They started the engine and the Defendant took off but crashed shortly after. The Defendant was killed and the Claimant was seriously injured. An autopsy revealed that the Defendant had consumed the equivalent of Whiskeys. In an action for negligence, the Defendant raised the defence of volenti non fit injuria. The defence was allowed. The actions of the Claimant in accepting a ride in an aircraft from an obviously heavily intoxicated pilot was so glaringly dangerous that he could be taken to have voluntarily accepted the risk of injury and waived the right to compensation.

ACT OF GOD (*VIS MAJEUR*)

Act of God may be defined as "circumstances which no human foresight can provide against any of which human prudence is not bound to recognize the possibility, and which when they do occur, therefore, are calamities that do not involve the obligation of paying for the consequences that result from them".

Ex:- The falling of a tree, a flash of lightening, a tornado, storms, tempests, tides, volcanic eruptions, or a flood.

Essential conditions for the availability of this defence are:

- Externality: There must be working of natural forces without any intervention from human agency, and

- Unpredictability: The occurrence must be extraordinary and not one which could be anticipated and reasonably guarded against.

- Irresistibility: The occurrence must be such that it could not have been avoided by any amount of precaution.

Whether a particular event amounts to an Act of God is question of fact. Today the scope of this defence is very limited because with the increase in knowledge the foresight also increases and it is expected that the possibility of the event could have been visualized.

Whether a particular circumstance or occurrence amounts to an act of God is a question of fact in each case and the criterion for deciding it "is no human foresight and prudence could reasonably recognise the possibility of such an event." There is a tendency on the part of courts to limit the application of the defence of act of God not because of the fact that its application in the cases of absolute liability is diminished but because advancement in the scientific knowledge which limits the unpredictable.

In Ramalinga Nadar v. Narayana Reddiar, the Kerala High Court held that the criminal activities of the unruly mob cannot be considered to be an Act of God.

In Saraswati Parabhai *v.* Grid Corporation of Orissa and Others, where an electric pole was uprooted and fell down with live wire which caused death of a person. Orissa High Court rejecting the defence of Act of God held that it was the responsibility of the Grid Corporation authorities to provide protection in such situation of storm and rain.

Nicholas v. Marshland, The defendant constructed three artificial lakes which were fed by a natural stream. The lakes were well constructed and adequate in all normal circumstances. An extraordinary rainfall burst the banks of artificial lakes on the defendant's property and the flood water destroyed a number of bridges owned by the county council. It was held that the defendant was not negligent and the accident was due to an act of God.

Inevitable Accident

All recent authorities support the view that 'inevitable accident'"negatives liability. An 'inevitable accident' is that which could not possibly be prevented by the exercise of ordinary care, caution and skill. It means an accident physically unavoidable. It does not apply to anything which either party might have avoided. It is an accident such as the defendant could not have avoided by use of the kind and degree of care nece'ssary to the exigency, and the circumstances, in which he was placed. If in the performance of a lawful act, done with all due care, damage ensues through some unavoidable reason, such damage affords no cause of action. "People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.

In A. Krishna Patra v. Orissa State Electricity Board, the Court explained inevitable act and held that an inevitable accident is an event which happens not only without the concurrence of the will of the man, but in spite of all effects on his part to prevent it.

Limitations of this defence, In trespass as well as in negligence, inevitable accident has no place. Similarly, under the rule in Ryland v. Fletcher, the defendant is liable even if he has taken reasonable care. In the same way the defence has no role in cases of absolute liability.

Distinction between "inevitable accident" and "act of God", Dr. Winfield says that "an act of God" is much older, much simpler and much more easily grasped by primitive people than is the idea of 'inevitable accident.' A falling tree, a flash of lightning, a tornado, or flood presents to the observer a simple and dramatic fact which a layman would regard as an excuse for harm done without further argument.... But the accidents which are not convulsions of nature are a very different matter. To know whether injury from a run away horse was inevitable, one must ask 'would a careful driver have let it run away'..,. 'Inevitable accident' differs from the act of God in not depending on 'natural forces. All cases of 'inevitable accident' may be divided into two classes,

1. those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and

2. those which have their origin either in whole or in part in the agency of man, whether in the commission or omission, non-feasance or misfeasance, or in any other causes independent of the agency of natural forces. The term "act of God" is applicable to the former class. The latter types of accidents are termed 'inevitable accident' or "unavoidable accidents."

An act of God will be extraordinary occurrence due to natural cause, which is not the result of any human intervention, which could not be avoided by any foresight and care, for example, a fire caused by lighting. But an accidental fire, though it might not have resulted from any act or omission of common carrier, cannot be an act of God.

Leading case on this point is *Brown v. Kendall*. A dog owned by the plaintiff was fighting with a dog owned by the defendant. The plaintiff stood behind the defendant without his knowledge while the defendant was trying to separate the dogs with a stick. The stick struck the plaintiff in his eye and caused injury. It was held that the defendant was not liable as he had exercised reasonable care.

Nitroglycerin case, The defendants who were a firm of carriers were carrying a wooden box sent by one of the customers, the contents of which were not reported. When the servants of the defendants found that the box was leaking, they took it their office to inspect. Though they tried to open it with normal care, the nitroglycerin which was highly inflammable substance exploded. All those who were present there were killed and the building in which the office was situated got severely damaged and the office itself was completely destroyed. It was held that the defendants were not liable for the loss to the building.

Stanley v. Powell, The plaintiff, who was engaged in carrying cartridges and game for the party, was hit by a shot fired by the defendant while on an organized pheasant shoot when the shot glanced off a tree before hitting the plaintiff. It was held that the defendant was not liable.

National Coal Board v. Evans, In this case a colliery company preceded the National Board, had buried an electric cable in the county council's land. The county council's contractor damaged the cable while excavating land and the fact that electric cable was buried under the land was not known to the council or

contractor. It was held that in these circumstances, neither the council nor the contractor would be liable for damage of cable and the defence of inevitable accident was allowed.

NECESSITY

Necessitas inducit privilegium quod jura privata (Necessity induces a privilege because of a private right).

The act may be necessary

1. to exercise authority given by law
2. to avoid a greater harm
3. in the larger interest of public

This is intentional damage to prevent even greater destruction or in defence of the realm. The exception of necessity is based on the maxim "Salus populi est suprema lex" (The welfare of the people is the Supreme Law).

E.g. one arresting and restricting the movement of the drunken person who is likely to cause danger to the people at large, can successfully plead necessity as a defence. However, one who puts live electric wires on his land to stop the trespassers cannot successfully avail this defence if he does not give notice, warning of such a dangerous thing.

Cope v. Sharpe, A fire broke out on A's land. A's servants were busy in extinguishing the fire, the gamekeeper of C (who had shooting rights over A's land) set fire to some strips of heather extinguished between the fire and some nesting peasants of C, in a shot, while the fire was by A's servants. A sued the gamekeeper for trespass. The Court held that the gamekeeper was not liable for there was a real and imminent danger to the game which justified the action taken by the defendant.

Private Defence

Private defence is another ground of immunity well known to the law. No action is maintainable for damage done in the exercise of one's right of private defence of person or property provided that the force employed for the purpose is not out of

proportion to the harm apprehended. And what may be lawfully done for oneself in this regard may likewise be done for a wife or husband, a parent or child, a master or servant. But the force employed must not be out of proportion to the apparent urgency of the occasion. Thus it is not justifiable to use a deadly weapon to repel a push or blow with the hand. "Honest and reasonable belief of immediate danger" is the test. Indian Penal Code extends the benefit of this defence even in case of causing death in certain circumstances.

In India the right of private defence has been given a statutory recognition in Sections 96 to 106 of the Indian Penal Code. Though provisions of these sections are applicable to the criminal law, the principles contained therein may profitably be imported into the Law of Torts. Self defence as a permissible defence against an action in torts has recently been discussed by Orissa High Court in *Devendra Bhai v. Megha Bhai*, the principle extends not only to the right of person to protect himself but also to protect others' life, his wife, his parents and his child. He is to use only necessary force or not to use force in excess of what is necessary.

ACTS CAUSING SLIGHT HARM

De minimis non curat lex (Law does not cure minor loss): Courts generally do not take trifling and immaterial matters into account, except under peculiar circumstances, such as the trial of a right, or where personal character is involved.

Acts which separately would not be wrongs may amount to a wrong by a repetition or combination.

Holford v. Bailey, A casts and draws a net in water where B has the exclusive right of fishing. Whether any fish are caught or not, A has wronged B, because the act, if repeated, would tend to establish or claim a right to fish in that water. Similarly, an act, which a small incidence, may be a part of a larger transaction. In such a case also the law will take cognizance of the act.

Statutory Authority

A person cannot complain of a wrong which is authorised by the legislature. When a statute specially authorizes a certain act to be done by a certain person which would otherwise be unlawful and actionable, no action will lie at the suit of any

person for the doing of that act. "For such a statutory authority is also statutory indemnity taking away all the legal remedies provided by the law of torts for persons injuriously affected." (Salmond) If I construct a bridge under the authority of a statute and if anybody is denied his right of way and traffic through that way for a specific period, no suit can be brought against me for what I have done is in pursuance of statutory authority.

Therefore, if a railway line is constructed, there may be interference with private land when the trains are run, there may also be some incidental harm due to noise, vibration, smoke, emission of spark etc. No action can lie either for interference with the land or for incidental harm, except for payment of such compensation which the Act itself may provided.

In *Vaughan v. Taff Vale Rail Company,* sparks from an engine of the respondent's Rail Company, set fire to the appellant's woods on adjoining land. Held, that since the respondent had taken proper care to prevent the emission of sparks and they were doing nothing more than that the statute had authorised them to do, they were not liable. Similarly, in Hammer Smith Rail Coach v. Brand, the value of plaintiff's property had considerably depreciated due to the noise, vibration and smoke caused by the running of trains. The damage being vibration and smoke caused by the running of trains. The damage being necessarily incidental to the running of the trains authorised by the statute, it was held that no action lies for the same.

However, when an act authorised by the legislature is done negligently, then an action lies. In *Smith v. London & South Western Railway Company*, the servants of a Railways Company negligently left trimmings of grass and hedges near a rail line. Sparks from an engine set the material on fire. By a heavy wind the fire was carried to the nearby plaintiff's cottage which was burnt. Since it was a case of negligence on the part of the Railways Coch, they were held liable.

When a statute authorises the doing of an act, which would otherwise be a tort, the injured has no remedy except the one (if any) provided by the statute itself. An Indian case of this point is of *Bhogi Lal v. The Municipality of Ahmedabad,* The Municipality of Ahmedabad demolished the wall of the plaintiff under their statutory powers. The demolition of the wall also resulted in the falling of the roof of

the defendant on the wall. On an action by the plaintiff for the damage to his property, it was held by the court that the defendant would not be liable. For no suit will lie on behalf of a man who sustain a private injury by the execution of powers given by a statute, these powers being exercised with judgment and caution.

But statutory powers are not charters of immunity for any injurious act done in the exercise of them. The act done in pursuance of the statutory powers must be done without negligence. If it is done negligently an action lies.

PLAINTIFF THE WRONG-DOER

Main object of the law of torts is make a person liable for the loss caused by his fault. If the defendant's fault causes loss to the plaintiff, defendant has to bear the loss by compensating the plaintiff. Thus, the loss suffered by the plaintiff on account of defendant's fault is shifted to the defendant. But in many cases, though the act of the defendant causes harm to the plaintiff, the plaintiff's own fault may be the reason for the loss.

Boloch v. Smith, A person, who having occasion to come to the house of another, strays from the ordinary approaches to the house, and trespasses upon the adjoining land, where there is no path, has no remedy for any injury which he may sustain from falling into unguarded wells or pits, as the injury is the result of his own carelessness or misconduct. But occupier of a land has a duty to keep premises safe even in respect of trespassers. If he violates this duty, then he cannot take this defence and will be liable to the plaintiff. In such a case, there will be mutual torts and each party may sue the other for the tort committed against him.

There are two situations where this justification can be applied

1. Plaintiff caused the wrongful act to be committed by defendant. Defendant would not otherwise have committed the act.
2. Plaintiff alone is responsible for loss. Defendant had no duty to avoid the loss to the plaintiff.

If both plaintiff and the defendant are at fault, the loss will have to be shared by them in the proportion of their fault. This is called 'distributive justice'.

Sayers v. Harlow, Mrs. Sayers found herself locked in a public lavatory. Unable to summon help, she tried to climb out over the top of the door. She found this impossible and, when climbing back down, allowed her weight to rest on the toilet roll which 'true to its mechanical requirement, rotated'. Mrs. Sayers fell and was injured. It was held that 75% of her injury was the fault of the Council for providing a defective lock which jammed, and 25% was her own fault.

Stapley v. Gypsum Mines Ltd., Two miners who worked, in breach of instructions, under a dangerous roof were held 80% contributory negligent.

Froom v. Butcher, A front seat passenger injured in a car accident had his damage reduced by 25% because he had not worn a seat belt.

JUDICIAL OR QUASI-JUDICIAL ACTS

No action lies for acts done, or words spoken, by a judge in exercise of his judicial office, although they may be malicious. It is founded on the principle of public benefit that Judges should be at liberty to exercise their function independently and without fear of consequences.

Judicial Officers Protection Act, 1850 grants protection to a judicial officer for any act done or ordered to be done by him in the discharge of his judicial duty. He is protected even though he exceeds his jurisdiction provided that at that time he honestly believed that he had jurisdiction to do or order the act complained of.

Limits of such protection are;

1. No such protection is granted if a magistrate is acting mala fide and outside his jurisdiction.

Sailajanand Pandey v. Suresh Chandra Gupta, The magistrate acting mala fide, illegally and outside his jurisdiction, ordered the arrest of the plaintiff. The Patna High Court held that he was not entitled to the protection given by the Judicial Officer's Protection Act, 1850 and was, therefore, liable for the wrong of false imprisonment.

2. The protection of judicial privilege applies only to judicial proceedings as contrasted with administrative or ministerial proceedings and where, a judge acts

both judicially and administratively, the protection is not afforded to the act done in the later capacity.

State of U.P. v. Tulsi Ram: Five persons were prosecuted for certain offences. One of them was acquitted by the Sessions Court and another by the High Court. The High Court upheld the conviction of only three of the five persons and authorized the issue of warrants against these three convicted persons. The judicial magistrate acting negligently signed an order for the arrest of all the five persons. As a result of this order, the plaintiffs, even though they had been acquitted by the High Court, were arrested by the police.

It was held that the judicial officer was liable for the wrongful arrest of the plaintiff-respondents as the judicial officer was not exercising any judicial function but only an executive function while issuing warrants and therefore, the protection under the Judicial Officers Protection Act, 1850 could not be available in this case.

PARENTAL OR QUASI PARENTAL AUTHORITY

Parents and persons in loco parentis (place or position of parents) have a right to administer punishment on a child for the purpose of correction, chastisement of training. However one must remember that such an authority warrants the use of reasonable and moderate punishment only and therefore, if there is an excessive use of force, the defendant may be liable for assault, battery or false imprisonment, as the case may be.

In England, as per Section 1(7) of the Children and Young Persons Act, 1933, a parent, teacher, or other person having lawful control or charge of a child or young person is allowed to administer punishment on him.

In *Fitzgerald v. North cotel,* Cockburn C.J. Observed, "The authority of a schoolmaster is while it exists, the same as that of parent. A parent, when he places his child with a school master, delegates to him all his authority, so far as it is necessary for the welfare of the child".

The authority of a teacher to correct his students is not limited only to the wrongs which the student may commit upon the school premises but may also extend to the wrongs done by him outside the school because there is not much opportunity for

boy to exhibit his moral conduct while in school under the eye of the master the opportunity is while he is at play or outside the school.

R v. Newport ,It has been held that if the school rules prohibited smoking, both in the school and in the public, the school master was justified in caning a student whom he had found smoking cigarette in a public street. Reasonable professional behaviour, rather than perfection, is the norm.

Eisel v. Board of Education, The Maryland High Court ruled that school counsellors were negligent in not revealing their knowledge of a student's threatened suicide to the child's parents. The counsellors' negligence was not for failure to physically prevent the student's suicide, but rather for not communicating information regarding the child's intent.

VICARIOUS LIABILITY

As a general rule, a man is liable only for his own act but there are certain circumstances in which a person is liable for the wrong committed by others. This is called "vicarious liability", that is, liability incurred for another. The most common instance is the liability of the master for the wrong committed by his servants. In these cases liability is joint as well as several. The plaintiff can sue the actual wrong-doer himself, be he a servant or agent, as well as his principal. In the words of Salmond, "In general a person is responsible only for his own acts, but there are exceptional cases in which the law imposes on him vicarious responsibility for the acts of another, however, blameless himself."

The doctrine of vicarious liability is based on principles which can be summed up in the following two maxims,

a) **Qui facit per alium facit per se,** The maxim means, 'he who acts through another is deemed in law as doing it himself. The master's responsibility for the servant's act had also its origin in this principle. The reasoning is that a person who puts another in his place to do a class of acts in his absence, necessarily leaves to determine, according to the circumstances that arise, when an act of that class is to be done and trust him for the manner in which it is done, consequently he is answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in

which it ought not to have been done, provided what is done is not done from any caprice of the servant but in the course of the employment.

b) **Respondent superior,** This maxim means that, the superior must be responsible or let the principal be liable. In such cases not only he who obeys but also he who command becomes equally liable This rule has its origin in the legal presumption that all acts done by the servant in and about his master's business are done by his master's express or implied authority and are, in truth, the act of the master. It puts the master in the same position as if he had done the act himself. The master is answerable for every such wrong of the servant as is committed in the course of his service, though no express command or privity is proved. Similarly, a principal and agent are jointly and severally liable as joint wrongdoers for any tort authorised by the former and committed by the latter.

Modern View, In recent times, however, the doctrine of vicarious liability is justified on the principle other than that embodied in the above-mentioned maxims. It is now believed that the underlying idea of this doctrine is that of expediency and public policy. Salmond has rightly remarked in this connection that "there is one idea which is found in the judgments from the time of Sir John Holt to that of LordGoddard, namely, public policy."

Modes of vicarious liability, The liability for others wrongful acts or omissions may arise in one of the following three ways,

a) **Liability by ratification,** Where the defendant has authorised or ratified the particular wrongful act or omission.

b) **Liability arising out of special relationship,** Where the defendant stands to the wrong- doer in a relation which makes the former answerable for wrongs .committed by the other, though not specifically authorised. This is the most important form of liability. Liability arising out of master and Servant.

In order that the master may be held liable for the tort of his servant following conditions should be fulfilled,

1. Tort is committed by the 'servant', and
2. The servant committed the tort while acting in the course of employment of his

master.

Who is servant? Lord Thankerton has said that there must be contract of service between the master and servant has laid down the following four ingredients.

1) the master's power of selection of his servant,
2) the payment of wages or other remuneration,
3) the master's right to control the method of doing the work, and
4) the master's right of suspension or dismissal.

Thus, a servant may be defined as any person employed by another to do work for him on the terms that he is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done. A servant is thus an agent who works under the supervision and direction of his employer, engaged to obey his employer's order from time to time. Applying this test, a son is not a servant of his father in the eye of law.

Difference between Servant and Independent Contractor

1. A servant is an agent who works under the supervision and direction of his employer. Where as An independent contractor is one who is his own master.
2. A servant is a person employed to obey his master's directions from time to time. Where as An independent contractor is a person engaged to do certain works, but to exercise his own discretion as to the mode and time of doing it!
3. A servant is bound by the orders of his master but an independent contractor is bound by the terms of his contract.

Course of employment, A servant is said to be acting in the course of employment if,

1) the wrongful act has been authorized by the master, or
2) the mode in which the authorized act has been done is wrongful or unauthorized. It is the general rule that master will be liable not merely for what he has authorized his servant to do but also for the way in which he does that which he has authorized to do.

An employee in case of necessity is also considered as acting in the course of employment, if he is performing his employer's business. For instance, a Government employee was travelling in a jeep to deliver medicines in the course of his duties. He had licence to drive and had also been authorized to drive the Government's vehicle in the case of necessity. The driver of the jeep suddenly took ill and, therefore, he had to drive, in order to ensure the medicines reaching their destination, While driving the jeep he negligently run over the deceased, It was held that he was acting in the course of employment and thus the Government was liable,

The trend of the recent decisions of various High Courts is to allow compensation to the accident victim against the owner of the vehicle and through him, the insurance company. The aspect of the relationship of the independent contractor and employer between the mechanic or the workshop and the owner of the vehicle has been generally ignored, such liability has been recognised on the basis of the law of agency by considering the owners of the workshop or the mechanic as an agent of the owner of vehicle.

The recent trend in law to make the master liable for acts which do not strictly fall within the term 'in course of employment' as ordinarily understood. The owner is not only liable for the negligence of the driver if that driver is his servant acting in the course of the employment but also when the driver is with the owner's consent, driving, the car on the owner's business or for the owner's purposes.

Thus, although the particular act which gives the cause of action may not be authorised, yet, if the act is done in the course of employment which is authorised, the master is liable. In other words, "to hold master liable for the wrongful act of a servant it must be committed in the course of master's business so as to form part of it, and not merely, coincident in time with it," but if the torts are committed in any manner beyond the scope of employment the master is liable only if he was expressly authorised or subsequently ratified them.

Main incidents of Master's Liability, There are six principal ways in which a master becomes liable for the wrong done by servants in the course of their employment.

1. The wrong committed by the servant may be the natural consequence of something done by him with ordinary care in execution of his master’s specific

orders.

In Indian Insurance Corporation, Association Pool, Bombay v. Radhabai, the driver of a motor vehicle belonging to the Primary Health Centre of the State was required to bring the ailing children by bus to the Primary Health Centre. The driver in the course of driving gave the control of the steering wheel to an unauthorised person. 'this was an unauthorised mode of doing the act authorised by the master. It was held that in such circumstances, the Government, *viz.*, the owner of the vehicle is vicariously liable for the negligence of the driver in permitting unauthorised person to drive the vehicle.

2. Master will be liable for the negligence of his servant.

In Baldeo Raj v. Deowati, the driver of a Truck sat by the side of the conductor and allowed the conductor to drive. The conductor caused an accident with a rickshaw as a result of which a rikshaw passenger died. It was held that the act of the driver in permitting the conductor to drive the vehicle at the relevant time was a breach of duty by the driver, and that was the direct cause of the accident. For such negligence of the driver his master was held vicariously liable.

3. Servant's wrong may consist in excess of mistaken execution of lawful authority. Here two things have to be established.

In the first place, it must be shown that the servant intended to do on behalf of his master something which he was, in fact, authorised to do. Secondly, it has to be proved that the act if done in a proper manner, would have been lawful.

4. Wrong' may be a wilful wrong but doing on the master's behalf and with the intention of serving his purpose.

If a servant performs some act which indicates recklessness in his conduct but which is within the course of his employment and calculated to serve the interest of the master, then the latter will be saddled with the responsibility for it.

5. Wrong may be due to the servant's fraudulent act.

A master is liable also for the wrongful acts of his servants done fraudulently. It is immaterial that the servant's fraud was for his own benefit. The master is liable if the

servant was having the authority to do the act, that is, the act must be comprehended within his ostensible authority. The underlying principle is that on account of the fraudulent act of the servant, the master is deemed to extend a tacit invitation to others to enter into dealings or transactions with him. Therefore, the master's liability for the fraudulent acts of his servants is limited to cases where the plaintiff has been invited by the defendant to enter into some sort of relationship with a wrong doer. Consequently, where there is no invitation, express or implied, the acts will be treated as the independent acts of his servant himself, and outside the scope of his employment,

6. Wrong may be due to the Servant's Criminal Act.

Though there is no such thing as vicarious liability in criminal proceedings, yet in a civil action, a master is liable in respect of the criminal acts of a servant, provided they are committed in the course of his employment.

GOVERNMENT LIABILITY IN TORTS

Vicarious Liability of the State Position in England

At one time in England the maxim of the Common Law was that "the King can do no wrong", and as such crown could not be sued for the tortious acts of its servants. The individual wrong-doer (that is, the official) was personally liable for the wrong committed by him, even when the wrong was actually authorised by the Crown or was committed in the course of his employment. Obviously, the position thus obtained was inequitable and incompatible. However, with the expansion in the activities of the State, it became necessary that the State should shoulder liability for the acts of its servants without claiming any special immunity. With this object in view, the Crown Proceedings Act, 1947, was passed. Now, like a private employer, the Crown is liable for the torts committed by its servants in the course of their employment.

Position in India

Article 300 of the Constitution of India stated the legal position of State as regards its liability for the tortuous acts of its servants done in course of their employment. The Article provides that the Government of India may sue or be sued

by the name of Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the dominion of India and the corresponding provinces or the corresponding Indian states might have sued or been sued if this constitution had not been enacted.

Thus, the Union of India and the states are juristic persons by virtue of Article 300 but this Article does not mention those circumstances under which the Union of India and the State Governments can sue and be sued. This Article simply mandates to refer to the legal position prevailing before the commencement of the constitution. The legal position of the State before the Constitution came into force is to be found in the Government of India Act, 1935, which again like the Constitution, said that the position prevailing before the Act of 1935, that is, position as obtaining under the Government of India Act, 1915, shall prevail. The Act of 1915 in a like manner made reference to the Government of India Act, 1858. The Act of 1858 made it clear that the Government was liable for acts of its servants in those cases in which the East India Company would have been liable.

The East India Company was held to be liable for the tortuous acts of its servants which were done in the exercise of its non-sovereign function, that is, the function which could have been performed by a private individual. It was held not to be liable for a tort committed by its servants if the act was done in exercise of sovereign power. The question of liability of East India Company was considered in the following case,

In Peninsular & Oriented Steam Navigation Company v. Secretary of State for India, the plaintiff's horse was injured by the negligence of the servants of the Government. These were engaged at the time of the injury in carrying along a public road a heavy piece of iron for being placed on board a steamer. The plaintiff filed a suit against the Secretary of State for the recovery of damages. Held, the Government was liable as the act in question was not being done in the exercise of any Governmental or sovereign function. Peacock C.J., observed in this case,

"There is a great and clear distinction between acts done in exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them. Where the act is done or a contract is entered into, in the exercise of powers usually called sovereign powers, no action will lie."

In *State of Rajasthan v. Vidhyawati***,** the driver of a Rajasthan Government's jeep which was meant for the use of the collector was taking it from the repair shop to the collector's residence. On way, owing to rash and negligent driving, a pedestrian was knocked down and killed. The widow of the victim sued the Government for damages. Held, the State Government was vicariously liable for the tortious acts of its servants, like any other employer.

In *Fatima Begum v. State of Jammu & Kashmir***,** a truck belonging to the Government Transport Undertaking knocked (town a cyclist while it was engaged in transporting police personnel from the place of duty to barracks. The High Court rejected plea of defence of sovereign immunity and held the State Government liable.

In *lqbal Kaur v. Chief of Army Staff***,** an accident occured due to the negligent driving by a driver of the Government while he was going with a truck for imparting training in motor driving to new recruits. Held, the act did not constitute an act in exercise of sovereign power and the Union of India was liable for damages.

In *Union of India v. Savita Sharma***,** soldiers were being transported in an army vehicle. Negligence on the part of its driver resulted in an accident to a private tempo. An occupant of ths tempo was injured in the accident. Held, the State was liable for damages.

In *State of Tamil Nadu v.M.N. Shamsuden***,** the death of a person was caused by an ambulance belonging to the Government which was being used for transporting a patient for emergency treatment. The Madras High Court disallowed the protection of immunity on the ground that transporting of the patient to the hospital could be done even by private individuals.

In *Surjit Singh Bhatia v. Segalla Ramula,* a military vehicle dashed against a motor cycle and caused injuries to the pillion rider. The Punjab & Haryana High Court rejected the plea of sovereign immunity.

In *Indian Insurance Corporation Asson Pool v. Radhabai*, it has been held that taking ailing children to Primary Health Centre in a vehicle belonging to the State Government is not a sovereign function and the State is liable for the accident caused by the negligence of the driver of such vehicle. It was a case decided on the lines of Vidyawati's case.

In *Union of India v. Harbans Singh,* meals were being carried from the cantonment, Delhi for being distributed to military personnel on duty. The truck carrying the meals belonged to the military department and was being driven by a military driver. It caused accident resulting in the death of a person. It was held that the act was being done in the exercise of sovereign powers, and therefore, the State was not liable for the same.

In *Pushpa Thakur v. UOI***,** where the truck involved in accident was engaged in carrying ration and sepoys within the country during peace time in the course of movement of troops after the hostilities were over, held that this is a "routine duty" not directly connected with carrying on of war, the traditional sovereign function.

In *Ram Ghulam v. State of Uttar Pradesh***,** the police authorities recovered some stolen property and deposited the same in the Malkhana. The property was again stolen from the Malkhana. The Government of U.P. was held not liable for the same to the owner of the property as the Government servants were performing obligations imposed by law. Similar decision was given in *Mohd. Murad v. Govt. of Uttar Pradesh.*

In *State of U.P. v. Hindustan Lever Limited,* the act of the Government servants was in exercise of statutory powers but the powers in that case were not sovereign powers, and therefore, the State was held liable.

In *People's Union for Democratic Rights v. Police Commn, Delhi***,** the State was ordered to pay compensation to victims of police firing.The police fired without any warning on a group of poor peasants who had collected for a peaceful meeting.

Thus, from the above cases it can be concluded that sovereign powers means those powers which can be lawfully exercised by a person by virtue of delegated sovereign powers. It must include maintenance of the army, various departments of the Government for maintenance of public law, order, administration of the country. An easy test to consider that whether a function is a non-sovereign function or not is that if a private individual can be engaged in that function it is a non-sovereign function. Thus, functions relating to trade, business, commerce and the welfare activities are non-sovereign functions.

Vicarious Liability of the Government of India: Plea for Review

While in England, after the passing of the Crown Proceedings Act, 1947, it is no defence for the State that the tort committed by its servants was in discharge of obligations imposed by law, in India, the same has been considered to be a defence in a number of cases.

However, in order to exempt the State from liability it is further necessary that the statutory functions which are exercised by the Government servants were exercised by way of delegation of the sovereign power of the State. In case the tortious act committed by the servant was in discharge of non-sovereign functions die State would be liable for the same *(Kasturi Lal's* case; *State of U.P. v. Hindustan Lever Ltd.*).

The palpable unjustness of the decision in *Kasturi Lal* case has led to its bypassing in recent times. Today, the State has been held liable in respect of loss or damage either to the property or to a person. Although the decision of the Supreme Court in *Kasturi Lal's* case is yet to be overruled, subsequent decisions of the court have greatly undermined its authority and reduced the strength of sovereign immunity In *Common Cause, A Registered Society v. UOI* ,the court observed that "the doctrine of sovereign immunity has no relevance in the present day context Much of *Kasturilal's* efficacy as a binding precedent has been eroded".

The present law relating to the vicarious liability of State is not satisfactory in India. A proper legislation is lacking in this regard. It is left to courts to develop the law according to the views of the judges. The citizens are not in a position to know the law definitely. In *Kasturi Lal* case, die Supreme Court had expressed dissatisfaction

at the prevailing position. It said that the remedy to cure this position lies in the hand of the Legislature. In *T.V. Nagendra Rao's* case also, the Supreme Court suggested for enacting appropriate legislation to remove die uncertainty in this area.

The position prevailing before the commencement of the Constitution remains unchanged though the Parliament and the State Legislature have been empowered to pass law to change the position (Article 300 of Constitution). The unsatisfactory state of affairs in this regard is against social justice in a welfare State. In the absence of legislation, it will be in consonance with social justice demanded by the changed conditions and the concept of welfare State that the courts will follow the recent decisions of the Supreme Court rather than *Kasturi Lal.*

It emerges from the various decisions (barring recent ones) that the Government is not liable for the torts committed by its servants in exercise of sovereign powers, but for the torts committed in the exercise of non-sovereign powers. Sovereign powers mean powers which can be lawfully exercised only by a sovereign or by a person to whom such powers have been delegated.

There are no well defined tests to know what are sovereign powers. Functions like maintenance of defence forces, maintenance of law and order and proper administration of the country, and the machinery for administration of justice can be included in sovereign functions. Functions relating to trade, business and commerce and welfare activities *(viz.* running of hospital) are amongst the 'non-sovereign' functions. Broadly speaking such functions, in which private individuals can be engaged in, are *not* sovereign functions.

Routine activities, such as maintenance of vehicles of officers of the government, also fall within the sphere of 'non-sovereign' functions.

The following are the instances of "sovereign" functions:

1. Maintenance of defence force that is construction of a military road, distribution of meals to the army personnel on duty, checking army personnel on duty.

In *Baxi Amrik Singh v. Union of India,* held that the checking of army personnel on duty was a function intimately connected with the army discipline and it could only be performed by a member of the Armed Forces and that too by such a member who

is detailed on such duty and is empowered to discharge that function.

2. Maintenance of law and order that is if die plaintiff is injured while police personnel are dispersing unlawful crowd *(State of Orissa v. Padmalochan*), or plaintiff's loudspeaker set is damaged when the police makes a lathi charge to quell a riot *(State of M.P. v. Chironji Lal*).

The following are the instances of "non-sovereign" functions;

a. Maintenance of dockyard (P. *& O. Steam Navigation Co.* case).

b. A truck belonging to the public works department carrying material for the construction of a road bridge *(Rap Raw Verses The Punjab State*), Famine relief work *(Shyam Sunder v. State of Rqjasthan*).

c. A Government jeep car being taken from the workshop to the Collector's bungalow for the Collector's use *(State of Rajasthan v. Vidjawati*).

d. Taking ailing children to Primary Health Centre in a Government carrier *(Indian Insurance Co. Assn. Pool v. Radbabai*).

e. Carrying military *jawans* from Railway Station to the Unit Headquarters *(union of India v. Savita Sharma*). Similarly, carrying ration and *sepoys* within the country during peace time in the course of movement of troops after the hostilities were over *[Pushpa Tbakur v. UOI*].

f. Carrying Air Force officers from one place to another in Delhi for playing hockey and basket ball *(Satya Wati Devi v.UOI*), or bringing back military officers from the place of exercise to the college of combat

g. Taking a truck for imparting training to new M.T. Recruits *(Iqbal Kaur v. Chief of Army Staff*).

h. Transporting of a machine and other equipment to a military training school *(Union of India v. Sugrabai*).

i. Where some military *jawans* found some firewood lying by river side and carried the same away for purposes of camp fire and fuel *(Roop Lal v.UOI*).

j. a 'service' (facility) provided to a 'consumer' within the meaning of the Consumer Protection Act, 1986 is not a 'sovereign' function *(Lucknow Development Authority v. M.K. Gupta*).

UNIT-III

NEGLIGENCE

Introduction:

In day to day usage Negligence denotes mere carelessness. In legal sense it signifies failure to exercise the standard of care which the doer as a reasonable man should, by law, have exercised in the circumstances.

Generally speaking there is a legal duty to take care where it was or should have been reasonably foreseeable that failure to do so was likely to cause injury. Negligence is, accordingly, a mode in which many kinds of harms may be caused, by not taking such adequate precautions as should have been taken in the circumstances to avoid or prevent that harm, as contrasted with causing such harm intentionally or deliberately. A man may, accordingly, cause harm negligently though he was not careless but tried to be careful, if the care taken was such as the court deems inadequate in the circumstances.

Generally speaking one is responsible for the direct consequences of his negligent acts where he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to another.

Negligence takes innumerable forms, but the commonest forms are negligence causing personal injuries or death, of which species are employers' liability to an employee, the liability of occupiers of land to visitors thereon, the liability of suppliers to consumers, of persons doing work to their clients, of persons handling vehicles to other road-users, and so on. The categories of negligence are not closed and new varieties such as negligence causing economic loss may be recognized.

Negligence has two meanings in law of torts:

1. *Negligence as state of mind*- Negligence is a mode of committing certain torts e.g. negligently or carelessly committing trespass, nuisance or defamation. This is the subjective meaning of negligence advocated by the Austin, Salmond and Winfield.

2. *Negligence as a type of conduct*- Negligence is a conduct, not a state of mind. Conduct which involves the risk of causing damage. This is the objective meaning of negligence, which treats negligence as a separate or specific tort.

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

Essentials of Negligence

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

1. That the defendant owed a duty of care to the plaintiff.

2. That the defendant made a breach of the duty i.e. he failed to exercise due care and skill.

3. That plaintiff suffered damage as a consequence thereof.

1. Duty of care to the plaintiff

The existence of a duty situation or a duty to take care is thus essential before a person can be held liable negligence. It means a legal duty rather than a mere moral, religious or social duty. The plaintiff has to establish that the defendant owed to him specific legal duty to take care, of which he has made a breach. Normally the existence of a duty situation in a given case is decided on the basis of existing precedents covering similar situations; but it is now well accepted that new duty situations can be recognized.

In Donoghue v. Stevenson, the appellant plaintiff drank a bottle of ginger beer which was brought from a retailer by her friend. The bottle which was of dark opaque glass in fact contained the decomposed body of snail (found out by her when she had already consumed a part of the contents of the bottle).

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

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

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

Whether the defendant owes a duty to the plaintiff or not depends on reasonable foresee ability of the injury to the plaintiff. In *Heaven v. Pender*, held that the duty arises only if a person is nearer to the person or property of another. A useful test to decide culpability is to determine what a 'Reasonable Man' (i.e. a man of ordinary prudence or intelligence) would have foreseen and behaved under the circumstances. The standard of foresight of the reasonable man is an impersonal or objective test. However, the standard of care of the reasonable man involves in its application a subjective element.

In *Rural Transport Service v. Bezlum Bibi,* the conductor of an overloaded bus invited passengers to travel on the roof of the bus. One of the passengers on the roof of the bus was struck by an overhanging branch of a tree. He fell down and died. Held that there was negligence on the part of both the driver and conductor of the bus.

In *SushmaMitra v. M.P. State Road Transport Corpn ,* the plaintiff was resting her elbow on the window sill. A truck coming from the opposite direction hit her elbow as a result of which she received severe injuries. Held that it is the duty of the driver to pass on the road at a reasonable distance from the other vehicles.

When the injury to the plaintiff is not foreseeable, the defendant is not liable. In *Glasgow Corpn. v. Muir*, the managers of the defendant corporation tearooms permitted a picnic party to have their food in the tearoom. Two members of the

picnic party were carrying a big urn containing 6-9 gallons of tea to a tearoom through a passage where some children were buying ice creams. Suddenly one of the persons lost the grip of the handle of urn and six children, including the plaintiff, were injured. Held that the managers could not anticipate such an event and, therefore, she had no duty to take precautions. Hence neither she nor he corporation could be held liable.

To establish negligence it is not enough to prove that the injury was foreseeable. But a reasonable likelihood of the injury has also to be shown. The duty is to guard against reasonable probabilities rather than bare or remote or fantastic possibilities.

In *Fardon v. Harcourt,* the defendant parked his car by the roadside and left a dog inside the car. The dog jumped out and smashed a glass panel. A splinter from this glass injured the plaintiff while he was walking past the car. Held that the accident being very unlikely, the defendant was not liable.

In *Balton v. Stone,* a person on road was injured by a ball hit by a player on a cricket ground abutting on that highway. The ground had been used for 90 years and during the last 30 years the ball had been hit in the highway on about six occasions but no one had been injured. Held that the defendant (committee and members of cricket club) were not negligent.

When the defendant owed a duty of care to persons rather than the plaintiff, the plaintiff cannot sue even if he might have been injured by the defendant's act. Thus the duty must be owed to the plaintiff.

In *Palsgraf v. Long Island Railroad Co.,*a passenger carrying a package was trying to board a moving train. He seemed to be unsteady as if about to fall. A railway guard, with an idea to help him pushed him from behind. In this act, the package (of fireworks) fell resulting in an explosion, as a result of which the plaintiff was injured. Held that the guard if negligently to the holder of the package was not negligent in relation to the plaintiff standing far away (about 25 feet).

Similarly, counsel has a duty towards client. The Counsel should be careful in performing his professional duties. If a counsel, by his acts or omissions, causes the interest of the party engaging him, in any legal proceedings to be prejudicially affected. He does so at his peril. On the same analogy a person engaged in some

particular profession is supposed to have the requisite knowledge and skill needed for the purpose and he has a duty to exercise reasonable degree of care in the conduct of his duties. The standard of care needed in a particular case dependents on the professional skill expected from persons belonging to a particular class. A surgeon or anesthetist will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong. In case of specialists, a higher degree of skill is needed.

Explaining the nature of duty of care in medical profession, the Supreme Court observed in *Dr. LakshmanBalkrishna Joshi v. TrimbakBapu Godbole,* "The petitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor, no doubt, has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency."

2. Breach of Duty

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

The law requires taking of two points into to determine the standard of care required:

(a) *The importance of the object to be attained*- The law does not require greatest possible care but the care required is that of a reasonable and prudent man under certain circumstances. The amount of care, skill, diligence or the like, vary according to the particular case. The prudent man, ordinarily, with regard to undertaking an act is the man who has acquired that special skill to do the act which he undertakes; a man who has not acquired that special skill is imprudent in undertaking to do the act, however careful he may be, and, however great his skill in other things. The law permits taking chance of some measure of risks so that in public interest various kinds of activities should go on.

As has been pointed in *Dabron v. Bath Tramways* , that if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of the abnormal risk.

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

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

(b) *The magnitude of risk*- The degree of care which a man is required to use in a particular situation in order to avoid the imputation of negligence varies with the obviousness of the risk. If the danger of doing injury to the person or property of another by the pursuance of a certain line of conduct is great, the individual who proposes to pursue that particular course is bound to use great care in order to avoid the foreseeable harm. On the other hand if the danger is slight only a slight amount of care is required. Thus the driver of a vehicle has to observe a greater care when he is passing through a school zone, or he finds a blind man, a child or an old man. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved.

In *Kerala State Electricity Board v. Suresh Kumar*, a minor boy came in contact with an overhead electric wire which had sagged to 3 feet above the ground, got electrocuted thereby and received burn injuries. The Electricity Board had a duty to keep the overhead wire 15 feet above the ground. The Board was held liable for breach of its statutory duty.

Glasgow Corp. v. Taylor, is another illustration where there was lack of due care according to the circumstances of the case. In that case poisonous berries were grown in a public garden under the control of the corporation. The berries looked like cherries and thus had tempting appearance for the children. A child, aged seven,

ate those berries and died. It was found that the shrub bearing the berries was neither properly fenced nor a notice regarding the deadly character of the berries was displayed. It was, therefore, held that the defendants were liable for negligence.

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

Good sense and policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. In a moment of peril and difficulty the court not expect perfect presence of mind, accurate judgment and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because upon review of facts, it can be seen that the course he had adopted was not in fact the best.

In *Jones v. Staveley, Iron & Chemical Co. Ltd.,* it was held that the standard of care owed by an employer to his workmen in his factory for the purpose of determining his liability to them for negligence is higher than the standard to be applied in determining whether there has been contributory negligence on the part of one of the workmen.

3. Damages

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

Proof of Negligence (*Res Ipsa Loquitur*)

The general rule is that it is for the plaintiff to prove that the defendant was negligent. Initial burden of making a prima facie case against defendant is on

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

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

If a brick falls from a building and injures a passerby on the highway, or the goods while in the possession of a bailee are lost, or a stone is found in a bun, or a bus going on a road overturns, or death of a person is caused by live broken electric wire in a street, a presumption of negligence is raised.

In *Agyakaur v. Pepsu R.T.C.,* a rickshaw going on the correct side was hit by a bus coming on the wrong side of the road. Held that the driver of bus was negligent.

In *Municipal Corpn.Delhi v. Subhagwati*, due to the collapse of the Clock Tower situated opposite to Town Hall in the main bazar of Chandni Chowk, Delhi, a number of persons died. The Clock Tower belonged to the Municipal Corporation of Delhi. The supreme court explained the legal position as: "There is a special obligation on the owner of the adjoining premises for the safety of the structures which he keeps beside the highway. If these structures fall into disrepair so as to be of potential danger to the passerby or to be a nuisance, the owner is liable to anyone

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

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

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

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

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

In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled

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

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

Under English law as laid down in *Bolam v. Friern Hospital Management Committee,* a doctor, who acts in accordance with a practice accepted as proper by a responsible body of medical men, is not negligent merely because there is a body of opinion that takes a contrary view. MC NAIR, J., in his summing up to jury observed: "Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clap ham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill….. A man need not to possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." At common law, a doctor cannot lawfully operate on adult persons of sound mind or give them any other treatment involving the application of physical force without their consent for otherwise he would be liable for the tort of trespass. But when a patient is incapable, for one reason or another, of giving his consent, a doctor can lawfully operate upon or give other treatment provided that the operation or the other treatment concerned is in the best interest of the patient if only it is carried out in order to save his life or

to ensure improvement or to prevent deterioration in his physical or mental health. The test here also in determining liability would be whether the doctor acted in accordance with the practice accepted at the time by a responsible body of medical opinion skilled in the particular form of treatment. Prior consent or approval of the court for giving the treatment is not necessary. But in case of a patient of unsound mind, the court may entertain a petition for declaration that a proposed operation or treatment on the patient may be lawfully performed. These principles were laid down by the House of Lords in *F v. Berkshire Health Authority*.

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

After adverting to the provisions of the Act, the supreme Court in *M.Veerappa's v. Evelyn Squeira,* held that an advocate who has been engaged to act is clearly liable for negligence to his is client. The Supreme Court, however, left open the question whether an advocate who has been engaged only to plead can be sued for negligence.

Kinds of Negligence

1. Contributory Negligence

In certain circumstances a person who has suffered an injury will not be able to get damages from another for the reason his own negligence has contributed to his injury; every person is expected to take care reasonable care of himself. According

to john G. Fleming, "Negligence is conduct that fails to conform to the standards required by law for safeguarding others (actionable negligence) against unreasonable risk of injury." Thus, when the plaintiff by his own want of care contributes to the damage caused by the negligence or wrongful conduct of the defendant, he is considered to be guilty of contributory negligence It does not mean breach of a duty towards other party but it means absence of due care on his part about his own safety.

For example, a pedestrian tries to cross the road all of a sudden and is hit by a moving vehicle; he is guilty of contributory negligence. In this case, the defendant could completely escape his liability for accident. Take another case, if the conductor of a bus invites passengers to travel on the roof of the bus, and one of the passengers travelling on the roof is hit by the branch of a tree and falls down and gets killed, there is not only negligence on the part of the conductor also contributory negligence on the part of the passengers. What amounts to contributory negligence in the case of an adult may not be so in case of a child. If, however, a child is capable of appreciating the danger he may be held guilty of contributory negligence.

In *Yachuk v. Oliver Blis Co. Ltd*, the defendant's servants sold some gasoline to two boys aged 7 and 9 years. The boys falsely stated that they needed the same for their mother's car. They actually used it for their play and one of them got injured. The defendant was held liable in full for loss.

At Common Law, contributory negligence was a complete defense, and the negligent plaintiff could not claim any compensation from the defendant. The court modified this rule and introduced the rule of "Last Opportunity" or "Last Chance The last opportunity rule may be stated as: "When an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care".

The rule was applied in *Davies v.Mann, in* this case, the plaintiff fettered the forefeet of his donkey and left it in a narrow highway. The defendant was driving his wagon too fast and the donkey was run over and killed. In spite of his negligence the plaintiff was entitled to claim compensation because the defendant had the last opportunity to avoid the accident.

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

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

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

2. Composite Negligence

When the negligence of two or more persons result in the same damage to a third person there is said to be a 'composite negligence', and the persons responsible are known as 'composite tort-feasors'.

In case of contributory negligence there is negligence on the part of the defendant as well as the plaintiff. Plaintiff's own negligence contributes to harm which he has suffered. In the case of composite negligence, there is negligence of two or more persons towards the plaintiff, and the plaintiff himself is not to be blamed.

While contributory negligence is a defense available to the defendant to overcome or reduce the liability in relation to the plaintiff, the composite negligence is not a defense.

Nuisance

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

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

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

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

Kinds of Nuisance

Nuisance is of two kinds:

i. Public or Common Nuisance
Ii. Private Nuisance or Tort of Nuisance

Public Nuisance

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

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

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

In *Dr. Ram Raj Singh v. Babulal*, the defendant erected a brick grinding machine adjoining the premises of the plaintiff, who was a medical practitioner. The brick grinding machine generated dust, which polluted the atmosphere. The dust entered the consulting chamber of the plaintiff and caused physical inconvenience to him and patients, and their red coating on clothes, caused by the dust, could be apparently visible. It was held that special damages to the plaintiff had been proved and a permanent injunction was issued against the defendant restraining him from running his brick grinding machine there.

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

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

Private Nuisance or Tort of nuisance

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

1. Unreasonable interference.

2. Interference is with the use of enjoyment of land.

3. Damage.

1. Unreasonable interference.

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

In *Radhey Shyam v. Gur Prashad*, Gur Prasad and another filed a suit against Radhey Shyam and others for a permanent injunction to restrain them from installing and running a flour mill in their premises. It was alleged that the said mill would cause nuisance to the plaintiffs, who were occupying the first floor portion o the same premises in as much as the plaintiffs would lose their peace on account of rattling noise of the flour mill and thereby their health would also be adversely affected. It was held that substantial additional to the noise in a noisy locality, by the running of the impugned machines, seriously interfered with the physical comfort of the plaintiffs and as such it amounted to nuisance, and the plaintiffs were entitled to an injunction against the defendants.

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

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

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

Does Nuisance Connote state of affairs?

Nuisance is generally continuing wrong. A constant noise, smell, vibration is a nuisance and ordinarily an isolated act of escape cannot be considered to be a nuisance. Thus, *in Stone v. Bolton,* the plaintiff, while standing on a highway, was injured by a cricket ball hit from the defendant's ground, but she could not succeed in her action for nuisance. At first instance, Oliver J. said:" An isolated act of hitting a cricket ball on to the rod cannot, of course, amount to a nuisance.

Malice: If the act of the defendant which is done with evil motive, becomes an unreasonable interference it is actionable. A person has right to make a reasonable use of his own property but if the use of his property causes substantial discomfort

to others, it ceases to be reasonable. “If a man creates a nuisance, he cannot say that he is acting reasonably. The two things are self contradictory.” In *Allen v. Flood*, Lord Watson said: “No proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance if his neighbors or of the public. If he violates that condition h commits a legal wrong, and if he does so intentionally he is guilty of a malicious wrong, in its strict legal sense.”

2. Interference is with the use of enjoyment of land.

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

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

Nuisance to incorporealProperty

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

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

ii. **Interference with Right to Light and Air England**

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

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

INDIA

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

B. Injury to comfort or health: Substantial interference with the comfort and convenience in using the premises is actionable as a nuisance. A mere trifling or fanciful inconvenience is not enough. The rule is De minimis non curat lex that means that the law does not take account of very trifling matters. There should be "a serious in convenience and interference with the comfort of the occupiers of the dwelling-house according to notions prevalent among reasonable English men and women….." The standard of comfort varies from time to time and place to place. Inconvenience and discomfort from the point of view of a particular plaintiff is not the test of nuisance but the test is how an average man residing in the same area would take it. The plaintiff may be oversensitive.

Disturbance to neighbors throughout the night by the noises of horses in a building which was converted into a stable was nuisance. Similarly, attraction of large and noisy crowd outside a club kept open till 3 a.m. and also in which entertainments by music and fireworks have been arranged for profit, are instances of nuisance.

Smoke, noise and offensive vapour may constitute a nuisance even though they are not injurious to health.

3. Damage.

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

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

Projections: As regards projections on the highway by objects like overhanging branches of a tree or a clock etc. from the land or building adjoining the highway, no action for nuisance can be brought for such projections unless some damage is caused thereby.

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

the branch would break and fall. There was no liability under the rule in *Rylands v. Fletcher* either, as growing a tree was a natural use of land.

Defences:

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

Effectual Defences

1. **Prescriptive right to commit nuisance**

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

2. Statutory Authority

An act done under the authority of a statute is a complete defence. If nuisance is necessarily incident to what has been authorized by a statute, there is no liability for that under the law of torts. Thus, a railway company authorized to run railway trains on a track is not liable if, in spite of due care, the sparks from the engine set fire to the adjoining property held in *Vaughan v. Taff Vale Rail Co.,* & *Dunney v. North Western Gas Board,*

In the absence of such an authority, the railway authority would have been liable even though there was no negligence; *Jones v. Festing Rail Co.* or the value of the adjoining property is depreciated by the noise, vibrations and smoke by the running of trains *Hammersmith Ry.Co. v. Brand,* If there is negligence in the running of trains, the railway co., even though run under a statutory authority will be liable. See

Smith v. L. and S.S. Ry. Co.

According to Lord Halsbury quoted in *London Brighton and south Coast Rail Co. v. Turman*, "It cannot now be doubted that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at Common Law.

Ineffectual Defences

1. Nuisance due to acts of others

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

2. Public Good

It is no defence to say that what is a nuisance to a particular plaintiff is beneficial to the public in general, otherwise no public utility undertaking could be held liable for the unlawful interference with the rights of individuals. In *Shelfer v. City of London Electric Lightning Co. and Thorpne v. Burmfit*, during the building of an electric power house by the defendants, there were violent vibrations resulting in damage to the plaintiff's house. In an action for injunction by the plaintiff, the defence pleaded was that if the building was not constructed the whole of the city of London would suffer by losing the benefit of the light to be supplied through the proposed power house. The plea was rejected and the court issued an injunction against the defendants.

3. Reasonable care

Use of a reasonable care to prevent nuisance is generally no defence. In *a Rapier v. LondonTramways Co,* considerable stench amounting to nuisance was caused by the defendants stables constructed to accommodate 200 horses to draw their trams. The defence that maximum possible care was taken to prevent the nuisance failed and

the defendants were held liable.

4. Plaintiff coming to nuisance

It is no defence that the plaintiff himself came to place of nuisance. A person cannot be expected to refrain from buying a land on which a nuisance already exists and the plaintiff can recover even if nuisance has been going on long before he went to that place. The maxim volenti non fit injuria cannot be applied in such a case. Held *in Ellostion v. Feetham; Bliss v. Hal; Sturges v. Bridgman.*

STRICT LIABILITY AND ABSOLUTE LIABILITY

Law of torts seeks to achieve what is called distributive justice, where the person responsible for the injury caused to the plaintiff has to bear the burden.

- If the defendant is responsible, i.e., is at fault, he has to compensate the plaintiff, and thus bear the burden.
- If the plaintiff is responsible he should bear the burden.
- If both are at fault, they should share the burden.
- If neither of them is at fault, the plaintiff has to bear the loss.

Further, law of torts does not hold the defendant liable for any loss that may be caused to the plaintiff on account of defendant's act. The loss must be caused due to breach of some legal duty on the part of the defendant towards the plaintiff (*damnum sine injuria* and *injuria sine damno*).

During the development of law of torts, distinction between two general classes of duties came to be recognised:

1. Duties not to injure intentionally, recklessly or negligently. - Fault Liabilty
2. Duties not to injure *simpliciter*. - No Fault Liability.

When a person is engaged in a duty of normal risk, he has the duty not to injure intentionally, etc.

But, when he is engaged in an activity which is regarded by law as inherently and extremely dangerous, such as handling explosives, there is a duty not to injure *simpliciter*.

ORIGIN

Justice Blackburn's judgement in *Rylands v.* Fletcher is acknowledged to be the first case in which strict liability was applied.

Rylands v. Fletcher: In 1860, John Rylands contemplated a new reservoir to be constructed for supplying water to the Ainsworth mill. He appointed a competent contractor to execute the plan. Thomas Fletcher had a mine in the neighborhood. There were some old disused shafts which lead from defendant's land to the plaintiff's mines. Though the contractor was aware of this, he did not take care in filling them. As a result when the reservoir was filled, these shafts succumbed to the pressure and water entered the plaintiff's mines and damaged them It was accepted that the defendant was not negligent, though the contractor was. But still the defendant was held liable.

Principle: The person who brings on to his land and collects and keeps there something likely to do mischief if it escapes must keep it in at his peril and if he does not do so, he is liable for all the damage which is the natural consequence of its escape. But the use of land must be non-natural.

ESSENTIALS OF STRICT LIABILITY

In Blackburn J.'s formulation, the rule applies to bringing onto the defendant's land things likely to do mischief if they escape, which have been described as 'dangerous things'.

In *Hale v. Jennings Brothers*, Scott, LJ, referred to the rule as "a broad principle that the liability attaches because of the occupier of the land bringing onto the land something which is likely to do damage if it escapes".

In *Read v. Lyons*, Lord Macmillan stated that "the doctrine of Rylands v. Fletcher derives from a conception of mutual duties of adjoining landowners and its congeners are trespass and nuisance".

In the same case, Viscount Simon aptly put the essential conditions to make one liable under doctrine of strict liability as follows:

"Now the strict liability recognised by this House in Rylands *v.Fletcher* is conditioned by two elements which I may call

1. the condition of 'escape' from the land of something likely to do mischief if it escapes, and
2. the condition of 'non-natural use of land'.

We may observe that the following are the three requirements for application of rule in *Rylands v. Fletcher*,

1. Something dangerous must be brought, collected and kept on the land.
2. It must be non-natural use of land.
3. The thing must escape.

1. DANGEROUS THING

A thing which is of such nature that it has the tendency to escape and when escapes to cause considerable damage.

e.g.,gases, liquids, animals.

2. NON-NATURAL USE OF LAND

Use of the land must be other than its ordinary use, i.e., the purpose for which it is meant or the purpose for which it is suitable.

Illustrations of natural use of land can be: storage of water in reservoir for mill or use, storage of one or two gas cylinder for domestic use, electricity connection to light the house, lighting an oil lamp in house etc.

In *Sochacki v. Sas*, B, who was a lodger in A's house, lit a fire in his room and went out. While he was out, his room caught fire may be due to jumping of a spark. It spread and damaged A's property in the rest of the house. There was no evidence of negligence on the part of B. It was held that B was not liable under *Rylands v. Fletcher* since his use of the fire in his grate was an ordinary, natural, proper,

everyday use of a fire place in a room.

In *T. C. Balkrishna Menon v. T.R. Subramanian*, the Court held that the use of explosives in an open field on the occasion of festival is a 'non-natural' user of land.

In *State of Punjab v. Modern Cultivators,* due to overflow of water from a canal damage was done to plaintiff's property. The Supreme Court held that use of land for construction of a canal system is a normal use and thus not non natural use of land.

In *Mukesh Textile Mills v. Subramanya Sastry,* A was owner of a sugar factory. B owned land adjacent to A's sugar factory. A stored quantity of molasses and it escaped to B's land and damaged his crop. B sued A. Collecting molasses in large quantities was held by the Court to be non natural use of land and if a person collected such things on his land and escaped to neighbours land, he was liable.

3. ESCAPE

Defendant would be liable only when there is escape of the object fromland of which he is in occupation or control.

Read v. J. Lyons & Co. Ltd., Appellant was employed as an Inspector of Ammunition. He was injured by the explosion of a shell while she was on respondent's premises in the performance of her duties. Further there was no proof of negligence on the part of the defendant. The Court held that the injury was caused on the premises of the defendants i.e. not outside, thus no escape thereby, the respondents were not liable.

EXCEPTIONS TO THE RULE OF STRICT LIABILITY

In the following circumstances, the rule of strict liability is not applicable.

1. Act of God (*Vis Majeur*)
2. Act of third party
3. Plaintiff's consent
4. Common benefit of plaintiff and defendant

5. Plaintiff's own default

6. Statutory Authority

1. **Act of God (*Vis Majeur*):** The damage took place due to some happening which was due to the force of nature and was unforeseen, beyond the control of the defendant and extraordinary.

Nichols v. Marshland, The defendant had some ornamental lakes formed up by damming up a natural stream. Due to unnatural rainfall "greater and more violent than any within the memory of a witness" broke down the artificial embankments and carried away four bridges belonging to the plaintiff. It was held that the defendant is not liable.

Ryan v. Young, Driver of a lorry of the defendant died while driving the lorry which thereon ran on and injured the plaintiff. The driver before dying appeared to be in good health. Further defendant was not under duty to get the driver medically examined. There was no fault in the lorry. The defendant was held not liable.

State of Mysore v. Ramchandra, Constructing a water storage to increase the supply of water is natural use of land and a permitted act, subject to application of emergency measure. One such measure is to make arrangement for outlet of water in case of emergency. It was not done in the present case which resulted into the damage to the property of one and great loss thereby. The defence of Act of God was not allowed.

2. **Act of Third Party:** Where escape is caused by the act of the third party over whom the defendant has no control, he will not be liable.

Box v. Jubb, The defendants were the owners of a reservoir, which was supplied with water from a main drain, not their property, which flowed by it. There were sluice gates properly constructed between the reservoir and main drain at both the inlet and out let. Owing to an obstruction in the main drain at a point below the defendants' reservoir, caused by a third party over whom the defendants had no control, and without their knowledge, the water in the drain forced open the sluice gates and caused the reservoir to overflow on to the plaintiff's land. Held, that the defendants were not liable for the damage caused by the overflow.

*Rickards v. Lothian***,** The plaintiff was tenant of the defendant on the second floor. On the fourth floor of defendant's building a third party maliciously plugged up the waste pipes and opened the water taps. As a result, the plaintiff's goods were damaged by the flow of water from the lavatory on the fourth floor. The defendant was held not liable as it was an act of third party beyond his control and no proof of negligence on his part.

3. **Plaintiff's Consent:** Where the plaintiff has given consent to the defendant in respect of the thing stored, there is no liability. This is similar to *volenti non fit injuria*.

In *Balakh Glass Emporium v. United India Insurance Company Ltd.,* the defendant was held not liable when water escaped from upper floor and damaged the lower floor because there was an implied consent by the occupier of lower floor to the normal use of water by the occupier of the upper floor.

4. **Common benefit of plaintiff and defendant:** Where the artificial work is maintained with the plaintiff's consent and for the common benefit of the defendant, this rule does not apply.

In *Carstairs v. Taylor,* Taylor, the landlord, rented his upper story to the plaintiff. Taylor, for the benefit of both maintained a rain water box for the benefit of both. Some rats gnawed the water box which resulted into escape of water and damaging the goods of the plaintiff. The defendant was held not liable as there was plaintiff's consent and no negligence on the part of the defendant.

5. **Plaintiff's own fault:** If the injury caused to the plaintiff is due to his own fault, the defendant is not liable.

Pointing v. Noakes, Plaintiff's horse reached over defendant's boundary and nibbled some poisonous tree and died. It was held that the death of the horse was caused by the plaintiff's own negligence and that the defendant was not liable.

6. **Statutory Authority:** Where the defendant is authorised or required under the law to accumulate, keep or collect the dangerous things which escape or cause mischief and injures the plaintiff, the rule of strict liability does not apply.

Green v. Chelsea Waterworks, The defendants were authorised by statute to store water for the purposes of supply to the city. Owing to some accidental cause the water escaped and caused injury to the plaintiff. The Court held that where the accumulation of water by the defendant was not for their own purpose, and where they had been authorised by statute to accumulate and keep it, they would not be responsible for any escape, unless it is result of the negligent act of the defendants.

APPLICABILITY OF STRICT LIABILITY IN INDIA

Rule of strict liability has been applied by the Indian Courts. But it is rarely applied. In India, storing of water for agricultural use or irrigation purpose is not held to be non natural use of land.

In the oleum leak disaster case of 1985 liability was made further stringent by the introduction of the rule of absolute liability.

M. C. Mehta v. Union of India (Oleum Gas Leakage Case or Sriram Industries Case), Oleum gas leaked from one of the units of Shriram Foods and Fertilizers Industries in New Delhi. It resulted into death of one of the advocate and caused serious injuries to several others. A writ petition under Article 32 of the Constitution was brought by way of public interest litigation.

The Supreme Court of India felt that the application of the rule of strict liability is inadequate to deal such serious problems, holding that

"Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments, taking place in this country Law cannot allow our judicial thinking to be constrained by reference of the law as it prevails in England or for the matter of that in any other foreign legal order."

The Court also observed:

"This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norm and the needs of the present day economy and social structure."

It further held that, "Application of exceptions to this rule is inapplicable."

Bhagwati, C.J. assertively announced the entry of the rule of absolute liability and held the Defendant liable in the following words,

"An enterprise, which is engaged in hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous activity which it has undertaken."

Union Carbide Corporation v. Union of India, In this case, the rule of absolute liability applied in the oleum gas leak disaster case was reaffirmed by the Supreme Court. In December, 1984 methyl iso-cyanate and other toxic gases leaked from the Union Carbide Corporation India Ltd. at Bhopal. About 2660 people died, several thousand suffered serious injuries which did not die with that generation but also in cases got transferred to their next generation. The Court on applying the principle of absolute liability held the defendant liable to pay US $470 Million dollars by way of compensation to the victims or relatives of the victims.

Arun Kumar v. Union of India, In this case, a tigress chewed the hand of a three year old child. While holding the Zoo authorities liable the Court held that the zoo authorities being under absolute responsibility did not perform their part of duty and thus should be answerable to pay compensation.

ABSOLUTE LIABILITY

(Innovation of the Supreme Court of India)

Decision of the Supreme Court of India in *M. C. Mehta v. Union of India (Oleum Gas Leakage Case)* is innovative in the sense that it gave rise to a new kind of liability called 'absolute liability'. Absolute liability is strict liability without exceptions.SC held that the rule in Ryland's case decided in the nineteenth century is inadequate to meet the needs of the modern scientific world with hazardous and dangerous activities being common.

In *Charan Lal Sahu v. UOI,* It was held that this duty was 'absolute non-delegable' and the defendant cannot escape liability by showing that he had taken reasonable

care and that there was no negligence on his part.

DISTINCTION BETWEEN STRICT AND ABSOLUTE LIABILITIES

Apart from the difference that in case of strict liability certain defences are admitted whereas in case of absolute liability no defence is admitted, the following are the other differences:

a. In case of strict liability, what is brought on land is dangerous, but not inherently dangerous. In case of absolute liability it is inherently dangerous, and hence no exceptions admitted.

b. Strict liability is based on non-natural use of land, absolute liability does not envisage such a user.

c. In case of strict liability, the thing must escape. Hence, there is no liability in respect of persons on the premises. Absolute liability is available also to the persons on the premises.

d. In case of strict liability ordinary damages are awarded. In M. C. Mehta it was observed that in such cases exemplary damages may be awarded and that the more prosperous or affluent the enterprise, the more damages should be awarded.

This observation was treated as obiter dictum in Charan Lal Sahu case, while was treated as *ratio decidendi* in *Indian Council for Enviro-Legal Action v. UOI.*

LEGAL REMEDIES

Remedies (reliefs available to the aggrieved person) may be classified as under:

1. Legal Remedies

a) Judicial Remedies

Damages, Injunction, Specific Restitution of Property

b.) Extra Judicial Remedies

i) Using ADR methods

ii) Self Help provided by law

Expulsion of trespasser, Re-entry on land, Recapture of goods, Distress of damage feasant, Abatement of nuisance.

2. Extra Legal Remedies

Self Help not provided by law

Judicial Remedies

1. Damages
2. Injunction
3. Specific Restitution of Property

1. DAMAGES

Damages which law presumes to be the natural consequences of the defendant's acts are general damages, whereas damages the law will not infer unless proved at the trial are special damages.

e.g. medical expenses incurred by plaintiff due to defendant's negligent driving will give general damages, whereas if he claims nervous shock, then he has to prove and will get special damages.

Types of Damages

Damages are of the following five kinds

1) Nominal Damages
2) Contemptuous Damages
3) Real or Substantial Damages
4) Exemplary Damages
5) Prospective Damages

1. **Nominal Damages:** Damages which are awarded by the Court to the plaintiff not by way of compensation but by way of recognition of some legal rights of plaintiff which the defendant has infringed are nominal damages.

Nominal damages are available for torts which are actionable per se.

Ashby v. White, Where a rightful voter's right to vote was wrongfully and maliciously denied at an election, he was awarded damages nominal in nature, though the candidate in whose favour he wanted to cast his vote won the elections.

Constantine v. Imperial London Hotels Ltd, The owner of a hotel wrongfully refused a West Indian Cricketer entry in their hotel. Although he suffered no loss, the wrongful exclusion was held to be tortuous, was given nominal damages.

2. **Contemptuous Damages:** Contemptuous damages are an indication of the law court expressing an opinion of the claim of the plaintiff or its disapproval of is conduct in the matter. They differ from nominal damages as they may be awarded for any tortuous act whether actionable per se or not.

3. **Real or Substantial Damages:** Damages which are assessed and awarded as compensation for damage actually suffered by the plaintiff, and not simply by way of mere recognition of a legal right violated are called real or substantial damages.

4. **Exemplary Damages:** Exemplary damages are awarded where there has been great injury by reason of aggravating circumstances accompanying the wrong. Exemplary damages are awarded not by way of compensation for the plaintiff, but by way of punishment for the defendant.

In *Rookes v. Barnard*, the Court laid down that exemplary or punitive damages can be awarded in three cases:

a. Oppressive, arbitrary or unconstitutional action by servants of the Government.

In *Bhim Singh v. State of J & K*, Bhim Singh, MLA of J & K was arrested when he was going to attend Assembly session. The Supreme Court considered it to be appropriate case to award exemplary damages.

b. Cases where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

In *Manson v. Associated News Papers Ltd.*, the court held that if a person who is possessed of material which would be defamatory if published, and who does to really believe it to be true at all, decides to publish it simply because he can make a profit from publishing it and because he reckons that any damage she might have to pay would be so small that it would be well worth it, then that is a man, and that is the only man, against whom an award of exemplary damages can be made.

c. Where exemplary damages are expressly authorized by the statute.

5. **Prospective Damages:** Damages which are likely to result from the wrongful act of the defendant but they have not actually resulted at the time when the damages are being decided by the Court.

In *Subhas Chandra v. Ram Singh*, appellant was hit by a bus driver. He suffered several injuries resulting in his permanent disability to walk without a surgical shoe. Because of the disability he could not take employment in certain avenues. The Motor Claims Tribunal awarded him compensation amounting to Rs. 3,000 under the heading probable further loss. The amount of compensation on appeal was increased to Rs.7000 by the Delhi High Court.

2. INJUNCTIONS

An injunction is an order of the court directing the doing of some act or restraining the commission or continuance of some act.

Injunctions are of classified in two ways:

1. Prohibitory and Mandatory Injunction
2. Permanent and Temporary Injunction

1. **Prohibitory and Mandatory Injunction:** An injunction is an order of a court directing a person to do or to forbear from doing an act.

If the injunction is an order to do an act, it is called mandatory injunction. e.g., order to remove a structure illegally built by defendant on the plaintiff's land, order to remove the obstruction violating plaintiff's right to enter upon his own land.

If the order is to forbear from doing an act, it is called prohibitory injunction. e.g.

order not to encroach upon the plaintiff's property, order not to cause nuisance. It is also called 'preventive injunction', 'perpetual injunction' or 'prohibitory injunction'.

2. **Permanent and Temporary Injunctions:** To obtain an injunction, the plaintiff has to institute a suit against the defendant, and after hearing the same, the court will grant injunction in deserving cases. This order is permanent.

In case of an order for mandatory injunction, once the act ordered is done, the order is discharged. But in case of a prohibitory injunction, the act prohibited cannot be done at any time. Hence, prohibitory injunction is also called permanent injunction or perpetual injunction.

Section 37, Specific Relief Act, 1963 defines temporary and perpetual injunction as follows:

"A temporary injunction is such as is to continue until a specified time, or until the further order of the court. A perpetual injunction is one by which the defendant is perpetually enjoined from the assertion of a right, or from the commission of an act, which could be contrary to the right of the plaintiff"

Temporary Injunction: It is also called as 'interlocutory injunction'. It does not mean determination in favour of the plaintiff but simply shows the concern of the Court that there is a substantial question requiring consideration.

E.g. A and B have a dispute regarding title over a plot of land, which is in A's possession. B also claims to have the title of the same plot. Case is pending before the court; A wants to begin with construction on the said plot. B may obtain temporary injunction by filing an interlocutory application in the suit pending before the court.

Perpetual Injunction: If the court after going into the matter, finds that the plaintiff is entitled to the relief, the temporary injunction will be replaced by a perpetual injunction. A perpetual injunction is a final order and is issued after the full consideration of the case.

3. SPECIFIC RESTITUTION OF PROPERTY

When one is wrongfully dispossessed of his movable or immovable property, the court may order that the specific property should be restored back to the plaintiff.

e.g. action for ejectment, the recovery of chattels by an action for detinue etc.

As per section 6 of the Specific Relief Act, 1963 a person who is wrongfully dispossessed of immovable property is entitled to recover the immovable property.

As per section 7 of the Specific Relief Act, 1963 a person who is wrongfully dispossessed of movable property is entitled to recover the movable property.

EXTRA-JUDICIAL REMEDIES

Following extra-judicial remedies can be availed by the plaintiff.

1. Expulsion of trespasser
2. Re-entry on land
3. Recapture of Goods
4. Abatement of Nuisance
5. Distress Damage Feasant

1. EXPULSION OF TRESPASSER

A person can resort to legitimate force in order to repel an intruder or trespasser provided the force used by him does not transgress the reasonable limits of the occasion i.e. he must not use disproportionate force.

In *Scott v. Mathew Brown & Co.*, the rightful owner of property of is entitled to use force in ejecting a trespasser so long as he does him no personal injury.

In *Edwick v. Hawkes*, while ejecting a trespasser, the rightful owner of property should not resort to violence.

2. RE-ENTRY ON LAND

A man wrongfully disposed of his land may retake its possession, if he can do so in a peaceful manner and without the use of force.

Hemmings v. Stoke Poges Golf Club, If an owner of landed property finds a trespasser on his premises, he may enter the premises and turn the trespasser out, using no more force than is necessary to expel him, without having to pay damages for the force used.

Section 6 of the Specific Relief Act, 1963 provides that if one in possession of immovable property is disposed, otherwise than by due course of law, he may, within six months, sue to recover possession without reference to any title set up by another, which is left to be determined in a separate action.

3. RECAPTURE OF GOODS

A person entitled to the immediate possession of chattels may recover them from any person who has then been in actual possession and detain them, provided that such possession was wrongful in its inception.

4. ABATEMENT OF NUISANCE

Abatement means removal of the nuisance by the party injured. It is justifiable provided it must be peaceable, without danger to life or limb and after notice to remove the same, if it is necessary to enter another's land to abate a nuisance, or where the nuisance is a dwelling house in actual occupation or a common, unless it is unsafe to wait.

In *Lemmon v. Webbs*, The occupier of land may cut off the overhanging branches of his neighbour's trees, or sever roots which have spread from these trees into his own land.

Someshwar v. Chunilal: One cannot cut the branches if the trees stand on the land of both parties.

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UNIT-IV

DEFAMATION

Introduction:

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

Defamation is customarily classified into, (a) libel and (b) slander.

Broad distinction between the two is that libel is addressed to the eye while as slander to the ear. Slander is the publication of defamatory statement in a transient form.

An example of it is spoken words. Libel is a representation made in some permanent form e.g. writing, printing, picture, effigy or statute. In a cinema film not only the photographic part of it is considered to be libel but also the speech which synchronizes with it is also a libel.

In *Youssoupoff v. M.G.M. Pictures Ltd.*, a film produced by an English Company, a lady, Princess Natasha, was shown as having relations of seduction or rape with the man Rasputin, a man of worst possible character. It was observed that so far as photographic part of the exhibition is concerned, that is the permanent matter has to be seen by the eye, and it is proper subject of an action for libel, if defamatory.

Under English Law, the distinction between libel and slander is material for two reasons; 1. Under criminal law, only libel has been recognized as an offence. Slander is no offence. 2. Under Law of torts, slander is actionable, save in exceptional cases, only on proof of special damage. Libel is always actionable per se i.e. without the proof of any damage.

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

1. Imputation of criminal offence to the plaintiff

2. Imputation of contagious or infectious disease to the plaintiff which has effect of preventing others from associating with the plaintiff

3. Imputation that the person is incompetent, dishonest, or unfit in regard to the office, profession, calling, trade or business carried on by him

4. Imputation of unchastity or adultery to any woman or girl.

Requisites of Defamation

The constituent elements of defamation are;

a. the words must be defamatory

b. the defamatory words, should directly or indirectly refer to the person defamed, and

c. publication of the words by any medium should take place

(a) Defamatory Words: The defamatory words or statements are those which cause an injury to reputation. Reputation is injured when one is lowered in the estimation of members of the society generally or when one is avoided by others or others shun his company. In short, an imputation which exposes the aggrieved person to disgrace, humiliation, ridicule or contempt, is defamatory. The criterion to determine whether a statement is defamatory or not, is "how do the right thinking members of the society think"? If they consider the statement as disgraceful, humiliating, ridiculous or contemptuous, the statement is defamatory. If the statement is likely to injure the reputation of the aggrieved person, it is no defence on the part of the defamer that he never intended to do so. Words which merely hurt feelings or cause annoyance but in no way cast reflection on reputation or character, are not libelous. Vulgar abuses uttered as mere abuse and not understood by the person who hears them as defamatory, though they hurt one's pride. Many a time, people do not directly use defamatory words, but utter defamatory words in innuendoes. Innuendoes are those words, which appear innocent but contain some secondary or latent meaning which is defamatory.

Thus, if A says to B in the presence of P that 'P is very honest man, he could never have stolen anything.' The statement will be defamatory if from this, B understood that P was a dishonest man. If the words or statements are defamatory, it is immaterial with what intention they are uttered or circulated.

In *Morrison v. Ritetise,* one R in good faith published a mistaken statement that M a lady, had given birth to twins. The fact of the matter was that M was married only two months back. The statement was held defamatory.

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

A good illustration is provided by *Newstead v. London Express Ltd.,* in the newspaper a news item appeared thus: 'Harold Newstead, a Camberwell man, has been convicted for bigamy.' The news was true to Harold Newstead, Camberwell Barman. Another Harold Newstead, Camberwell barber and his friend thought that it referred to him and brought a suit for defamation. As the statement was understood as referring to Harold Newstead, Camberwellbarber, the statement was held defamatory, though newspaper never intended him to be the person.

The state of English Law was considered unsatisfactory as it led to the conviction of innocent person. Consequently the Defamation Act,1952 was passed under which it was established that the publisher of the statement did not intended to publish it concerning the other man, or the words were not defamatory on the face of them and he did not know the circumstances under which they were understood to be defamatory. He would not be liable. Ordinarily there cannot be a defamation of a class of persons. If a person says: 'lawyers are liers' or 'all doctors are incompetent', no lawyer or doctor can sue for defamation unless he shows that these words were in reference to him.

In *Knupffer v. London Express Newspaper Ltd.,* Lord Atkin observed, "There can be no law that a defamatory statement made of a firm, or trustee, or the tenants of a particular building, is not actionable, if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. The reason as to why a libel published of a large or indeterminate number of persons described

by some general name fails to be actionable, is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement."

(c) Publication: No defamation will be constituted unless defamatory statement or material is published. Publication does not mean publication in press or by leaflets. If it is brought to the notice or knowledge of persons or even to a single person other than the defamed person, amounts to publication.

If a defamatory matter enclosed in an envelope is not publication. Dictating a defamatory letter to stenographer or typist is publication, but not to the private secretary. If a third person opens the letter not meant for him wrongly, for instance father reads the latter meant for his son or servant reads letter meant for his master, there is no publication. But if defamatory letter is written on a post card or telegram, it will amount to communication of defamation, irrespective of the fact whether someone has read it or not. If a letter is written in a language which the defamer does not understand and, therefore has to be read by someone else, it amounts to communication. If one spouse writes a defamatory letter to the other, there is no defamation, as there is no publication.

In *T.J. Ponnam v. M.C. Verghese*, the husband wrote number of defamatory letters to his wife about his father-in-law. The wife passed on these letters to his father. The father-in-law sued for defamation. The husband claimed privilege, under section 122, Indian Evidence Act. The Supreme Court took the view that if such letters fall into the hands of the defamed person, he can prove them in any other manner and if proved, the action for defamation will lie. If a third person writes a defamatory letter about one spouse to the other in such a manner that the former is most likely to read it, there is sufficient communication.

Defences to Defamation

1. Justification or truth

2. Fair comment

3. Privilege

1. **Justification or truth**

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

2. **Fair Comment**

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

The essentials of this defence are; a. It must be a comment, i.e. expression of opinion b. Comment must be fair c. Comment must be in public interest Comment and statement of facts are different. Comment is an expression of opinion on certain facts and circumstances, and not statement of fact.

For instance, after reading A's book, B says 'it is a foolish book.' 'It is an indecent book.' ''A' must be a man of impure mind.' These are comments. But if he says, 'I am not surprised that A's book is foolish and indecent and he is weak and of impure mind.' In former case, it is a comment and in the latter case, it is a statement of fact. Since comments are always made on facts, it is necessary that facts commented upon should be generally known or the commentator should make them known before comments upon them. A says 'B is guilty of breach of trust.' This is a statement of fact and must be true. A then adds, 'B is, therefore, a dishonest man.' This is a comment. But if audience or public do not know the fact that B has been convicted for breach of trust, the latter statement will be statement of fact. Comment should be fair. No comment can be fair which is based on untrue facts. Thus, when

commenting on play, it was stated that, ‘play potrays vulgarity as it contents a scene of rape’, while in fact there is no such scene, the comment is not fair.

3. Privilege

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

TRESPASS TO THE PERSON

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

Assault

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

Battery

If the physical contact that is apprehended in an assault actually takes place, then the tort of battery has been committed. It is not necessary for the physical contact to cause any injury or permanent damage to the victim, or even be intended to do so. The only intention required is that of making physical contact.It is also not necessary

for the tortfeasor, that is, the wrongdoer, to actually touch the victim, so battery may be committed by throwing stones at someone or spitting on them.

False Imprisonment

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

Defences to Trespass to the Person

1. Consent

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

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

2. Necessity

A wrongdoer may have a successful defence if they can show that it was necessary to act in the way they did. In other words, there must be a sound justification for breaking the law. A person who grabs another and drags them by force from the path of an oncoming vehicle, and who by doing so prevents them from serious injury or

death, is not liable in tort. Similarly, a doctor who performs emergency surgery on an unconscious patient, who naturally cannot consent, in order to save their life, may successfully argue that the battery was necessary if the surgery performed was limited to that which was required to save the patient's life.

3. Self-Defence

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

4. In Defence of Others

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

5. Defence for False Imprisonment

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

Malicious Prosecution

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

Essentials:

i. The proceedings were instituted without any probable or reasonable cause
ii. Proceedings were filed maliciously and not to book a criminal in a court of law/not with a mere intention of carrying the law into effect

iii. Termination of Proceedings in favour of the Plaintiff

iv. As a result of such prosecution, the plaintiff has suffered damage.

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

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

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

There is a reasonable and probable cause when one has sufficient ground for thinking that the other person has committed the offence. In Abrath v. N.E.Railway Co.,one 'M' had recovered compensation for his injury in a railway collision from the railway Co. Latter on the railway Co. came to know that those injuries were not suffered in the collision but were artificially created by him in collision with one doctor 'P'. The railway Co. made inquiries and on legal advice sued P for conspiring with M to defraud the railway Co. 'P' was acquitted and he filed an action for malicious prosecution against the railway. It was held that railway Co. had reasonable and probable cause.

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

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

UNIT-V

THE CONSUMER PROTECTION ACT, 2019

INTRODUCTION

Mahatama Gandhi once said that "A customer is the most important visitor on our premises. He is not dependent on us. We are dependent on him. He is not an interruption in our work. He is the purpose of it. He is not an outsider in our business. He is part of it. We are not doing him a favour by serving him. He is doing us a favour by giving us an opportunity to do so". The digital age has ushered and immensely grown in a fresh new era of e-commerce and brought new customer expectations. The digital age has brought easy access, increased choices and time saving modes of shopping for the consumers.

Due to the spurt of digitalization, the old Act possessed certain challenges and needed immediate attention. But the time has come where consumers can witness and cherish the new Consumer Protection Act, 2019 (hereafter referred as 2019 Act) that has recently replaced the three-decade old Consumer Protection Act, 1986 hereafter referred as the 1986 Act. The historical day was 6 August 2019 when the government passed the landmark Consumer Protection Act, 2019.

In ordinary language the term 'consumer' means 'one who consumes' something. We are all consumers from birth to death. In fact, even before we are born, we are consumers. We consume air, water, food and many other things.

Many terms in ordinary language have a special meaning in law. Especially in statutes, terms are defined to give them special meanings. Such special meanings are applicable to those terms in that statute, unless the context in which the term is used requires a different meaning to be attributed to that term.

Under Consumer Protection Act, 2019 terms consumer, defect, deficiency, person, trader, service, etc. are defined. These terms should be, subject to the context, applied in interpretation of the Consumer Protection Act.

For the purpose of the Act, generally, consumer is a person, 1. who purchases goods or avails of services for remuneration; 2. for whose use the goods are

purchased or services are availed; and 3. who uses the goods or services with the consent of the purchaser.

BASIC CONSUMER RIGHTS:

According to the Ministry of Consumer Affairs, Government of India, the following are the basic rights of the Consumers are:

1. Right to Safety;

2. Right to be Informed;

3. Right to Choose;

4. Right to be Heard;

5. Right to Seek Redressal; and

6. Right to Consumer Education.

Further, the definition of consumer rights given under sec. 2(9) of the Consumer Protection Act, 2019 also mentions the same six rights. It is pertinent to note that the definition under sec. 2(9) is not an exhaustive definition, but an inclusive definition. Therefore, the rights mentioned in that sub-section are not the only rights of consumers under the Act.

SALIENT FEATURES OF THE CONSUMER PROTECTION ACT, 2019

1. It aims at providing overall (holistic) protection to the consumers, eve better than the protection provided by the 1986 Act.
2. The Act is applicable to entire India, except for the state of Jammu and Kashmir.
3. The Act is applicable to all goods and services, unless explicitly stated by the Central Government. The Act excludes free services and contracts of personal services.
4. The 2019 Act expressly includes e-Commerce transactions and makes special provisions in respect of the same.
5. The Act has a comprehensive definition of services. The considers services of any description rendered or offered by any individual or organization.

6. The Act covers both public and private sector suppliers of goods and services, including the government agencies.
7. The 2019 Act has introduced the concept of product liability and brings within its scope, the product manufacturer, product service provider and product seller, for any claim for compensation.
8. The Act provides redressal of consumer grievances in a simple and inexpensive way. The Act provides for a simple procedure for filing grievances. The complaint can be made in a simple form, where the name and address of aggrieved party and opposing party are duly mentioned. The complaint can be written in form of a letter to the Redressal Forum. It is not obligatory for the parties to engage advocate. The Act allows the complainant or authorized agent to appear before the Redressal Forum. The 2019 Act provides for e-filing of complaints, which makes it very convenient especially to the consumers who are busy. Earlier, due to paucity of time many consumers did not approach the consumer fora.
9. The most important aspect of the Act is that it has a set time frame for settlement.
10. Consumers having common interests and grievances can collectively file complaint, under 'class action' provided under the Act.
11. The 2019 Act provides for mediation as an Alternate Dispute Resolution mechanism, making the process of dispute adjudication simpler and quicker. This will help with the speedier resolution of disputes and reduce pressure on consumer courts, who already have numerous cases pending before them.
12. The Act provides for formation of Consumer Protection Councils to promote the consumer protection and consumer rights. It is important to note that these councils do not have any legal authority under the Act and merely facilitate addressable of consumer grievances.
13. Therefore, the new Act proposes the establishment of a regulatory authority known as the Central Consumer Protection Authority (CCPA), with wide powers of enforcement. The CCPA will have an investigation wing, headed by a Director-General, which may conduct inquiry or investigation into consumer law violations.
14. The Act protects consumer against defective and hazardous goods, deficient and inappropriate services, and restrictive trade practices and unfair trade practices like hoarding, black marketing, insider trading, monopolies etc.
15. The Act covers restrictive trade practices.

16. The Act covers unfair trade practices like food adulteration, overcharging or short weighing on fixed price items and packaged commodities etc. Such grievances can be directly taken to District Forums directly. The new act has widened the definition of unfair trade practices, by including sharing of personal information given by the consumer in confidence, unless such disclosure is made in accordance with the provisions of any other law.
17. The 2019 Act also makes provisions against misleading advertisements. It also impose liabilities on the persons who endorse misleading advertisements, such as brand ambassadors.
18. The new Act introduces penal liabilities.
19. The Act is considered as a progressive instance of social welfare legislation. The Act has fortified consumer movement in India. The Act is one of its kinds, as it pertains to market and seeks redressal of complaints arising out the market interactions.
20. The Act is customer-oriented and safeguards the interests of the consumers against unjust and exploitative business practices like selling of defective goods, rendering poor services etc.

CONSUMER

The term 'consumer' is defined under sec. 2(7) of the Consumer Protection Act, 2019. Consumer may be consumer of goods or consumer of services. Sec. 2(7)(i) defines consumer of goods while sec. 2(7)(ii) defines consumer of services.

Explanation (b) to sec. 2(7) clarifies that the expressions 'buys any goods' and 'hires or avails any services' include offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing.

CONSUMER OF GOODS [SEC. 2(7)(i)]

Consumer of goods is basically a buyer of goods for his own use or for the use of some other person. A person who buys goods for resale or for commercial purpose is not a consumer.

According to Sec. 2(7)(i) 'consumer of goods' means any person who buys any goods for a consideration. As the expression 'buys' is used, the transaction becomes 'sale', and the consideration means 'price'.

The consideration, i.e., price may have been paid or promised or partly paid and partly promised, or under any system of deferred payment.

Any user of such goods other than the person who buys such goods is also a consumer for the purpose of the Act, if such use is made with the approval of the buyer of those goods.

However, a person who obtains such goods for resale or for any commercial purpose is not a consumer.

GOODS [SEC. 2(21)]

The term 'goods' is defined in sec. 2(11) of the Consumer Protection Act, 2019 to mean goods as under: 'Goods' means every kind of movable property and includes 'food' as defined in clause (j) of sub-section (1) of section 3 of the Food Safety and Standards Act, 2006.

Sec. 2(7) of the Sale of Goods Act defines 'goods' as every kind of movable property other than actionable claims and money. Moveable property, according to sec. 2(7) of the Sale of Goods Act, 1930, includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Any property which is not immoveable property is moveable property.

According to this definition,1. 'Goods' means moveable property. 2. Things attached to earth may be goods if they are to be severed from earth before sale. 3. Actionable claims and money are not goods.

Sec. 3(1)(j) "Food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;

Sec. 3(1)(zk) "primary food" means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its

natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman;

CONSUMER OF GOODS

The provision reveals that a person claiming himself as a consumer of goods should satisfy that 1. He is (a) the buyer of the goods for consideration; or (b) the user of the goods with the approval of the buyer; and

2. He has not bought the goods for 'resale' or for 'commercial purpose'.

Buyer of Goods for Consideration

For the application of the Act, the following conditions must be satisfied:

1. There must be a sale transaction between a seller and a buyer.
2. The sale must be of goods
3. The buying of goods must be for consideration.

The terms sale, goods, and consideration have not been defined in the Consumer Protection Act.

The meaning of the terms 'sale', and 'goods' is to be construed according to the Sale of Goods Act, and the meaning of the term 'consideration' is to be construed according to the Indian Contract Act.

User of the Goods with the Approval of the Buyer

When a person buys goods, they may be used by his family members, relatives and friends. Any person who is making actual use of the goods may come across the defects in goods. Thus the law construe users of the goods as consumers although they may not be buyers at the same time. The words "....with the approval of the buyer" in the definition denotes that the user of the goods should be a rightful user.

Dinesh Bhagat vs. Bajaj Auto Ltd.

A purchased a scooter which was in B's possession from the date of purchase. B was using it and taking it to the seller for repairs and service from time to time. Later on B had a complaint regarding the scooter. He sued the seller.

The seller contended that since B did not buy the scooter, he was not a consumer under the Act.

The Delhi State Commission held that B, the Complainant was using it with the approval of A, the buyer, and therefore he was consumer under the Act. This is an exception to the rule of privity of contract, i.e., general rule of law that a stranger to a contract cannot sue.

Purchaser of Goods for 'Resale' or Commercial Purposes'

The term 'for resale' implies that the goods are brought for the purpose of selling them, and the expression 'for commercial purpose' is intended to cover cases other than those of resale of goods. When goods are bought to resell or commercially exploit them, such buyer or user is not a consumer under the Act.

Purchaser of Goods for Self Employment

According to Explanation (a) to sec. 2(7), when goods are bought for commercial purposes and such purchase satisfies the following criteria, then such use would not be termed as use for commercial purposes under the Act, and the user is recognized as a consumer.

1. The goods are used by the buyer himself
2. The use is exclusively for the purpose of earning his livelihood. 3. The earning is by means of self-employment.

Examples

1. A buys a truck for plying it as a public carrier by himself, A is a consumer.
2. A buys a truck and hires a driver to ply it, A is not a consumer.
3. A has one cloth shop. He starts another business of a photocopier and buys a photocopy machine therefor. He hasn't bought this machine exclusively for the purpose of earning livelihood. He is not a consumer under the Act.

CONSUMER OF SERVICES [SEC. 2(d)(ii)]

Consumer of services is basically a person who hires or avails of any service for his own benefit or for the benefit of some other person. A person who hires or avails of services for any commercial purpose is not a consumer.

According to sec. 2(7)(ii) 'consumer of service' means any person who hires or avails of any service for a consideration.

The consideration may have been paid or promised or partly paid and partly promised, or under any system of deferred payment.

Any beneficiary of such service other than the person who hires or avails of the services is also a consumer for the purpose of the Act, if such use is made with the approval of the person who has hired or availed of such service. However, a person who hires or avails of such service for any commercial purpose is not a consumer.

SERVICE [SEC. 2(42)]

The definition provides a list of eleven sectors to which service may pertain in order to come under the purview of the Act .

The list of these sectors is not an exhaustive one. Service may be of any description and pertain to any sector if it satisfy the following criteria:

1. Service is made available to the potential users, i.e., service not only to the actual users but also to those who are capable of using it.
2. It should not be free of charge, e.g., the medical service rendered free of charge in Government hospital is not a service under the Act;
3. It should not be under a contract of personal service.

The term 'service' is used under the Consumer Protection Act to mean a regular commercial transaction. Thus the services rendered under the contract of personal service are specifically excluded from the definition.

The term 'contract of personal service' is not defined under the Act. In common usage, it means 'a contract to render service in a private capacity to an individual'. For example, where a servant enters into an agreement with a master for employment, or where a landlord agrees to supply water to his tenant, these are the contracts of personal service.

The idea is that under a personal service relationship, a person can discontinue the service at any time according to his will, he need not approach Consumer Forum to complaint about deficiency in service.

There is a difference between 'contract of personal service' and 'contract for personal service'. In case of 'contract of personal service', the service seeker can order or require what is to be done and how it should be done. Like a master can tell his servant to bring goods from a particular place. But in a 'contract for personal service', the service seeker can tell only what is to be done. How the work will be done is at the wish of the performer. Like when a person gives a suit to the tailor for stitching, he does not tell him which method he should use to stitch it. A 'contract of

personal service' is excluded from the definition of service, a 'contract for personal service' is recognised as service under the Act.

It does not make a difference whether the service provider is a Government body or a Private body. Thus even if a statutory corporation provides a deficient service, it can be made liable under the Act. Example: A applied for electricity connection for his flour mill to Rajasthan State Electricity Board. The Board delayed in releasing the connection. It was held deficient in performing service. Thus, the test is whether the person against whom the complaint is made performs a service for consideration which is sought by a potential user.

'CONSUMER' OF SERVICE'

A person is a consumer of services if he satisfy the following criteria:

1. He has (a) hired or availed of service for remuneration, or (b) taken benefit of the service with the approval of the person hiring it, and
2. He has not hired or availed of the service for 'commercial purpose'.

Person Who Hires or Avails of Services is a Consumer of Services

The purchase of goods naturally involves payment of price as a consideration for the sale of the goods. Hiring or availing of services should also be for some sort of remuneration. The rendering of any service free of charge or under a contract of personal service is excluded from the definition of 'service' for the purpose of the Act. In other words, only if the sale of goods or provision of services is for some consideration, the Act is applicable.

The term 'hired' has not been defined under the Act. Its Dictionary meaning is 'to procure the use of services at a price'. It appears that the difference between 'hiring' a service and 'availing of' a service is that in case of hiring, the service is given as per the requirement of the consumer, whereas in case of availing of service, the consumer makes use of the service which is available if it suits his requirement. Thus, one hires an auto rickshaw to go to the desired destination, but he avails of the city bus service if the city bus takes him to the destination of his desire.

What constitutes hiring has been an issue to be dealt with in many consumer disputes. If it is established that a particular act constitutes hiring of service, the transaction falls within the net of the Consumer Protection Act.

Example- A passenger getting railway reservation after payment is hiring service for consideration.

Smt. Laxmiben Laxmichand Shah vs. Smt. Sakerben Kanji Chandan

A landlord neglected and refused to provide the agreed amenities to his tenant. He filed a complaint against the landlord under the Consumer Protection Act. The National Commission dismissed the complaint saying that it was a case of lease of immovable property and not of hiring services of the landlord.

Beneficiary of Services with the Approval of Person Hiring or Availing Thereof

When a person hires services, he may hire it for himself or for any other person. In such cases the beneficiary (or user) of these services is also a consumer.

Example: A takes his son B to a doctor for his treatment. Here A is hirer of services of the doctor and B is beneficiary of these services. For the purpose of the Act, both A and B are consumers.

This is an exception to the rule of privity to the contract.

Person Hiring or Availing of the Service for Commercial Purpose

In case of goods, buyer of goods for commercial purpose ceased to be a consumer under the Consumer Protection Act, 1986. However, a consumer of service for commercial purpose remained a consumer under the Act as it was originally enacted.

Shamsher Khan vs. Rajasthan State Electricity Board

S applied to Electricity Board for electricity connection for a flour mill. There was a delay in releasing the connection. S was held a consumer under the Act.

Later, the Consumer Protection Act, 1986 was amended in 2002 to exclude a consumer of service for commercial purpose. Accordingly, now a consumer of service for commercial purpose is not a consumer in the same way as as consumer of goods. The same is the position under the Act of 2019.

CONSIDERATION [SEC. 2(d), INDIAN CONTRACT ACT]

The term 'consideration' is not defined in the Act, and the definition under sec. 2(d) of the Indian Contract Act, 1872 is applicable to the Consumer Protection Act.

Sec. 2(d) of the Indian Contract Act, 1872 defines 'consideration' in the following terms:

"When at the desire of the promisor, promisee or any other person has done or abstained or, does or abstains or promises to do or to abstain from doing something such act, abstinence or promise is called consideration for the promise."

Sec. 2(d) of the Indian Contract Act, 1872 read with Sec. 2(1)(d) of the Consumer Protection Act, 1986 provides that consideration may be one which has been

1. paid; 2. promised; 3. partly paid and partly promised; or 4. may be under any system of deferred payment.

CONSIDERATION MUST BE PAID OR PAYABLE

Consideration is regarded necessary for hiring or availing of services. However, its payment need not necessarily be immediate. It may be in instalments. For the services provided without charging anything in return, the person availing the services is not a consumer under the Act.

Examples

1. A hires an advocate to institute a suit. He promises to pay fee to the advocate after settlement of the suit. A is a consumer under the Act.
2. A goes to a Doctor for treatment. The Doctor being his friend gives him free treatment. A is not a consumer under the Act.

Byford vs. S. S. Srivastava

B issued an advertisement that a person could enter the contest by booking a Premier Padmini car. S purchased the car and thus entered the contest. He was declared as winner of the draw and was thus entitled to the two tickets from New Delhi to New York and back. S filed a complaint alleging that the ticket was not delivered to him.

The National Commission held that S was not a consumer in this context. He paid for the car and got it. B was not liable so far as the contract of winning a lottery was concerned.

The Direct and Indirect taxes paid to the State by a citizen is not payment for the services rendered.

Mayor, Calcutta Municipal Corporation vs. Tarapada Chatterjee

T was paying property tax for his house to the local corporation. This corporation was responsible for proper water supply to the premises under its work area. T raised a consumer dispute over the inadequacy of water supply by the corporation.

The National Commission held that it was not a consumer dispute as water supply was made by the corporation out of its statutory duty and not by virtue of payment of taxes by T.

CONSUMER PROTECTION COUNCILS

Chapter II of the Consumer Protection Act consisting of sections 3 to 9 provides for the establishment of Consumer Protection Councils for advice on protection and promotion of consumer rights under the Consumer Protection Act, 2019. Sec. 2(9) of the Consumer Protection Act, 2019 lists six rights as consumer rights.

Consumer Protection Councils are at three levels.

1. Central Consumer Protection Council;
2. State Consumer Protection Council; and
3. District Consumer Protection Council.

THE CENTRAL CONSUMER PROTECTION COUNCIL [SECS. 3-5]

ESTABLISHMENT AND CONSTITUTION OF THE CENTRAL COUNCIL [S. 3]

Under sec. 3(1) the Central Government shall establish the Central Consumer Council by issuing a notification.

Sec. 3(2) provides for the constitution of the Central Council. Accordingly, the Council shall consist of the following members, namely,

(a) the Minister in charge of consumer affairs in the Central Government, who shall be its Chairman, and

(b) such number of other official or non-official members representing such interests as may be prescribed.

MEETINGS OF THE CENTRAL COUNCIL [S. 4]

Sec. 4(1) provides that the Central Council shall meet at least once in a year. Apart from that mandatory meeting, the Council may meet as and when necessary.

The time and place of the meeting shall be decided by the Chairman.

The Council shall observe such procedure in regard to the transaction of the business at the meeting as may be prescribed by the Rules.

OBJECTS OF THE CENTRAL COUNCIL [S. 5]

The objects of the Central Council shall be to render advice on promotion and protection of the consumers' rights under this Act.

THE STATE CONSUMER PROTECTION COUNCILS [SEC. 6-7]

ESTABLISHMENT AND CONSTITUTION OF THE STATE COUNCILS [S. 6]

Under sec. 6(1) every state Government shall establish a State Consumer Council by issuing a notification. Thus, Karnataka State Government shall establish the Karnataka State Consumer Protection Council.

Sec. 6(2) provides for the constitution of the State Councils. Accordingly, the Councils shall consist of the following members, namely,

(a) the Minister-in-charge of consumer affairs in the State Government who shall be its Chairman;

(b) such number of other official or non-official members representing such interests as may be prescribed by the Rules;

(c) such number of other official or non-official members, not exceeding ten, as may be nominated by the Central Government.

MEETINGS OF THE STATE COUNCILS [S. 6]

Sec. 6(3) provides that the State Councils shall meet at least twice a year. Apart from those mandatory meetings, the Councils may meet as and when necessary.

The time and place of the meeting shall be decided by the Chairman.

The Council shall observe such procedure in regard to the transaction of the business at the meeting as may be prescribed by the Rules.

OBJECTS OF THE STATE COUNCILS [S. 7]

The objects of every District Council shall be to render advice on promotion and protection of consumer rights under this Act within the state.

THE DISTRICT CONSUMER PROTECTION COUNCILS [SEC. 8-9]

ESTABLISHMENT AND CONSTITUTION OF THE DISTRICT COUNCILS [S. 8]

Under sec. 8(1) every state Government shall establish District Consumer Councils for each district in the state, by issuing a notification. The Council shall be known, for example, as the Belagavi District Consumer Protection Council.

Sec. 8(2) provides for the constitution of the District Councils. Accordingly, the Councils shall consist of the following members, namely,

(a) the Collector of the district (in Karnataka Deputy Commissioner), who shall be its Chairman; and

(b) such number of other official and non-official members representing such interests as may be prescribed by the State Government.

MEETINGS OF THE DISTRICT COUNCILS [S. 8]

Sec. 8(3) provides that the District Councils shall meet at least twice a year. Apart from those mandatory meetings, the Councils may meet as and when necessary.

The time and place of the meeting shall be decided by the Chairman.

The Council shall observe such procedure in regard to the transaction of the business at the meeting as may be prescribed by the Rules.

OBJECTS OF THE DISTRICT COUNCILS [S. 9]

The objects of every District Council shall be to render advice on promotion and protection of consumer rights under this Act within the district.

CONSUMER DISPUTE [SEC. 2(8)]

As per sec. 2(8) of the Consumer Protection Act, 2019, 'consumer dispute' means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint.

A reading of sec. 2(6) of the Consumer Protection Act, 2019 which defines 'complaint' reveals that consumer disputes may arise due to the following reasons:

1. (a) unfair contact, (b) unfair trade practice, or (c) restrictive trade practice on the part of the trader;
2. goods being defective;
3. services being deficient;
4. excessive price being charged;
5. failure to inform about risk in case of hazardous goods, etc.
6. providing hazardous services; and
7. a claim of product liability action in favour of the consumer.

The unfair contracts and product liability are the two new grounds added under the Consumer Protection Act, 2019.

In addition to the above providing spurious goods or service may also be ground for a consumer dispute.

SPURIOUS GOODS [SEC. 2(43)] AND SPURIOUS SERVICES

Sec. 2(oo) of the Consumer Protection Act, 1986 defined 'spurious goods and services'. Accordingly, 'spurious goods and services' means such goods and services which are claimed to be genuine but they are actually not so.

Sec. 2(43) of the Consumer Protection Act, 2019 defines only 'spurious goods'. According to it, 'spurious goods' means such goods which are falsely claimed to be genuine.

UNFAIR CONTRACT [SEC. 2(46)]

The definition of 'unfair contract' under sec. 2(46), has two parts. The first part gives the definition of the expression, while the second part gives examples of 'unfair contract'.

According to the first part of sec. 2(46), an unfair contract is a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer.

The second part of sec. 2(46) gives six examples of unfair contracts. This list is not exhaustive. Use of the expression 'includes' makes the list illustrative, and any other similar contract may also be treated by the Consumer Commissions as unfair contract.

UNFAIR TRADE PRACTICE (UTP) [SEC. 2(47)]

Sec. 2(47) of the Consumer Protection Act, 2019 defines UTP in two parts. The first part of the definition defines UTP in general terms, while the second part gives a list of nine practices which are UTPs as against five practices mentioned under sec. 2(1)(r) of the Consumer Protection Act, 1986. This list is also illustrative.

According to the first part of sec. 2(47), "unfair trade practice" means "a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice."

RESTRICTIVE TRADE PRACTICE (RTP) [SEC. 2(41)]

Definition of 'restrictive trade practice' under sec. 2(41) also has two parts – definition and illustrations.

Section 2(41) of the Consumer Protection Act, 2019 provides, that "restrictive trade practice" means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions.

Second part of sec. 2(41) gives two examples of restrictive trade practice:

1. Delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;

2. Any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent for buying, hiring or availing of other goods or services.

The first example is where the consumer has to pay -

1. the price of goods as on the date of delivery, or

2. remuneration for service as on the date on which the service is provided, and because of the delay on the part of the trader, there is a rise in the price or remuneration.

The second example is called 'bundling' of goods or services. That means unless some goods are purchased, the buyer cannot buy some other goods. Similarly, unless some service is not taken the consumer cannot get some other service. Bundling imposes upon the consumer some goods or service, which he does not need, or in which he is not interested.

DEFECTIVE GOODS [SEC. 2(1)(10)]

A consumer can make complaint when he come across defective goods, i.e., whenever there is a defect in the goods bought by him.

According to sec. 2(10), 'defect' means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression 'defective' shall be construed accordingly.

This is definition is exhaustive. It means that the Act recognises only those defects which are covered by the definition. Any type of defect not mentioned here will not be entertained by Consumer Commissions.

Reading the above definition by breaking it into elements, we get—

1. "Defect" means (a) any fault, imperfection, shortcoming (b) in the quality, quantity, potency, purity of the goods.
2. Such quality etc. of the goods should have been
   (a) required to be maintained
      (i) by or under any law for the time being in force, or
      (ii) under any express or implied contract between the parties
   (b) claimed by the trader.
3. The defect has to be in relation to goods only, i.e., if an item does not fall within the definition of 'goods', no defect can be complained therein. However, the coverage of this definition is very wide.

Example: A sold a stolen car to B. B wanted to sue A for defect in the title of the car. Here B cannot sue A under the Consumer Protection Act as the defect in title of goods would not constitute defective goods as defined under the Act.

T. T. (Pvt.) Ltd. vs. Akhil Bhartiya Grahak Panchayat II

A Pressure Cooker burst and caused injury to the user. It was held to be a manufacturing defect.

Ramesh Chandra vs. Commercial Tax Officer

Failure to handover registration book along with jeep purchased by complainant is a defect.

Narayanan Vyankatkrishnan Iyengar vs. Shakti Foods

Where laboratory test report showed that soft drink was not fit for human consumption, it was held defective.

Farooq Hazi Ismail Saya vs. Gavabhai Bhesania

Electric household appliances which are not in accordance with the standards prescribed by ISI, being unsafe are defective.

Chitranjan Sahu vs. N. C. Jain II

A supplied white marble to B. Later on the colour of the marble changed. B sued A alleging supply of defective marble. It was held that A should have expressly told B that the marble would not retain its colour when polished. In the absence of such

assertion, it is deemed that A made B to understand that the marble would retain its white colour and when the colour changed, it comes within the scope of 'defect' in goods under the Act.

DEFICIENCY IN SERVICES [SEC. 2(11)]

When a service is found deficient by a consumer, he can make a complaint under the Act. The prime requirement is that the matter must fall within the definition of service, and it must entail a deficiency as per the norms given by the Act.

Sec. 2(11) of the Act provides that, "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

Under the Consumer Protection Act, 2019, two instances of deficiency in service are given:

1. any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and
2. deliberate withholding of relevant information by such person to the consumer;

Reading the above definition by breaking it into elements, we get—

1. "Deficiency" means (a) any fault, imperfection, shortcoming or inadequacy (b) in the quality, nature and manner of performance.

Example : A booked a car for B and promised to deliver it within one month of booking. The car was not delivered even after four months. Here A could be held liable for deficiency in service.

General Manager, South Eastern Railway vs. Anand Prasad Sinha I

A boarded a train. The compartment in which he and his wife travelled was in a bad shape. Fans not working, shutters of windows were not working, rexin of the upper berth was badly torn and there were rusty nails which caused some injuries to the wife of A. A made a complaint against the railway department. It was held that the complaint constituted 'deficiency in service' and the compensation of Rs. 1500 was awarded to A.

Poonam Verma vs. Ashwin Patel Dr.

A treated P under Allopathic system, though he himself was a Homoeopathic practitioner. Later on P allegated A for wrong treatment. The Commission held it as deficiency in service.

One interesting aspect is that deficiency in service should occur during the happening of performance. Thus it is crucial to determine when the performance of a service commenced.

Jaipur Metals & Electricals Ltd. vs. Laxmi Industries

A contracted with B to supply, erect and commission cold rolling mill. A supplied the mill, but failed to erect and commission the mill. B filed a suit alleging deficiency of service on A's failure to elect and commission the mill.

The National Commission observed that the deficiency must pertain to performance of service. Since A never started erecting and commissioning the mill, the question of performance did not arise. Thus the case is not that of deficiency of service.

2. Such quality and manner of performance of service should have been
(a) required to be maintained by or under any law for the time being in force, or
(b) undertaken to be performed by a person in pursuance of a contract or otherwise.

Lata Construction vs. Dr. Rameshchandra Ramniklal Shah

A, the builder, promised under written agreement to provide a flat to B. Subsequently he expressed his inability to give possession of the flat and entered into a fresh agreement to pay Rs. 9,51,000 to B in place of flat. A didn't even pay this money. B lodged a complaint against A.

The Commission held that since A had not even paid the money as per subsequent contract, the rights of earlier contract can be invoked by B. And that there was a deficiency of service on the part of builders.

3. The deficiency must be in relation to a service – The words '....in relation to any service' in the definition signifies that the deficiency is always in terms of service. Thus if the grievance pertains to a matter which does not fall in the definition of service', the concept of deficiency would not apply.

Mangilal vs. Chairman District Rural Development Agency

A deposited Rs. 100 with B as application fee and executed bond for the purpose of drilling tube well. B did not drill the tube well because it was not feasible. A alleged deficiency in service. It was held that depositing Rs. 100 as application fee and executing a bond does not amount to hiring of services, thus the deficiency of service cannot be complained of in the matter.

DEFICIENCY DUE TO CIRCUMSTANCES BEYOND CONTROL

In normal course, if the service is found deficient as per the above criteria, it is held deficient and the compensation is awarded. However there may be abnormal circumstances beyond the control of the person performing service. If such circumstances prevent a person from rendering service of the desired quality, nature and the manner, such person should not be penalised for the same.

Example : A undertook to supply water to B for irrigation of crops. Due to power grid failure of the State, A could not get sufficient power to perform the service. Here A cannot be held liable for deficiency in service.

However, negligence on the part of performer may not be excused under the cover of circumstances beyond control.

Orissa Lift Irrigation Corpn. Ltd. vs. Birakishore Raut

A agreed to supply water to B for irrigation of crops. He failed to do so because of a power breakdown due to burning of transformer. As a result crops damaged. B lodged a complaint against A for providing deficient service.

The National Commission held that it was duty of A to get the transformer repaired immediately. Since he was negligent in doing so, he is liable for the deficiency in service.

CHARGING EXCESSIVE PRICE

A complaint may be made against a trader who has charged a price in excess of the price:

1. fixed by or under any law for the time being in force, or
2. displayed on the goods, or
3. displayed on any package containing the goods.

Examples

1. Government fixed control rate of milk at Rs. 15 per litre in the month of June 2001. A sold it at the rate of Rs. 18 per litre in the same period. Price charged by A are excessive.
2. The price displayed on a one Kg. packet of salt was Rs. 4. Suddenly there was paucity of salt in the market. A started selling the same @ Rs. 6 per kg. The price charged by A is excessive.

It may be noted that when price of an article is not fixed by law, or when the same is not displayed on goods or on the package containing goods, no complaint can be made under the Act for excess pricing.

FAILURE TO INFORM ABOUT RISK IN CASE OF HAZARDOUS GOODS

The term 'hazardous goods' has not been defined in the Act. Dictionary meaning of the term is 'dangerous or risky'. The term is used in context of 'goods' only, i.e., a person can make a complaint if he is not informed about the hazardous nature of the goods but the same is not true in case of hazardous services.

The rationale behind this provision is to ensure physical safety of the consumers. The law seeks to ensure that those responsible for bringing goods to the market, in particular, suppliers, exporters, importers, retailers and the like should ensure that while in their care these goods are not rendered unsafe through improper handling or storage.

Consumers should be instructed in the proper use of goods and should be informed of the risks involved in intended or normally foreseeable use. Vital safety information should be conveyed to consumers.

Example A bought an insecticide from B. B did not inform A that touching this insecticide with bare hands can create skin problem. A, while using the insecticide came in contact with it and suffered from skin problem consequently. Here B can be held liable under the Act.

PROVISION OF HAZARDOUS SERVICES

Where the services which are hazardous or likely to be hazardous to life and safety of the public when used, are offered by a person who

1. provides any service, and

2. knows it to be injurious to life and safety, it is ground for a consumer dispute under the Consumer Protection Act, 2019.

CLAIM OF PRODUCT LIABILITY

Where a claim for product liability action lies against the product manufacturer, product seller or product service provider, as the case may be, it amounts to a consumer dispute.

According to sec. 2(34), 'product liability' means the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto.

According to sec. 2(35) 'product liability action' means a complaint filed by a person before a district commission or state commission or national commission, as the case may be, for claiming compensation for the harm caused to him.

UNFAIR TRADE PRACTICE

An unfair trade practice means a trade practice, which, for the purpose of promoting any sale, use or supply of any goods or services, adopts unfair method, or unfair or deceptive practice. Unfair practices may be categorized as under:

1. False Representation;
2. False Offer of Bargain Price;
3. Free Gifts Offer and Prize Schemes;
4. Non-Compliance of Prescribed Standards;
5. Hoarding, Destruction, etc.
6. Manufacturing Spurious Goods
7. Not Issuing Bill, etc.
8. Refusing to Withdraw Defective Goods or to Discontinue Deficient Service; and
9. Compromising Confidential Personal Information of the Consumer.

The first six were covered by the Consumer Protection Act, 1986. The last three are added by the Consumer Protection Act, 2019.

1. FALSE REPRESENTATION

The practice of making any oral or written statement or representation which:

1. Falsely suggests that the goods are of a particular standard quality, quantity, grade, composition, style or model;
2. Falsely suggests that the services are of a particular standard, quantity or grade;
3. Falsely suggests any re-built, second-hand renovated, reconditioned or old goods as new goods;
4. Represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which they do not have;
5. Represents that the seller or the supplier has a sponsorship or approval or affiliation which he does not have;
6. Makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
7. Gives any warranty or guarantee of the performance, efficacy or length of life of the goods, that is not based on an adequate or proper test;
8. Makes to the public a representation in the form that purports to be- (a) a warranty or guarantee of the goods or services, (b) a promise to replace, maintain or repair the goods until it has achieved a specified result, if such representation is materially misleading or there is no reasonable prospect that such warranty, guarantee or promise will be fulfilled.
9. Materially misleads about the prices at which such goods or services are available in the market; or
10. Gives false or misleading facts disparaging the goods, services or trade of another person.

    Such false statement may be –

    (a) expressed on an article offered or displayed for sale, or on its wrapper or container; or

    (b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or

    (c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public.

2. FALSE OFFER OF BARGAIN PRICE

Where an advertisement is published in a newspaper or otherwise, whereby goods or services are offered at a bargain price when in fact there is no intention that the same may be offered at that price, for a reasonable period or reasonable quantity, it shall amount to an unfair trade practice.

The 'bargain price', for this purpose means,

1. the price stated in the advertisement in such manner as suggests that it is lesser than the ordinary price, or
2. the price which any person coming across the advertisement would believe to be better than the price at which such goods are ordinarily sold.

3. FREE GIFTS OFFER AND PRIZE SCHEMES

The unfair trade practices under this category are:

1. Offering any gifts, prizes or other items along with the goods when the real intention is different, or
2. Creating impression that something is being offered free alongwith the goods, when in fact the price is wholly or partly covered by the price of the article sold, or
3. Offering some prizes to the buyers by the conduct of any contest, lottery or game of chance or skill, with real intention to promote sales or business.
4. Withholding the information about final results of the scheme from the participants, i.e., results are not published (a) prominently; and (b) within a reasonable time.

4. NON-COMPLIANCE OF PRESCRIBED STANDARDS

Any sale or supply of goods, for use by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by some competent authority, in relation to their performance, composition, contents, design, construction, finishing or packing, as are necessary to prevent or reduce the risk of injury to the person using such goods, shall amount to an unfair trade practice.

5. HOARDING, DESTRUCTION, ETC.

Any practice that permits the hoarding or destruction of goods, or refusal to sell the goods or provide any services, with an intention to raise the cost of those or other similar goods or services, shall be an unfair trade practice.

6. MANUFACTURING SPURIOUS GOODS, ETC.

Sec. 2(43) of the Consumer Protection Act, 2019 defines only 'spurious goods'. According to it, 'spurious goods' means such goods which are falsely claimed to be genuine. Manufacturing spurious goods or offering for spurious for sale is an unfair trade practice under the Consumer Protection Act, 2019. So also, adopting deceptive practices in the provision of services is unfair trade practice.

7. NOT ISSUING BILL, ETC.

Not issuing bill or cash memo or receipt for the goods sold or services rendered in such manner as may be prescribed is unfair trade practice.

8. REFUSING TO WITHDRAW DEFECTIVE GOODS OR REFUSING TO DISCONTINUE DEFICIENT SERVICE

Where the trader has warranted that he will -

1. withdraw the goods sold by him, if the same are found to be defective, or
2. discontinue the service, if found deficient, and has mentioned the time within which the price or remuneration, as the case may be, will be refunded, he has to do so. If no such time is agreed, sec.2(47)(viii) fixes the period at 30 days.

If the trader refuses to withdraw the goods and refund the price, or to discontinue the service and refund the remuneration, he will be liable for unfair trade practice.

9. COMPROMISING CONFIDENTIAL PERSONAL INFORMATION OF THE CONSUMER

Often, the seller of goods or provider of service need sensitive personal information of the consumer as a requirement of the trade, or as a requirement of law. Unless the consumer provides the information, the goods may not be sold to him or service may not be provided to him.

Therefore, the consumer provides his personal information to the trader. The trader is under a legal obligation of keeping such information confidential.

If the trader discloses to or shares that information with some other person without legal permission, he is liable for unfair trade practice.

LIABILITY IN CASE OF CONSUMER DISPUTE

When a person finds any defect in the goods, be it manufacturing defect, or excessive price, or lack of information about hazardous nature, or restrictive or unfair trade practice, he can make a complaint against the trader. Thus it is very important to know who can be termed as a trader under the Act.

TRADER [SEC. 2(45)]

Section 2(45) of the Act says that 'trader' means any person who -

1. sells or distributes any goods for sale and
2. includes the manufacturer thereof, and
3. where such goods are sold or distributed in package form, includes the packer thereof.

Generally speaking 'trader' means any person who carries on a trade. Under the Consumer Protection Act, even a packer has been included in the definition of trader. Packer means one who packs the goods.

Examples

1. A got an agency of 'Indana' products. He sells and distributes these products in North India. He is a trader under the Act.
2. A manufactures combs. He is a trader under the Act.
3. A provide bottles to pack the perfume manufactured by B. Here A is also a trader under the Act.

"Trader" is a wider term which includes a manufacturer also. Sec. 2(24) defines manufacturer.

According to it, 'manufacturer; means a person who—

1. makes any goods or parts thereof;
2. assembles any goods or parts thereof made by others; or
3. puts or causes to be put his own mark on any goods made by any other person;

Examples

1. A Ltd. were into manufacturing of Pressure Cookers. B bought a cooker which burst out while using. B sued A Ltd. for compensation. Here A Ltd. being manufacturer of the cooker is liable for the loss.

2. A Ltd. used to buy components and assemble computers therefrom. They were selling them under the brand name 'Rotal'. B bought a Rotal computer which turned

out to be defective. Here B can hold A Ltd. liable for the loss as they will be considered manufacturer of Rotal computer under the Act.

Namdeo Baijrao Raut vs. Hindustan Lever Ltd.

N bought H-4 Cotton seeds from the market which were labelled as produced and marketed by the Hindustan Levers Ltd. (HLL). N established that the seeds were defective. He lodged a complaint against HLL. HLL contended that it did not manufactured the seeds but had only marketed them, and that some company based in Gujarat produced the same. The Commission held that in this case HLL comes under the third limb of the definition of manufacturer under the Act. Thus it is liable for the loss suffered by N.

It may be noted that where a manufacturer despatches any goods or part thereof to any branch office maintained by him, such branch office shall not be deemed to be the manufacturer even though the parts so despatched to it are assembled at such branch office and are sold or distributed from such branch office.

COMPLAINT [SEC. 2(6)]

An aggrieved consumer seeks redressal under the Act through the instrumentality of complaint. It does not mean that the consumer can complain against his each and every problem. The Act has provided certain grounds on which complaint can be made. Similarly, relief against these complaints can be granted within the set pattern.

According to sec. 2(6) 'complaint' means any allegation in writing, made by a complainant for obtaining any relief provided by or under this Act, that—

1. an unfair contract or unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;

2. the goods bought by him or agreed to be bought by him suffer from one or more defects;

3. the services hired or availed of or agreed to be hired or availed of by him suffer from any deficiency;

4. a trader or a service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price—

(a) fixed by or under any law for the time being in force; or

(b) displayed on the goods or any package containing such goods; or

(c) displayed on the price list exhibited by him by or under any law for the time being in force; or

(d) agreed between the parties;

5. the goods, which are hazardous to life and safety when used, are being offered for sale to the public—

(a) in contravention of standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;

(b) where the trader knows that the goods so offered are unsafe to the public;

6. the services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by a person who provides any service and who knows it to be injurious to life and safety;

7. a claim for product liability action lies against the product manufacturer, product seller or product service provider, as the case may be.

COMPLAINANT [SEC. 2(5) AND SEC. 35]

'Complainant' is a person who lodges a complaint. At the outset it is clear that a person who can be termed as a consumer under the Act can make a complaint. To be specific on this account, following are the persons who can file a complaint under the Act:

1. A consumer. A user of goods or beneficiary of services is included in the definition of 'consumer' and hence, he may independently make a complaint.

2. Any voluntary consumer association registered under any other law for the time being in force;

3. The Central Government or any State Government.

Where the interest of public or larger section of the public is involved, the Governments may make a complaint as their representatives.

4. The Central Consumer Protection Authority

5. One or more consumers, where there are numerous consumers having the same interest.

This is a representative action similar to one under O. VII, R. 8 of the Civil Procedure Code, 1908. The complainants must have a cause of action to make the complaint under the Consumer Protection Act, 2019.

6. Legal representative or legal heir of a deceased consumer.

Initially, the Consumer Protection Act, 1986 did not expressly indicate that the LRs or heirs of a consumer are also included in its scope.

In *Cosmopolitan Hospital vs. Smt. Vasantha P. Nair* ,

It was held that by operation of law, the legal representatives get clothed with the rights, status and personality of the deceased. Thus the expression consumer would include legal representative of the deceased consumer and he could exercise his right for the purpose of enforcing the cause of action which had devolved on him.

So also, in *Joseph Alias Animon vs. Dr. Elizabeth Zachariah*, it was held that a legal heir of the deceased consumer could well maintain a complaint under the Act.

In 2002 by amendment to the Consumer Protection Act, 1986, LRs and legal heirs were included in the definition of 'consumer' to give legislative approval to the above decisions.

7. Parent or legal guardian of a minor consumer.

Apart from the above seven persons, the following three persons may also make a complaint under the Consumer Protection Act, 2019.

1. Husband of the Consumer

Punjab National Bank, Bombay vs. K. B. Shetty

In the Indian conditions, women may be illiterate, educated women may be unaware of their legal rights, thus a husband can file and prosecute complaint under the Consumer Protection Act on behalf of his spouse.

2. A Relative of Consumer

Motibai Dalvi Hospital vs. M. I. Govilkar

When a consumer signs the original complaint, it can be initiated by his/her relative.

3. Insurance Company

New India Assurance Company Ltd. vs. Green Transport Co. II

Where Insurance company pays and settles the claim of the insured and the insured person transfers his rights in the insured goods to the company, it can file a complaint for the loss caused to the insured goods by negligence of goods or service providers.

For example, when loss is caused to such goods because of negligence of transport company, the insurance company can file a claim against the transport company.

LIMITATION [SEC. 69]

Sec. 69 of the Consumer Protection Act, 2019 provides that The District Commission, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

Initially, under the Consumer Protection Act, 1986, there was no provision relating to limitation to make a complaint under that Act. The Consumer Forums were following the Limitation Act, 1963, which says that a suit can be filed within three years after the cause of action arises. Provision relating to limitation was inserted in the Act in 1993.

The point of time when cause of action arises is an important factor in determining the time period available to file a complaint. There are no set rules to decide such time. It depends on the facts and circumstances of each case.

Example

A house was allotted on 1-1-1999. Defects appeared in the house on 10-1-1999. Here the cause of action will arise on 10-1-1999.

It may be noted that these time frames are not absolute limitations. Sec. 69(2) provides for condonation of delay in filing a complaint. If the Consumer Commission is satisfied that there was sufficient cause for not filing the complaint within the prescribed period, it can entertain a complaint beyond limitation time. However, the Commission must record the reasons for condonation of delay.

Mukund Lal Ganguly vs. Dr. Abhijit Ghosh III

A got his eye operated by B in 1989. He got a certificate of blindness on 18th December, 1989. He was still in hope of gaining his sight and went from second operation in 1992 and was discharged on 21-1-1992. He lodged a complaint against

B on 11-1-1994. B opposed on the ground that more than 2 years were over after 18-12-1989, thus the complaint is not maintainable.

The Commission held that here the cause of action for filing the complaint would arose after the second operation when A lost entire hope of recovery. Thus the suit is maintainable.

REMEDIES AVAILABLE [SEC. 39]

A complainant can seek any one or more of the following relief under the Consumer Protection Act, 2019:

1. to remove the defect pointed out by the appropriate laboratory from the goods in question;
2. to replace the goods with new goods of similar description which shall be free from any defect;
3. to return to the complainant the price, or, as the case may be, the charges paid by the complainant along with such interest on such price or charges as may be decided;
4. to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party:

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

5. to pay such amount as may be awarded by it as compensation in a product liability action under Chapter VI;
6. to remove the defects in goods or deficiencies in the services in question;
7. to discontinue the unfair trade practice or restrictive trade practice and not to repeat them;
8. not to offer the hazardous or unsafe goods for sale;
9. to withdraw the hazardous goods from being offered for sale;
10. to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;
11. to pay such sum as may be determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

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

12. to issue corrective advertisement to neutralise the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

13. to provide for adequate costs to parties; and

14. to cease and desist from issuing any misleading advertisement.

COMPLAINTS WHICH CANNOT BE ENTERTAINED

The following complaints cannot be entertained:

1. Complaints on behalf of public
2. Complaints by Unregistered Associations
3. Time-barred complaints
4. Frivolous and vexatious complaints

Complaints on Behalf of Public

A complaint on behalf of the public which consists of unidentifiable consumers cannot be filed under the Act.

Commissioner of Transport vs. Y.R. Grover

A complaint by an individual on behalf of general public is not permitted.

Consumer Education and Research Society, Ahmedabad vs. Indian Airlines Corporation, New Delhi

A complaint was filed on the basis of a newspaper report that passengers travelling by flight No. 1C-401 from Calcutta to Delhi on May 13, 1989 were made to stay at the airport and the flight was delayed by 90 minutes causing great inconvenience to the passengers. It was held that such a general complaint cannot be entertained. No passenger who boarded that plane came forward or authorised the complainant to make the complaint.

Complaints by Unregistered Associations

An unregistered association cannot file a complaint under the Act.

Gulf Trivendrum air Fare Forum vs. Chairman & Managing Director, Air India

The complainant was an association formed in the Gulf and was unregistered in India. It was held that since the petitioner was not a voluntary organization registered under any law in force in India, cannot come within clause (d) of section 2(1) of the Act and hence can't file a complaint.

Time-barred Complaints

A complaint after expiry of limitation period is not permitted. A complaint cannot be filed after the lapse of two years from the date on which the cause of action arise unless the Forum is satisfied about the genuineness of the reason for not filing complaint within the prescribed time.

Frivolous and Vexatious Complaints

Since the Act provides for an inexpensive procedure (Court fees is not charged in consumer complaints under the Act) for filing complaints, there is a possibility that the Act is misused by people for filing vexations claims. To discourage frivolous and vexatious claims, the Act has provided that such complaints will be dismissed and the complainant can be charged with the costs not exceeding Rs. 10,000.

CONSUMER COMMISSIONS

The Consumer Protection Act provides for a 3 tier approach in resolving consumer disputes.

There are three levels of consumer courts —

1.DCDRC: District Consumer Disputes Rederessal Commission (District Commission),

2.SCDRC: State Consumer Disputes Redressal Commission (State Commission),

3.NCDRC: National Consumer Disputes Redressal Commission (National Commission).

District Forum and State Commission are formed by States while the National Commission is formed by the Central Government. These Commissions have not taken away the jurisdiction of the civil courts but have provided an alternative remedy. Sec. 100 provides. "the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force." Thus the jurisdiction of the civil Courts is not affected by the Consumer Protection Act.

DISTRICT COMMISSION [SEC. 28]

The compositions of the District Forum and the State Commission were detailed out by the Consumer Protection Act, 1986. Under the Consumer Protection Act, 2019 most of the things regarding the qualifications, appointment and conditions of service of the Presidents and members of the Consumer Commissions are left to the Central Government, to be prescribed through Rules.

ESTABLISHMENT OF THE DISTRICT COMMISSION [SEC. 28(1)]

Sec. 28(1) provides that every state Government shall establish a District Consumer Disputes Redressal Commission called 'District Commission' for each district in the state. Discretion is also given to the state Governments to establish more than one District Commission for a district, if the state Government finds it necessary. In such cases one will be called the Principal District Commission and the others Additional District Commissions. For example, if a district has three District Commissions, one will be the Principal District Commission, and the others will be I Additional and II Additional District Commissions, respectively.

CONSTITUTION OF THE DISTRICT COMMISSION [SEC. 28(2)]

Sec. 28(2) provides that each District Commission shall consist of—

1. a President; and
2. not less than two and not more than such number of members as may be prescribed, in consultation with the Central Government.

APPOINTMENT AND TENURE OF THE PRESIDENT AND MEMBERS [S. 29]

Sec. 29 provides that the Central Government may, by notification, make rules to provide for

1. the qualifications,
2. method of recruitment,
3. procedure for appointment,
4. term of office,
5. resignation and removal of the President and members of the District Commission.

In pursuance of the powers granted by sec. 29, the Central Government has framed the Consumer Protection (Qualification for Appointment, Method of Recruitment, Procedure of Appointment, Term of Office, Resignation and Removal of the President and Members of the State Commission and District Commission) Rules, 2020.

Qualifications of President and Members [R. 4]

Rule 4 of provides for the qualification and appointment of President and members of the District Commission.

According to sub-Rule (1), the President of the District Commission shall be

1. a sitting judge of a District Court;
2. a former judge of a District Court; or
3. a person qualified to be a judge of District Court.

According to sub-Rule (2), the Member of the District Commission shall be

1. of at least 35 years of age;
2. graduate from a recognised University;
3. having ability, integrity and standing, and
4. having special knowledge and professional experience of not less than fifteen years in consumer affairs, law, public affairs, administration, economics, commerce, industry, finance, management, engineering, technology, public health or medicine.

If the President of the Commission is not a woman, at least one of the members of the Commission shall be a woman.

The object underlying the inclusion of non-judicial members appears to be to impart a balance to the functioning of the District Forum by ensuring that the members are able to understand the economic and social impact of the matters. Further inclusion of woman member ensures that the matters are viewed from a woman's angle also.

Disqualifications for Appointment as President or Member [R. 5]

Rule 5 lays down five circumstances in which a person may not be appointed as President or member of a District Commission. They are, where he

1. has been convicted and sentenced to imprisonment for an offence which involves moral turpitude;
2. has been adjudged to be insolvent;

3. is of unsound mind and stands so declared by a competent Court;

4. has been removed or dismissed from the service of the State Government or Central Government or a body corporate owned or controlled by such Government; or

5. has, in the opinion of the State Government, such financial or other interest as is likely to prejudicially affect his functions as the President or a member.

Method of Recruitment [R. 6]

According to Rule 6, every appointment of the president and members of the District Commission is made by the State Government on the recommendation of a Selection Committee consisting of the following, namely—

1. The Chief Justice of the High Court or a High Court Judge nominated by him — Chairman.

2. Secretary in charge of Consumer Affairs of the State Government — Member.

3. Nominee of the Chief Secretary of the State — Member.

The Secretary in charge of Consumer Affairs of the State Government shall be the convener of the Selection Committee.

Procedure for Appointment [R. 6]

Rule 6 details the procedure for appointment of the President and Members of District Commissions.

The process shall be initiated by the Government

1. at least six months before the vacancy arises (by retirement); or

2. immediately on arising of vacancy

(a) by death, resignation (or removal), or

(b) by creation of a new post.

Sub-Rule (6) requires that an advertisement of a vacancy inviting applications for the posts from eligible candidates shall be published in leading newspapers and circulated in such other manner as the State Government may deem appropriate.

Applications shall be received till the last date mentioned in the advertisement.

The applications so received shall be scrutinised and a list of eligible candidates shall be prepared and the same shall be placed before the Selection Committee.

The Selection Committee shall consider all the applications of eligible applicants referred to it. If it considers necessary, it may shortlist the applicants in accordance with such criteria as it may decide.

The Selection Committee shall determine its procedure for making its recommendation

1. keeping in view the requirements of the District Commission, and
2. after taking into account the candidates'(a) suitability, (b) record of past performance, (c) integrity, and (d) adjudicatory experience.

The Selection committee shall prepare a 'merit list' of the candidates and recommend it for the consideration of the State Government.

The state Government shall verify or cause to be verified the credentials and antecedents of the recommended candidates.

Before appointment, the selected candidate shall furnish

1. a certificate of physical fitness in the form prescribed by the Rules, duly signed by a civil surgeon or District Medical Officer.
2. an undertaking that he does not and will not have any such financial or other interest as is likely to affect prejudicially his functions as a President or member.

Term of Office [R. 10]

Every member of the District Commission is to hold office for a term of 4 years or up to the age of 65 years, whichever is earlier.

He shall be eligible for re-appointment for one more term of 4 years subject to the age limit of 65 years. Such reappointment is made on the basis of the recommendation of the Selection Committee.

Vacancy

A vacancy in the office of president or a member may occur after the expiry of his term, or by his death, resignation, or removal.

Resignation [R. 7]

In terms of Rule 7, President or a Member may resign his office in writing under his hand addressed to the State Government.

President or Member shall continue to hold office until,

1. the expiry of three months from the date of receipt of such notice (resignation letter);

2. he is permitted by the State Government to relinquish office;

3. a person duly appointed as a successor enters upon his office; or

4. the expiry of his term of office,

whichever is the earliest.

Removal [R. 8]

Rule 8 mentions five grounds on which a President or Member of a District Commission may be removed from his office.

1. has been adjudged an insolvent, or

2. has been convicted of an offence involving moral turpitude, or

3. has become physically or mentally incapable of performing his duties, or

4. has acquired such financial interest in the matter as would prejudicially affect his functions as president or member, or

5. has abused his position so as to render his continuance to office prejudicial to public interest.

Proviso to R. 8 requires that before the President or Member is removed on these grounds, the charge against him must be informed to him, and an opportunity of being heard must be given to him.

Inquiry of Misbehaviour or Incapacity [R. 9]

If there is any allegation in respect of the President or a Member of a District Commission, the state Government shall make a preliminary scrutiny of such complaint. But before any such scrutiny is launched, the following conditions must be satisfied:

1. The allegation must be in the form of a written complaint;

2. Such complaint must be made to the State Government;

3. The allegation in the complaint must be (a) of misbehaviour, or (b) incapacity to perform the functions of the office; and

4. The allegation must be definite (not vague).

If on preliminary scrutiny, the state Government is satisfied that the allegation appears to have merits, it shall make a reference to the State Commission to conduct the inquiry.

The State Commission, shall complete the inquiry within three months or such further time as may be specified by the National Commission.

The State Commission is not bound by the procedure laid down by the Code of Civil Procedure, 1908. But it shall be guided by the principles of natural justice.The State Commission shall have power to regulate its own procedure, including the fixing of date, place and time of its inquiry.

After the conclusion of the inquiry, the State Commission shall submit its report to the State Government stating therein its findings and the reasons for findings on each of the charges separately. The State Commission shall also make such observations on the whole case as it may think fit.

TERMS AND CONDITIONS OF SERVICE [S. 30]

Sec. 30 empowers the Central Government to make Rules to provide for salaries and allowances and other terms and conditions of service of the President, and members of the District Commission.

The terms and conditions of service of the President and Members of District Commission are governed by the Consumer Protection (Salary, Allowances and Conditions of Service of President and Members of the State Commission and District Commission) Model Rules, 2020.

Salary and Allowances [R. 3]

According to Rule 3(1), the President is entitled to the salary and allowances as are admissible to a District Judge in the super time scale of pay.

According to Rule 3(2), a Member shall receive a pay equal to the pay at the minimum of the scale of pay of a Deputy Secretary of the State Government and other allowances as admissible to such officer.

If the President or Member is receiving any pension, his salary shall be reduced by the gross amount of pension drawn by him [R. 3(3)].

The salaries of President and Members shall be increased at the rate of 3% every year [R. 3(4)].

JURISDICTION

Original Jurisdiction [Sec. 34]

Pecuniary Jurisdiction [Sec. 34(1)]

District Commission has original jurisdiction to entertain complaints where the value of claim is up to Rs. 1 crore.

Subject to the other provisions of this Act, the District Commission shall have jurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed one crore rupees.

Proviso to sec. 34(1) empowers the Central Government to alter the pecuniary jurisdiction of the District Commissions.

Territorial Jurisdiction [Sec. 34(2)]

Every District Commission has definite geographical limits within which it can exercise its jurisdiction.

1. If

(a) there is only one opposite party, he must

(b) there are more than one opposite party, all of them or any one or more of them must

(i) ordinarily reside,

(ii) carry on business,

(iii) have a branch office, or

(iv) personally work for gain within the jurisdiction of the District Commission.

If only one or some of the opposite parties, but not all of them, reside, etc. within the jurisdiction of the District Commission, complaint may be made to that District Commission only with the prior permission of that District Commission.

2. The cause of action, wholly or in part, must arise within the jurisdiction of the District Commission.

3. The complainant resides or personally works for gain within the jurisdiction of the District Commission.

Review Jurisdiction [Sec. 40]

The District Commission has the power to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order.

STATE COMMISSION [SEC. 42]

After the District Commission, State Commission is next in the hierarchy of Consumer Rederessal commissions under the Act.

ESTABLISHMENT OF THE STATE COMMISSION [SEC. 42(1)]

Sec. 42(1) provides that every State Government shall establish a State Consumer Disputes Redressal Commission called State Commission for the state.

CONSTITUTION OF THE STATE COMMISSION [SEC. 42(3)]

Sec. 42(3) provides that each State Commission shall consist of—

1. a President; and
2. not less than four or not more than such number of members as may be prescribed in consultation with the Central Government.

APPOINTMENT AND TENURE OF THE PRESIDENT AND MEMBERS [S. 43]

Sec. 43 provides that the Central Government may, by notification, make rules to provide for

1. the qualifications,
2. method of recruitment,
3. procedure for appointment,
4. term of office,
5. resignation and removal of the President and members of the State Commission.

In pursuance of the powers granted by sec. 29, the Central Government has framed the Consumer Protection (Qualification for Appointment, Method of Recruitment, Procedure of Appointment, Term of Office, Resignation and Removal of the President and Members of the State Commission and District Commission) Rules, 2020.

Qualifications of President and Members [R. 3]

Rule 3 provides for the qualifications and appointment of President and members of the State Commission.

According to sub-Rule (1), the President of the State Commission shall be

1. a sitting judge of a High Court; or
2. a former judge of a High Court;

According to sub-Rule (2), the Member of the State Commission shall be of at least 40 years of age;

1. (a) having an experience of at least ten years as presiding officer of a District Court or of any tribunal at equivalent level or combined service as such in the District Court and tribunal; or

   (b) graduate from a recognised University; and having special knowledge and professional experience of not less than fifteen years in consumer affairs, law, public affairs, administration, economics, commerce, industry, finance, management, engineering, technology, public health or medicine.
2. having ability, integrity and standing.

Thus, there may be two categories of members in a State Commission.

1. Judicial Members; and
2. Non-Judicial Members.

Proviso to sec. 3(2)(a) restricts the number of judicial members to 50%. In other words, not more than 50% of the members of a State Commission may be judicial members. That further means that more that 50% the members of a State Commission may be non-judicial members.

If the President of the Commission is not a woman, at least one of the members of the Commission shall be a woman.

Disqualifications for Appointment as President or Member

Rule 5 which prescribes the conditions for disqualification for appointment of President and Members of State Commission.

Method of Recruitment [R. 6]

The method of selection and appointment of President and Members of a State Commission is the same as the method of selection and appointment of the President and Members of a District Commission.

Procedure for Appointment [R. 6]

The procedure for selection and appointment of President and Members of a State Commission is the same as the procedure for selection and appointment of the President and Members of a District Commission.

Term of Office [R. 10]

The terms of office of President and Members of a State Commission is the same as those of the President and Members of a District Commission.

Vacancy

Rules as to the vacancy related in the office of the President or Member of State Commission are the same as those of the members of the District Commission, the only difference being that in case of removal of President or Member of State Commission, the enquiry will be conducted by the National Commission.

TERMS AND CONDITIONS OF SERVICE [S. 30]

Sec. 30 empowers the Central Government to make Rules to provide for salaries and allowances and other terms and conditions of service of the President, and members of the District Commission.

The terms and conditions of service of the President and Members of District Commission are governed by the the Consumer Protection (Salary, Allowances and Conditions of Service of President and Members of the State Commission and District Commission) Model Rules, 2020.

Salary and Allowances [R. 4]

According to Rule 4(1), the President of the State Commission shall receive the salary and other allowances as are admissible to a sitting judge of the High Court of the State.

According to Rule 4(2), a Member of the State Commission shall receive a pay equivalent to the pay at minimum of the scale of pay of an Additional Secretary of the State Government and other allowances as are admissible to such officer.

If the President or Member is receiving any pension, his salary shall be reduced by the gross amount of pension drawn by him [R. 4(3)].

The salaries of President and Members shall be increased at the rate of 3% every year [R. 4(4)].

JURISDICTION [SEC. 47]

Original Jurisdiction [Sec. 47(1)(a)(i) and (ii)]

Pecuniary Jurisdiction

Sec. 47(1)(a) provides that subject to the other provisions of this Act, the State Commission shall have jurisdiction to entertain—

1. complaints where the value of the goods or services paid as consideration, exceeds rupees one crore, but does not exceed rupees ten crore:

Proviso to sec. 47(1)(a)(i) empowers the Central Government to alter the pecuniary jurisdiction of the State Commissions if it deems it necessary so to, as it deems fit.

2. complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed ten crore rupees.

Territorial Jurisdiction [Sec. 47(4)]

The principles applicable for determining territorial jurisdiction of State Commission are the same as those applicable to District Commission.

Appellate Jurisdiction [Sec. 47(1)(a)(iii)]

Sec. 47(1)(a)(iii) empowers State Commissions to hear and decide appeals against the orders of any District Commission within the State.

Revisional Jurisdiction [Sec. 47(1)(b)]

Under sec. 47(1)(b) State Commission has the power to call for the records and pass appropriate orders in any consumer dispute which is

1. pending before, or
2. has been decided by any District Commission within the State.

Grounds for Revision

Where it appears to the State Commission that such District Commission

1. has exercised a jurisdiction not vested in it by law;
2. has failed to exercise a jurisdiction so vested; or
3. has acted in exercise of its jurisdiction illegally or with material irregularity.

Review Jurisdiction [Sec. 50]

The State Commission has the power, under sec. 50, to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within 30 days of such order.

Exercise of Jurisdiction Through Benches [Sec. 47(2) and (3)]

Sec. 47(2) provides that the jurisdiction, powers and authority of the State Commission may be exercised by Benches thereof. A Bench may be constituted by the President with one or more members as the President may deem fit.

Proviso to sec. 47(2) lays down that the senior-most member shall preside over the Bench.

Where the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority. If the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President.

The President shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members. and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it.

Proviso to sec. 47(3) requires that the opinion on reference shall be given within a period of one month from the date of such reference.

NATIONAL COMMISSION [SEC. 53]

The National Commission is the top most layer in the three level hierarchy of the Consumer Forums.

ESTABLISHMENT OF THE NATIONAL COMMISSION [SEC. 53(1)]

Sec. 53(1) provides that Central Government shall establish a National Consumer Disputes Redressal Commission.

CONSTITUTION OF THE NATIONAL COMMISSION [SEC. 54]

Sec. 54 provides that the National Commission shall consist of—

1. a President; and

2. not less than four or not more than such number of members as may be prescribed in consultation with the Central Government.

APPOINTMENT AND TENURE OF THE PRESIDENT AND MEMBERS [S. 55]

Sec. 55 provides that the Central Government may, by notification, make Rules to provide for

1. the qualifications,

2. method of recruitment,

3. procedure for appointment,

4. term of office,

5. resignation and removal; and

6. other terms and conditions of service of the President and members of the National Commission.

In pursuance of the powers granted by sec. 184 of the Finance Act, 2017, the Central Government has framed the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017.

Entry 16 in the Table given in the Schedule provides for the qualifications, appointment, term of office and age of retirement of the President and Members of the National Tribunal.

Qualifications of President and Members [R. 3]

Rule 3 r/w Column 3 of Entry 16 of the Table in the Schedule appended to the Tribunal, Appellate Tribunal Rules, 2017 provides for the qualifications and appointment of President and members of the National Commission. Accordingly, the President of the National Commission shall be

1. (a) a sitting judge of the Supreme Court; (b) a former judge of the Supreme Court; or (c) a person qualified to be a Judge of the Supreme Court; or

2. (a) a sitting Chief Justice of a High Court; or (b) a former Chief Justice of a High Court; or

3. has, for a period not less than three years, held office of Member or Judicial Member; or

4. (a) is a person of ability, integrity and standing, and

(b) having special knowledge of, and professional experience of not less than twenty-five years in economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or any other matter which in the opinion of the Central Government, is useful to the National Consumer Disputes Redressal Commission.

A Member of the National Commission shall be

1. a person of ability, integrity and standing;

2. having special knowledge of, and professional experience of not less than twenty years in economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or any other matter which in the opinion of the Central Government, is useful to the National Consumer Disputes Redressal Commission.

There are two categories of members in a Nantional Commission. 1. Judicial Members; and 2. Non-Judicial Members.

A person to be qualified to be appointed as a Judicial Member, shall be 1. (a) a sitting judge of a High Court;

(b) a former judge of a High Court; or

(c) is qualified to be, a Judge of a High Court; or

2. a person who has, for at least ten years, held a Judicial office in the territory of India.

If the President of the Commission is not a woman, at least one of the members of the Commission shall be a woman.

Method of Recruitment [R. 4]

The method of selection and appointment of President and Members of a National Commission is provided by Rule 4 r/w Column 4 of the Entry 16 of the Schedule to the Tribunal, Appellate Tribunal Rules, 2017.

The President shall be appointed by the Central Government after consultation with the Chief Justice of India.

Search-cum-Selection Committee for the post of member consists of

1. a person who is a Judge of the Supreme Court, to be nominated by the Chief Justice of India -chairperson;
2. Secretary to the Government of India, Ministry of Law and Justice (Department of Legal Affairs) - member;
3. Secretary to the Government of India, Ministry of Consumer Affairs – member;
4. two experts to be nominated by the Central Government – members.

Term of Office [Provisos to Sec. 55(1)]

The first proviso to sec. 55(1) provides that the President and members of the National Commission shall hold office for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for re-appointment.

Column 5 of the Schedule to the Tribunal, Appellate Tribunal Rules, 2017 provides that the term of President and Members of the National Commission is 3 years.

Second proviso to sec. 55(1) provides that no President or members shall hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not exceed,

(a) in the case of the President, the age of seventy years;

(b) in the case of any other member, the age of sixty-seven years.

Column 6 of the Schedule to the Tribunal, Appellate Tribunal Rules, 2017 provides that the age of retirement of President and Members shall be 70 years. But as per the second proviso to sec. 55(1) restricts the age of retirement of a member of National Commission to 67 years. As a result, the age of retirement of

1. President is 70 years; and
2. Member is 67 years.

Vacancy

A vacancy in the office of president or a member may occur after the expiry of his term, or by his death, resignation, or removal.

Resignation [R. 6]

In terms of Rule 6, President or a Member may resign his office in writing under his hand addressed to the Central Government.

President or Member shall continue to hold office until,

1. the expiry of three months from the date of receipt of such notice (resignation letter);

2. he is permitted by the Central Government to relinquish office;

3. a person duly appointed as a successor enters upon his office; or

4. the expiry of his term of office, whichever is the earliest

Removal [R. 7]

Rule 7 mentions five grounds on which a President or Member of the National Commission may be removed from his office.

1. has been adjudged an insolvent;

2. has been convicted of an offence involving moral turpitude;

3. has become physically or mentally incapable of performing his duties;

4. has acquired such financial interest in the matter as would prejudicially affect his functions as president or member; or

5. has abused his position so as to render his continuance to office prejudicial to public interest.

Proviso to R. 7 requires that before the President or Member is removed on these grounds, except the first ground, the charge against him must be informed to him, and an opportunity of being heard must be given to him.

Inquiry of Misbehaviour or Incapacity [R. 8]

If there is any allegation in respect of the President or a Member of the National Commission, the Ministry of Consumer Affairs of the Central Government shall make a preliminary scrutiny of such complaint. But before any such scrutiny is launched, the following conditions must be satisfied:

1. The allegation must be in the form of a written complaint;

2. Such complaint must be made to the Central Government;

3. The allegation in the complaint must be

(a) of misbehaviour, or

(b) incapacity to perform the functions of the office; and

4. The allegation must be definite (not vague).

If on preliminary scrutiny, the Central Government is satisfied that the allegation appears to have merits, it shall make a reference to a Committee constituted by it in this behalf, to conduct the inquiry.

The Committee, shall complete the inquiry within such time or such further time as may be specified by the Central Government.

The Committee is not bound by the procedure laid down by the Code of Civil Procedure, 1908. But it shall be guided by the principles of natural justice. The Committee shall have power to regulate its own procedure, including the fixing of date, place and time of its inquiry.

After the conclusion of the inquiry, the Committee shall submit its report to the Central Government stating therein its findings and the reasons for findings on each of the charges separately. The Committee shall also make such observations on the whole case as it may think fit.

Terms and Conditions of Service

Salary and Allowances [R. 11]

According to Rule 11(1), the President of the National Commission shall be paid a salary of Rs. 2,50,000 (fixed) and other allowances and benefits as are admissible to a Central Government officer holding posts carrying the same pay.

According to Rule 11(2), a Member of the National Commission shall paid a salary of Rs. 2,25,000 and shall be entitled to draw allowances as are admissible to a Government of India Officer holding Group 'A' post carrying the same pay.

If the President or Member is receiving any pension, his salary shall be reduced by the gross amount of pension drawn by him [R. 11(3)].

JURISDICTION [SEC. 58]

Original Jurisdiction [Sec. 58(1)(a)(i) and (ii)]

Pecuniary Jurisdiction

Sec. 58(1)(a) provides that subject to the other provisions of this Act, the National Commission shall have jurisdiction to entertain—

1.complaints where the value of the goods or services paid as consideration, exceeds rupees ten crore:

Proviso to sec. 58(1)(a)(i) empowers the Central Government to alter the pecuniary jurisdiction of the National Commission if it deems it necessary so to, as it deems fit.

2.complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees.

Territorial Jurisdiction

The territorial jurisdiction of the National Commission is whole of India except the State of Jammu & Kashmir.

However, the Consumer Protection Act is applicable only if the cause of action arises in India. If the cause of action arises out of India, National Commission has no jurisdiction over the matter as it cannot be tried in India under the Act.

Gulab Hotchand Bhagchandaney vs. Egyptian Airlines III

The complainant alleged that they were not properly treated by the Egyptian Airlines authorities at Barcelona. It was held that the cause of action arose at Barcelona, so the complaint under the Act is not maintainable in India.

Appellate Jurisdiction [Sec. 58(1)(a)(iii) and (iv)]

Sec. 58(1)(a) empowers National Commission to hear and decide appeals against the orders of

1. any State Commission; and
2. the Central Consumer Protection Authority.

Revisional Jurisdiction [Sec. 58(1)(b)]

Under sec. 58(1)(b) National Commission has the power to call for the records and pass appropriate orders in any consumer dispute which is

1. pending before, or
2. has been decided by any State Commission.

Grounds for Revision

Where it appears to the National Commission that such State Commission

1. has exercised a jurisdiction not vested in it by law;
2. has failed to exercise a jurisdiction so vested; or
3. has acted in exercise of its jurisdiction illegally or with material irregularity.

Review Jurisdiction [Sec. 60]

The National Commission has the power, under sec. 60, to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within 30 days of such order.

Exercise of Jurisdiction Through Benches [Sec. 58(2) and (3)]

Sec. 58(2) provides that the jurisdiction, powers and authority of the National Commission may be exercised by Benches thereof. A Bench may be constituted by the President with one or more members as the President may deem fit.

Proviso to sec. 58(2) lays down that the senior-most member shall preside over the Bench.

Where the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority. If the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President.

The President shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members. and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it.

Proviso to sec. 58(3) requires that the opinion on reference shall be given within a period of two months from the date of such reference.

PROCEDURE IN A COMPLAINT BEFORE DISTRICT COMMISSION

Sec.s 36-39 of the Consumer Protection Act, 2019 detail the procedure to be followed by a District Commission in complaint before it.

Sec. 36(1) provides that every proceeding before the District Commission shall be conducted by the President of that Commission and at least one member of the Commission, sitting as a Bench.

ADMISSION OR REJECTION OF THE COMPLAINT [SEC. 36]

When a complainant is presented to the District Commission, the Commission has two options:

1. to admit the complaint; and
2. to reject the complaint.

Where the complaint is admissible and prima facie has merits, the complaint has to be admitted.

Where

1. the complaint is within limitation,

2. proper court fee is paid,

3. the complainant has locus standi to make the complaint,

4. the relief falls within the jurisdiction of the Commission,

5. the complaint is in proper form,

the complaint will be admitted. Otherwise it has to be rejected. If the Commission has to reject the complaint, before rejecting the complaint, the complainant has to be given a reasonable opportunity of being heard.

The Commission has to decide about the admissibility of the complaint ordinarily within 21 days from the date of filing of the complaint. If the Commission does not decide the admissibility of the complaint within the said period of 21 days, the complaint is deemed to be admitted.

REFERENCE TO MEDIATION [SEC. 37]

The Commission, may, if it finds any possibility of settlement of the dispute before it through mediation, it may ask the parties to the dispute to give their consent in writing to settle the matter by mediation under Chapter V of the Consumer protection Act, 2019. The consent, if any, must be given within 5 days from the date on which the Commission has asked for it.

The Commission may refer the matter for mediation at any stage, preferably at the stage of the first hearing of the complaint.

The Central Government may prescribe cases in which the dispute may not be referred to mediation.

If the parties agree for mediation and give their consent, then the Commission shall within 5 days from the date of consent, refer the matter for mediation.

HEARING OF THE COMPLAINT [SEC. 38]

Where -

1. the Commission does not find that the matter may be settled through mediation;

2. the matter is one which shall not be referred to mediation; or

3. the matter is referred to mediation, but mediation fails, the Commission may proceed with the hearing of the complaint.

PROCEDURE IN COMPLAINT IN RESPECT OF GOODS [S. 38(2)]

Objections to the Complaint

The Commission refers a copy of the complaint to the opposite party for its objections, within 21 days.

The opposite party has to present the objections within 30 days. The Commission has the power to extend the time by a maximum of 15 days.

Where the opposite party admits the liability, the Commission may pass a suitable order and dispose of the complaint.

If the opposite party

1. presents objections and denies or disputes the allegations; or
2. fails to present objections

the Commission shall proceed to hear the complaint and dispose of it.

Reference of Sample Goods to Appropriate Laboratory

If the alleged defect in goods cannot be determined without proper analysis or test of the goods, the Commission shall obtain a sample of the goods from the complainant.

The sample so obtained shall be sealed and authenticated in the manner as may be prescribed by Rules.

The Commission shall ask the complainant to deposit the specified fees.

Then the sealed and authenticated sample shall be referred to the appropriate laboratory along with

1. fees deposited by the complainant; and
2. a direction that such laboratory to make an analysis or test.

Sec. 2(2) defines 'Appropriate Laboratory' as a laboratory or an organisation—

1. recognised by the Central Government; or
2. recognised by a State Government, subject to such guidelines as may be issued by the Central Government in this behalf; or
3. established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect.

On receiving the report from the laboratory, a copy shall be given to the parties. If any party has any objection to the correctness of the report, it shall have an

opportunity to present the objections to the report. Both the parties shall have an opportunity to argue in favour of and against the report. After hearing both the parties, the Commission shall make suitable order to dispose of the complaint.

If the defect of goods need not be referred to appropriate laboratory, the Commission shall adopt the procedure in complaints in respect of services.

PROCEDURE IN COMPLAINT IN RESPECT OF SERVICES [S. 38(3)]

Objections to the Complaint

The Commission refers a copy of the complaint to the opposite party for its objections, within 21 days.

The opposite party has to present the objections within 30 days. The Commission has the power to extend the time by a maximum of 15 days.

Where the opposite party admits the liability, the Commission may pass a suitable order and dispose of the complaint.

If the opposite party

1. presents objections and denies or disputes the allegations; or
2. fails to present objections the Commission shall proceed to hear the complaint and dispose of it.

RECORDING OF EVIDENCE [SEC. 38(5) AND (6)]

The Commission shall settle the consumer dispute on the basis of evidence brought to its notice by the parties.

The complaint shall be heard by the Commission on the basis of affidavit and documentary evidence placed on record. Where an application is made for hearing or for examination of parties in person or through video conferencing, the Commission may allow the same.

Proviso to Sec. 38(6) puts two conditions for examination of witnesses:

1. the applicant must show sufficient cause for examination of witnesses, and
2. the Commission must record reasons in writing for allowing the application.

TIME FRAME FOR DISPOSING OF COMPLAINT [SEC. 38(7)]

Sec. 38(7) requires that every complaint shall be disposed of as expeditiously as possible. The Commission shall endeavour to decide the complaint within a period of

1. three months from the date of receipt of notice by opposite party where the complaint does not require analysis or testing of commodities and

2. five months if it requires analysis or testing of commodities.

Ordinarily, the Commission shall not give adjournments to the parties. But where there is sufficient reason, the Commission may give adjournments subject to payment of costs by the party seeking adjournment to the opposite party.

FINDINGS OF THE DISTRICT COMMISSION [SEC.39]

Where the District Commission is satisfied

1. that the goods complained against suffer from any of the defects specified in the complaint or

2. that any of the allegations contained in the complaint about

(a) the services or

(b) any unfair trade practices, or

3. claims for compensation under product liability are proved, it shall issue suitable order against the opposite party.

A. IN CASES OF DEFECTIVE GOODS AND SERVICES

WHERE THE SAMPLE GOODS ARE REFERRED TO APPROPRIATE LABORATORY

The Commission may order the opposite party to

1. to remove the defect pointed out by the appropriate laboratory from the goods in question; or

2. to replace the goods with new goods of similar description which shall be free from any defect; or

3. to return to the complainant the price, or, as the case may be, the charges paid by the complainant along with such interest on such price or charges as may be decided.

IN CASE OF OTHER GOODS, AND SERVICES

Where the goods are not referred to appropriate laboratory, and in case of services, the Commission may order the opposite party to remove

1. the defect from the goods or

2. deficiency from the services.

COMPENSATION OR DAMAGES

In addition to the above order, the Commission may order the opposite party to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.

The Commission has the power to grant punitive damages in such circumstances as it deems fit.

B. IN CASES OF PRODUCT LIABILITY CLAIMS

In a product liability action under Chapter VI the Commission may order the opposite party to pay such amount as may be awarded by the Commission as compensation.

C. IN CASES OF UTP OR RTP

The Commission may order the opposite party to

1. discontinue the unfair trade practice or restrictive trade practice and
2. not to repeat them.

D. IN CASES OF HAZARDOUS OR UNSAFE GOODS

The Commission may order the opposite party

1. not to offer the hazardous or unsafe goods for sale; or
2. to withdraw the hazardous goods from being offered for sale; and
3. to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature.

ORDER FOR COMPENSATION IN CASE OF HAZARDOUS OR UNSAFE GOODS

The Commission may order the opposite party to pay such sum as may be determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently.

The minimum amount of sum so payable shall not be less than 25% of the value of such defective goods sold or service provided to such consumers;

Any amount so obtained shall be credited to such fund and utilised in such manner as may be prescribed.

E. IN CASES OF MISLEADING ADVERTISEMENTS

In case of misleading advertisement the Commission may order the opposite party

1.to cease and desist from issuing any misleading advertisement; or

2.to issue corrective advertisement to neutralise the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

In all cases, the District Commission has the power to provide for adequate costs to parties.

FINALITY OF ORDERS [SEC. 68]

Sec. 68 lays down that every order of a District Commission or the State Commission or the National Commission, as the case may be, shall, if no appeal has been preferred against such order under the provisions of this Act, be final.

ENFORCEMENT OF ORDERS [SEC. 71]

Sec. 71 lays down that every order made by a District Commission, State Commission or the National Commission shall be enforced by it in the same manner as if it were a decree made by a Court in a suit before it.

Provisions of Order XXVI of the Civil Procedure Code, 1908 relating to the execution of decrees shall be applicable to such enforcement of orders.

PENALTY FOR NON-COMPLIANCE OF ORDER [SEC. 72]

Failure to comply with any order made by the District Commission or the State Commission or the National Commission, as the case may be, attracts

1. imprisonment for a term which shall not be less than one month, but which may extend to three years, or

2. fine, which shall not be less than twenty-five thousand rupees, but which may extend to one lakh rupees, or

3. both.

The District Commission, the State Commission or the National Commission, as the case may be, have the power of a Judicial Magistrate of First Class for the trial of the offence of non-compliance of their orders. For that purpose, they shall be deemed to be Judicial Magistrates of First Class for the purposes of the Code of Criminal Procedure, 1973.

The trials by the Commissions shall be summary trials, and the orders passed by the Commissions in such trials are appealable.

MOTOR VEHICLES ACT, 1988

The Motor Vehicles Act, 1988 is a Central Act (an Act of the Parliament of India) which regulates all aspects of road transport vehicles. The Act came into force from 1 July 1989. It replaced Motor Vehicles Act, 1939 which earlier replaced the first such enactment Motor Vehicles Act, 1914.

In view of heavy casualty all over India, by motor accidents which are, in a majority of cases, arising out of violation of traffic rules, in 2019, sweeping amendments were brought to the Motor Vehicles Act. The amendment introduced new traffic offences, and sharply enhanced the penalties under the Act. Further, to save the lives of the victims, it has made special provisions. Good Samaritans have been given protection against Police harassment.

OBJECTS OF THE ACT

1. Rationalization of certain definitions with additions of certain new definitions of new types of vehicles;
2. Stricter procedures relating to grant of driving licences and the period of validity thereof;
3. Laying down of standards for the components and parts of motor vehicles;
4. Standards for anti-pollution control devices;
5. Provision for issuing fitness certificates of vehicles also by the authorised testing stations;
6. Enabling provision for updating the system of registration marks;
7. Liberalised schemes for grant of stage carriage permits on non-nationalised routes, all-India Tourist permits and also national permits for goods carriages;
8. Administration of the Solatium Scheme by the General Insurance Corporation;
9. Provision for enhanced compensation in cases of “no fault liability” and in hit and run motor accidents;
10. Provision for payment of compensation by the insurer to the extent of actual liability to the victims of motor accidents irrespective of the class of vehicles;
11. Maintenance of State registers for driving licences and vehicle registration;
12. Constitution of Road Safety Councils.

SALIENT FEATURES OF THE MOTOR VEHICLES ACT, 1988

In order to fulfil the above objectives, the Act provides in detail the legislative provisions regarding

1. licensing of drivers and conductors,

2. registration of motor vehicles,

3. control of motor vehicles through permits,

4. special provisions relating to

(a) state transport undertakings,

(b) traffic regulation, and

(c) insurance

5. liability,

6. offences and penalties, *etc*.

In pursuance of the rule-making powers under the Act, the Government of India has framed the Central Motor Vehicles Rules, 1989. Similarly, state governments also have framed State Motor Vehicle Rules. Karnataka Government has made the Karnataka Motor Vehicle Rules, 1989.

Features Added by the Motor Vehicles (Amendment) Act, 2019

The Motor Vehicles (Amendment) Act, 2019 has introduced the following salient features:

1. The New Motor Vehicles (Amendment) Act, 2019 makes Aadhaar obligatory for getting a vehicle registration and driving license.

2. In case of traffic violations by juveniles, the owner or the guardians of thevehicle would be held accountable, if they are unable to provide evidence that the offence was committed without their information or they tried to prevent it.

3. The government of India will provide a *solatium* of Rs. 2 lakh or more to the victim's family for deaths in hit-and-run cases. Earlier, the amount was only Rs. 25,000. Similarly, the compensation for no fault liability is increased by ten-folds. In

case of death, the compensation is now Rs. 5 lakhs in place of earlier amount of Rs. 50,000 and in case of grievous hurt Rs. 2.5 lakhs in place of Rs. 25,000.

4. The amended Motor Vehicles Act provides for a National Road Safety Board, to be created by the central government through a notification. The Board will advise the state and central governments on all facets of traffic management and road safety, including standards of motor vehicles, licensing and registration of vehicles, promotion of new vehicle technology and standards for road safety.

5. The amended Motor Vehicles Act mandates automated fitness testing for vehicles.

6. A method for cashless treatment of road accident victims during golden hour is provided by the Motor Vehicles (Amendment) Act, 2019.

7. The amendment empowers the central government to order for recall of motor vehicles if a fault in the vehicle causes damage to the environment, or other road users, or the driver.

8. The amendment has increased the penalties for driving errors.

NO FAULT LIABILITY UNDER THE MOTOR VEHICLES ACT

No fault liability under the Motor Vehicles Act, 1988 was contained in Chapter X containing ss. 140 to 144. Chapter X is omitted by the Motor Vehicles (Amendment) Act,2019. Now no fault liability is governed by sec. 164.

Another important change brought about by the Motor Vehicles (Amendment) Act, 2019 is the substitution of expression “grievous hurt” in sec. 164 in place of the expression “permanent disablement” which was used in the erstwhile sec. 140.

Where death or grievous hurt of any person has resulted from an accident arising out of the use of a motor vehicle, the owner of the vehicle or the authorised insurer shall be liable to pay compensation in respect of such death or grievous hurt in accordance with the provisions of s. 164.

Under sec. 140 the liability was imposed on the owner of the vehicle only. But insurance company was liable under the contract of insurance to indemnify the vehicle owner.

Therefore, the situation under sec. 140 was not much different than the one under the present sec. 164. Sec. 164 only clarifies what was implicit under sec. 140.

If the death or permanent disablement results from an accident arising out the use of more than one vehicle, all the owners of all the vehicles are liable jointly and severally to pay compensation under s. 164.

The amount of compensation to be paid in respect of death is Rs. 5,00,000 and in respect of permanent disablement is Rs. 2,50,000. Under sec. 140 these amounts were Rs. 50,000 and Rs. 25,000 respectively.

As the compensation is under no fault liability, it is not necessary that it should arise out of any intention, rashness or negligence of the driver of the vehicle. Therefore, is not necessary for the Petitioner to plead and prove any wrongful act, neglect or default on the part of the driver.

Further, even if the victim himself was negligent, he is entitled to the compensation under sec. 164. Thus, contributory negligence is not a defence for compensation under sec. 164.

Settlement by Insurance Company

Under sec. 140, this compensation was an interim compensation. Under sec. 164 it is a substantial remedy. Sec. 149 provides procedure for settlement by the insurance company.

Information about a motor vehicle accident may be given to the company which has insured the vehicle involved in the accident, by the claimant (victim). The company may also receive the information about the accident from some other source.

As soon as it receives the information about that accident the insurance company has to designate an officer to settle the claim arising out of an accident [Sec. 149(1)]. The settlement officer has to follow the procedure which may be prescribed by the Central Government for making settlement. After that he may make an offer for settlement of claim before the Claims Tribunal within 30 days [Sec. 149(2)].

If the person to whom the offer is made accepts the offer, the Claims Tribunal has to make the record of settlement. The case ends by settlement by consent. In other words, there is no appeal against the order of the Tribunal. The insurance company has to make the payment within 30 days from the date of acceptance.

The Petitioner is entitled to compensation under any other law for the time being in force. But if he has received compensation under sec. 164, according to the

procedure laid down under sec. 149, he cannot claim other compensation [Proviso to sec. 166(1)].

If the person to whom the offer is made rejects the offer, the Claims Tribunal proceed with hearing and disposal of the case.

THIRD PARTY INSURANCE

Because of increase in automation and consequential losses of life and property in accidents, a need was felt to provide relief to the victims of accident claims. Therefore, Parliament intended to enact an effective law for the said purpose.

In this regard, provisions have been inserted for compulsory third party insurance and to provide a machinery of adjudication of claim in Motor Vehicle Act, 1939 by Amending Act No. 110 of 1956, by which

1. sec.s 93 to 109 with reference to third party insurance; and

2.sec.s 110-A to 110-F with reference to creation of Motor Accident Claims Tribunal and procedure for adjudication of claim were enacted in the Motor Vehicles Act, 1939.

Initially the liability was restricted to a particular sum. But after 1982 the liability of the Insurance Company has been made unlimited. Even the defences of the insurance companies have been restricted so as to ensure payment of compensation to third parties.

In the year 1982 the concept of providing interim compensation on 'no fault' basis have been introduced by addition of sec.s 92-A to 92-E to the Motor Vehicles Act, 1939.

By the same amendment, relief by way of solatium has also been given those persons who die by hit and run accidents, where the offending vehicles are not identified.

Under the new Motor Vehicle Act introduced in 1988

1. Chapter 10 provided for no fault liability in certain cases,

2. Chapter 11 provides for insurance of motor vehicle against third party risk, and

3. Chapter 12 provides for the constitution of Claims Tribunal and adjudication of claim and related matters.

This law is still in a phase of serious changes. Supreme Court has a number of times held that this is a welfare legislation and the interpretation of provision of law is required to be made so as to help the victim.

In this process Supreme Court has passed various judgements in recent past, which have restricted the statutory defences to the Insurance Company to a greater extent as law relating to burden of proof has been totally changed.

Limited defences as to not holding valid driving license, use of vehicle for hire and reward, use of transport vehicle for the purpose not allowed by permit are required to be proved in so stringent manner that insurers are not getting advantage of these defences.

Insurance policies in respect of vehicles are of two types:

1. Comprehensive Policy; and
2. Third Party Insurance Policy.

Comprehensive policy covers the loss suffered by the owner of the vehicle and also his liability to compensate a third party for the loss suffered by that third party on account of the accident by the use of the vehicle in a public place.

Third party insurance policy only covers the liability of the owner of the vehicle to compensate a third party for the loss suffered by that third party on account of the accident.

Sections 145 to 164-D in Chapter 11 provide for compulsory third party insurance, which is required to be taken by every vehicle owner. This entire chapter is substituted by the Motor Vehicles (Amendment) Act, 2019.

Sec. 145(i) defines third party. According to this definition “third party” includes the Government, the driver and any other co-worker on a transport vehicle. The expression “includes” implies that third party means person other than the owner of the vehicle and also government, driver of the vehicle and in case of transport vehicle cleaner or labourer. Driver of the vehicle and in case of transport vehicle cleaner or labourer are added by the Motor Vehicle (Amendment) Act, 2019.

It is provided by in sec. 146(1) that no person shall use or allow using a motor vehicle in public place unless there is in force a policy of insurance complying with the requirements of Chapter 11. If the vehicle is carrying hazardous goods or is meant for carrying hazardous goods it shall also be insured under the Public Liability Insurance Act, 1991.

Using an uninsured vehicle in a public place is an offence under sec. 196, punishable with imprisonment of up to three months or with fine of up to Rs. 2,000 or both. If the offence is repeated, the punishment shall be imprisonment of up to three months or with fine of up to Rs. 4,000 or both.

If the person driving the vehicle is only a paid employee and the vehicle is uninsured, he is not guilty of the offence under sec. 196 if he did not know or did not have reason to believe that the vehicle was uninsured at that time.

The appropriate Government, *i.e.*, state Government or central Government may exempt the following entities from the application of sec. 146:

1. Government, if the vehicle connected with commercial enterprise of the state,
2. any local authority; and
3. any State Transport Undertaking.

MOTOR ACCIDENT CLAIMS TRIBUNAL (MACT)

A new forum, *i.e.*, Motor Accidents Claims Tribunal, which substitutes Civil Court, has been created by the Motor Vehicles Act, 1988 for cheaper and speedier remedy to the victims of accident of motor vehicles.

Prior to the Motor Vehicles Act, a suit for damages had to be filed with civil court, on payment of *ad valorem* court fee. But, under the provisions of this Act, an application claiming compensation can be made to the Claims Tribunal without payment of *ad valorem* fee.

New provisions in Motor Vehicles Act, do not create any new liability, and the liability is still based on Law of Torts and enactments like the Fatal Accidents Act. The position on this point was critically explained in *Oriental Fire & General Insurance Co. vs. Kamal Kamini*:

Oriental Fire & General Insurance Co. vs. Kamal Kamini

"The object of this group of sections of the Act is to supply a cheap and expeditious mode of enforcing liability arising out of claim for compensation in respect of accident involving the death, or bodily injury to, persons arising out of the use of motor vehicles, or damage to any property of a third party so arising."

Chapter XII of the Motor Vehicles Act, 1988 deals with the constitution of Claims Tribunal, Application of Claims and Award of compensation *etc*.

Minu B. Mehta vs. Baikrishna

The Supreme Court of India held that the power of a State Government to constitute Claims Tribunal is optional and the State Government may not constitute a Claims Tribunal for certain areas.

Sec. 175 provides that where any MACT has been constituted for any area, no civil court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Tribunal for that area. If no MACT is constituted for any particular area, the civil courts have jurisdiction.

ESTABLISHMENT OF MACT

Sec. 165 of Motor Vehicles Act, 1988 empowers the State Governments to constitute Claims Tribunals to adjudicate upon claims for compensation arising out of motor vehicle accidents, resulting in death or bodily injury to persons or damages to any property of third parties.

A State Government may by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals for such area as may be specified in the notification.

Sushma Mehta vs. Central Provinces Transport Services Ltd.

It is held by the court that no tribunal can be constituted unless there has been

1. firstly, a notification of the State Government and
2. secondly, such notification has been published in the official gazette of the state.

CONSTITUTION OF MACT

A Claims Tribunal shall consist of such number of members as the State Government may think fit to appoint. Where it consists of two or more members, one of them shall be appointed as the Chairman.

A person shall not be qualified for appointment as a member of a Claims Tribunal unless he

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

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

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

Appointment of a person as member of tribunal by name is not necessary and appointment with reference to an office is sufficient. The usual practice has been to designate as claims tribunal, the District Judge or Additional District Judge.

Where two or more Claims Tribunal are constituted for any area, the State Government, may by general or special order, regulate the distribution of business among them.

POWERS OF MACT

Claims tribunal set up under Motor Vehicles Act are deemed to be civil courts. It is a civil court for all purposes of adjudication of claims for compensation in motor accident cases.

The Claims Tribunal shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:

1. The summoning and enforcing the attendance of any witness and examining him on oath;
2. The discovery and production of any document;
3. The reception of evidence on affidavits;
4. The requisitioning of any public record or document or copy of such record or document from any court or office; and
5. Such other matters as may be prescribed.

OFFENCES AND PENALTIES

As flagrant violations of traffic rules and consequently a large number of accidents resulting in death or grievous hurt were observed, it was deemed expedient by the Parliament to amend the Motor Vehicles Act, 1988 thoroughly as far as offences and penalties are concerned. Therefore, the Motor Vehicles (Amendment) Act, 2019 has made sweeping amendments to Chapter XIII of the Act.

The Amending Act has introduced many new offences and has increased the punishments for the existing offences.

The following are the major offences and penalties provided therefor:

1. **Travelling Without Ticket or Pass (Sec. 178):** Travelling in a stage carriage without having a proper pass or ticket, or failure or refusal to present ticket for examination, shall be punishable with fine which may extend to **Rs. 500**.

2. **Allowing Unauthorised Persons to Drive Vehicles (Sec. 180):** If an owner of a vehicle or a person in charge of a motor vehicle permits any other person who does not have a licence or is below 18 years of age, to drive the vehicle, he shall be punishable with imprisonment for a term which may extend to **3 months**, or with fine which may extend to **Rs. 5,000**, or with **both**.

3. **Driving Without Licence (Sec. 181):** Driving a motor vehicle without a licence or driving a motor vehicle by a person under 18 years of age, shall be punishable with imprisonment for a term, which may extend to **3 months**, or with fine, which may extend to **Rs. 5,000**, or with **both**.

4. **Driving Without Valid Licence (Sec. 182):** If a person disqualified under the Motor Vehicles Act from holding or obtaining a driving licence drives a motor vehicle in a public or in any other place, or applies for or obtains a driving licence without disclosing the endorsement made on a driving licence previously held, shall be punishable with imprisonment for a term which may extend to **3 months**, or with fine which may extend to **Rs. 10,000** or with **both**, and any **driving licence obtained by him shall be of no effect**.

Whoever, being disqualified under this Act for holding or obtaining a conductor's licence, acts as a conductor of a stage carriage in a public place or applies for or obtains conductor's licence or, not being entitled to have a conductor's licence issued to him free of endorsement, applies for or obtains a conductor's licence without disclosing the endorsements made on a conductor’s licence previously held by him, shall be punishable with imprisonment for a term which may extend to **1 month**, or with fine which may extend to **Rs. 10,000**, or with **both**, and any **conductor’s licence so obtained by him shall be of no effect**.

5. **Driving at Excessive Speed (Sec. 183):** Driving a motor vehicle in contravention of the speed limits prescribed, is punishable with fine which may be minimum **Rs. 1000** and maximum **Rs. 2,000**, in case of LMV and minimum **Rs. 2,000** and maximum **Rs. 4,000.** If a person having been previously convicted of an offence under this section commits the offence again, his driving licence shall be impounded.

6. **Driving Dangerously (Sec. 184):** Whoever drives a motor vehicle at a speed or in a manner, which is

1. dangerous to the public, or

2. which causes a sense of alarm or distress to the occupants of the vehicle, other road users, and persons near roads shall be punishable for the first offence with imprisonment for a term of **minimum 6 months to maximum 1 year**, or with fine of **minimum Rs. 1,000 to maximum Rs. 5,000**, or with **both**, and second or subsequent offence if committed within three years of the commission of a previous similar offence with imprisonment for a term which may extend to **2 years**, or with fine which may extend to **Rs. 10,000**, or with **both**.

In deciding whether the driving is dangerous *etc*., regard shall be had to all the circumstances of the case including the nature, condition and use of the place, where the vehicle is driven and the amount of traffic which actually is at the time or which might reasonably be expected to be in the place.

Explanation to sec. 184 provides examples of dangerous driving.

(a) jumping a red light;

(b) violating a stop sign;

(c) use of handheld communications devices while driving;

(d) passing or overtaking other vehicles in a manner contrary to law;

(e) driving against the authorised flow of traffic; or

(f) driving in any manner that falls far below what would be expected of a competent and careful driver and where it would be obvious to a competent and careful driver that driving in that manner would be dangerous.

7. **Driving by a Drunken Person or by a Person Under the Influence of Drugs (Sec. 185):** Whoever, while driving, or attempting to drive, a motor vehicle,

(a) has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser or any other test including laboratory test, or

(b) is under the influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle, shall be punishable for first offence with imprisonment for a term which may extend to **6 months**, or with fine which may extend to **Rs.10,000**, or with **both**, and for second or subsequent offence, with

imprisonment for a term which may extend to **2 years**, or with fine which may extend to **Rs. 15,000**, or with **both**.

Explanation to sec. 185 provides that for the purposes of this section, the expression "drug" means any intoxicant other than alcohol, natural or synthetic, or any natural material or any salt, or preparation of such substance or material as may be notified by the Central Government under this Act and includes a narcotic drug and psychotropic substance as defined in sec. 2(xiv) and 2(xxiii) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

Breath Test (Sec. 203): Sec. 203 empowers a police officer in uniform or an authorised officer of the Motor Vehicle Department, may require any person driving or attempting to drive a motor vehicle in a public place to provide one or more specimens of breath for breath test there or nearby, if such officer has any reasonable cause to suspect him to having committed an offence under this section.

If any person required by a police officer to provide specimens of breath refuses, he may be arrested by that police officer, without warrant. But if that person is at a hospital as an indoor patient, he cannot be arrested.

A person arrested under this section shall while at a police station, be given an opportunity to provide a specimen of breath for a breath test there.

Laboratory Test (Sec. 204): A person arrested under sec. 203 may be required by a police officer at a police station to provide a specimen of his blood for a laboratory test to a registered medical practitioner produced by such police officer.

Where such person is female and the registered medical practitioner produced by police officer is male, the specimen shall be taken only in the presence of a female, whether a medical practitioner or not.

This provision is applicable if any of the following conditions is satisfied:

(a) the presence of alcohol in the blood of such person was found in his breath test, or

(b) such person, when given the opportunity to submit to a breath test, has refused, omitted or failed to do so.

8. **Driving When Mentally or Physically Unfit to Drive (Sec. 186):** Driving a motor vehicle in any public place when to the knowledge of the driver he suffers from any disease or disability calculated to cause driving of the vehicle to be a

source of danger to the public, he shall be punishable for the first offence with fine which may extend to **Rs. 1,000** and second or subsequent offence with fine which may extend to **Rs. 2,000**.

9. **Racing and Trials of Speed (Sec. 189):** Whoever without the written consent of the State Government permits or takes part in a race or trial of speed of any kind between motor vehicles in any public place shall be punishable for the first offence with imprisonment for a term which may extend to **3 month**, or with a fine which may extend to **Rs. 5,000**, or with **both** and for second or subsequent offence with imprisonment for a term which may extend to **1 year**, or with a fine which may extend to **Rs. 10,000**, or with **both**.

10. **Using Vehicle in Unsafe Condition (Sec. 190):** Any person who drives or allows to be driven in any public place a motor vehicle or trailer, having any defect, which renders the driving of the vehicle a source of danger to persons and vehicles using such place, shall be punishable with fine which may extend to **Rs. 1,500**.

If as a result of such defect an accident is caused causing bodily injury or damage, to property, such person shall be punishable with imprisonment for a term, which may extend to **3 months**, or with fine, which may extend to **Rs. 5,000**, or with **both**.

Any person who drives or allows to be driven, in any public place a motor vehicle, which violates the standards prescribed in relation to road safety, control noise and air-pollution, shall be punishable for the first offence with imprisonment which may extend to **3 months** or fine of **Rs. 10,000** or **both** and for second or subsequent offence with imprisonment which may extend to **6 months** a fine of **Rs. 10,000** or **both**.

Any person who drives or allows to be driven, in any public place a motor vehicle which violates the provisions of this Act or the rules made there under relating to the carriage of goods which are of dangerous or hazardous nature to human life, shall be punishable for the first offence which may extend to **Rs. 10,000** and his licence shall be suspended for three months, or with imprisonment for a term which may extend to **1 year**, or with **both**, and second or subsequent offence with fine which may extend to **Rs. 20,000**, or with imprisonment for a term which may extend to **3 years**, or with **both.**

11. **Using Vehicles without Registration (Sec. 192):** Whoever drives a motor vehicle or allows an unregistered motor vehicle to be used shall be punishable for the first offence with a fine which may extend to **Rs. 5,000** but shall not be less than **Rs. 2,000** second or subsequent offence with imprisonment which may extend to **1 year** or with fine which may extend to **Rs. 10,000** but shall not be less than **Rs. 5,000** or with **both**.

However, the above provision does not apply to the use of a motor vehicle in an emergency for the conveyance of persons suffering from sickness or injuries or for the transport of food or materials to relieve distress or of medical supplies for a like purpose, provided that the person using the vehicle reports about the same to the Regional Transport Authority **within seven days** from the date of such use.

12. **Failure to Use Safety Belt (Sec. 194-B):** Driving without fastening seat belt or carrying passengers who are not using seat belt is punishable with fine of Rs. 1,000. Where a child below the age of fourteen years is carried, use of safety belt or child restraint system is mandatory. Failure use the same attracts a fine of Rs. 1,000.

13. **Carrying More than One Pillion Rider (Sec. 194-C):** Carrying more than one pillion rider or carrying pillion rider without a secure seat is punishable with a fine of **Rs. 1,000**, and with **suspension of driving licence for three months**.

14. **Not Wearing Helmet (Sec. 194-D):** Driving a motor cycle without wearing helmet is punishable with a fine of **Rs. 1,000**, and with **suspension of driving licence for three months**.

15. **Not Allowing Free Passage to Emergency Vehicles (Sec. 194-E):** Not allowing free passage to ambulance, fire brigade or any other emergency vehicle is punishable with imprisonment for a term which may extend to **6 months**, or with a fine of **Rs. 10,000** or **both**.

16. **Driving Uninsured Vehicle (Sec. 196):** Whoever drives a motor vehicle or causes or allows a motor vehicle to be driven an uninsured vehicle shall be punishable for the first offence with imprisonment, which may extend to **3 months**, or with fine, which may extend to **Rs. 2,000**, or with **both,** and second or subsequent offence with fine which may extend to **Rs. 4,000**, or with imprisonment for a term which may extend to **3 months**, or with **both.**

17. **Taking Vehicle Without Authority (Sec. 197):** Whoever takes and drive away any motor vehicle without having the consent of the owner shall be punishable with imprisonment which may extent to **3 months**, or with fine which may extend to **Rs. 5,000**, or with **both**.

However, no person shall be convicted if the court is satisfied that such person acted in the reasonable belief that he had lawful authority or in the reasonable belief that the owner would in the circumstances of the case have given his consent if he had been asked therefore.

Whoever, unlawfully by force or threat of force or by any other form of intimidation, seizes or exercise control of a motor vehicle, shall be punishable with imprisonment which may extend to **3 months**, or with fine which may extend to **Rs. 5,000**, or with **both**.

Attempt or abetment to commit any offence under this section is also treated as commission of offence under this section.

18. **Causing Obstruction to Free Flow of Traffic (Sec. 201):** Whoever keeps a vehicle place, on any public, in such a manner, so as to cause impediment to the free flow of traffic, shall be liable for penalty up to Rs. 500 per hour, so long as it remains in that position.

However, a vehicle involved in accident shall be liable for penalty only from the time of completion of inspection formalities under the law.

Provided further that where the vehicle is removed by an agency authorised by the Government, removal charges shall be recovered from the vehicle owner or person in-charge of such vehicle.

19. **Offences by Juveniles (Sec. 199-A):** Where an offence under the Act is committed by a juvenile, his guardian or the owner of the vehicle shall be deemed to have committed the offence, and he shall be punished accordingly.

In addition to the punishment for the offence committed by the juvenile, the guardian or the owner of the vehicle is also liable to a punishment of imprisonment which may extend to a term of **3 years**, and fine of **Rs. 25,000**.

If the guardian or the owner of the vehicle proves that the offence was committed without his knowledge and he took all precautions to prevent it, he will not be punished.

20. **Residuary Clause (Sec. 177):** Whoever contravenes any provision of this Act or of any rule, regulation or notification made there under shall, if no penalty is provided for the offence is punishable for the first offence with fine which may extend to **Rs. 500**, and for any second or subsequent offence with fine which may extend to **Rs. 1,500**.