LESSON - 1

Negligence

Objective:- After going through this lesson you should be able to:

- Understand the common law concept of negligence.
- Describe theories of negligence.
- Define negligence.

Structure:-

1.1 Introduction :-

The words 'Neglect and 'Negligence' have the same origin. They originate from the Latin expression 'Neclego' meaning 'not together. That is the failing to take such care, show some attention, pay such courtesy, etc as may be rightfully demanded.

Negligence is often used to denote the habit of neglecting that, which ought to be done. Neglect has a passive sense which negligence has not. It does not state any specific attitude of mind but it states a matter of objective fact, which may be produced either by intentions or negligence. Thus, negligence is simply neglect of some care, which one is bound to exercise towards another.

1.2.1 Common Law Concept :-

In the early period of common law the general rule was that man was liable for harm which he had inflicted upon another if what he did could be brought within any of the forms of actions recognized by law irrespective of any question as to intention, negligence or accident. Negligence was not recognized as a separate tort before 1825. Though there were traces of action for negligence earlier. Then, the word negligence was employed in its general sense to describe the breach of any legal obligation or designating a mental element usually one of inadvertence or indifferences entering into the commission of other torts. The view expressed by some writers that negligence is only a way commiting other torts, has not been accepted as this tort has distinct of features of its own.

1.2.2 Assumpist Action :-

Assumpist was the name of an old common law form of an action for damages for breach of simple contract. The basis of the assumpist action was an allegation that the defendant had undertaken to do something for the plaintiff and had harmed the plaintiff in person or property by doing it badly or wrongly. Assumpist was originally for an action in tort. If caused by one to another by an unlawful act, a misfeasance, which did not amount to an actual trespass.

Thus in **Humbler ferryman** case 913480 a ferryman undertook to carry a mare in his boat across a river. The boat and the mare were destroyed due to over- loading of the boat. The owner of the mare was allowed an action in regard to damage suffered. Similarly in **Waldon V. Marshall** (1370) the, defendant promised the plaintiff to cure plaintiff's horse, however he performed the promise so badly and negligently that the horse died instead of being cured. Held that the plaintiff was entitled to an action for recovery of the damage suffered. Thus, the whole concept of assumpist on promise to do and this action was in regard to tort.

Thus, tortuous negligence known to law in the 14^{th} century was in the form of liability of those persons in society who professed to be competent and skilled in certain public callings, such as innkeepers, carriers, artificers, surgeons and attorneys. These persons were required to the standard of reasonable skill and proficiency as they were supposed to have assumed an obligation to give proper service for breach where of by their negligent, they were made liable.

However conduct, the early cases dealt with acts rather than omission i.e. misfeasance rather than nonfeasance. This continued up to the end of 18^{th} century. Thereafter started the era of liability for omissions, and its development was very fast. A review of case records of negligence would clearly establish liability for omission also. In **Dixon V Bell** (1816), a too young girl was sent to fetch a loaded gun by the defendant. The girl carelessly and improperly shot off the same at and into the face of the plaintiff's son. It was held that the defendant was liable because by his want of case the instrument left in a state capable of doing mischief.

The idea of liability for omissions, however, was not accepted in **Langride V. Levy** (1837) and **Winter bottom V. Wright** (1842) cases. But it was recognized in 1883 in the case of **Heaven V. Pender** and was subsequently extended in **Donoghue V. Stevanson** (1932) by introducing neighbour principle. In between, **Alderson B. in Blyth V. Burming ham water works Co**.(1858) introduced a classical, definition of negligence and **Lord Wright in** 1934 laid down yet another authoritative definition of negligence. Again the case of **Grant V. Australion knitting Mills** (1936)

extended the neighbour principle to products such as under garments and to other manufactured goods making the idea a modern concept.

The march of law however did not stop at it finally extended the action for negligence even for misstatements causing economic loss in **Hedley byrne** case (1964). Thus negligence is a modern and fast developing tort taping in its embrace a variety of situations unthought-of. The reasons for the development of negligence as a separate tort were invention of railways, advent of machinery and industrial revolution, disappearance of distinction between direct and indirect injuries, fast means of transport and resultant increase in accidents.

1.2.3. What is Negligence :-

In very day usage negligence denotes carelessness, but in legal sense the word negligence carries two senses in the law of torts. It may mean.

(1) Either a mental element, which is to be inferred from one of the modes in which some tort may be committed, or it may mean.

(2) An independent tort which consists of a breach of a legal duty to take care which results in damage undesired by the defendant, to the plaintiff.

1.3.1. Theories of Negligence :-

There are two competing theories as to the nature and meaning of the term negligence. According to one theory negligence is a state of mind, which is known as the subjective theory of negligence. According to the other negligence is not a state of mind but merely a type of conduct, which is called objective theory of negligence.

1.3.2 Subjective Theory of Negligence :-

According to Austin negligence is faulty mental condition which is penalized by the award of damages. Salmond says negligence is culpable carelessness. According to him negligence essentially consist in the mental attitude of undue indifference with respect to one's conduct and its consequences it has been support by Wharton, street and Winfield.

Case of **Vaugham V.Menllove** (1837) is an example of full advertence to one's conduct and its consequences. In that case inspite of warning that his haystack would be overheated and would catch fire that would spread to neighboring lands and cause damage, the defendant said that he would take his chance and there was damage due to fire. It was held that the defendant liable.

1.3.3. Merits and Demerits:-

The proposition that negligence is only a mental element in a persons conduct has the merit of making clear the distinction between intention and negligence. The intentional wrongdoer desires the consequences where the negligent wrongdoer does not desire the harmful consequences. On the other hand if this proposition is accepted that would lead to the unsurmountable difficulties in regard to its proof. More over state of mind cannot cause harm to another and no action can lie for state of mind because it cannot be measured.

According to Edgerton the subjective theory of negligence would leave the general security unprotected against the vast amount of dangerous conduct which result not from inadvertence or indifference but from deficiencies in knowledge memory, observation, imagination, foresight, intelligence, judgement, quickness of reaction, deliberation, coolness, self control, determination, courage or the like.

1.3.4.Objective Theory of Negligence:-

According to this theory negligence is not a particular state of mind or form of 'mensrea' at all but a conduct which falls below the standard prescribed by law for protection of others against unreasonable risk of harm. The chief supporters of this theory are Terry, Education, Bevam, Holmes and Pollock. In support of this theory Pollock writer's negligence is the contrary of diligence and no one describes diligence as a state of mind. Negligence is failure to achieve the objective standard of a reasonable man. Thus if a defendant failed to achieve that standard and caused damage to another, it would be no defence that he as been anxious to avoid harm and has taken utmost care. For example, to drive at night without light or to drive in a crowed place without proper brakes are negligence how so ever careful mentally the driver may be. Objective theory of negligence is justified on the ground that it is easier to prove conduct than state of mind and it is the conduct and not state of mind that causes harm. If one's conduct is abnormally dangerous he cannot escape liability by virtue of his close attention.

1.3.5. The Correct View:-

The balance tilts in favour of objective theory. The law cannot look into the state of mind of the doer, it assumes that the doer of an act has such capacity to judge and foresee consequences as a man of ordinary prudence.

Clark and Lind sell in their book on torts say "negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take. It is in no sense a positive idea and has nothing to do with state of mind." The objective theory has found judicial approval in many leading cases.

Reconciliation of both the views is not impossible. In fact negligence bears two meanings and whether it is used in one sense or the other will depend upon the context. Where it is used in contract to wrongful intention it is used in the sense of a mental condition. In many cases it becomes necessary to ascertain whether a particular act was done with a guilty intention or merely carelessly. Suppose a person left poison on the table, which another eats? Here the same conduct may lead to different consequences according to mental state of the actor. If he left the poison with an intention that the other person should eat it, he is guilty of intentional wrong but if he left the poison inadvertently he is guilty of negligence only. The conduct is same but to ascertain whether it is merely negligent or intentional an inquiry into his mental condition is necessary.

On the other hand when negligence is used as contrasted with inevitable accident, the standard is generally objective. If his conduct falls below the standard of a reasonable man he is negligent. If it confirms to that standard he is not negligent and can escape liability.

The reality is that intention or negligence originally indicated a mental condition, but since what passes in ones mind cannot be easily ascertained, his state of mind came to be judged by his external acts. Thus, a person shooting at another cannot be herd to say that he had no intention to

kill him. This principle is based on normal experience that a person must know the ordinary consequences of his conduct. In tort of negligence this approach has gone a little further to develop a common standard of careful behaviour and to discourage avoidance of liability on the basis of personal equation.

Even when one considers negligence, as a mental condition for purposes of other torts standard cannot in practice be wholly subjective. Law judges mental state from external behaviour. But incase of tort of negligence standard is completely objective. Now, it is well established that a person is liable in negligence if he harms another person by not complying with the standard of care expected of a reasonable man how so ever cautious and careful mentally he might have been.

However, a close examination of the subjective theories of negligence would reveal that the dispute is only formal. In ultimate analysis the negligence is inadvertence or indifference as to probable consequences of one's conduct. When consequence is reasonably foreseeable but he fails to take reasonable precautions the inadvertence or indifference is presumed. Thus the subjective theory of negligence emphasizes the actual in inadvertence while the objective theory of negligence attaches more importance or indifference.

1.4.1. Definition of Negligence:-

In modern times negligence is considered as an independent tort. In this sense it means a conduct, which causes damage without anything in mind. A precise and accurate definition of negligence is not possible. However, a survey of some well-known definitions would make the elements of negligence very clear.

In 1856 in **Blyth V. Birmengham.** Water Works Co. Alderson, B**.** defined negligence thus Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do".

In 1934 Lord Wright has defined negligence as follows": in strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission it properly connotes the complex concept of duty, breach and damages thereby suffered by the person to whom the duty was owing".

Clark and Lindless in their book on Torts say," Negligence is the omission to take such care as under the circumstances it the legal duty of a person to take. It is in no sense a positive idea and has nothing to do with state of mind."

According to winfeld "Negligence as a tort is a breach of a legal duty to take care which results in damages".

According to American Restatement of "Law conduct which involves an unreasonably great risk of causing damage or fully conduct which falls below the standard established by law for the protection of others against unreasonably great risk of harm" is negligence (Restatement of Torts, section 242).

As observed in **Babusingh V. Champa Devi(1974),** negligence is not a question of evidence, but an inference to be drawn from proved facts. It is not an absolute term but is relative one and is rather a comparative term. It is consequently a matter of risk, a cognizable danger of injury.

1.4.2. Elements of Negligence :-

From the above definitions, it must be noted, that of the Winfield's definition is the best as it embraces all the general elements of negligence. The elements of the cause of action for negligence may therefore be summarized as under.

a. A legal duty to take care.

b. Breach of the Duty.

c. Damage to the plaintiff as a result of breach of duty.

Thus, in an action for negligence, once the court finds that there is damage, it tries to fix the liability and its limits and the person on whom it should fall.

1.4.3. Distintion between Negligence and Intent :-

A negligent act is different from an intentional act. Intention is a conscious shapping of conduct to bring about a certain event. Therefore, to intend is to have in mind a fixed purpose to reach a desired objective. Thus, intentional act is a combination of both foresight and will. In intentional act the actor desires to bring about certain consequences of his act, while in a negligent act he does not so desire to bring them about, nor does he know that they are substantially certain to follow or believe that they will.

An apt illustration in this regard is **Wilknson V. Downton** (1897) in that case the defendant who wanted to play a practical joke informed his friend's wife that her husband had met with an accident and was ailing in a hospital. As a result, the women fell ill and received a nervous shock. The defendant's excuses that he did not expect such consequence to follow were not accepted and he was held liable for the consequences of his intentional act.

In intentional acts the question of care does not arise, as the consequences are desired. Where as in case of negligent acts due care would have avoided the consequences but the same is wanting. Intentional acts could be deterred by exemplary damages, while negligent acts are not capable of being so deterred. An intentional wrong is punished by fine or imprisonment or both for a negligent act the wrongdoer is made to pay damage to the injured.

1.5. Summary:-

The common law to begin with did not recognize negligence as a separate tort. It was considered as only a way of commiting other torts. Action for damages, which fall short of trespass, was claimed through assumpist action. The concept of negligence gradually came to be recognized in certain circumstances those engaged in certain common callings such as ferryman, surgeons, innkeepers etc.

The development of negligence as a separate tort has taken place in the first part of 19^{th} century. The reasons were rapid industrialization, fast means of transport and resultant increase in accidents.

The word negligence has two meanings. Firstly it indicates the state of mind of a party in doing an act i.e. subjective theory of negligence. Secondly it means a conduct, which the law deems wrongful i.e. objective theory of negligence. Originally negligence was used in its subjective sense. Negligence in the sense of conduct refers to the behaviour of a person who, although innocent of any intention to bring about the result in question, has failed to act up to the standard set by the law.

Although it is clearly a mental element, still, judges in deciding whether a man is guilty of negligent conduct or not apply an external standard and do not take into consideration his mental attitude at the moment of the act. Thus, negligence is a conduct and not a mental element. It differs from an intentional act but it is equally important to note that all careless acts do not constitute negligence.

1.6. Self Assessment Question:-

1. Give a detailed description of the development of negligence under the common law.
2. Critically examine the two theories of negligence.

1.7. Reference Books:-

Winfield: History of negligence of Tort, 42 LQR 184.

W.V.H.Rogers- Winfield and Jolowiez on tort 13th Edn 1990.

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Lesson – 2

MODERN TORT OF NEGLIGENCE

Objective:-

After going through this lesson you should be able to

- Understand the concept of duty.
- Describe Neighbour rule.
- Analyse concept of reasonable man and Reasonable care.

Structure:-

2.1 Concept of Duty - Meaning:-

The first thing to be established in an action of negligence in modern times is the legal duty of care owed by the defendant to the plaintiff. A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. However it is not an easy task to determine the existence or absence of such duty in a particular situation.

Although discussion of duty of care can be found in earlier cases, the first attempt to lay down a general test of duty was made in 1883 by **Brett M.R. in Heaven V Pender**. He says "Wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger". In that case, the plaintiff, an employee of an independent contractor engaged by the defendant, was painting a ship in the dock of the defendant. He was injured because a rope supplied by the defendant slinging the staging on which he was standing was defective. The defendant was held liable for supplying a bad rope.

Pointing to the definition of duty as presented by Brett M.R, Lord Atkin in **Donoghue** case (1932)) said that though it is wide it is capable of affording a valuable practical guide if it is properly limited. Accordingly he has analyses and developed the idea further, put it in the right background and attempted to present said that thought it is wide it is capable of affording a valuable practical guide if it is properly limited. Accordingly he has analysed and developed the idea further, put it in the right background and attempted to present in brief the concept of duty, its history and its practical application to various cases. The question in that case was about the duty of a manufacturer to the ultimate purchaser or consumer.

2.2 Duty to act or Omit:-

The concept of duty was further explained in **Blyth V Birmingham Waterworks Co. (1856).** In that case the defendants water Works Company laid pipes in accordance with statutory provisions but during an entirely cold winter, such as no man could have foreseen, a plug burst and caused injury to the plaintiff. Speaking for the court Alderson B. held that the plaintiff could not recover damages, as the defendant had not been negligent. According to him "negligence is the omission to do something which a reasonable man would do, or doing smoothing which a prudent and reasonable would not do.

Thus, this case explains that negligence is not a legal abstraction, it is not an idea in air but it is a failure to perform duty to take care. The duty to take care consists of an act or omission and the same would be measured by the standard of a reasonable man in the given circumstances.

2.3 Content of Duty:-

As to the content of duty it may be said that it is the minimum level of the cautionary conduct expected of the defendant which he ought to reach. The action whether such duty is broken, is a question of fact, which can be found out from the examination of the actual conduct of the defendant. Thus negligence is not actionable unless the duty to be careful exists. As said by lord Mac Millon in **Donoghue** case (1932) duty to be careful exists in many fold ways. He says, "The grounds of action may be as various and manifold as human errancy and the concept of legal responsibility may develop in adaptation to the altering social conditions and standards. The criterion of judgement must adjust and adopt itself to the changing circumstances of life. The categories of negligence are never closed".

2.2.1 Neighbour Rule (Proximity Rule):- Before 1932 there was no general duty of care in negligence. Lord Atkin propounded neighbor rule in **Donoghue V Stevension (1932)**, which helps to decide if in a particular case duty of care exists. Lord Atkin said: "the rule that you are to love your neighbour becomes in law, you must not injure your neighbour you must take reasonable care to avoid acts or omissions which you must reasonably foresee would be likely to injure your neighbour".

To the question, who then, in law is, my neighbour he went one to define neighbours as "Persons so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

In that case the appellant drank a bottle of ginger beer, which was purchased by her friend from a retail shop. The bottle contained remains of a decomposed snail. As the bottle

was opaque the snail could not be detected until greater part of the content was consumed by the appellant. She filed a suit for damages against the respondents who were the manufacturers of ginger beer. It was alleged that she suffered from a severe shock and gastroenteritis. The respondents were held liable. Lord Atkin delivering the judgement observed.

"A manufacturer of a product which he sees in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of a product would result in an injury to the consumers life or property owes a duty independently of contract, to the consumer to take reasonable care".

Thus, the defences pleaded by the defendant that he did not owe any duty of care towards the plaintiff and that the plaintiff was a stranger to contract and her action was, therefore, not maintainable were rejected.

In 1934 the case of **Grant V. Australian Knitting Mills** extended the neighbour principle to products such as undergarments and to other manufactured goods and in 1948 in Coco Cola Bottling co. Case to manufacturer of drinks and to other fields. But the real change took place in **Anns V. Merton London Borough** (1978). In that case the plaintiffs were lessees under long leases of certain flats built in 1962. The owners who were also the builders were the first defendants. The local authority to the Borough Council was the other defendant. In 1970 structural movement began to occur resulting in cracks in the wells sloping of floors etc. The plaintiff's case was that these were due to the inadequate foundation, there being a depth of two feet six inches only instead of three feet or deeper as shown in the approved plans. As against the local authority the plaintiff's claim was based on negligence in failing to carry necessary inspection of the foundation before it was covered up. The local authority we enabled through buildings bye laws made under the public health act 1936 to supervise and control the construction of buildings in their area and in particular the foundation of buildings.

The House of Lords held that the act and the bye-laws did not impose a duty to inspect but conferred a discretionary power but this by itself did not exclude the existence of the common law duty to take care and the local authority was under a duty to take reasonable care to secure that a builder did not cover in foundations which did not comply with the bye-laws and this duty was owed to owners and occupiers of the building other than the builder who might suffer damage as a result of the construction of inadequate foundations. Accordingly the local authority was held liable to the plaintiffs. In holding so Lord Wilberforce observed thus.

"The position has now been reached that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relation of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may be likely

to case damage to the latter in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively it is necessary to consider whether there are any considerations, which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damage to which a breach of it may give rise".

The general principle of duty laid down in the aforementioned cases has been accepted by courts in almost all common law systems including India as a test of the existence of duty In all cases of negligence. The duty is not to injure ones neighbour and the word neighbour have been carefully defined. It does not denote any physical proximity. Every one is your neighbour for purposes of duty if a reasonable man can foresee that he is libel to be affected by your act or omission.

In **Popat Lal Goakaldas shah V. Ahmedabad Municipal Corporation** (AIR 2003 GUJ 44); plaintiff's son aged 21 years went for swimming at a swimming pool. He took dive but met with an accident and became serious. He died on the way to hospital and declared dead in the hospital. The plaintiff's case was that when their son met with an accident the coach of the swimming pool had not taken proper protection and care by giving immediately helps and the defendant corporation did not provide medical help. The corporation contented that to maintain the swimming pool was a discretionary duty under section 66 of the Corporation Act, therefore, it was not liable. The trial court held that plaintiffs have proved that deceased received injuries resulting into death, while taking bath in the swimming pool on account of negligence of the defendant corporation in maintaining the pool, but held that the suit was barred by the period of limitation and dismissed the suit. On appeal, the High Court held that the corporation had failed to discharge duty of care through its servant coach towards persons swimming in swimming pool and liable in tort. Accordingly the judgement and decree of the trail court was set aside and the Corporation was directed to pay Rs 80,000 with 9% interest per annum from the date of the suit towards compensation.

The rule of proximity and (neighbour rule) was applied in a new situation in **Madhya Pradesh Road Transport corporation V. Basantibai** (1971) SCJ 328. In that case the driver of the appellant corporation was stabbed by a ruffian while going to his place of work in early hours of the morning. There was a communal riot in the city and the authorities had promulgated curfew order. The question before the court was whether the appellant was negligence in not providing adequate arrangement for the safety of the deceased while he was going to join his duty. The court after referring Donoghue case held that the appellant was liable in the new situation. The court said normally an employer owes no duty of care for the safety of his employer while the employee is going to the place of his employment from his house. The point, however is whether the situation is abnormal and when as a result of out-break of violence in the city, the law enforcement authorities promulgate curfew order requiring citizens within doors as the only means which can reasonably ensure that safety. In such a situation, when every citizen is expected to be within doors as a matter of safety, if the employers requires his employee to come to the place of employment in early hours of the morning, it is reasonably foreseeable that the employee is likely to suffer injury at the hands of ruffian while going to his place of work unless adequate measure are made by the employer to the safety of the employee. Requiring an employee to come to work in such a situation is itself such an act from which harm to the employee is foreseeable and the employee being closely and directly connected with the act of requiring time to join

work, the employer must have his safety in contemplation. On the basis of the principle enunciated by Lord Atkin in **Donoghue** case the employer must, in the circumstances prevailing in the instant case, be held to owe a duty of care to the employee while he was on his way to his place of work. The employer should have taken adequate care for the safety of the employee while he was on his way, either by providing, safe transport or some person to accompany and guard him. In case it was not possible for the employer to make any arrangement for the safety of the employee the employer should have temporarily closed down the business as the only alternative of avoiding harm to the employee.

In **Union of India V.Supriya Ghosh** (AIR 1973 pat .129) one Mr. Subharata Ghosh while driving his car dashed against a mail train at a railway level crossing and died in the accident, In an action by his window Supriya Ghosh against Union of India, it was contended that the level crossing was unmanned and gates were open at the time of passing of the train. The evidence showed that there was no contributory negligence on the part of deceased as he could not see the railway line from a distance nor could he hear the sound of a running train as windscreen of the car was closed. It was held that there was a duty on the railway administration to keep the level crossing gate closed when the train was to arrive. Since they were negligent in not doing so, the defendants were held liable for the same.

In **Prig Ice and Oil Mills V. Union of India** (AIR 1990 all 168) the Allahabad high court has held that the railway administration does not have a duty to man all the railways crossings in the country. In that case there was a level crossing at a place where the surrounding area was not very much developed and there was very little traffic to cross that crossing.

The plaintiff caterpillar type tractor, which had chins instead of rubber wheels, tried to cross through the line at this crossing but was stuck up. The driver abandoned the tractor on the line seeing the train coming. He did not give any signal to stop the train. The tractor was thrown of by the impact of the railway engine of the approaching train. The plaintiff sued the railway authorities for damages. It was held that the accident had occurred due to the negligence of the driver of the tractor because he did not make any effort to give signal to the train in order to stop it. The train was coming at slow speed and had he made efforts it could have stopped. The railway authorities had given due notice of danger of coming trains by installing big size notice boards on both sides of railway crossing. In such a situation it is the duty of public to be careful while crossing the railway line. It was held that the railway authorities were not liable.

In **Municipal Corporation of Delhi V. Subhagwanti** (AIR 1966 sc 1750) the Supreme Court held that the owner of the structures adjoining the highway has a special duty to take care and if due to disrepair of the structure, any damage to passerby is caused, the owner of the structure will be liable therefor. In that case a clock tower situated in Chandini Chowk, Delhi collapsed causing the death of a number of persons. The structure was 80 years old where as its normal life was 40-45 years. The Municipal Corporation of Delhi, who was having control of the structure, had obviously failed to get the periodical check up and the necessary remains done. The Corporation was held liable to compensation for the consequences of the collapse of the structure.

Similarly in **Municipality Corporation of Delhi V. Susheela Devi** (AIR 1999Sc 1929) a person passing by the road died because of fall of the branch of tree on his head. As per an expert witness, a botany professor, the tree had died up and had hanging dangerously. The Supreme Court following Subhagawati case held the horticulture department of the corporation would have carried out periodical inspection of the trees and, should have taken safety precautions to see that the road was safe for the users by removing such dangerous branches on the high way. The Corporation held liable for negligence and bound to pay compensation to the claimants.

In **Makbool Ahmed V. Bhuralal** (AIR 1986 Raj 176) the Rajasthan High Court has explained the duty of care, of the driver and the conductor of a bus. In that case, one Mustaq Ahmed while trying to board a bus at a bus stop asked the cleaner to blow whistle for starting the bus. On the cleaner doing so, the bus started, and Mustaq Ahmed fell down. He was run over and crushed by the rear wheel of the bus. His body was dragged by the bus and it was stopped only after covering a distance of 20-25 yards. It was held that the conductor should have stood at the gate of the bus to see that every passenger had properly boarded the bus, and the driver should also have run the bus keeping in view of the safety of the passengers, and their failure to do so amounted to negligence on their part. The parents and the widow of the deceased were held entitled for compensation against the owner, driver, conductor and the insurer of the bus.

2.2.2 Limitations to Neighbor Rule:- Although, the rule of neighborhood has been widely applied for determining existence of duty, yet certain exceptions have been recognized by the courts.

They are:

(a) Lawful exercise of legal right-where a person exercises a legal right in lawful manner, he will not be liable to another person who is injured thereby in his interests merely because injury to him might be reasonably contemplated while exercising such right. For example, where one opens a competitive school in the same locality (**Gloucester Grammar School case,** 1410) or does some thing on his land (**Bradford corp. (v) Pickles,**(1895).

(b) Omission as opposed to positive acts-there is no general duty to do positive acts for the benefit of others. Thus, where you fail to feed a man dying of hunger or fail to save a drowning man, you are not liable.

(c) Statutory duties-when a duty is created by a statute, the extent of such duty and the liability for its breach are matters, which are governed by that statute.

(d) Animals straying on the highway-if the domestic animals are not known to be dangerous the owner owes no duty to prevent them from straying on the highway and, therefore, will not be liable to loss caused by them to the users of the highway, (**Searle V. Wallbank,** 1947).

(e) Special privileges and immunities-the rule of neighborhood also does not apply where an act is done by a person who enjoys privileges such as sovereign powers etc, **Kasturi Lal V. UP** (1965).

2.3 Concept of Reasonable man and Reasonable Care:-

The law has formulated the concept of a reasonable man in order to measure the defendant's conduct. If his conduct falls short of the conduct a reasonable man he is termed as negligent. The factual happenings are compared with this legal standard and a judgment is arrived at.

The term 'reasonable' is an adjective used in many phrases in legal contexts generally signifying that which is agreeable to reason, not irrational, extravagant or excessive nor yet trivial and hence coming to mean moderate.

The concept 'reasonable care' is a standard of care precaution desiderated by many rules of common law which can be described only as being the care which can be described only as being the care which a person possessed of reason would take.

A 'reasonable man' is a hypothetical creature whose imaginary characteristics and conduct by way of foresight, care precautions against harm, susceptibility to harm, and the like are frequently referred to as the standard for judging the actual foresight, care, etc of a particular defendant. Such a man is a man of ordinary prudence, a man using ordinary care and skill. He will guard against the obvious, the possible, and the foreseeable, but not against the bare possibility the highly unusual and the completely unexpected. He will take atleast the precautions customary and normal in the circumstances.

Further, a reasonable man is not infallible or perfect. In qualities of the head and heart he represents and does not excel the general average of the community. He foresees danger and uses his intelligence. He is an abstraction, a creature of law and an objective and impersonal standard.

In words of Fleming, a reasonable man is the embodiment of all the qualities which we demand of the good citizen; and if not exactly a model, perfection, yet altogether a rather better man than probably any single one of us happens or perhaps even aspires to be. His impersonal standard varies with circumstances, the magnitude of any known risk, the practicability of precautions, the customary practice in the like. The reasonable man must be of type once warned, twice shy. But it is not incumbent on him to gain special skill as part of his equipment unless he undertakes top perform the job of that type.

The concept of reasonable man first appeared in **Vaughan V. Menlove**(1837).

The test in each case of negligence is the behaviour of such hypothetical reasonable person under the circumstances of a particular case the degree of precautions expected of him. In **Kandal V. Tavrant** (1955). There was a collision between the plaintiff's car, which he had left stationary on the roadside and the defendants moving tractor. The Court of Appeal held that where there was a collision between as moving vehicle and a stationary vehicle which was plainly visible, the onus was on the driver of moving vehicle to show that he had taken reasonable care and on the facts the defendant had failed to show that he had taken all the steps which reasonably ought to have been taken in the circumstances. Accordingly the defendant was held liable for the negligence of his driver.

In **Babu Singh V. Champa Devi** (AIR 1974 All 90) a truck was being driven at 20-25 kilometers per hour on a 12 feet road though there was traffic in front of the truck. It struck a buffalo-cart killing buffalo as well as cart driver and damaging the cart badly. It was held that the truck driver was negligent. On the other hand in **Mysore State Road Transport corporation V. Albert Dias** (AIR1973 Mys 240) a bus driver was trying to overtake a bullock-cart .The right wheel of the bus got on the untarred portion of the road and the soil of the mud portion being loose the bus wheels sank in the mud and the bus toppled to the right side. The passengers of the bus including respondent were injured. It was found that tarred portion of road was only 12 feet wide and while overtaking it was usual for a vehicle to get on to the untarred portion for the road and the driver in this case could not know that the soil of the untarred portion had become loose. Under such circumstances it was held that the driver was not negligent and as such appellants could not be held liable.

In **Safdar Hussain V. Union of India** (AIR 1978 All 53) the chief booking clerk of railway department kept cash in iron safe and the keys of the safe he kept in another wooden almirah in a hidden place and put his own lock in the almirah. Then after the back door was bolted from inside he locked the outer door. Next day it was found that the chain latch of the back door was open, lock of the almirah was broken and entire cash was missing. The clerk was held not liable for he did everything that reasonable person could do under the circumstances. In **Shivkar V. Ramnaresh** (AIR1978 Guj 115) two teachers of a school took 60 children to a picnic spot. They instructed the children not to go to the riverside. But three children went and drowned in the river. Two were rescued alive by fisherman but one died. The court held that the danger was apparent, obvious and forceable because there was a deep monsoon current in the river, the river was in close proximity to the picnic spot and an attraction or allurement to the young boys. The incident occurred when both the teachers were taking food. Applying the test of reasonable parents the court held that both the teachers and children should not have started taking food together. The defendants were held liable for negligence.

2.4 Summary:-

The duty to take care is not mere moral, religious or social duty. It is not contractual. The idea of negligence and duty are co-relative as there is no such thing as negligence in abstract. Actionable negligence consists in the neglect of the use of ordinary duty of care towards a person to whom the defendant owes that duty of care. The duty to take care consists not only of an act or omission but it may also arise making a statement. The grounds of action for negligence are manifold.

Lord Atkin in **Donoghue Case** laid down the principle of neighbourhood, which helps to decide the existence of duty of care in a particular case. The duty is not to injure ones neighbour and neighbour does not denote physical proximity. Every one is our neighbour for the purpose of duty if a reasonable man can foresee that he is likely to be affected by our act or omission. Application of neighbour rule to negligence cases is subject to certain limitations. They are lawful exercise of legal rights, mere omissions as opposed to positive wrongful acts discharging statutory duties, animals straying on the high way which are not harmful the acts of sovereign immunity etc.

T he concepts of reasonable man and reasonable care are well established. Today the standard of care in negligence is that of a reasonable man. Thus the law of torts does not recognize different standards of care. The sole standard is the care that would be shown under the given circumstances

by a reasonably careful person. However, the amount of care will be different in different cases because a reasonable person will not show same anxious care in different situations. A reasonable man is a model of all proper qualities with only those human shortcomings and weaknesses, which the community will tolerate.

2.5 Self Assessment Questions:-

1. Describe the development of the concept of duty of care.
2. Explain the origin of neighbour rule and its application.
3. Analyse the concept of reasonable man.

2.6 Reference Books:-

Street-on torts 9th edition 1993.

Toney weir – a case book on tort seventeenth edition1992.

B.M Gandhi -law of tort 1987.

Lesson Writer

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Lesson – 3

QUESTION OF FIXING STANDARDS

Objective:-

After going though this lesson you should be able to:

- Understand the standard.
- Know the factors relevant for deciding the stand of care.

Structure:-

3.1 Introduction:-

The Standard of care demanded by the law of negligence is nearly always an Objective one that of the hypothetical' reasonable man in that situation, The whole theory of negligence presupposes some Uniform standard of behavior. To say that the standard is that of the reasonable man, does not answer the question of what paragon would or would not have in the circumstances of the particular case. The law of negligence is certainly not a high way code of dos and don'ts for particular activities. However, there has been enough judicial analysis of the idea of reasonable care to give us a few more points to the decision in an individual case, even though the final out come may be un predictable. The fundamental point is that in order to determine whether conduct is negligent there must be a balancing of risks against the cost of precautions.

3.2 Meaning of standard:-

A standard is a defined criterion by reference to which individual conduct may be judged. A standard is also regarded as a measure of Quality, Quantity or value established by law or general consent. It is the general recognition and acceptance that maces a standard. Standards may be either fixed or in definite.

A standard is indefinite, where it is fixed by a formula, which permits individual judgment in the circumstances of the particular case. For example reasonable care, due diligence, the care of a reasonable man etc. Indefinite standards are in their nature capable of development, but in each case it is for the court to judge or decide. Whether in the Particular circumstances what is under consideration satisfies the standard or not. The law establishes a standard of care, which each individual is observed. He may be in any field of activity but the standard of care to be observed is fixed so to say, and to that standard the actor has to confirm or else his conduct may be regarded as negligent. Thus. if the conduct of the defendant falls short of the conduct of a reasonable man in that field, the defendant is negligent and would be liable.

3.3 The objective standard:-

The standard of care expected of the reasonable man is objective and impersonal. But it is equally true that it is for the judge to declare what in each case the party concerned should have contemplated or foreseen as a reasonable man. As there is always a room for difference of opinion between one judge and another the actual application of the standard of care may justly be said to have a subjective element. Thus what to one judge may seem farfetched may seem to another both natural and probable. This point is well illustrated by **Nettle ship v Weston** [1971]: In that case the defendant was a learner – driver who crashed into a lamppost injuring the front seat passenger. The defendant was convicted of driving without due care and attention, but at first in stance the plaintiff's claim was dismissed because the defendant had been doing her best to control the car. The Court of Appeal held that the standard of care required of a leaner driver is the same as that required by any other driver, namely that of a reasonably competent and experienced driver. The defendants driving had fallen below this standard and it was irrelevant that this was because of her inexperience. A variable standard for different levels of experience, or competence, or temperament would create much uncertainty and, indeed, unfairness for plaintiffs, and result in the court having the impossible task of specifying a subjective level of competence for each defendant.

Salmon LJ dissented in Nettleship case on the Question of the stand of care that a passenger is normally entitled to expect from a learner-driver. This was an the basis that the duty of care springs from the relationship between the parties, and in the case of an inexperienced learner-driver the passenger knows that the driver did not possess the skill and competence of an experienced driver. Thus, the learner driver Should not be liable for an accident which results tram some mistake which any prudent beginner doing his best can be expected to make.

The approach of salmon L.J was adopted by the High court of Australia in **Cook v Cook** (1986) In that case the driver to the knowledge of the passenger both unlicensed to drive and inexperienced. It was held that, while the personal skill or characteristics of the individual driver are not directly relevant to the standard of care, special and exceptional facts may so transform the

relation ship between driver and the passenger that it would be unreal to treat it as the ordinary relationship of the driver and passenger, and unreasonable to measure the standard of skill and care by reference to the skill and care of an experienced and competent driver. Thus cooks case illustrates an active approach to the problem of inexperienced defendants. However, it does not represent the law in England and in India.

According to proseer the objective standard is evidenced by the usual and customary conduct of others under similar circumstances normally relevant and admissible, as an indication of what the community regards as proper. If the actor does only what every one else has done, there is at least an inference that he is conforming to the community idea of reasonable behavior. Custom also bears upon what others will expect the actor to do. However, changing social conditions force the court to recognize new duties.

Thus, while applying the community standard or the reasonable man standard to the actor, the court would not enquire into the internal mental condition or attributer of the actor. But the court would measure the extreme conduct or attributes of the actor. This is because, it is difficult and perhaps impossible to find out and measure internal attributes of each man. For this reason, if the actor is to live in community he must learn how to adjust with this standard. If he con not, then he must pay for what he breaks. No allowance is made in this regard and no one would be heard to say that he did the best he knows how. Personal equations are not considered.

Knowledge of the actor also plays an important part in fixing him with liability, be cause an ordinary person is presumed to possess certain elementary knowledge, which puts him in that category. He would not be excused when he denies the knowledge of the risk. And this is the minimum standard have know ledge based upon what is common to the community and expected of a reasonable man

3.4 Standard is Question of Law:-

The standard of care is a question of law and not of fact. It various with the circumstances of a case. In deciding the issue of standard of care the court should take into account the following factors.

3.4.1 The Likelihood of The Harm :- Duty to take precautions depends to a great extent upon the likelihood of the harm. In **Fardon V. Harcourt Rivington** (1932) Lord Denedin said people must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities." In that case the defendant parked his car by the roadside and left a dog inside the car. The dog jumped about and smashed a glass panel. A splinter from this glass injured the plaintiff while he was walking past the car. It was held that the accident, being very unlikely, there was no negligence in not taking precaution against it and, therefore the defendant was not liable. In **Bolton V. Stone** (1951) the defendants were the committee and members of a cricket club. A batsman hit a ball, which went over a fence and injured the plaintiff on the adjoining road. The wicket from which the boll was hit was about 78 yards away from the fence and 100 yards away from the plaintiff. The ground had been used for about 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. The court of appeal held that the defendants were not liable for nuisance but they were liable for negligence. On appeal

the House of Lords held that there was no liability even on the basis of negligence. The reason was that the chance of a person ever being struck even in a long period of years was very small and even the likely risk created was not substantial.

Similarly in **Sukhraji V. State Road Transport Corporation, Calcutta** (AIR 1996 Cal 620) it was held that if a person suddenly comes before a fast moving vehicle and is it thereby, the driver of the vehicle cannot be blamed for that. In that case the plaintiff's son a boy of 14 years, got down from a moving tramcar and while he tried to cross the road, he was run over by an omnibus, which was about to overtake the said tramcar. It was found that the boy had got down without a stop for the tramcar and on seeing the boy in front of his bus, the driver of the omnibus had applied the brakes with all his might but the boy could not be saved. It was held that the driver of the omnibus could not anticipate that certain passengers would jump off a moving tramcar where there was no stop. He would rather take it for granted that no one was getting down from it. Accordingly it was held that the driver cannot be made liable for negligence. It was found to be negligence on the part of the deceased himself.

On the other hand in Superintendent of Police, **Dharwar V. Nikhil Bindurao** (1974) 2 karn L.J.495.It was held that if, pedestrians are likely the to cross the road, special care must be taken. If the pedestrians crossing the road are schoolboys of young age, a much greater care is needed. In that case a schoolboy, who had alighted from a bus, which had halted nearby, was half crossing the road when a police van dashed against him causing him grievous injuries. Two or three boys ahead of him had successfully crossed the road. There were signboards indicating this as school zone, where the presence of boys could be expected. It was held that the accident was because of the negligence of the driver and the defendant was, therefore, liable for the same.

3.4.2 The Magnitude of The Risk:- The law in all cases exacts a degree of case commensurate with the risk created. The greater the risk of harm the more precautions must be taken. Thus, the driver of a vehicle should take greater care when it is drizzling. A person carrying a loaded gun is expected to take more precaution than a person carrying an ordinary stick. Greater care is required to be taken in transporting inflammable and explosive material than in transporting ordinary goods.

Glassgow Corporation V. Taylor(1922) is a typical illustration of lack of due care according to the circumstances of the case. In that case poisonous berries were grown in public garden under the control of the defendant 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 neither properly fenced nor a notice regarding the deadly character of the berries was displayed. Therefore, the defendants were held liable for negligence. According to lord summer "a measure of care appropriate to liability or disability of those who are immature or feeble in mind or body is due from others who know of, or ought to anticipate, the presence of such persons within the scope and hazard of their own operation."

The House of Lords in **Haley V. London Electricity Board** (1964) explained the law relating to the extent of duty towards blind persons. In that case the plaintiff a blind man was walking carefully with a stick along a pavement in a London suburb, on his way to

work. The servants of the dependants Electricity Board dug a trench there in pursuance to statutory powers and in its front they put a long-handled hammer. The head of the hammer was resting across the pavement while the handle was on a raising two feet above the ground. The plaintiff tripped over the obstacle, fell into the trench and was injured. In an action for damages it was found that there were 285 blind persons registered in that area. The hammer gave adequate warning of breach to persons with a normal sight, but it was insufficient to blind persons. Under these circumstances, the House of Lords held that since the city pavement was not a place where a blind man could not be expected; not providing sufficient precautions for him was negligence for which the defendants were held liable.

In **Nirmala V Tamil Nadu Electricity Board** (AIR 1980 mad 201) a high-tension wire had snapped and fallen over the farm of the plaintiff's husband. While he was in his farmhouse he heard strange cry of bulls drawing bullock cart. He came out and as he was running to find out what was happening he treaded upon the wire and died instantaneously by electrocution. The electricity rules provided that every overhead line which is not covered by insulating material and which is expected over any part of a street or other public or any factory or mine or any consumer's premises shall be protected with a device approved by the inspector for rendering the line electrically harmless in case it breaks. The court held that the burden was on the electrical board to show that there had been no negligence on their part. The fact that the overhead line, which snapped and fell on the ground, continued to be live showed that the precautions necessary under those circumstances were not taken.

In **Bhagwat Sarup V. Himalaya Gas Company** (AIR 1985 H.P 41) the plaintiff booked replacement of a cooking gas cylinder with the defendant, who had the gas agency in Simla. The defendant's deliveryman took a cylinder being defective; he tried to open it by knocking at the same with the axe. This resulted in damage to the cylinder and leaking of gas there from. Some fire was already burning in the kitchen and the leakage gas also caught fire. As a consequence of fire, the plaintiff's daughter died, some other family members received severe burn injuries and some property inside the house was also destroyed by fire. It was held that the defendant's servant was negligent in opening the cylinder and the defendant was liable for the consequences of such negligence.

3.4.3 The usefulness or advantages of the defendants act:-The social utility of the defendant's activity may justify taking greater risks than would otherwise be the case. For example where a fire has been caused and serious damage to a locality is threatened the driver of the vehicle of fire brigade cannot be expected to go with the same speed as is prescribed for other vehicles. In **Daborn V. Bath Tramways Motor co. ltd** (1946) it was held that it was not negligent to use a left hand drive vehicle as an ambulance in wartime when there was a shortage of vehicles for the task even though it was difficult to give hand singles and this has caused an accident. **Asquith L.J** said that in assessing what is reasonable care the risk must be balanced against the consequences of not assuming the risk. The purpose to be served, if sufficiently important, justifies the assumption of normal risk. And so the need for ambulances justified the risks involved in using the left hand drive vehicle.

Similarly in **Latimer V. A.E.C ltd**.(1953),due to an exceptionally heavy rainstorm, the respondents factory was fllooded with water. Some oily substances got mixed up with water. After the water drained away an oily film remained on the surface of the floor, which become slippery. Respondents spread all the available sawdust on the floor to get rid of the oily film but some areas remained uncovered due to lack of further supplies of saw dust. The appellant, who was an employee in the respondent's factory, slipped from one such oily patch and was injured. He sued the respondents for negligence and contended that the respondents should have closed down the factory as a precaution until the danger had disappeared. The House of Lords held that the risk created by slippery floor was not so great as to justify the precaution of closing down the factory with over four thousand workers. The respondents had acted like a prudent man and, therefore, they were not liable for negligence.

Similar was the position in **K. Nagiroddi V. Government of Andhra Pradesh** (AIR 1982 A.P 119) in that case the plaintiff had an orchard consisting of some 285 fruit bearing trees. The state government constructed a canal under Nagarjunasagar project for irrigation purpose without cementing the floors and banks of the canal. Due to the absorption of excess water from that canal through the roots, all the trees died. The plaintiff brought an action contenting that not cementing the floor of the canal or its bunds was negligence, for which the state should be liable. The contention was rejected and it was held that the construction of project or laying of canals for irrigation purpose was a great necessity, particularly in Indian conditions, and without them the land would be wilderness, the floors or the banks of the State Government. The defendant Government was, therefore held not liable to pay any compensation to the plaintiff.

However, this does not mean that the purpose of saving life or limb justifies taking any risk. There is little point racing to save one person if in the process others are killed and injured. Thus, it can be negligence for the driver of a fire engine to ignore a red traffic light **(Ward V. London county council** (1938).

3.4.4 The cost of avoiding the harm:- Some risks are unavoidable. Others can be eliminated or reduced only at great expense. The question that arises is at what point the cost of precautions would justify a reasonable man in not taking them. In such a situation reasonableness remains a matter of achieving a balance and the practical problem is to determine what weight will be given to the respective factors in achieving that balance. If a large reduction of risk could be obtained by a small expenditure, the defendant has acted unreasonably if he does not take the precautions. If great expenses could only produce a very small reduction in risk it will be reasonable to do nothing. It is a question of degree. But even where the risk is very small it would be careless to ignore it if it could be avoided at virtually no cost.

In Over **Seastankship (us) ltd V. Miller Steamship Co.Pty.ltd** (1967). The Wagon Mound (N02). In that case a large quantity of bunkering oil was spilled in **Sydney Harbour** as a result of the carelessness of the defendants engineer. With a high flash point the oil was very difficult to ignite in the open, but it did catch fire causing extensive damage due to hot metal falling to the water from welding operations carried out on a wharf the Privacy Council concluded that a reasonable man would have foreseen the possibility of the oil

catching fire but the likelihood of it doing so was extremely small. It did not follow, however, that, no matter what the circumstances, it is justified to neglect a small risk. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g. that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. It would have been simple to stop the discharge of oil-it was a matter of closing a valve. A reasonable man would not ignore even a small risk, if action to eliminate it presented no difficulty, involved no disadvantage and required no expense.

When precautions are not practicable then the risk of continuing the activity have to be weighed against the disadvantages of stopping the activity altogether. As a general rule a defendant's lack of resources will not justify a failure to take the precautions demanded by the exercise of a reasonable care. Impecuniosity is no defence. However, it may be relevant where the plaintiff seeks to hold public authority liable in negligence for failing to provide an adequate service. In **Knight V. Home Office** (1990) it was held that the prison authorities in failing to provide the same level of staffing for prisoners suffering from psychiatric illness that would be found in a psychiatric hospital outside prison.

3.4.5 Cases of Emergency :- Where things happen in quick succession an error of judgement may not be treated as negligence where personal danger is so imminent as to amount to an emergency he may be excused from liability for injury arising from his act. Self-interest and instinct to protect ones life indicate conclusion. In such cases the test is not whether a better course was open but the test is what a reasonable person might have done under such circumstances. In **Indian Airlines Corporation V. Madhuri Chowdhuri** (AIR 1965 Cal 252) a tragic air crash occurred in Nagpur when an aeroplane crashed immediately after it started flying from Nagpur to madras. The heirs and legal representatives of the deceased person failed suit for damages against the Indian Airlines Corporation. One of the grounds for claim was the negligence of the pilot in not following the rules of landing. The court held that the pilot was not negligent. The court observed that in case of sudden emergency a pilot is not required to exercise that degree of skill which would be required by a calm review of facts long after the accident had occurred. **Citing Thomas V. American Air ways inc.** (1935) the court held if a man is confronted with a dangerous situation not of his own making and there are several courses open to him and he is required to make a quick judgement the failure to exercise the best possible judgement would not itself constitute negligence.

3.4.6 The Amount of Consideration for Service:- The degree of care depends also on the kind of services offered by the defendant and the consideration charged there for from the plaintiff. For instance, one who purchases a glass of water from a trolley in the street for 50 paise is entitled to safe drinking water, which should not ordinarily infect him. But if a person purchases a mineral water bottle for Rs10/-then he can justifiably demand higher degree of purity. The manufacturer of a water bottle cannot be heard to say that so long he has made it equivalent to trolley man's after he has done his duty.

In **Klaus Mittelbachert V East India Hotels ltd** (AIR 1997 Delhi 201) the question of liability of a visitor, who got seriously injured when he took a dive in the swimming pool. The court while awarding damages amounting to 50 Lakhs held that there is no difference between a five star hotel owner and insurer so for as the safety of the guests is concerned. The

court also observed a time star hotel charging a high or fanoy price from its guests owes a high degree of care as regards quality and safety of its structure and service it offers and makes available. Any latent defect in its structure or service, which is hazardous to guests, would attract strict liability to compensate for consequences flowing from the breach of duty to take care." The principles laid down in this case still stand although the Division Bench reversal the decision in appeal on the ground that the cause of action in the pending case died with the death of the claimant (**E1 Ltd (v) Klaus Mittlebachert** (AIR 2002 Delhi 124).

3.5 Summary:-

Negligence is the omission to do something which a reasonable man, would do, or doing something which a reasonable man would not do. The standard of care expected of a reasonable man is objective. It does not take account of the particular weakness of the defendant. The court while applying the standard of a reasonable man to the actor would not enquire into his internal mental condition.

The law requires taking of certain factors into consideration to determine the standard of care required. Such as 1**.**The likely hood of the harm – where the chance of happening of an event is small, a reasonable would be justified in disregarding it. 2**.** The magnitude of risk – There is no absolute standard; the degree of care required varies directly with the risk involved. Those engaged in operations inherently dangerous must take precautions, which are not required of persons engaged in the ordinary, routine of daily life. 3. The usefulness of the defendants act – the law permits taking chance of some measure of risks so that in public interest various kinds of activities should go on. 4. The cost of avoiding the harm – the court will balance the risk against the advantage to be gained or the end to be achieved. Thus, where the benefit, which results from the act, is far greater than the apparent injury, which ensues, the law will tolerate the activity even though it inflicts injury. 5. Emergency – In cases of sudden emergency where things happen in quick succession an error of judgement will not be treated as negligence.

However, this does not mean that subjective factors can be wholly ignored. The language that negligence consists in failure to do what the reasonable man would have done under the circumstances suggests considering the personal character of the actor himself. The law has, therefore, made allowances for the blind, the deaf, the lame, the weak and on account of sex and age. But here also, in theory the standard remains the same i.e. of a reasonable man, but it is sufficiently flexible to take persons physical defects into account.

3.6 Self Assessment Questions:-

1. Explain the concept of standard.
2. Critically examine the various factors relevant in determining the degree of care.

3.7 Suggested readings:-

1. Margarst Brazier – Street on Torts – Ninth Edition 1993.
2. Michael A. Jones – Torts – Fourth Edition 1995.

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LESSON - 4

Professional Skill

Objective:-

After reading this lesion you should be able to

- Describe duty in medical profession
- Explain breach of duty in medical profession.
- Understand liability for negligent mis-statements.
- Know the scope of the consumer protection Act

Structure:-

4.1 Introduction:-

The rule that a person is expected to exercise only the degree of care which an ordinary prudent man would exercise is subject to an important exception. A person who undertakes something requiring special knowledge or skill will be considered negligent if by reason of his not possessing that knowledge he bungles although he does his best. Thus, when any one is engaged in a transaction in which he holds himself as having professional skill, the law expects him to show

the average amount of competence associated with the proper discharge of the duties of that profession, trade or calling. If he falls short of that and injures someone in consequence, he is not acting reasonably.

Thus a surgeon though he cannot be taken to be an insurer against every accidental slip must exercise such care as a normally skilful member of his profession may reasonably expected to exercise. But a passer by who renders first aid in an accident on the highway is not expected to use the same amount of skill as a doctor treating a patient in a hospital. However, if a reason deliberately takes upon himself to do things requiring skill, and if he does not possess it he ought not to undertake the task.

But extraordinary skill is not required of any one. For example an erroneous judgment upon a new point of law or upon a difficult question of construction is not indicative of negligence of a solicitor. But the case is different in the case of ignorance of practice and mismanagement of the preparation of a case for trail for in such matters a solicitor of ordinary intelligence and having that knowledge of professional duties which all solicitors should have, ought not to make a mistake. A solicitor is liable for the consequences of ignorance or non-observance of the rules of practice of the court. His liability may be either under the contract or tort.

4.2 Duty in Medical Profession:-

A person must exercise that much of care and caution as is commensurate with the profession he carries on. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. A doctor, as observed by the Supreme Court in **L.K Joshi Dr. V. T.B. Godbole** (AIR 1969 sc 128), when consulted by his patient owes him certain duties, vig, **(1)** A duty of care in deciding whether to undertake the case, **(2)** A duty of care in deciding what treatment to give and **(3)** A duty of care in administration of that treatment. A breach of any of these duties will give rise to an action for negligence against him. The practioner must bring to his task a reasonable degree of skill and knowledge and must exercise reasonable degree of care. Neither the very highest nor 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. In that case, the son of the respondent aged 20, met with an accident, which resulted in the fracture of his leg. He was taken to the appellant's hospital for treatment. What he did was to reduce the fracture, and in doing so he did not give an anesthetic to the patient but contended himself with a single dose of morphia injection. He used excessive force in going through this treatment, using thereof his attendants for pulling the injured leg of the patient. He then put this leg in plaster of paris splints. The treatment resulted in shock, causing the death of the patient. The Supreme Court held that the doctor was guilty of negligence.

Every slip or mistake does not import negligence. In Phillips India Ltd V. Kunju Punnu (AIR 1975 Bom.306), the plaintiff's son who was treated for illness by the defendant company's doctor, died. The plaintiff in her action contended that the doctor was negligent and had given wrong treatment. The Bombay High Court made the following observation form Lord Nathan's Medical Negligence, "The Standard of care which the law requires is not an insurance against accidental slips. It is such degree of care as a normally skilful member of the profession may reasonably be expected of

exercise in actual circumstances of the case in question. It is not every slip or mistake which imports negligence". The court held that the plaintiff could not prove negligence of the doctor and there fore the defendants could not be made liable.

How ever, if a specialist has lesser skill, intelligence and knowledge than that possessed by the like person in his profession and a patient knows this and accepts the same the standard stands modified accordingly. But medical malpractices cannot be excused. By undertaking to render medical services and though gratuitously, a doctor will ordinary under stood to hold him self out as having standard professional skill and knowledge.

Disclosure of information to the patient and his consent also play an important part. In words of Proseer, What should be done here is a matter of professional judgment in the light of the applicable medical standards. Accordingly the prevailing view now is that the action, regardless of its form is in reality one for negligence in failing to confirm to the proper standard, to be determined on the basis of expert evidence as to what disclosure should be mode. In applying the standard therefore in this area of disclosure of information, the factors to be included are the likelihood and seriousness of the bad result, the feasibility of alternative methods, the interest of the patient, knowledge of his past history, his emotional stability, the necessity of treatment and the existence of an emergency. The issue again came up for decision before the Madhya Pradesh high court in **Ram Biharilal V. T, N Srivastava** (AIR 1985 Mp150). In that case, the plaintiff's wife aged 32 years got abdominal pain. The defendant a civil assistant surgeon grade I started her treatment. As she did not respond to treatment, the defendant advised plaintiff that his wife was to be operated for appendicitis, to which they reluctantly agreed. The patient was put under chloroform anesthesia. On incision, the appendix was found to be normal and not at all inflamed.

The defendant then made another incision and removed the gall bladder of the patient without taking her husband's consent for the same, although he had been waiting outside the operation theatre. The liver and the kidney of the patient, which were badly damaged, had been further damaged due to the toxic effects of the chloroform and as a consequences of the same, the patient died on the third day after this operation. It was found that the operation had been performed in that ill-equipped hospital having no anesthetically and other basic facilities like oxygen and blood transfusion, and without carrying on necessary investigations like urine test, which are necessary investigations like urine test, which are necessary for carrying out any major operation, and without preparing the patient for the operation. Moreover, the second operation for removing the gall bladder was found unnecessary. It was neither gangrenous nor was there any pus formation and, therefore it was not a case of emergency operation and, it took hours before the completion of operation when the patient was under the effect of chloroform. The Division Bench while reversing the single judge decision held that the patient died due to rash and negligent act of the defendant surgeon and there fore he was held liable for the same.

4.3 Breach of Duty in Medical Profession:-

As pointed but earlier the law requires a fair and reasonable standard of care and competence by the medical man towards his profession. A medical man, who is consulted by a patient, owes him certain duties, normally. A duty of care in deciding, whether to under take the case, what treatment to give and careful administration of the treatment? A breach of any of these duties will support an action for negligence by the patient. The medical man must exercise reasonable care

and skill measured by the standard of what is reasonable to be expected from the ordinarily competent practioner of his class. The standard of care, which the law requires, is not insurance against accidental slips, it is such a degree of care as a normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case in question. There may be so many instances in which a medical man may commit breach of duty.

In **Collins V. Hortfortshire County Council** (1947) it was held that every surgeon takes responsibility for what he injects into a patient. As a local anesthetic it is his duty to take some steps reasonably to make sure before he injects it that he is injecting that which he ordered. If he is negligent in this, he will be liable. In that case a whole time resident medical officer performing under contract of service for a County Council, who was not a qualified medical practitioner but has passed the pharmalogical part of her final examinations, took instructions on phone from the surgeon regarding the operation to be performed next day. On her notebook she wrote down cocaine of certain percentage in certain dose while in fact what the surgeon had phoned was procaine to be kept ready for the purpose of injecting as a local anesthetic. The mistake was bona fide and due to disturbance in sound, as a result five times of the lethal doze of cocaine with adrenalin was kept ready and was injected into the patient next day by the surgeon thinking that what he was injecting was procaine with adrenalin. The patient died. It was held that the resident medical officer died not use reasonable skill and care in his office fully knowing that the dose of cocaine which she got ready was more than a fatal doze. It was her duty to get the instructions checked. While dispensing a dangerous drug it is the duty of a dispenser pharmacist to see that prescription is in writing from a fully qualified medical officer, when an order is received requiring him to dispense an unusually large quantity of a dangerous or poisonous drug, before doing so it is his duty to take steps to verify that there is no mistake about what is being ordered.

Similarly in **Cassidy V. Ministry of Health** (1951) the hospital authorities were held liable when, due to the negligence of the house surgeon and other staff, during post operation treatment, the plaintiff's hand was rendered useless.

In **Dr P. Narasimha Rao V. G. Jayaprakasu** (AIR 1989 AP 2070) the plaintiff a brilliant student of 17 years was given anesthesia in order to be operated for some ailment. After giving anesthesia the doctor kept him in the open temperature for 3 minutes and before removing the pipe for giving medicine failed to administer oxygen and he delayed in inserting the tube resulting in respiratory arrest. Although the surgeon was present in the room and saw the blocking of respiration but with out obtaining the condition of the patient from the anesthetist completed the operation as a result of which the patient suffered brain damage and he became totally dependent on his parents throughout his life. It was held that the anesthetist and the surgeon both were liable for negligence for violating their duty of care.

4.3.1 Unsuccessful Sterilization Operation:- In **Archana Paul V. state of Tripura)** (AIR 2004 Gauhati 7) The court has held that if negligence is alleged, the specific case is to be made out that in what manner the doctor was negligent in conducing the operation. In that case the petitioners had opted for laparoscopic sterilization but subsequently had to bear pregnancy and ultimately gave birth to an unwanted child inspite of sterilization operation by government doctors. The petitioners argued that due to the negligence of doctors the operation failed. The respondents contended that after sterilization operation written instructions were given to the petitioners to visit the hospital at regular intervals and in case

of any complication, to contact the medical officer immediately for check up by the doctors. But none of the petitioners did it and they allowed the pregnancy to become matured. It was further contended that in laparoscopic sterilization, there are chances of failure and all the petitioners had also given their undertaking in case of failure of sterilization, they will not hold the medical officer responsible in any manner as there are chances of failure in sterilization.

The court held that the object of taking undertaking only indicators that there are chances of failure in laparoscopic sterilization operation and the petitioners were aware about this fact and they did not follow the written instructions given by medical officers. There was no averment in the petition as to how the doctors were negligent in conducting the operation. There was nothing to show that the government doctors did not take due care, diligence and reasonable and competent degree of still while performing the operation. Hence, it was held that the doctors did not act negligently and so they were to liable. The court referred to the observation of Lord Denning M.R in **Hucks V. Cole** (1968) thus, "with the best skill in the world, things sometimes went amiss in surgical operations or medical treatment. Thus a doctor is not to be held negligent simply because something went wrong. He is only liable when he fell below the standard of a reasonably competent practitioner in his field so much so that his conduct might be deserving of censure or inexcusable".

However, the Supreme Court in state of **Haryana V. Smt. Santra** (AIR 2000 Sc 1488) held that both the doctor and the state were liable to pay damages for failure in laparoscopic sterilization operation. In that case the respondent, a poor labour, already having 7 children approached the chief medical officer, Gurgoan, in 1988, for her sterilization operation under the state sponsored family planning programmer. She developed pregnancy after the operation and gave birth to a female child, as the operation performed was a failure. The court held that the doctor concerned was negligent perse as he had obviously failed in his professional duty to take care and, therefore no further proof of negligence was needed. Accordingly the appellants were held liable, as the birth of another child had created economic burden on the poor woman, who had chosen to be operated upon.

4.3.2 Foreign Matter Left in Body During Operation:- In **A.H.Khodwa V. state of Maharastra** (AIR 1996 sc 2377) a mop was left inside a women's peritoneal cavity while she was being operated for sterilization in a government hospital causing peritonitis which resulted in her death. By applying the principle of Res Ipsa Loquitur the doctor was held liable for negligence, and therefore, the government was vicariously held liable. The Supreme Court has laid down the Law in this regard thus-the skill of medical practioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment, which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment it would be difficult to hold the doctor to be guilty of negligence.

4.3.3 Free eye Camp:- In **Pusphaleela V. State of Karnataka** (AIR 1999 Karnataka 119) a free eye camp was organized by Lions Club and a social service organization in January 1988, where 151 persons were operated upon for cataract problem. Most of these persons developed infection and severe pain after surgery. 72 out of them lost sight of one eye and victims lost the sight of both eyes. According to an enquiry report, the guidelines laid down by the government of India for such eye camps were not followed, and the procedure adopted for sterilization was not up to the mark. There was found to be negligence and carelessness in performing eye operations. The court after directing payment of interim compensation finally awarded costs to the petitioners and lump sum payment of compensation ranging from Rs40, 000/-to 1.5 Lakhs to the victims, on the basis of injury suffered by them.

4.3.4 Transfussion of wrong group of blood:- In **R.P.Sharma V.State of Rajasthan** (AIR 2002 Raj 104) The petitioners wife was admitted to governmental hospital, at Jaipur for the removal of gallstone. She was operated upon and the operating surgeon was advised transfusion of blood group "O" positive to the patient. Accordingly one bottle of "O" positive blood was transfused. Subsequently, another bottle of blood was obtained from the blood bank. Due to the negligence of the hospital staff the new bottle was of "B" positive. Soon after transfusion of the second bottle the condition of the patient deteriorated, she lost her eyesight and two days after that she died. The state was held vicariously liable for death caused due to the negligence of the hospital staff.

4.4 Negligent Mis-statement:-

Initially, it was understood that a contract or a fiduciary relationship could alone impose a duty of care not to make a negligent mis-statement. However, the House of Lords in **Hedely Byrne & Co. Ltd V. Heller and Partners Ltd** (1964) ruled that a duty of care not to make a negligent mis-statement could exist apart from contract or fiduciary relationship. In that case the plaintiff's who were advertising agents had entered into various advertising contracts on behalf of a company Easipower Ltd. The plaintiff's were anxious to know the financial position of Easipower Ltd. To decide whether they could give credit to that company. The plaintiff with this object sought banker's references about Easipower Ltd. The plaintiff's bankers for this purpose approached the defendant, the bankers of Easipower Ltd: who gave favorable references, which were passed on, to the plaintiff's. Placing reliance on those references, the plaintiff's incurred expenditure on Easipower Ltd, which latter went in to liquidation causing substantial loss to the plaintiff's. The references were expressly given by the defendants without responsibility. In their claim for damages, the plaintiff's contended that the defendant's replies regarding Easipowers credit worthiness were given in breach of their duty of care.

The trail judge dismissed the claim holding that the defendants owed no duty to the plaintiff's although they were careless in giving the replies about Easipowers standing. The Court of Appeal also took the same view. The House of Lords held that the defendant's owed a duty of care to the plaintiff's but they were not liable as the replies that they gave were expressly given without responsibility.

Similarly in **Mutual Life and Citizens Assurance Co Ltd V. Evatt** (1971)**,** the appellant Insurance Company gave to the respondent information and advice as to the financial affairs of an associated company. The respondent invested money on this advice and lost the investment. The

Privy Council by majority held the appellant company not liable as its business did not include giving advice on investments and it did not claim to house any necessary skill and competence to give such advice and to exercise the necessary diligence to give reliable advice. Thus, the duty of care is confined to those cases where the person giving advice does in the course of his business or profession although gratuitously.

4.5 Consumer Protection ACT 1986:-

The main object of the Consumer Protection Act 1986 (the Act) is to "provide better protection of the interest of consumers" and "To settle consumer disputes in a speedy and simple manner." The act has been amended in 1991,1993 and in 2002 to make the application of the consumer law more effective. The Central Government in exercise of its powers under section 30(1) of the act framed the consumer protection rules, 1987. According to section 3 of the Act these provisions with regard to the protection and safeguarding of consumers right are in addition to and not in derogation of the provisions of any other law for the time being in force.

For providing cheap and speedier justice to a consumer, the Act provides for the setting up of consumer protection councils both at the central and state level and also establishment of Consumer Disputes Redressal Agencies to be known as The District Forum, The State Commission and The National Commission. The amendment brought to the Act in 2002 has increased the pecuniary jurisdiction of the District Forum up to 20 Lakhs, that of the State Commission to above 20 Lakhs and below rupees one Crore, and the national commission to above rupees one Crore.

Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission, from there to the National Commission and finally to the Supreme Court within in 30 days from the date of the order. An appeal after the expiry of 30 days may be entertained if it is satisfied that there was sufficient cause for not filing it within that period. As per the amendment made to the Act in 2002 no appeal against the order of the District Forum shall be entertained by the state commission unless the appellant has deposited 50% of the amount ordered or Rs 25000/- which ever is less. Likewise to make an appeal against the order of the state commission to the National Commission 50% of the amount ordered or Rs 35,000/- which ever is less and in case of an appeal from the National Commission to the supreme court 50% of the amount ordered or Rs 50,000/- which ever is less has to be deposited.

Where no appeal has been filed against the order of the District Forum the State Commission or the, National Commission the same shall become final (section 24). As per section 24(A) added in 1993 to the Act, the period of limitation for filing complaints in Consumer Forum is 2 years from the date on which the cause of action has arisen. The forum has power to condone delay on sufficient cause by reducing the same into writing.

Any Forum may direct the attachment and sale of the property of the party not complying with the order passed by it. It may also issue certificate to the collector of the district to recover the damages awarded from the party in the same manner as the arrears of land revenue. Failure to comply with the orders of any forum is punishable with imprisonment for a term between one month and three years and or fine between Rs 2000/- and 10,000/-. The aggrieved party may prefer an appeal to the immediate superior forum.

Any compliant filed by a party is found to be frivolous or vexatious the same is liable to be dismissed by the forum and a fine up to Rs 10,000/- can be imposed. Such order is subject to appeal within 30 days.

4.5.1 Who is a Consumer:- According to section 2(1) (d) consumer means any person who either (1) buys any goods for a consideration or hires or avails any services for a consideration. The term consumer did not include a person who obtained goods for resale or for any commercial purpose, however, according to explanation added to section 2(1) (d). Commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self- employment. As per section 2(1) (d) service means service of any description which is made available to potential users and includes the provision of facilities in connection with banking financing, insurance, transport, processing, supply of electrical or other energy, board or loading or both, entertainment, amusement or the purchasing a he as or other information but does not include the rendering of any service free of charge or under a control of personal service.

Thus to enable a consumer to bring an action he must have availed the service for a consideration. The consideration may6 be either paid or promised or partly paid and partly promised or under nay system of deferred payment.

Deficiency in service, according to section 2(1) (g) means any fault, imperfection, short coming or inadequacy in the quality, nature and manner or 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.

4.5.2 Medical service:- Although, the definition of term service in section 2(1)(0) of the act is of very wide import, in the beginning the courts have taken a very narrow view and held that services provided by the state and local authorities in government hospitals are services rendered free of charge and therefore does not come under the purview of the Act**.(Consumer Unity and Trust Society V. State of Rajasthan** 1992-1CPJ 299 (NC)**.** And in **C.S.Subramanian V. Kumara Swamy,** (1994) CPJ 509(B.B), the Madras High Court under had held that medical practitioners do not come under the purview of the Act.

The controversy has been set at rest by the Supreme Court in a landmark judgment in Indian Medical Association **V. V.P Shantha and others** (AIR. 1996 S.C 550). It has been held that patients aggrieved by any deficiency in treatment from both private clinics and Government hospitals, are entitled to seek damages under the Act. The Supreme Court also held that.

(1) Service rendered to patient by a medical practioner by way of consultation, diagnosis and treatment, both medical and surgical in hospitals, nursing homes, health centers, dispensaries would fall with in the ambit of, 'service' under the Act.

(2) The fact that medical practioners are subject to the disciplinary control of the Medical Council of India and or State Medical Councils would not exclude their service from the ambit of the Act.

(3) The service rendered by a doctor was under a contract for personal service than a contract of personal service and was not covered by the exclusionary clause of the definition of service contained in the Act.

(4) A service rendered free of charge to everybody, would not be service under the Act.

(5) The hospitals and doctors cannot claim it to be free service if the expenses have been borne by an insurance company under medical care or by one's employer under the service condition.

In **M/s Spring Meadows Hospitals V. Harjot Ahluwalia** (AIR1998 SC 130), the Supreme Court has held that the definition of the term consumer in the act is very wide and it does not include the patients only who hire or avail such services but also the beneficiary of such services directly. When a young child is taken to a hospital by his parents and the child is treated by the doctor the parents would come within the definition of the consumer having hired the services the Child being beneficiary of such services and both can claim compensation under the Act.

4.6 Summary:-

A new duty of care is on the shoulders of professionals to take care in reference to those who depend upon them. In the case of medical man, negligence means failure to act in accordance with the standards of reasonably competent man at the time. There may be one or more perfectly proper standards, and if he confirms with one of these proper standards, then he is not negligent.

The law recognizes liability for negligent mis-statements also. Thus the duty to take care is not limited to situations where there was a contract or fiduciary relationship between the parties.

The consumer protection Act 1986 aims at providing better protection of the interest of consumer and to settle consumer disputes in a speedy and simple manner. The Act provides three-tier system of Consumer Disputes Redressal Forum, at District State and National Level. The term consumer is defined very widely. Consumer includes any one who purchases goods or hires services for personal use. The use of such goods or services with the permission of buyer is also a consumer. But a person who obtains goods or services for resale or for any commercial purpose is excluded from the purview of consumer. The act does not also include the rendering of any service free of charge or rendering a contract of personal service.

In the beginning the courts have held that the services provided by the medical practioners do not come under the purview of the Act. But the Supreme Court in spring medico's hospital case says that both parents and the child would be entitled to compensation because parents are consumers as they hire the services and the child is also a consumer as he is the beneficiary of the service.

4.7 Self Assessment questions:-

1. Analyses professional skill with reference to medical profession.
2. Discuss liability for negligent mis-statement.
3. Explain the term consumer under the Consumer Protection Act in the light of medical practioners.

4.8 Suggested Reading:-

1. Margaret Brazier-street on Torts 9th Edn.1993.
2. Mechael A. Jones- Torts, 4th Edn. 1995.
3. Anand and Sastri –Law of Torts 5th Edn.1985.
4. Ratanlal and Dhirajlal –The Law of Torts 21 Edn 1987.

Lesson Writer

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Lesson - 5

CAUSATION

Objective:

After going through this lesson you should be able to understand caution (but for test) remoteness of damage direct ness-fore seeability-novous actus interveniens.

Structure:

Causation is concerned with the physical connection between the defendant's negligence and the plaintiff's damage. No matter how gross the defendant's negligence he will not be liable if as question of fact his conduct was not a cause of the damage. In deciding the question whether the damage was caused by the defendant's wrongful act, the generally accepted test is known as but for test.

5.1 The but for test:

The commonsense approach to the problem has led to the formulation of this test for ascertaining the real or the effective cause of the harm. According to this test if it be found that the result would not have happened but for a certain event then that event is a cause. This test enables the elimination of the irrelevant. The law is more concerned to know whether a particular event in cases of tort is the cause of the plaintiff's loss. If the plaintiff's damage would have occurred even if the defendant's breach of duty had not occurred then it is clear the defendant's breach of duty is not the cause of the damage. The case of Lampert V Eastern National Omnibus co. (1954) is a clear illustration of this principle. In that case the plaintiff a married woman was injured in a road accident by the defendant's negligence. The injuries were such as to make her permanently disfigured, as a consequence of which she alleged that the husband deserted her. The court held that there was no action and loss of affection resulting in estrangement of a husband with consequent distress and suffering, but that on the facts the plaintiff could not recover because her husband had

to a large extant been estranged even before the accident and the disfigurement was not the real cause of the desertion. Similarly in Robinson V Post Office (1974) a doctor's omission to test for an allergic reaction, because the test would not have revealed the allergy in time. In that case the plaintiff who was employed by the post office slipped as he was descending a leader and sustained a wound. Some eight hours letter he visited his doctor and was administrated anti tetanus serum (ATS). The recognized taste procedure then was to wait for help an hour after injecting a small quantity to see whether the patient showed any reaction before administering a full dose. The plaintiff did not suffer any reaction for about three days but there after he suffered from encephalitis, which is a possible though rare consequence of ATS injection. In a suit for negligence against the doctor it was found that the director was not negligent in deciding to inject ATS. His negligence lay in not waiting for half an hour after the test dose. But the negligence did not cause the onset of encephalitis for it was almost certain that when the plaintiff did not show any reaction for three days after administration of full dose he would not have shown any signs of reaction ever if the doctor had waited for half an hour after the test dose. The plaintiff's suit, the before, failed against the doctor.

The same principle applies where the defendant's employer's negligence lies in not taking prescribed safely precautions. In **MC Williams V. Sir Williams Arrol and Co**.(1962), the claim was by the widow of a workman of the defendants, who fell from a steel tower which was being erected and died. The defendants were at fault in not providing safety belts, the use of which would have prevented the accident. Evidence was, however given that throughout for a long period when belts had been provided the deceased never used them and a finding was reached that the defendant would not have worn a belt on the date of the accident even if it had been available. On this finding it was held that the defendant's breach of duty in not providing safety belts did not cause the accident and the defendants were not liable.

It is to be noted that the wrongful act of the defendant need not have been the sole or principal cause of the damage. The defendant would be liable for the damage if his wrongful act caused or materially contributed to it not with standing that there are other factors for which he was not responsible which had contributed to the damage. In **Mc Ghee V. National Coal Board**. (1972). The workman contracted dermatitis after some days spent in cleaning brick kilns. The employer was not at fault for the hot and dusty condition of the brick kilns. The employer's fault lay in not providing washing facilities as a consequence of which the employee had to cycle home unwashed. It was not proved that the washing would have effective to prevent onset of dermatitis. But it was found that the absence of washing material increased the risk of the disease and on this finding the defendant was held liable.

When there are present simultaneously two or more independent facts each sufficient to produce the damage, it is generally agreed that each would be held to have contributed to the damage. But if one of the two factors each sufficient to cause the damage, instead of reinforcing neutralizes the effect of the other before it has any effective operation then only former, which has its full operation, will be held to have caused the damage.

Different problem arises when the events causing damage to the plaintiff are not simultaneous but successive. Such a problem is illustrated by the case of Baker V. Willoughby (1969). In that case the plaintiff's leg was injured in 1964 when he was knocked down by a car, which was negligently driven by the defendant. In 1967, before the action came for trail, the plaintiff was shot in the same

leg during an armed robbery and the limb had to be amputed well above the knee. It was submitted by the defendant that no loss or injury suffered thereafter by the plaintiff could be attributed to his tort since its effect was obliterated by the gunshot injury followed by amputation. The trail judge rejected this submission and allowed full damages taking both past and future losses into account on the basis of continued weakness and pain in the left ankle and the possibility of later development of arthritis in the leg. The defendant's submission, however, succeeded in the court of appeal. But on further appeal the House of cords restored the decision of the trail judge. The policy consideration leading to the decision was that otherwise the second tort-fearer could reduce the damages against him on the ground that he was only responsible for the removal of an already damaged leg, and not for removal of a sound leg. Thus if the first tort-feaser escaped liability, the plaintiff could not get full compensation for the injuries done to him.

In **Joblin V. Associated Dairies Ltd** (1981) Baker's case, thought not overruled came up for strong criticism. In that case the plaintiff received a back injury arising due to the defendant's breach of statutory duty and the injury impaired the plaintiff's capacity to work by 50% During the pendency of the plaintiff's action for trail, he was found suffering from a special disease which rendered him wholly unfit to work. The House of Lords held that the defendants were not liable for any loss of earnings suffered by the plaintiff after the onset of the special disease rendering him wholly unfit to work. The principle applied here was that in assessing damages, the vicissitudes of life are to be taken into account so that the plaintiff is not over compensated and that a supervening illness known at the time of the trail is a known vicissitude. The distention between the two cases on facts is that in bakers case the first and the second injuries were both from tortious acts. Where as in Joblin's case the second injury was from a supervening illness. Baker's case, though shaken by Joblin's case, is still an authority in case of disabling injuries arising from successive and independent tortious acts.

5.2 Remoteness:

Even if the plaintiff proves all the essential elements of a tort committed against him, his claim will be defeated if the harm suffered by him is remote consequences of the defendant's act or omission. There is a well-recognized Latin maximum injure non-remota causa sed proxima spectatur which means that law provides remedy for proximate consequences. So once it is established that the damage suffered by the plaintiff is a consequence of defendant's act or omission the further question arises whether the consequence is remote or proximate. If it is proximate the plaintiff may have a remedy. If it is remote his claim is bound to be defeated. So far as intended consequences are concerned they are never treated as remote. The question of remoteness is relevant in cases of unintended consequences. Towards the middle of the 19th century, two competing views were advanced as laying down the test of remoteness. They are directness and foresee ability.

5.2.1 The test of directress:- According to this test the defendant will be liable for all the direct consequences of his wrongful act whether he could foresee them or not because consequences which directly follow from act are not too remote **Scott V. Shepherd** (1773) is an example on the point. In that case the defendant threw a lighted squib into the market when it was crowded. The squib came down on the shed of a vendor of ginger bread who to protect himself caught it and threw it away. It then fell on the shed of another ginger bread

seller who passed it on in precisely the same way till at last it burst in the plaintiff's face and put his eye out. It was held That the defendant was liable to the plaintiff because the damage caused to the plaintiff was natural and direct consequence of the defendant's act.

The test of directness was for the first time applied in **Smith V. London Southwest railway co**. (1870). In that case the servants of the defendant railway company after cutting hedges and grass negligently left it near the railway line. It was a dry weather. Spark from the railway engine set fire to the heap of grass .Due to high wind the fire was carried to the plaintiff's cottage, which was burnt. The court held that the defendant company was liable for the negligence of their servants though they could not have foreseen the loss to the cottage of the plaintiff.

The leading authority of the test of directness is the decision of the court of appeal in Re Polemis and Furnace, withy and co (1921). In that case the defendants had chartered plaintiff's ship, the Polemis, to carry a cargo, which contained a quantity of benzene or petrol. Some of the petrol cases leaked on the voyage and there was petrol vapor in the hold while shifting some cargo at a port, the stevedores employed by the characters negligently knocked a plank out of a temporary staging erected in the hold, so that the plank fell into the hold and in its fall by striking something caused a spark which ignited the petrol vapor and consequently the vessel was completely destroyed. It was held that as the fall of the board was due to the negligence of the characters servants the characters were liable for all the direct consequences of the negligent act even though such a loss could not have been reasonably foreseen. According to this case once the tortuous act is established, the defendant is to be held liable for all the damage, which "is in fact directly traceable to the negligent act, and not due to independent causes having no connection with the negligent act."

However, the Scope of Repolemis on the test of direct causes was limited in its scope by **House of Lords in Liesbosch Dredger V. Edison** (1933) in those cases owing to the negligence of Edison the dredger Liesbosch was sunk. The owners of Liesbosch required it for the performance of a contrast with a third party, but since they were too poor to purchase a new one, they hired one at an exorbitant rate. They sued the owners of Edison for negligence and their claim for compensation included the price of the dredger, and the hire charges, which they had to pay from the date of the sinking to the date they, could actually purchase a new dredger.

The **House of Lords** accepted their claim under the first head and allowed compensation equal to market price of the dredger comparable to Liesbosch. As regards the second head of claim, the compensation allowed was for loss suffered in carrying out the contract with third party from the date of the sinking of Liesbosh to the date when another dredger could have been put to work. Thus, the claim after the time when a new dredger could have been reasonably purchased and put to work was rejected. The reason why new dredger could not be purchased by the plaintiffs was their poverty and the House considered the additional loss being to the extraneous cause of poverty and as such too remote.

5.2.2 Test of Reasonable Foresee ability:- According to this test, if the consequences of a wrongful act could have been foreseen by a reasonable man, they are not too remote. If, on

the other hand, a reasonable man would not have foreseen the consequences they are too remote. There is no liability for consequences, which are too remote. The tests of reasonable foresee ability was laid down in 1850 by Pollock C.B in the two cases decided by Exchequer chamber namely **Rigby V. Hewit** (1850) and **Greenland V. Chaplin** (1850). He declared that "a person is expected to anticipate and guard against all reasonable consequences of his act or omission but he is not expected to anticipate and guard against that which no reasonable man would expect to occur. The test of directness applied by courts for about forty years with certain modifications was rejected by the **Judicial Committee of the Privy Council in 1961 in Overseas Tankship (U.K) Ltd V. Morts Dock and Engg. Co. Ltd** (wagon mound cases1) and again reasonable foresee ability test was applied. In that case, the wagon mound, an oil-burning vessel, was chartered by the appellants and was taking fuel oil at Sydney port. At distance of about 600 feet, the respondents owned a wharf, where the repairs of a ship including some welding operations were going on. Due to the negligence of appellant's servants a large quantity of oil was spilt on the water. The escaped oil was carried by wind and tide beneath the respondents wharf. When the respondent's manager become aware of the conditions in the vicinity of the wharf, he enquired from the manager of caltex co. whether they could safely carry on the welding operations. As a result of the enquiry, coupled with his own belief as to inflammability of the furnace oil on water in the open, the manager gave instructions to carry on the welding operations. But directed that all safety precautions should be taken to prevent inflammable material falling into the oil.

After 60 hours, there was a put break of fire. The exact cause of fire is unknown, but the most probable explanation, which the court accepted, was that underneath the wharf was a floating piece of debris with some smoldering cotton waste or rag on it. It was set on fire by the molten metal falling from the wharf. Thus, floating oil was set afire and the wharf was severely damaged.

The Trail Court applied the test of directness and held the overseas tank ship Ltd liable. The Supreme Court of the New South Wales also followed the Re Pole mis rule and held the unforeseen ability of damage by fire was no defense. On appeal the Privy Council reversed the judgement and held that the appellants were not liable in negligence. The Privy Council also held that the Repolemis was not a good law and laid down that the test of reasonable foresight was the correct law. The Judicial Committee of the Privy Council observed thus "for it does not seem consonant with current ideas of justice or morality that for an act of negligence however, slight or venial, which results in some trivial foreseeable damage the acter should be liable for all the consequences however unforeseeable and however grave, so long as they can be said to be direct". The committee further observed after the event even a fool is wise. But it is not hindsight of a fool; it is the foresight of a reasonable man that alone can determine responsibility.

The decision in Wagon Mound's case being a decision of the Privy Council is not applicable in England. But in its subsequent decisions the English Courts have approved the **Wagon Mound** decision The House of Lords in **Hughes V. Lord advocate** (1964)**,** expressly stated that it is Wagon Mound and not the Repolemis which is the governing authority. In that case the post office employees opened a manhole for the purpose of maintaining under ground telephone equipment. The time was about 5 pm. The employees

left the manhole for a tea break. They covered the manhole by a tent surrounded by four kerosene lamps. A boy, aged 8 years, entered the tent and fell into the manhole and sustained severe burn injuries. It was foreseeable that boys might enter the shelter and play with the lamps and that spilled kerosene might catch fire and cause burn injuries. The House of Lords held the defendants liable since the kind of damage was foreseeable although the extent to which it caused damage was not expected.

The test in Wagon Mound case was further explained in **Overseas Tankship (UK) Ltd V. The Miller Steamship Pvt Ltd** (Wagon Mound case 2) (1966). The facts of thus case were the same as in wagon mound case one expect that in case one the plaintiffs were the owners of the wharf but in case 2 the plaintiff's were the owners of the ships, which were being repaired and were damaged by fire. The decision was, however, different. This was mainly due to difference in the evidence adduced in the two cases and the findings of facts. In case 1 it was found that the consequences were not at all foreseeable but in case 2 the court found **(a)** that the officers of wagon mound would have regarded the furnace oil as very difficult to ignite on water not that they would have regarded this as impossible. **(b)** that their experience would probably have been that this had very rarely happened, not that they would never have heard of a case where it had happened and **(c)** that they would have regarded it as a possibility but one which would become an actuality only in very exceptional circumstances. The case decides that in cases of real danger it is enough if consequences were foreseeable as possible, though not as probable.

5.2.3 Egg-Shell Skull Rule:- It is a well established principle of law that the defendant must take the plaintiff as he finds him. He cannot escape liability merely on the ground that the plaintiff would not have suffered damage had he been a normal person in all respects. The ratio in Wagon Mound cases also leaves unaffected the eggshell skull cases. The principle is illustrated in **Smith V. Leech Brain and Co. Ltd** (1962). In that case a workman of the defendants because of their negligence suffered a burn injury on his lower lip, which promoted cancer at the site of the burn resulting in his death. But for the burn, the cancer might never have developed, though there was a premalignant condition, and there was likelihood that it would have done so at some stage in his life. In an action by the widow of the deceased workman, the defendants were held liable for his death on the principle that a tort-feasor must take his victim as he finds him.

5.2.4 Novus Actus Interveniens:- The damage suffered by the plaintiff may be regarded as too remote because a new act of some person other than the defendant intervenes and such a new independent act is the effective cause of the damage. This proposition is so simple, but the difficulty lies in formulating principles as to when an act or event breaks the chain of causation. The snapping of the chain of caution may be caused either by a human action or a natural event. As regards human act, two principles are settled. Firstly, that human action does not persevere the connected sequence of acts. Secondly, that to break the chain of causation it must be shown that there is something, which can be described, as unreasonable, extraneous or extrinsic.

As an application of these principles, in **The City of Linclon** (1889) it was held that a reasonable act done by a person in consequences of the wrongful act of the defendant which results in further damage does not break the chain of causation. In that case a

collision took place between a steamer and a barge in which the streamer alone was to be blamed. The steering compass, charts and other instruments of the barge were lost in the collision. The captain of the barge made for a port of safety, navigating his ship by a compass, which he found on the board. The barge without any negligence on the part of the captain or the crew, and to the loss of requisites for navigation, grounded and was abandoned. The court of appeal held that the captain's action of navigating the barge to a port of safety, in which he did not succeed, was a reasonable act and did not break the chain of causation.

But in **Mckew V. Holland and Hannen and Cubbits Scotland Ltd,**(1969) it was held that a further injury caused by the second accident following the plaintiffs unreasonable conduct cannot be attributed to the defendants wrongful act causing the first accident because the chain of causation is broken by the plaintiffs unreasonable conduct. In that case the appellant sustained injury in the course of employment for which respondents were liable. As a result of which he used to lose control of his left leg. This could have been cured in a week or two. But one day he was descending a steep staircase without handrails. He lost control of his leg and tried to jump so that he could land in a standing position. On landing he suffered a serve fracture of the ankle. The House of Lords held that the act of the appellant in attempting to descend a steep stir case without handrails and without adult assistance was unreasonable. Therefore, the chain of causation was broken and the respondents were not liable for the second injury.

However, every intervening cause will not exonerate the defendant. After the Wagon Mound cases the effective test now in all case is the reasonable foreseeability of the damage. According if the intervening act is such as could be foreseen and avoided by a reasonable man then the defendant will remain liable.

5.3 Position in Indian:

In India there is no constitutional or statutory provision in conflict with either of the test of directness or of the test of reasonable foresee ability. The applicability of these tests will depend upon the attitude of our courts. In cases, which were decided before the decision in **Wagon Mound** case, we find some support for direct consequences test, but cases which have been decided after Wagon Mound case are clearly in favour of adoption of foresee ability rule in India.

In **Madappa V. Kariappa** (AIR 1964 Mys 80) the plaintiff's orange garden was destroyed by fire started by the defendant in his garden, which was adjacent to that of the plaintiff. The Mysore high court expressly following the wagon mound case held: "when the appellant set fire to his land without reasonable precautions to prevent the same from spreading into the lands in neighbourhood he was playing with fire and should be deemed to have foreseen the possibility of the fire spreading into the lands adjoining his land and is liable for any damage caused to them.

In **Veeran V. Krishna Murthy** (AIR 1966 Ker 172) the Kerala High Court also followed the test of foreseeability. In that case some boys from a nearby school gathered on the roadside to cross it. They waited for a bus coming down from the south to pass. The defendant's lorry was coming 75 to100 years behind the bus at a speed of 25 to 30 miles per hour. As soon as the bus passed, the boys began to cross the road and one of the boys was injured by the defendant's lorry. The Court held that the defendants were liable because the accident that happened must have

been foreseen by the defendants. The following line from the judgement of **Viscount Simmond** in **Wagon Mound case,** was quoted" the real and effective test is the foreseeability of the accident, foreseeability not of the manner in which the accident happened but of the occurrence of an accident of the kind".

Similarly, the courts in India also adopt Novus actus intervenes. The **Madhya Pradesh High Court in Chaurasia and Co. V. Smt. Pramila Rao** (1974) act 481 (MP) observed that a reasonable act by the persons affected by the negligence in a dilemma created by the negligence act couldn't be held to be Novus actus interveniens, which breaks the chain of causation. In that case the driver negligently drove passenger bus over a causeway when one of the wheels got stuck up in stones embedded on the sides of the causeway. One of the passengers crossed the causeway safely on foot. Others remained in the bus. The water was then up to waist level. When the water level rose further, the passengers climbed to the top. The water went on rising and the bus swept away by the flood and the passengers died. In a claim by the dependants of one of the deceased passengers, it was argued that the deceased should have crossed the causeway on foot and should not have remained in the bus. There were two courses before the marooned passengers in the bus. One was to cross the submerged causeway by walking and the other was remaining in the bus in the hope that the water will recede. Both the causes involved a great risk, but neither could be called unreasonable looking into the circumstances in which the passengers were placed. The court, therefore negatived the contention that the death of the passengers was caused by their own act of remaining in the bus and not by the negligent act of the driver in driving the bus over folded causeway. The court also observed: if the persons affected by the negligent act of the defendant are exposed to risk of misjudgement of accident which would not have other wise arisen, further damage from the materialisation of the risk may be recoverable.

5.4 Summary:

A plaintiff will not be able to get damages if the damage alleged was not caused by the defendants wrongful act. The generally accepted test in establishing causation between the defendant's wrongful act and the injury suffered by the plaintiff is put for test. According to but for test if the damage would not have resulted but for the defendant's wrongful act, it would be taken to have been caused by that wrongful act conversely the defendant's wrongful act is not the cause of the damage if the same would have happened just the same, wrongful act or no wrongful act.

The principle of remoteness draws a line between those items of damage for which the defendant is legally answerable and those for which he is not. In deciding remoteness of damages, initially, the test of reasonable foresight was applied. According to it a wrongdoer was only responsible for damage which was intended by him or which though not intended, was the natural and probable consequence of his act.

The court of appeal in Repolemis case by rejecting the rule of natural and probable consequence laid down the test of directness. According which the defendant is liable for any damage which is the direct consequence of his unlawful act, whether he intended the consequence or not and whether he could have reasonably foreseen them or not. However, the **Privy Council** in **Wagon Mound** case disapproved the test of directness and re-established the test of reasonable foreseeability. The courts in India follow the foreseeability test.

The principle underling the maxim Novus actus interveniens is that there are circumstances when an intervening act of a third person breaks the chain of causation between the defendant's wrongful act and the damage sustained by the plaintiff. The defence of Novus actus is not available if the defendant is responsible for the intervening cause or is caused by an irresponsible actor or the plaintiff has been placed in a situation of alternative danger.

5.5 Self Assessment question:

1. Discuss the concept of causation.
2. Explain remoteness of damages in the light of directness and foreseeability tests.
3. Write a note on (i) but for test, (ii) Novus actus Interveniens.

5.6 Suggested readings:

1. Ratanlal and Dhirajlal –the law of torts-21st Edition.1987.
2. Michael A. Jones.-Text book on torts-4th Edition.1995.
3. Anand and Satry –law of torts-5th Edition 1985.

Lesson Writer

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Lesson - 6

RES IPSA LOQUITUR

Object:-

After going through this lesson you should be able to understand:

- RES IPSA LOQUITUR
- -meaning-origin-conditions for application and the limitations.

Structure:-

6.1 Introduction:-

In an action for negligence the general rule is that the plaintiff has to establish **(1)** the existence of duty of care owed by the defendant to him, **(2)** the breach of that duty and **(3)** Consequent damage. If he fails to establish the same he is to loose his case. However, there are certain situations where the doctrine of RES IPSA LOQUITUR applies. In such situations the plaintiff has to only prove that the accident happened while things were under the defendant's control. He need not establish that defendant was negligent.

6.2 Meaning:-

The Latin phrase RES IPSA LOQUITUR literally means that the thing speaks for itself. Some times a thing (accident) tells its own story. Where the accident is such as would not happen in the ordinary course without negligence on the part of the defendant. The mere happening of the accident raises an inference that the defendant has been negligent. But this inference may be displaced by the defendant by showing that the accident would have happened without his negligence. If he fails to displace the inference then the doctrine of RES IPSA LOQUITUR applies and negligence on the part of the defendant is presumed. The maxim is not a rule of law. It is no more than a rule of evidence affecting onus. It is based on commonsense.

6.3 Origin:-

The doctrine of RES IPSA LOQUITUR is traceable to **Byrne V. Boadle (1863).** In that case the plaintiff while walking in the street was injured by falling a barrel of flour from the upper window of the building occupied by the defendant. The plaintiff did not gives any evidence to show how the barrel fell. The defendant also did not give any evidence. It was pointed out that the plaintiff had not established prima facie case. Still the Court of Exchequer held the defendant liable. **Pollock C.B.Speaking** for the Court said "There are certain cases to which it may be said RES IPSA LOQUITUR and this seems to be one of them. In some cases the courts have held that the more fact of accident is evidence of negligence".

Erle C.J. Stated the doctrine of **RES IPSA LOQUITUR** for the first time in 1865 in **Scott V. London and St. Katherine Docks Co**.(1865)**.** In that case a custom officer was passing the doorway of the defendant warehouse when six bags of sugar fell on him and he was injured. Defendants called no evidence. While holding that there is sufficient evidence of negligence **Erle C.J.**Observed thus "there must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care".

6.4 Conditions for application:-

Conditions which must be fulfilled for the application of **RE IPSA LOQUITER** may be summerised as under.

1. The thing which causes the accident must have been under the exclusive control and management of the defendant.
2. For the accident to happen somebody's negligence is responsible, otherwise ordinarily it could not happen.
3. The defendant gives no reasonable explanation.
4. The evidence as to the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.

The High courts as well as the Supreme Court have applied the maxim in India in a number of cases.

6.4.1 Collapse of Clock-Tower: In **Municipal Corporation of Delhi V. Sudhagawati** (ARI 1966sc 1750) an 80 years old clock tower in the main bazar of Delhi exclusively under the owner ship, control and management of the Corporation, collapsed and killed 3 reasons. It was found that having regard of the kind of mortar used, the normal life of the structure of the building could be only 40 or 45 years. There was also evidence of the chief Engineer that the collapse was due to thrust of the arches on the top portion and mortar was deteriorated to such an extent that it was reduced to powder with out any cementing properties. In these circumstances, it was held that the mere fact that there was fall of the clock tower told its own story in raising the inference of negligence so as to establish a prima-facie case against the defendant corporation.

6.4.2 Breach in Canal: In **State of Punjab V.Modern Cultivators:** (AIR 1965 sc 17)due to wide breach caused in western Jammu canal Which remained un repaired for Quite some time, the canal waters escaped and caused damage to the plaintiff's crops by inundation to the tune of Rs. 60,000/- On plaintiff suing the defendant state, and in spite of courts insistence for production of official records, the state department failed to do so. Therefore, the trail court decreed the suit in plaintiffs favored. The state appealed to the high court which reduced the decreed amount. However, the state appealed to the Supreme Court saying that their negligence was not established. The plaintiff cross-appealed for restoration of damages decreed by trial court. A three Judge Bench of the supreme court rejected the appeal and allowed plaintiffs cross appeal, applying the maxim **RES IPSA LOQUITUR** as the non modulation of records was held to be a deliberate act, because if produced it would have establish negligence of the state.

6.4.3 Accident cases:- In SHYAM SUNDER . Vs. STATE OF RAJASTAN [AIR 1970 sc890] A truck belonging to the defendant state had hardly gone a distance of 4 miles on a Particular day that its engine caught fire. One of the occupants, **Naveneet lal** jumped out to save him self from the fire, he struck against a stone lying by the side of the road and died instantaneously. It was found that a day earlier the truck took 9 hours to Cover a distance of 70 miles because the radiator was getting heated frequently and the driver was pouring water after every 6 or 7 miles of journey. It was held that since generally an ordinary roadworthy vehicle would not catch fire, there was a presumption of negligence on the part of the driver in putting the vehicle on the road. As the driver could not explain the cause of the accident which was within his exclusive knowledge, the defendant state was held liable. **In KRISHNA BUS SERVICE Vs.MANGALI** (A.I.R 1976S.C 700): The bus belonging to the defendant was being driven on a good road from Delhi to Hissar, on the way the vehicle overturned, resulting in the death of the husband of the plaintiff. In a suit of damages against the defendant for the negligent act of the defendant's servant, who was a retired divisional engineer, the court held that the buses in sound road worthy conditions driven with ordinary care, do not normally overturn. It was for the driver who had 'special knowledge' of the relevant facts to explain why the vehicle overturned. A presumption about the negligence will arise. In the absence of any explanation by the driver the maxim RES IPSA LOQUITUR will be attracted.

InPUSHPABHAI Vs. RANJIT Ginning & pressing (A.I.R 1977 SC 1735), the manager of the company while driving the car caused the death of another employee of the company who was allowed to take lift in the car. The width of the road on which the car was going was

15 ft, with fields on the either side. It was found that the car proceeded to the right extremity of the road and dashed against the tree uprooting it about 9 inches from the ground. The front side of the car was badly damaged; the engine and the steering wheel were displaced from their position. The maxim **RES IPSA LOQUITUR** was applied to the case by the Supreme court as the car could not have gone on the wrong side of the road to the right extremely and hit the tree with such a violence if the driver had exercised reasonable care and caution. The respondents could not rebut the presumption of negligence and they were held liable.

In KARNATAKA STATE ROAD TRANSPORT CORPORATION. Vs. KRISHNA, (AIR 1981 Kanth11) Two buses brushed each other in such a way that the left hands of two passengers traveling in one of these buses were cut of below the shoulder joint. In a suit for damages, it was held that the accident itself speaks volumes about the negligence on the part of drivers of both the vehicles. The doctrine of RES IPSA LOQUITUR was applied to the case and in the absence of any satisfactory explanation, the defendants were held liable.

6.4.4 MEDICAL NEGLIGENCE CASES:- The use of doctrine of RES IPSA LOQUITUR is made in medical malpractices where the apparent cause of action lies within the scope of defendant's obligations .Of course, since one expert would rarely give evidence against the other, it is very difficult to prove this without expert's evidence. Albeit in the following cases without expert-evidence the **RES IPSA LOQUITUR** speaks: where an operation leaves a mop in the patient's interior **A.H KHODWA V STATE OF MAHARASTRA,(1996 ACJ 505 SC)**;where scissors were left in the body during operation **NIHAL KAUR vs DIRACTOR, P.G.I, Chandigarh;** and abdominal pack left in abdomen in **Mrs.APARNA DUTTA V APPOLO HOSPITAL Enterprises Ltd,(A.I.R 2000 Mod 340).** Where a patient did not awake from general anesthetic for almost a month and then with brain damage in **PENDERSON V DUMMOUCHEL 1967).**

6.5.1 Maxim where not Applicable:- In cases where the facts are not easily ascertained, the courts proceed on the use of **RES IPSA LOQUITUR.** But the maxim cannot be applied to criminal proceedings. In crime, therefore, there is no exception to the rule that one who charges the other with a crime has to prove it beyond all reasonable doubts. The Supreme Court has explained this in **SYED AKBAR V STATE OF KARNATAKA** (A.I.R.1979 SC 1848) In that case a driver while driving his bus at a moderate speed saw a child of four years on the road crossing it. The road was narrow and full of ditches on both the sides. The driver though careful steered the bus to the extreme right to save the child, but this he could do only to a certain limit as there was a deep ditch. Had he proceeded, there the bus could have fallen into the ditch. He could not save the boy. He was charged under section 304 A of IPC but the Supreme Court acquitted him. The reason was that the fact that the driver tried to save the child was itself an indication that the accident happened due to error of judgement and not as a result of error negligence or want of skill and care. The Supreme Court observed that :

1. As a rule, mere proof that an event has happened or an accident has occurred the cause of action is unknown, is not an evidence of negligence.

2. The peculiar circumstances constituting the event or accident in a particular case, may themselves proclaim "in concordant, clear and unambiguous voices" the negligence of

somebody as the causes of the event or accident. The res must not only speak of negligence but also pin it on the defendant. Where a reasonable explanation of the incident is offered or where the incident is beyond the control of the defendant, he cannot be made liable on the strength of RES IPSA LOQUITER..

6.5.2 Cause of Accident is known:- Similarly where the cause of accident is known the maxim has no application.

6.5.3 Multiple defendants:- In SUSHMA MITRA Vs. M.P.STATE ROAD TRANSPORT CORPORATION. (AIR 1947 MP 68) a passenger of the defendant corporation bus who rested his below on the windowsill was severely hurt by a truck coming from the opposite direction. The two vehicles did not come into contact with each other. Both the drivers were negligent but both of them did not disclose the reason of accident. The court ruled in favour of the plaintiff and awarded damages from both the defendants. The court also observed that it was doubtful that the maxim applies in case of two or more defendants who are not responsible for acts of each other and when negligence of all or any of them could have caused the accident the mere happening of the accident is therefore insufficient evidence against any of the defendants.

6.5.4 Mere error of Judgement:- A mere error of judgement is no negligence was explained in Indian **AIRLINES CORPORATION Vs. MADHURI** (AIR 1962 Cal 544) thus…. "if a man confronted with a dangerous situation not of his own making, and there are several courses open to him, and he is required to take a quick judgement, the failure to exercise the best possible judgement would not of itself constitute negligence in law".

6.5.5 Capable of Different Inference:- When the accident is capable of more then one explanation, the maxim RES IPSA LOQUITUR is not applied. In **WALKELIN Vs. LONDON and SOUTH WESTERN RAILWAY CO.**(1886 12 A.C 414), 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 which carried the usual head lights, but did not whistle. In an action by the widow, it was held that there was evidence of negligence on the part of the railway company, yet there was no evidence to connect such negligence with the accident. In the course of the judgement **Lord Halsbury** observed 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 than the man ran against the train?".

6.6 Rebuttal of inference:-

A presumption is applied and inference arrived in the absence of evidence, but it is not itself evidence. However, the inference may be rebutted by the defendant.

(1) By proving some specific cause of the accident for which he was not responsible.

(2) By providing that he was not infact negligent.

(3) By giving a reasonable explanation that the happening of the accident was as consistent with the absence of negligence as it was with the presence of it.

(4) By proving that it is an incident, which happens without anybody's negligence.

(5) By proving that the plaintiff could have avoided the incident by using reasonable care and skill.

(6) By proving that the incident was due to some factors beyond one's control, such as act of God.

Thus, when the defendant has done this the burden created by presumption and inference is automatically shifted to the plaintiff. But, if the defendant fails to prove it he would be liable.

In **CATES Vs. MONGINI BROTHERS** [(1917) 19 BOM LR 778] the plaintiff, who was a midwife, went to the restaurant of the defendant to take lunch and sat at a table over which an electric fan was suspended with a rod attached to the ceiling. As the fan was switched off by a waiter under her instructions it fell on her left hand causing injuries to her hand and fingers. In an action for damages, the court held, that the defendants were not liable as the falling of the fan was not due to any negligence on their part but due to an accident owing to a latent defect in the metal of the suspension rod, and the accident could not have been averted by the exercise of ordinary care, skill and caution on the part of the defendants. Similarly in **NAGAMANI Vs. CORPORATION of MADRAS** (AIR 1956 MAD.59) a ventilator iron post belonging to Madras Corporation fell down hurting a passerby who latter on died due to injuries. The presumption of negligence on the part of the corporation was raised. But the Corporation was able to rebut the presumption by proving that the steel column, which had fallen, had been erected only 30 years ago where as it had a normal life of 50 years. Such columns were securely fixed on a cement pavement in an iron socket three feet deep and that occasional inspection of the pillar including one made a month before the accident had indicated no signs of such danger. Hence, the corporation was held not liable.

Thus, the principle of **Res Ipsa Loquitur** may not be applied too liberally. What is said in relation to res in one case cannot indiscriminately be applied to another case. Moreover, it should not be applied as a legal rule but only as an aid to an inference when it is reasonable to think that there are no further facts to consider.

6.7 Summary:-

As a rule the onus of proving negligence is on the plaintiff. In certain cases, the plaintiff need not prove that. From the facts an inference may be drawn that the defendant was negligent. According to the maxim **res ipsa loquitur** Which means the thing spears for it self, there is a presumption of negligence In such cases the plaintiff has to simply show that the accident has occurred when the event causing accident was under the control of the defendant and the accident Could not have ordinarily occurred but for his negligence.

The principle of res ipsa loquitur is merely a rule of evidence. The defendant may rebut this presumption if he can. The maxim has no application in criminal proceedings, where cause of accident is known, in cases of multiple defendants and when the accident is capable of different inferences.

6.8 Self Assessment Questions:-

1. Explain the maxim Res ipsa Loquitur and state limitations on it with the help of decided cases.
2. The accident would not have occurred but for the negligence of the defendant"- explain with the help of decided cases.

6.9 Suggested Readings:-

1. Winfield and Jolowic on Tort by W.V.H. Rogers 13th Edition1989.
2. Law of Tort by B.M.Gandhi Edition 1987
3. The law of Torts by Ratanlal and Dhirajlal 21st Edition1987.

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Lesson - 7

CONTRIBUTORY NEGLIGENCE

Object:-

After going through this lesson you should be able to explain :

- Contributory negligence
- Last opportunity rule
- Constructive last opportunity
- Apportionment of damages
- Contributory negligence of children

Structure:-

7.1 Meaning:-

Contributory negligence is one of the defences to an action for negligence. It may be defined as negligence on the plaintiff's part in not avoiding the consequences arising from the negligence of the defendant when means and opportunity are afforded to do so. It is the non – exercise by the

plaintiff of such ordinary care, diligence, and skill as would have avoided the consequence of the defendants negligence.

The burden of proving contributory negligence is on the defendant. The plaintiff is not to prove the absence of it. At common law contributory negligence was a complete defence. It was laid down in **Butterfield V.Forrester** (1809) in that case the defendant wrongfully obstructed the road by putting poll across it. The poll could be seen from a distance of 100 yards. The plaintiff, who was riding violently, was over thrown by the pole and was injured. The defendant was held not liable. Bayley J. said" If he had used ordinary care he must have seen the obstruction so that the accident seems to happen entirely from his own fault".

7.2.1 The rule of last opportunity:- The common law rule of contributory negligence created great hardship to the plaintiff where he suffered serious injuries although his fault was not the major cause of the accident, and also in situations where the defendant could easily avoid the harm but plaintiff had no opportunity to avoid the accident. To mitigate this hardship the courts invented a rule known as last opportunity rule. According to this rule the plaintiff could recover inspite of contributory negligence on his part if it could be proved that the defendant had the last opportunity to avoid the accident. The rule was laid down in **Davis V Mann** [(1842) 10 MW 546)]. In that case the plaintiff tied the fore feet of his donkey and negligently left it on the road. The defendant's wagon driven by horses at an excessive speed collided with the donkey and killed it. It wad held that the accident would not have happened but for the contributory negligence of the plaintiff on the ground that the defendant had sufficient opportunity of avoiding by the use of reasonable care the danger so created by the plaintiff's negligence. It was remarked, "Although the ass may have been wrongfully there still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Where this is not so, a man might justify the driving over goods left on public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road".

The rule of Last opportunity was approved by the House of Lords in **Radley V. London and South Western Rly. Co** (1876). In that case the plaintiffs were the colliery proprietors and they also owned a bridge near the siding from under which trucks loaded with coal used to be taken by the defendants. One day, the plaintiff loaded a truck so high that the same was obstructed by the bridge. Without trying to see what caused obstruction the defendants servants gave momentum to the engine and also got the overloaded truck pushed by many other trucks of the defendants to make the truck pass under the bridge. The result was that the plaintiff's bridge was knocked down. Inspite of negligence on the part of plaintiffs in overloading the truck, they were held entitled to recover damages from the defendants because by an ordinary care the defendants could have averted damage to the bridge.

7.2.2 Constuctive last opportunity:- The scope of the defence of contributory negligence was further limited by extension of the last opportunity rule to constructive last opportunity. According to it, where a person would normally have had the last opportunity but in fact did not have last opportunity to save the accident because of some fault on his own part, he was held liable on the basis of constructive last opportunity rule. The leading case on this point is the **British Columbia Electric Rly Co. V. Loach.** (1916) I A.C.719**.** In that case an action was brought against the Railway Company by the administrator of a man who while

being driven in a wagon across a level crossing was run down and killed by an electric train. The deceased was guilty of negligence in so far is he did not try to see the train before entering the level crossing and the defendant company was also guilty of negligence in so far as their driver was running the electric car at an excessive speed with defective breaks. The driver saw the horses from 400 feet and applied the brakes. If the breaks had been in good condition he could have stopped the car in 300 feet. The railway company was held liable not withstanding the negligence on the pert of the deceased, because the driver would have had the last opportunity to avoid the accident but for his fault in not maintaining the brakes in good order.

Similarly where the defendant alone actually knows of danger, and fails to use due care to avoid it, he is liable, even to a negligent plaintiff who had in fact, the last opportunity. Again there must be sufficient separation of time, place or circumstances between the acts of negligence to enable the court to hold that there was such a last opportunity as will prevent the acts of negligence from being treated contemporaneous.

7.3 The Law Reform (Contributory Negligence) Act 1945:-

In England as well as in India the rule of constructive last opportunity was applied not with any satisfaction. Because, of the two negligent parties one whose negligence earlier wholly escaped the liability and the other whose negligence was subsequent in point of time had to bear the whole burden. In case of maritime collisions this position was remedied in England by enacting Maritime conventions Act 1911. as per section 1 of the Act the liability to make good the loss depended upon and was fixed in proportion to the degree in which each vessel was in fault.

After maritime Act the rule of constructive last opportunity met with severe criticism and it was finally modified by the **Law Reforms (Contributory Negligence) Act 1945.** Section 1 of the Act provides that “where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage but damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimants share in the responsibility for the damage”. By section 4 of the Act damage includes loss of life or personal injury. Thus, the Act of 1945 provides for apportionment of damages, which is now equitable in England.

7.4 Apportionment of Damages:-

In India there is no legislation parallel to English Law Reforms (Contributory Negligence) Act, 1945. Nevertheless courts in India in exercise of their discretion on the touchstone of equity, justice and good conscience adopted the rule of contribution (apportionment) as provided by the Act of 1945. However, the Kerala Legislature has taken a lead by creating the Kerala Torts (Miscellaneous Provisions) Act, 1976. Section 4 of the Act provides for apportionment of liability in case of contributory negligence. The provision is similar to the one contained in the English Act of 1945. Thus, in an accident, if the plaintiff is as much at fault as the defendant, the compensation to which he would otherwise be entitled will be reduced by 50 percent.

In **Vidyadevi V. MPSRT Corporation** (AIR 1975 M.P.89) the husband of the plaintiff died in an accident caused by collision between a bus of the defendants Corporation and deceased's motorcycle. The court assessed damages at Rs 32,400/- but because the deceased was also negligent to the extent of two-third, the damages were reduced to Rs 10,000/- only.

In **Rural Transport Services V. Bezlum Bibi,** (AIR. 1980. Cal.165) as the bus was over crowded the conductor invited the passengers to travel on the roof of the bus. The driver swerved the bus to the right side of the road to overtake a car and the plaintiff's son who was on the roof was struck by an overhanging branch of a tree and fell on the ground. As a result of multiple injuries he died. The court assessed Rs.16,000/- as damages but reduced it by 50% on account of the contributory negligence of the passenger.

7.5 Contributory negligence distinguished from composite negligence:

In contributory negligence it is the plaintiff who contributes to his own damages. Where as in composite negligence it is the negligence of two or more defendants that go to contribute concurrently but independently to the same damage. In composite negligence the liability of the joint-tort-feasors being joint and several they are jointly and severally responsible. There is no apportionment of their respective liabilities. There being a single decree for a single sum, the plaintiff can enforce his claim from any one or all of the defendants. Of course the defendant paying more his than share has right of contribution from other defendants.

In **Narendrapal Singh V. Punjab** (AIR 1989 P and H. 82) as a result of the head on collision between the bus owned by the Punjab roadways and a truck coming from the opposite direction the appellant Traveling in the bus was seriously injured in the right arm. Which had to amputed. He was awarded Rs 75,000/- as damages for the same. Both the drivers were found to be equally negligent. For the convenience of the claimant, the liability of the Punjab state, the owner of the bus and the New India Assurance Co. who had insured the truck was rated a fifty. However, the claimant had recovered the entire amount from the insurance company. The insurance company was held entitled to reimbursement of half of the amount with interest there on from the state of Punjab.

7.6 Contributory negligence of children:-

The doctrine of contributory negligence doesn't apply to children with the same force as in the case of adults. This is because a child cannot be expected to be as careful for his own safety as an adult. Therefore when the plaintiff is a child he will not be disentitled to relief merely because he has failed to show as much care as a person of mature age. In **Glasgow Corporation V. Taylor** (1922) a child went to a botanical garden opened for public in general which was maintained by the defendant corporation. He ate some attractive but poisonous berries in the garden and died. The defendants were held liable.

In **YACHUK V. OLIVER BLAIS Co LTD** (1949) A.C 586**.** The defendant's servant sold a certain quantity of gasoline to two boys aged 9 and 7 years. They had falsely stated that they needed the same for their mother's car. They actually used gasoline for their play with the result that one of these children were severely burnt. In an action on behalf of the injured child, the plea of contributory negligence on the part of the child was pleaded. The Privy Council found that there

was evidence to show that the infant plaintiff appreciated the dangerous nature of gasoline and the defendant was held liable in full for the loss.

In **Nitin walia V. Union of India** (AIR 2001 Delhi 141) a boy of 3 years went to national zoological park, Delhi along with his family members. All family members were keenly watching the white tigers kept inside iron bars followed by a railing before that. As the boy reached near the railing, the tigers all of a sudden grabbed his right hand and had bit it. The boy was taken to the hospital situated in the zoo but no treatment was given for want of any medicine. He was then taken to all India institute of medical sciences where the right arm of the boy had to be amputed. After the incident the zoo authorities have fenced the area by putting wire mesh on iron bars. That itself showed. The type of caution, which was required, was not taken earlier. By rejecting the defence of contributory negligence on the part of the child a compensation of Rs.5 Lakhs was awarded.

However, this does not give a child a license to be careless. A child capable of knowing the danger and of discrimination was held guilty of contributory negligence in **M and SM Railway Co**. **LTD V. Jayammal ,** (1924) 48 Mad 417**.** In that case a girl of 7 years was knocked down by an engine while she was crossing the railway line after passing through a wicket-gate. It was held that the proximate cause of the accident was the negligence of the girl in not looking out for a passing engine when she was crossing the line and that as she was capable of appreciating the danger and was old enough to have a sense of discrimination. Thus each case would be judged having regard to the child's capacity to cope with the danger. Allowance must be made for the child's inexperience and infirmity of judgment. Hence, the defence of contributory negligence is more difficult to make out against the child than against an adult.

7.7 Exceptions to the defence of contributory negligence:-

7.7.1 Rescue Cases:- The doctrine of contributory negligence does not apply to rescue cases. The rule of voluntary assumption of risk does not apply where the plaintiff has under an exigency caused by the defendant's wrongful conduct, consciously and deliberately face risk, even of death, to rescue another from imminent danger, injury or death, whether the person endangered is one to whom he owes a duty of protection as a member of the family, or is a mere stranger to whom he owes no such special duty.

In **RIDLEY V. MOBILE, Etc. Rly. Co** (1905 Sw Rep. 606) the plaintiff's husband saw a boy standing on a track in imminent danger from an approaching train, which had failed to give the statutory signals. To rescue the boy the deceased rushed upon the track immediately in front of the moving train, and in that process was killed. It was held that the deceased was not guilty of contributory negligence, and the plaintiff's claim succeeded.

7.7.2 Alternative Danger:- The law permits the plaintiff to encounter an alternative danger to save himself from the danger created by the defendant. If the course adopted by the plaintiff result in some harm to himself, his action against the defendant will not fail. The judgment of the plaintiff should not, however, be rash. The Supreme Court in **SHYAM SUNDER V. State of Rajasthan** (AIR 1947 Sc.890) has applied the doctrine of alternative danger. In that case due to the negligence of the defendant's driver, a truck belonging to them caught fire hardly after it had covered a distance of only four miles on a particular day. One of the

occupants, Navneetlal jumped out to save himself from the fire; he struck against a stone lying by the roadside and died instantaneously. The defendant state was held liable for the same.

7.7.3 PRESUMPTION:- The plaintiff, under certain circumstances, can take for granted that the defendant will be careful. In such cases he has no duty to guard against the negligence of the defendant which is unforeseen. When the duty to take care does not exist, the defendant cannot blame the plaintiff for not having guarded against the accident. In **Gee V. METROPOLITION RLY Co;** (1873) the plaintiff was a passenger in the defendant's railway. He slightly leaned against the door of a carriage not long after the train had left the station. As the door had been negligently left unfastened by the defendant's servants, it flew open and the plaintiff fell off the train. He was held entitled to recover damages, even though he did not check up that the door had been properly fastened because he had a right to presume that the railway servant's were not negligent in leaving the door unfastened.

7.7.4 Statutory Exception:- The motor vehicles Act, 1988 has fixed amount of compensation as Rs 25,000/- in case of death, and Rs 12,000/- in case of permanent disablement, of the accident victim. Hence, the right to claim compensation is not affected by any wrongful act, neglect or default of the accident victim, and the quantum of compensation payable shall not be reduced on account of contributory negligence.

7.8 Summary:-

If 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. The burden of providing contributory negligence was a complete defence and the plaintiff was denied any compensation even though the defendant was at fault.

To mitigate the hardship created by the rule of contributory negligence, the courts invented last opportunity rule. According to this rule of last opportunity when plaintiff and defendant are negligent, that one of them, who had the later opportunity of avoiding the injury by ordinary care should be liable for the entire loss. This rule was laid down in Davis V. MANN**.** The last opportunity rule was limited in its scope by the constructive last opportunity in British Columbia electric railway Co V. Loach.

The rules of last opportunity and constructive last opportunity were very unsatisfactory because the party whose act of negligence was earlier altogether escaped the responsibility and whose negligence was subsequent was made wholly liable even though the resulting damage was the product of the negligence of both the parities. The Law was changed in England by the Maritime Conventions Act 1911 and subsequently by the Law Reform (Contributory Negligence) Act1945. According to these Acts, when both the parties are negligent and they have contributed to the same damage, the damages will be apportioned as between them according to the degree of their fault. Though, there is no legislation in India on the subject, the position is similar one contained in the Act of 1945. The liability of composite tort feasors (composite negligence) is joint and several. They cannot plead for the apportionment of damages in between them. In case of contributory negligence both the defendant and the plaintiff are negligent. On the other hand in composite negligence, there is negligence of two or more persons towards the plaintiff, and the plaintiff himself was not at fault.

As the children are not expected to be as careful as adults, the doctrine of contributory negligence does not apply to them with the same force. This is because the children are not able to appreciate and understand certain danger's. There are certain other exceptions to the defence of contributory negligence pleaded by the defendant. They are rescue cases, creation of alternative danger and the presumption of carefulness on the part of the defendant. The motor vehicles act 1988 has fixed the amount of compensation in case of death and permanent disablement of the accident victim which shall not be reduced on account of contributory negligence.

7.9 Self Assessment Questions:-

1. Critically examine the law relating to contributory negligence.
2. Explain the following
   (a) Last opportunity rule.
   (b) Contributory negligence and composite negligence.
   (c) Exceptions to the doctrine of contributory negligence.

7.10 SUGGESTED READINGS:-

1. The law torts by rattan Lal and Dhirajlal 21st edn. 1987.
2. Law of tort by B.M Gandhi 1987.
3. Tort by Winfield and Jolowicz 13th edn.1990.

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LESSON - 8

RIGHTS AND DUTIES OF MASTER AND SERVANT INTERSE AND TO THIRD PARTIES

Objective:-

After reading this lesson you should be able to explain

- master and servant
- rights and duties between the master and servant and to third parties.
- doctrine of common employment
- risk-theory
- social insurance.

Structure:-

8.1 Master and Servant:-

Servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to control and directions of his employer in respect of the manner in which his work is to be done. Thus, master and servant relationship involves, a power of control the other, called his servant.

Consequently a master may also be defined as a person who is legally entitled to give such orders and to have them obeyed. The master and servant relationship is brought about by a contract of service, express or implied, as distinguished from a contract for services. A contract of service as expressed by Lord Thankerton in **short V.J and W. Henderson Ltd.** (1946) has the following four indicia.

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

However all the four elements need not exist to establish the relationship and none of them is conclusive proof of the existence of such relationship, yet consideration of these elements helps in determining the relationship in a particular case.

8.1.1 Master's duty to servant:- Apart from the express terms of the control of service, which governs the relationship between master and servant, certain terms are implied by law as incident to the relationship between them. In English law these terms are attributed to the common law of master and servant. The law in India in this regard is not very different from the law in England. An outline of such law is given below.

8.1.2 Doctrine of common Employment:- A master will be vicariously liable for torts committed by servants in the course of employment. This applies both to claims by third parties and by

fellow servants. But at one time the doctrine of common employment precluded a servant's action against his master for harm inflicted by fellow servants. This doctrine was first propounded in **Priestly V. Fowler** (1837). According to Lord Abinger

(1) The master cannot be bound to take more care of the servant than he may reasonably be expected to do himself because the servant has better opportunity ties of watching the conduct of the fellow servant than the master.

(2) That a contrary view will encourage the servants to be negligent. A third reason applied in **Hutclinson V. the York, New Castle and Berwick Rly. Co**.(1850) was that when entering into contract of service the servant takes the risk and such dangers of service are considered in fixing wages.

To get over the hardship created by the doctrine the courts evolved a new concept of duties personal to the employer. These duties were carefully defined by L. Wright in **Wilson and Clide Coal Co. Ltd. V. English** (1938). They are (1) the provision for competent staff **(2)** Adequate material and **(3)** proper system of work and effective supervision. The employer remained liable even though these duties are entrusted to some other person.

The legislature in England also made various attempts to mitigate the harshness of the doctrine of common employment. The Employers Liability Act,1880 was a temporary measure. Workmen's compensation Act,1897 provided for a compensation to a workman injured in the course of his employment even though no negligence on the part of the employer or any one else was shown. The doctrine was, ultimately, abolished by Law Reform (Personal Injuries) Act,1948 The National Insurance(Industrial Injuries) Act,1946 passed in England provided for insurance to all persons employed under contract of service or apprenticeship. The Act provided for three kinds of benefits namely (1) injury benefit,(2) death benefit, and (3) disablement benefit. The benefit is to be paid out of the fund to which half the contributions are to be made by the employer and half by the workman.

In India as to the applicability of the doctrine of common employment the various high courts expressed different opinions. In **Secretary of State V. Rukminibai** (AIR 1937 Nag. 354). Nagpur High Court held that the doctrine was not applicable in India. In that case the plaintiff's husband, an employee in the defendants Railway Company was killed because of the negligence of a fellow employee. Stone C.J allowed the action for damages. However, the privy council in **Governor General in Council V. Comstance Zena Wells** (AIR 1940p.c 225) held that the doctrine of common employment was applicable in India, although its scope has been limited by the Indian Employer's Liability Act,1938. In that case the plaintiff's husband a fireman in the defendant's railway was killed in an accident caused by the negligence of a fellow employee, a railway driver. The Privy Council held that the defence of common employment was available to the defendant and the plaintiff's claim for compensation was rejected. The scope of the doctrine has also been limited by the Workmen's Compensation Act,1923, and the Employees State Insurance Act, 1948. Finally the Personal Injury (Compensation Insurance) Act1963 imposed liability on the employers to compensate their workmen. Thus, the doctrine of common employment has remained only a matter of historical importance both in England and India.

8.1.3 Common law duties:- The master's duty to his servant is personal and non-delegable. He can delegate the performance of the duty to others, whether servants or independent contractors, but not responsibility for its negligent performance. This is the case even though by legislation the master is required to delegate the task to a suitably qualified person and is to permit to interfere. It is not, however a duty of strict liability. The master's duty is commonly dealt with under the following headings.

8.1.3.1 Competent Staff:- The master has an obligation to select competent fellow servants and a correlative duty to give them proper instruction. In the use of equipment. This is a continuing duty, which might require the dismissal of incompetent servants. In **Hudson V. Ridge Manufacturing Co. Ltd** (1957) the plaintiff was injured by a servant with a reputation of persistently engaging in practical jokes. Though, this deliberate conduct was not within the course of employment, the master's were held liable for not taking any steps to curb his conduct.

8.1.3.2 Safe place of work:- A master must take such steps as are reasonable to see that the premises are safe and this may also apply to the means of access. It is not necessarily discharged by giving a warning of the danger, nor is it any answer that the servant was experienced and familiar with the danger, and had made no complaints about the safety of the premises. In the case of a temporary danger the reasonableness of the master's conduct will depend on both the degree of risk and the master's knowledge of the risk.

The master is also under a duty with respect to the premises of a third party even thought he has no control over the premises, but the steps required to discharge the duty will vary with the circumstances. In some cases a warning to his workers about the danger may be sufficient, where as in others it may not be reasonable to allow them to work on the premises until the occupier has made them safe. The circumstances that have to be taken into account include the place where the work is to be done, the nature of the building if any on the site concerned, the experience of the servant, the nature of the work he is required to carry out, the degree of control that the master can reasonably exercise in the circumstances, and the master's knowledge of the defective state of the premises.

8.1.3.3 Proper plant and Equipment:- A master has a duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition. So if necessary equipment is unavailable and this leads to an accident he will be liable, although he is not necessarily bound to adopt the latest improvements and equipment. However, this is not an absolute obligation, and so the master is not liable for a latent defect that could not have been detected on a reasonable inspection.

In **Davie V. New Merton Board Mills Ltd** (1959) the plaintiff was injured when a fragment of a metal broke off a drift on being struck by a hammer and entered his eye. The manufacturer had been negligent, but the plaintiff's masters had purchased the tool from a reputable supplier and the defect was not discoverable by reasonable inspection. The House of Lords held that the masters were not liable for the manufacturers negligence. The decision was reversed by the Employers Liability (Defective Equipment) Act,1969. section 1(1) of the Act makes an employer liable if an employee suffers personal injury in the course of his

employment in consequence of a defect in equipment by an employer, and the defect is attributable wholly or partly to the fault of a third party, whether identifiable or not.

A master will not be liable if a worker fails to make proper use of the equipment supplied, nor where the worker acted foolishly in choosing the wrong tool for the job, if the worker has been given adequate instruction in the use of the equipment.

8.1.3.4 SAFE SYSTEM OF WORK:- It is a question of fact whether a particular operation requires a system of work in the interest of safety, or whether it can be reasonably be left to the servant charged with the task. In **Clifford V. Charless H. Challen and son Ltd** (1951) it was held that the master must consider the situation, devise a suitable system and instruct his servants how best to avoid the dangers. He must allow for the fact that servants may be inadvertent or become heedless of the risks, particularly where they are encountered on a regular basis. This will involve taking reasonable steps not only to instruct servants on safety procedures but also to ensure that the orders are obeyed.

8.1.3.5 OBLIGATION TO PROVIDE WORK:- The master is bound to provide employment so as to enable the servant to earn wages. This will arise, normally when the wages depend upon the work done. Obligation to provide employment may also be implied where the opportunity of acting in the capacity provided for in the contract of service is of importance to the employee from the point of view of publicity or reputation, such as, in the case of an actor or a cinema star.

8.1.3.6 REMUNERATION:- A part from statutory provision like the payment of wages Act, the master is under a duty to pay for the service rendered by the servant. The mere fact that a person has rendered service does not, of course entitle him to payment if there is no agreement to pay. Similarly, where a person continues his services after the expiration. But if a person is led to believe by the employer that he has been appointed to a particular post it is for the employer to prove that the services are not to be remunerated. Even if there is an agreement that the remuneration should be at the discretion of the employer, the master cannot refuse to pay any remuneration. The servant is entitled in such circumstances to recover the reasonable remuneration on an implied contract to pay him.

A servant is, however, not entitled to be paid extra remuneration for services which are within the scope of his duty under the contract of service. Such a promise to pay extra remuneration is liable to be held as promise with out consideration. In certain circumstances, however, a promise to pay extra remuneration may be enforced other wise than under the contract on the basis of quantum meruit. A part from this, an additional remuneration can be recovered only if it is definitely agreed upon.

It is a condition precedent to the recovery of any salary in respect of service that the servant should perform the duty. The normal rule at common law is that the whole work should be completed before wages can be claimed unless there is a contract or usage to the country permitting payment for the portion of the work already done. Where payment of wages is due at stated intervals it can be recovered for such intervals already completed.

Wages for any period during which a servant is incapacitated through illness would be payable according to the terms of individual contracts of service, express or implied. In

certain circumstances the incapability may go to the root of the contract so as to justify the master in terminating the contract. Where under the contract a servant is entitled to payment of wages during the absence due to illness he can claim it although the illness was caused by his own misconduct.

No wages can be claimed if the servant voluntarily leaves his service without notice or is dismissed or the contract is terminated otherwise.

8.1.4 Srevant's duty to Master:- A servant not only becomes liable to third persons for his wrongful acts done during the Course of his employment but also renders himself liable to his master for his acts of wrongful omissions or commissions. Thus in **A.C Mukherji V. Municipal Board Banaras** (1924) the secretary of the Board was held liable for the acts of misappropriation of funds by his subordinate whom the secretary impliedly trusted.

In **Abdulla Sheriff V. Mohamaed Ala** (1926) the plaintiff sent his servant to a bank to pay his money into the bank. The servant came back saying that he had lost the amount. No proof was forth coming as to what happened to the money and whether they were stolen. On the master suing the servant for its recovery, it was held that the servant did not take proper care of his master's money and there fore he was guilty of negligence. The servant was liable to repay it.

If the master has to pay damages for the work, he is justified in seeking the recovery of the same from his servant. The act of the servant may be of omission to take care or it may be a positive act involving his master in loss. In **Lister V. Ramford Ice and Cold Storage Co**. Ltd(1957) the company had employed Lister as a lorry driver who took his father as his mate. While he was backing the lorry he injured his father. The father sued the company for injuries and recovered damages which the master had to pay to the father. The court held that the Company was entitled to recover from Lister the driver.

8.1.4.2 Illegal gains by Servant:- Where a servant misuses his position and makes a breach of duty there by enjoying a secret profit, he is accountable to the master for this amount. In Readings Petition of Right (1949), an army sergeant stationed at Cairo, obtained large sums of money by escorting a lorry containing unknown material and thus made it possible for the lorry to pass undetected. This happened on several occasions. He was supplied with the uniform, to be used solely for the benefit of the crown in the course of his employment. It was held that the sergeants use of the uniform was in breach of his duty he owed to the crown. The crown was therefore entitled to the money received by the servant. In such cases it cannot be argued that master has not suffered any loss or that the master could not have made such gains.

A servant is also liable to his master for neither breach duty even where neither a third person suffers nor the servant gains.

8.1.5 Master's duty to third Parties:- To impose vicarious liability for his servants acts, upon the master one has to prove the master servant relationship between them. A observed in **Bayley V M.S and RLY. Co** (1873) a person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise when an act of that class is to be done, and trusts 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 employment. This is the true and real principle working behind vicarious liability. In other words the master is not liable for all the wrongs of his servant. He is liable for those acts committed by the servant in the course of employment. However, the judge made law goes to depict that the master is liable for his servants negligence, fraud, forgery, mistake, malice, excesses, assault, willful wrong, theft and other illegal acts so connected with his authority to act that they constitute a mode or manner of the servants act in the course of his employment. His liability is therefore extensive and it is being extended by interpretation.

If the servant does an act "on a frolic of his own" or if he deviates from his duty or commits unauthorized" acts the master is not generally liable. The master's liability for the unauthorized torts of his servant is limited to unauthorized modes of doing authorized acts.

Though there is nothing like vicarious liability in criminal proceeding yet it is well established that in civil action master can be liable for servant's act done in the course of employment even if the servants act amounts to crime. Thus a master will be liable for assault, defamation or fraud committed by his servant. In **Morris V.G.W Martin and Son Ltd** (1966) the plaintiff sent her fir coat for cleaning to X who sent it with her Consent to the defendants who were specialists in cleaning fir coats. The defendants gave it to their servant who stole it. The defendants were held liable.

8.1.6 Servant's Liability To Third Persons:- It is rule of common sense that one who commits a wrong is liable to answer for it and it does not lie in his mouth to say that as he was acting as an agent or servant on behalf of or for the benefit of another he is to be excused. No authority what so ever obtained by the servant from the master can excuse him or stop him from becoming liable in an action. The person wronged has therefore a remedy against both, the servant and his master or either of them as he chooses.

8.2 Risk Theory:-

The doctrine of risk , that "for acts which are tortuous because done with lack of care liability extends and extends only- to those persons who and to those interests which are within the risk of harm," has been contending for recognition as the most satisfactory solution for the handing of negligence cases in the courts. The risk theory was first enunciated in mature from by Mr. Justice Cardozo in **Palsgraf V. Long Island Railroad Co**.(1928) where a defendant which had created an undue risk of harm to certain persons but not by concession, to the plaintiff, was held not liable despite a direct casual connection between the defendant's acts and harm to the plaintiff. In that case, the guard in helping a passenger to board a train, knocked down a package from his arm. It contained fireworks and exploded throwing some scales on the other end of the platform which injured the plaintiff was not foreseeable.

The risk theory assumes that in the cases to which it is applied, liability depends on some fault in the defendants conduct, and it does not attempt to furnish a way of answering whether the defendants conduct has been a factual cause of the harm complained of. The risk theory itself is confined to weighing the following factors:

(1) What a reasonable man in the defendant's position would have regarded as the probability that a protected interest of the plaintiff would be harmed;

(2) What a reasonable man in the defendant's position would have believed to be the extent of harm likely to ensue if the risk matured in damage;

(3) The social utility of the defendants conduct and

(4) The social cost of avoiding the risk by alternative methods. If, but only if, the resultant of these considerations is in the plaintiff's favour and the defendant's conduct was a factual cause of harm to the interest thus jeopardized, liability should follow.

8.2.1 Magnitude of the Risk:- The law in all cases exacts a degree of care commensurate with the risk created. The greater the risk of harm the more Precautions must be taken. The magnitude of risk is the product of two factors.

(a) The likelihood of the risk materializing and

(b) The potential severity of the damage if it should occur.

8.2.2 Likelihood of the Harm:- In **Bolton V. Stone** (1951) the plaintiff was struck by a cricket ball driven from the defendant's cricket ground on to a quiet road. It was rare for balls to be hit out of the ground. It had happened perhaps 6 times in 30 years. The risk of such an accident was foreseeable but the chance that it would actually occur was very small. The house of Lords held that the defendants were not liable because in the circumstances it was reasonable to ignore such a small risk. Lord Reid that reasonable man take into account the degree of risk and do not act on a bare possibility as they would if if the risk were more substantial. In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do is to create a risk, which is substantial.

This case should be contrasted with **Miller V. Jackson** (1977) where cricket balls were hit out of the defendant's ground 8 or 9 times a season, damaging the plaintiff's property on a number of occasions. A high fence did not prevent this because the pitch was too close. By a majority the Court of Appeal held that the risk of harm was so great that the defendants were negligent on each occasion when a ball comes over the fence and causes damage. **Bolton V.Stone** is not authority for the view that it is always reasonable to ignore a small risk. The risk must still be measured against the defendant's purpose and the practicability of precautions.

If the defendant had knowledge of some fact which makes harm to the plaintiff more likely than would otherwise be the case, then as a reasonable man he must take account of that. A greater than average knowledge of the risks will entail more than the average or standard precautions. In **Haley V. London Electricity Board** (1965) the plaintiff, who was blind, fell into a whole in the pavement that had been dug by the defendants. The precautions taken to warn the public of the danger were adequate for sighted persons but not for the blind. The defendants were held liable. It was common knowledge that blind people walk alone on city pavements and there was no difficulty in providing adequate warning. It could not be said that the risk of causing them injury was small as to be ignored.

8.2.3 Severity of the Damage:- The more serious the potential consequences, the greater the precautions that should be taken. Those who engage in operations inherently dangerous must take precautions, which are not required of persons engaged in the ordinary, routine of daily life. In **Paris V.Stepney Borough Council** (1951) the defendant knew that the plaintiff employee was blind in one eye. In the course of the plaintiff's work a chip of metal entered his good eye rendering him totally blind. He alleged that the defendants were negligent in failing to provide goggles, although it was not usual to do so for that type of work. In the House of Lords the defendants were held liable.

8.2.4 Defendant's purpose:- The social utility of the defendants activity may justify taking greater risk than would otherwise be the case in **Daborn V.Bath Tram Ways Motor Co.Ltd** (1946) it was held that it was not negligent to use a left-hand-drive vehicle as an ambulance in wartime when there was a shortage of vehicles for the task, even though it was difficult to give hand signals and this had caused an accident. Asquith LJ said that in assessing what is reasonable care the risk must be balanced against the consequences for not assuming the risk. "The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk, and so the need for ambulances justified the risks involved in using the left-hand-drive vehicle.

However, this does not mean that the purpose of saving life or limb justifies taking any risk. There is little point racing to save one person if in the process others are killed and injured. Thus, in **Ward V. London County Council** (1938**)** it was held that it can be negligence for the driver of a fire engine to ignore a red traffic light. Where, on the other hand, the defendant's activity has no social utility or, indeed, is unlawful then he will have to exercise a very high degree of care to justify even a small risk of harm to others.

8.2.5 Practicability of precautions:- Some risks are unavoidable others can be eliminated or reduced only at great expense. The question that arises is at what point the cost of precautions would justify a reasonable man in not taking them. In **Latimer V.AEC Ltd** (1953) the defendant's factory was flooded after a heavy rainfall, and water became mixed with oil leaving the floor very slippery when the flooding subsided. Sawdust was spread over the surface but there was not enough to cover the entire area. A workman slipped on the uncovered part and was injured. The trail judge held the defendants liable for failing to close down that part of the factory. The House of Lords agreed that this might be necessary if the risk to employees was sufficiently grave, but that had not been the position in this case.

When precautions are not practicable then risks of continuing the activity have to be weighed against the disadvantages of stopping the activity altogether.

8.3 Principle of Social Insurance:-

The role of insurance is crucial to the operation of tort system. The courts regularly make awards of compensation running to tens or hundreds of thousands of rupees which would be beyond the capacity of individuals and even many company's, to pay. Insurance spreads the risk of a particular type of loss among all the premium payers. There are two broad categories of insurance, first-party (or loss) insurance and third-party (or liability) insurance.

First-party insurance protects the insured against damage to himself or his property irrespective of whether the loss is caused by the insured or some one else. Of course deliberate damage by the insured is generally excluded. Common examples of first-party insurance are house contents and building insurance, fire insurance and comprehensive motor vehicle insurance. This is a form of no fault compensation and is much more significant as a source of compensation for property damage than the tort system.

Third party insurance protects the insured against his liability for causing damage to others, and takes effect through the mechanism of the tortfeasors liability. This also protects the victim because it ensures that a judgment for damages against the insured will be satisfied. Thus liability insurance serves both to spread risks among potential defendants and meet the compensation objective of tort. Protection for victims is the rationale behind legislation making insurance against some forms of liability to third parties compulsory.

In the case of tortuous damage to property, the owner may have first-party insurance which would compensate him for the loss under the equitable doctrine of subrogation the insurer is then entitled to pursue any claim that the insured would have had against third parties in respect of the insured loss. This is done in the name of the insured. So not only are the defendants in tort actions frequently nominal, the real defendant being the insurance company, but in some cases the plaintiff is also nominal, and the substance of the action is which of the two insurance companies should bear the loss. Thus the existence of insurance serves the loss distribution and compensation objective of tort while retaining the language of individual responsibility and in theory at least, the possibility of deterrence.

8.4 Summary:-

A servant is a person employed by another to do work under the directions and control of his masters. A master is liable for acts of his servant done during the course of employment. The servant who commits the wrong is always liable for what he does and can be sued by the injured person. A servant is also under a duty to his master to compensate the loss caused, duty to make an account of illegal gains. He is also liable for breach of duty even where neither third party suffers nor a servant gains.

The doctrine of common employment was that a master was not liable for the negligent harm done by one servant to another fellow servant acting in the course of their common employment. This was an exception to the rule that a master is liable for the wrongs of his servants. This rule was first applied in **Priestly V. Fowler** (1837) and was firmly established by the subsequent decisions. The basis of the rule was supposed to be on implied contract of service whereby a servant agreed to run risks naturally incidental to the common employment, including the risk of negligence on the part of his fellow employees. The doctrine was criticized, limited in scope by legislation and judicial decisions and ultimately abolished by the **Law Reform (Personal Injuries)** Act 1948 in England.

In India various high courts expressed different views on the applicability of the doctrine of common employment and finally abolished by the legislative enactments.

Risk theory explains that the liability extends to those who are within the risk of harm and the degree of care required is directly proportional to the magnitude of risk involved in a particular case. The magnitude of risk depends on likelihood of the harm, severity of the damage and

practicability of precautions. Some risks are unavoidable others can be eliminated or reduced only at great expense.

A master today is normally not an individual but a substantial enterprise or undertaking, and that by placing liability on the enterprise what is in fact achieved is the distribution of losses caused in the conduct of its services of products. Knowing of its potential liability for the tort of its servants the enterprise insures against this liability and the cost of insurance is reflected in the price it charges to its customers. Thus, the employer is the most suitable channel for passing the losses on through liability insurance.

8.5 Self Assessment Questions:-

1. Explain the master and servant relationship and describe the rights and duties of master and servant inters and to third parties.
2. Discuss the following
   a) Doctrine of common employment
   b) Risk theory
   c) Social Insurance

8.6 Suggested Readings:-

1) C. Kameswara Rao Law of damages and compensation Vol 2. 5th Edn 1987.
2) Law of tort by B.M Gandhi 1987.
3) Torts by Michall A.Jones 4th Edn .1995.

Lesson Writer

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LESSON - 9

DAMAGES AS A CIVIL REMEDY

Object:-

After going through this lesson you should be able to under stand

- Damages as a civil remedy
- Liquidated damages
- Unliquidated damages

Structure:-

9.1.1 THE CONCEPT OF DAMAGES:-

"The primary right to a satisfaction for injuries is given by the law of nature", says Blackstone in his commentaries. This right to receive compensation is based upon the sanctity of individual rights which humanity has always been from its infancy, jealously protecting from being wantonly violated. This natural right was early discovered to be essential to the growth and well being of the society. During the successive stages of civilization and refinement, various means were devised to enforce the same. In the ruder ages when the appeal to arms was the only mode of redress for wrongs, the old barbaric notion of "an eye for an eye, a tooth for a tooth" became almost a law. Indeed, instances are not wanting in the history of a man where a person robbed of his wife was held to have a natural right to carry off the wife of the offender or a person robbed of his cattle's was entitled to rob the thief in turn or where even in case of a murder, the heirs of the murdered man

were held entitled to take the life of the murderer though this form of obtaining satisfaction had its origin in the passion of revenge always so prominent in nature, the basic principle appears to be nothing but the right to obtain reparation for the wrong or injury. However, as the ideas of refinement began to develop, and peace and progress came to be valued, it had to be recognized, that this form of reparation is not consistent with tranquility, progress and social organization.

With the advancement of society and the increase of commerce and the varied activities of national and social intercourse, the history of human relations assumed such a complexly as to exercise the minds of the ancient law-givers to evolve new rules for regulating the remedies consonant with the changing ideas of right and wrong. Thus, all the several legal systems which govern the civilized nations of the world agree upon the basic principle of a natural right to obtain reparation for wrongs or infringement of rights, and that the reparation or satisfaction which the law allows must be in the nature of compensation proportionate to the injury inflicted.

9.1.2 MEANING AND DEFINITION OF DAMAGES:-

Damages represent the pecuniary recompense recoverable by the process of law, by a person who has sustained an injury through the wrongful act or omission of another. Blackstone in his commentaries regards damages as “a species of property that is acquired and lost by suit and judgment at law”. “The injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors and the judgment of the court thereupon do not in this case, so properly vest a new title in him, as fix and ascertain the old one. They do not give but define the right”.

Damage may be defined as the disadvantage which is suffered by a person as a result of the act or default of another. Injuria is damage which gives rise to a legal right to recompense; if the law gives no remedy, there is damnum absque injuria, or damage, without the right to recompense. “Damages” are the pecuniary recompense given by process of law to a person for the action able wrong that another has done to him. In considering the legal import of the term ‘damage’ it is, however, necessary to bear in mind that the injury for which pecuniary compensation is awarded in an action at law, may have been caused by the defendant, or by any one for whose acts or omissions the law holds the defendant responsible, and that the injury complained may be the result of a breach of contract or tort.

9.1.3 OBJECT OF DAMAGES:-

The purpose or function of damages is to put the plaintiff in the same position, as he was if his right had been respected. In **Cutler V.Vauxhall Motors Ltd** (1970), the plaintiff’s right ankle was razed by the admitted negligence of the defendants. Prior to the accident the plaintiff had suffered from varicosity in the veins of both the legs and would have probably required an operation at some future date. The graze set of the varicose condition and the operation was carried out immediately. The defendant contended that the damages were not recoverable in respect of loss of wages suffered while the plaintiff was in hospital for the operation. Held the defendants contention succeeds. The object of damages is to place the plaintiff in as good a position as he was in before the wrong and thus the plaintiff cannot be recouped for a loss which, he would in all probability have been obliged to bear, had there been no accident. But it is not always possible to reach the general principle of assessment of damages called the restitution in integru. It is the aim which is difficult,

rather impossible to attain in the area of tort in so far as loss of a limb, or loss of amenities or pain and suffering or humiliation which is brought about by the defendant's wrong doing. The court therefore attempts to assess and grant reasonable compensation as distinguished from perfect compensation. As salmon puts it, "it might be better to say that such sums are an acknowledgment of regret for having caused a hurt that is imponderable rather than a compensation properly so called, or if the legislature fixed a definite sum to which the relatives would be entitled by way of solatium.

Damages should neither be standardized nor there should be any attempt at rigid classification. But in a court of law compensation for physical injury can only be assessed and fixed in monetary terms. In this respect the best that courts can do is to hope to achieve some measure of uniformity. As far as possible it is desirable that two litigants whose claims correspond should receive similar treatment, just as it is desirable that they should both receive fair treatment.

9.1.4 DAMAGES IN TORT AND BREACH OF CONTRACT:-

Insofar as damages are concerned, the tort law, in order to establish and vindicate the plaintiff's right, awards nominal damages and in suitable cases where the defendants act is fraught with malice, fraud or violence it awards exemplary damages too; serving a double purpose thereby – of satisfying the plaintiff and punishing the defendant on the other hand the purpose of the law of contract is to award just and proper compensation; not to punish the defendant for his breach. Thus law attempts at restitution in property cases, the law of torts generally does not pretend that.

Damages in tort, may be granted with reference to consequences which the defendant had no notice. In contract the defendant is liable for predictable consequences only. The distinction which must be made turns not on the form of action as such but on the nature of plaintiff's damage and the defendant's behavior. Thus, the application of the principle of remoteness of damage is not the same with these two branches of law.

The case of **Koufos V. Czarnikow Ltd** (1967) popularly known as" The heron II "explains the deference between the measure of damages in tort and breach of contract. In that case a vessel was chartered for voyage from C to B for the carriage of sugar. She deviated to X to load lime stock for ship owners. If she had not deviated, she would have arrived at place B ten days earlier than she did in fact. The characters claimed damages for the difference between the market value of the sugar at the expected date of delivery and the actual date of delivery. Held, their claim should succeed. Although the ship owners did not know what the chatterers intended to do with the sugar, they knew that there was a market for sugar in B. They must have realized that at least it was not unlikely that the sugar would be sold there on arrival and then in any ordinary market, prices were apt to fluctuate daily. It was an even chance that the fluctuation would be downwards. The loss of a kind which the ship-owners, when they made the contract, out to have realized was not unlikely to result from a breach of causing delay in delivery. The Law Lords emphasized that the measure of damages in contract and that in tort are not the same. In contract there is opportunity for the injured party to protect himself against the risk by directing the other party's attention to it before the contract is made. In tort there is no such opportunity and a tort feasor cannot reasonably complain if he had to pay for unusual but foreseeable damage resulting from his wrongdoing.

Finally in tort-actions the damage is typically physical and the behavior of the defendant normally culpable. On the other hand in contract actions the damage is typically financial only and the behavior of the defendant is frequently innocent.

9.2.1 LIQUIDATED DAMAGES:-

The term “liquated damages” is applied to such damages as constitute a liquidated demand payable in money. If a sum of money is previously agreed upon the parties to a contract, to be paid, to either party, in case of breach of such contract, whether or not actual damage is proved to have been caused thereby, it is called liquidated or stipulated damages, which the party complaining of the breach is entitled to recover. In such a case it is not to be interfered with by the Court. It is well settled that the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

Under section 74 of the Indian contract,1872, when liquidated damages are entered in a contract itself as payable in the event of breach, then, damages payable when a breach occurs, are to be assessed in the ordinary way subject to that fixed amount as a maximum, and it is for the plaintiff to prove the exact amount of damages which he suffered and that amount only could be awarded. The gain derived by the defendant by a breach, should be taken to be the loss suffered by the plaintiff. The sum named in the contract itself, however, is not the conclusive evidence. The plaintiff shall have to prove his damages irrespective of the specified amount in the contract. Therefore, it follows; the plaintiff cannot get a decree for damages unless he proves that he has suffered loss or damages.

9.2.2 DISTINCTION BETWEEN LIQUIDATED DAMAGES AND PENALTY:-

The distinction between liquidated damages and penalty depends upon the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the special sum is a penalty. The essence of penalty is a payment of money stipulated as in errorum of the offending party. If, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages. The courts refuse to be bound by the mere use of the word “liquidated damages” or penalty and will look to what must be considered, in reason, to have been intended by the parties in relation to the subject matter.

At common law, parties could name a penal sum as due payable in the event of breach and the named sum according to the true intention of the parties could represent damages. Parties to a contract were also free by common consent to assessment to a fixed measure of damages to avoid the difficulty that very often is found in quantifying the compensation. The use of the term penalty or liquated damages by itself is not decisive and even what is described as liquidated damage could turn out to be penalty on the facts of a given case.

An illustration of penalty is **FORD MOTOR Co V. ARMSTRONG** (1915). In that case, the defendant, a retailer, received from the plaintiffs supplies of cars and parts and agreed not to sell any item below the listed price. A sum of £250 was payable for every breach as agreed damages. A breach having taken place, a majority of the Court of Appeal held that the sum fixed was a penalty as it might happen that a part sold in breach was of lesser value than the damages payable.

Similarly in **LONDON TRUST Co. Ltd V. HURREL.** (1955), a car was purchased on hire-purchase terms, the total price payable by installments being £558. the agreement provided that if the purchaser returned the car or if, on account of his default the seller retook it, the total sum, including the installments already paid of £425 must be paid. The purchasers paid up to £302 and then defaulted. The seller retook and resold it for £270, thus receiving a total sum of £572, which was more than the contract price. Even so he brought an action to recover £122, being the difference between £425 and the installments paid. But his claim failed. The court rejected the sum as being a penalty and not a genuine pre-estimate of the probable damage. In arriving at this conclusion dinning LJ took into account these circumstances:

The £425 is three quarters of the total price. It is inserted by the hire-purchase companies by rule of thumb without regard to the make of car, its age, the market conditions or anything of the kind. It is the same for all. In addition to the liability to pay £425, the purchaser was to keep the car in good order, repair and condition and was to pay independent damages for any breach of this condition, supposing that the car was taken back with in a month, could anyone think that the hire or depreciation would go up to £425. “In these circumstance, his Lordship concluded, ” I cannot regard the figure of three quarters as a genuine pre estimate of damage. “If the parties had genuinely tried to estimate the depreciation of this particular car, the figure would have been much less.”

In **DUNLOP PNEUMATIC TYRE Co. Ltd V. NEW GARAGE and MOTOR Co.Ltd** (1915), a manufacturer of tyres supplied a quantity of tyres to dealer on the condition that they would not be sold below the list prices and that liquidated damages, not penalty, of £5 would be payable for every tyre sold in breach of the agreement. The dealer committed breach. The question was whether the said sum was intended as a genuine compensation for the loss suffered. The House of Lords speaking through Lord. Dunedin held it to be liquidated damages.

The Supreme Court of Indian in **FATEHCHAND V. BALKISHNA DASS** (AIR 1963 Sc 1405) pointed out that the question was one of construction of a contract to be judged as at the time it was made and the mere description as penalty or liquidated damages though relevant was not decisive.

9.3 UNLIQUIDATED DAMAGES:-

Damages are the most important remedy for a tort. After the commission of the wrong, it is generally not possible to undo the harm which has already been caused and it is the money compensation, which may satisfy the injured party. Damages in the case of tort are un-liquidated. When the compensation has not been previously determinable or agreed to by the parties, but the determination of the same is left to the Court the damages are said to be Unliquidated. As has been discussed, it is possible in the case of a contract that the contracting parties, at the time of making of the contract may make a stipulation as regards the amount of compensation payable by either of the parties in the event of a breach of the contract. If it is a genuine pre-estimate of the compensation for the breach of the contract, it will be known as liquidated damages. But there is no possibility of any such pre-determination of damages by the parties in the case of tort as they are not known to each other until the tort is committed. Moreover, it is difficult to visualize beforehand the Quantum of loss in the case of a tort. There fore, such damages let to be determined between the parties at the discretion of the court are un-liquidated damages.

9.4 Summary:-

Right to compensation for the injury sustained is a natural right. All the legal systems of civilized nations recognized this concept of damages proportionate to the injury inflicted. Damages are the pecuniary compensation payable by one person to another for injury, loss or damage caused by the one to the other by the breach of a legal duty or commission of tort. The object behind awarding damages is to put the plaintiff in his original position by attempting restitution in integrum or to grant monetary compensation as a solution and acknowledging a regret for having hurt him.

Damages in tort are 'unliquidated' that is not a pre-determined and inelastic sum. These damages are different from penalty and also differ from damages in case of breach of contract where they are "liquidated."

9.5 SELF ASSESMENT QUESTIONS:-

1) Explain 'damages 'as a civil remedy.

2) Discuss liquidated damages and distinguish it from unliquidated damages.

9.6 SUGGESTED READINGS:-

1) C. KAMESWARA RAO'S law of damages and compensation by M.C DESAI vol.1 5th Edition.1988.

2) Law of Tort by M.GANDHI 1987.

3) Law of Damages and compensation by PRASAD.

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LESSON - 10

DAMAGES AS COMPENSATION AND PENALTY

Object:-

After going through this lesson you should be able to understand:

- Award of Damages as compensation and
- Award of Damages as Penalty

Structure:-

10.1 INTRODUCTION:-

The right to receive compensation is a primary right by the law of nature and is of universal nature founded upon natural reason and natural justice. This fundamental right is regulated by a number of maxims which are the condensed good sense of nations. The authority of these maxims, according to Herbert Broom, rests entirely upon general reception and usage. Some of the important Legal maxims upon which the edifice of law of torts stands are; ubi jus ibi remedium which means that where there is a right there is a remedy. In other words, there is no wrong without a remedy. **Holt C.J.in Ashby V. White** describes this maxim thus" if a man has a right he must have a means

to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and indeed it is a vain to imagine a right without a remedy, for want of right want of remedy are reciprocal". Lex simper dabit remedium, which means law will always afford a remedy, almost constitutes the charter of a free people, so universal in its nature and so wide in its scope that it will apply for all time to come. Injuria non execusat injuriam, which literally means, one wrong does not justify another or in other words, two wrongs will not make a right. The time honoured saying you cannot take the law into your own hands seems to have taken its origin in this maxim.

To the Question does the law afford a remedy for even trivial wrongs, the answer was given in the maxim "deminimis non curat lex" which means, law will not take notice of triffles. To this the maxim of civil law "Lex non favet dilicatorum votis" which means law plays little attention to mere fastidiousness, is a corallary. But even this maxim has gained, in its application, certain exceptions in case of trespass to private property for which the law affords a remedy, for every invasion of private property be it ever so minute, is a trespass.

But, then it was found necessary to set certain limitations to the exercise of right to receive compensation for injury. The distinction between damnum abseque injuria i.e damage without injury, and injuria sine damun i.e injury without damages were sought to have been made very early in legal history. In regard to the actual working out of the right to recover compensation it must have been perceived that, even in the case of infringement or violation of rights it is not every kind of damage or loss that was made recoverable. The maxim injure, non remote causa, sed proxima spectatur i.e in law the immediate, not the remote cause of any event is regarded. The exception contained in the maxim violent non fit injuria i.e. "No injury to party willing" must have been one of the first conceived by the jurist. These and other maxims regulate the law of damages for wrongs.

10.2.1 Nature, extent and scope of the right to compensation:- Normally, every violation or infringement of a right creates in the injured party a right to recover compensation. Salmond described the right to recover compensation as a sanctioning right, which is of two kinds. They are (1) The right to exact and receive a pecuniary penalty and (2) The right to exact and receive damages or other pecuniary compensation. The second form of right is in modern law most important and the relief which this form of right affords is always remedial in nature. That is the awarding of compensation to the party injured, what her the wrong-doer is punished by giving penal redress to the injured, or simple compensation is given for breach of contract, in either case, the law simply awards compensation to the sufferer. This compensation is furnished in the damages which are awarded according to certain rules forming what is known as the measure of damages. In considering the subject of damages two questions naturally arise, namely (1) The question of liability and (2) The question as to the quantum of the damages payable. Putting it more analytically, to discriminate between that portion of the damages payable by the wrongdoer and that portion which has to be bone by the sufferer.

An inquiry into these questions necessarily leads into the vast and unlimited region of the law of torts and contracts. The most eminent writers on the subject**, J.D.Mayne and Sedgwick** recognize the necessity of discussing the principles which fix the liability, and are of opinion that some times the dividing line between the right to recover and the amount recoverable dwindles into a vanishing point. Sedgwick observes "The amount of damages, or in other words, the pecuniary compensation awarded by Tribunals of Justice

in the widest acceptance of the term, embraces almost the whole field of legal redress, and a treatise on the subject of the rules which govern the amount of damage, if considered in their largest and most general sense, would include nearly the entire philosophy of the law." In fact, as Salmond observes, "in the civil law, the rules as to the measure of damages pertain to substantive law, no less than, those declaring. What damages is actionable".

10.2.2 What constitutes Compensation:- According to wharton's law lexican compensation is making things equivalent, satisfying or making amends, a reward for apprehension of criminals; also that equivalent in money which is paid to the owners and occupiers of lands taken or injuriously affected for public purposes and under Act of parliament. Compensation, thus, may be described as money paid for damage caused by any breach of contract or wrong to the aggrieved party; amount paid in consideration of services rendered; just value for properly taken for public purpose.

In estimating the amount of compensation that may be awarded to the injured in the case of a wrong, the pecuniary loss, direct and indirect, the time and expenses spent in establishing the right, and the anxiety and worry i.e. mental suffering, may be taken into account, with the element of bodily pain and suffering superadded in the case of personal violence. But when the injury is the result of oppression, design fraud, malice, different considerations arise and the injured party is entitled to claim compensation for 'the sense of wrong or insult' otherwise called Solatium, and the wrongdoer sometimes may even be dealt with more severely by being directed to pay something in errorum. In the case of torts or breach of duty, where there is no element of fraud, oppression, malice, the amount of compensation is generally limited the actual pecuniary loss and the expenses for recovery.

A person is not compensated for the physical injury, he is compensated for the loss which he suffers as a result of that injury. In **Baker V. Willoughby** (1969) it was held that the plaintiff's loss is not in having a stiff leg; it is his inability to lead a full life, his inability to enjoy those amenities which depends on freedom of movement and his inability to earn as he used to earn or could have earned if there had been no accident.

10.2.3 Damages Distinguished from Compensation:- There is an evident distinction between the damages and compensation. While the term damages is used in reference to pecuniary recompense awarded in reparation for a loss or injury caused by a wrongful act or omission, the term compensation is used in relation to a lawful act, which caused the injury in respect of which an indemnity is obtained under the provisions of a particular statute.

The word compensation would embrace in its purview any actual loss suffered by a party. For example, if trees had to be cut certain structure had to be altered or demolished, in that case a Question of paying compensation would arise but the Question as to what loss a party would suffer in case he was prevented from making any constructions or using the roof would not come within the meaning of the word compensation. It would come under the wider definition of the word 'damages'.

Damages are also distinguishable from debt, from a penalty, from costs and from a sum payable under contractual liability to a sum certain on a given event other than breach

of contract. But damages include sums payable under claims for a reasonable price or remuneration for goods sold or serves rendered and under claims under an insurance policy when the quantum of damage had been proved.

10.2.4 Determination of Compensation:- A review of the works of prominent authors on the law relating to damages and the course of judicial decisions leads one to an irresistible conclusion that task of ascertaining the Quantum of general damages is a difficult and perplexing one primarily because there is no exact or uniform rule for measuring the value, either of the human life or of any particular limb, and the assessment of damages for the loss of one or the other could not be arrived at by any precise mathematical calculation. However difficult the problem of compensation for pecuniary losses may be, the basis of assessment have always been clear, the award of the tribunal or the court seeks to put the injured, in the economic position, he would have in but for the accident. The compensation on this restitutionary basis is however, imposable in the case of non-pecuniary losses because it is not possible to get an order for the defendant to redeliver the plaintiff the leg or an eye which he has lost nor it is possible for a court to adopt a formula by which mental pain, agony and aguish, that is suffered by the victim, could be obliterated. Similarly the loss of happiness or partial or total earning capacity could not be supplied nor could days be added to a life which has been irretrievably shortened. Restitution in integrum in its ordinary meaning would be impossible in such a case. Therefore, courts have, in general confined their attention to the award of what may appear to them to be fair, just and reasonable compensation in the given circumstances.

Compensation for an injury sustained in an accident resulting from negligence of another can be claimed under the heads of **1)** Pecuniary compensation, i.e. the amount which has been spent by the injured on the medical aid for the injury **2)** Compensation for the pain and agony which had been caused by injury to the injured **3)** Ordinary compensation, i.e. the damage to be suffered by the injured due to the effects, including the deformity, caused by the injury. When definite evidence is led in proof of pecuniary damages, the same amount should be allowed. I however, the evidence led by injured in proof of such damages is not such which can be readily accepted at least some amount, which of course, should be reasonable, has to be allowed as compensation for the amount spent by the injured in obtaining medical aid for the injury on his proving that he did obtain such medical aid and he had suffered expenses for the same since the pain and agony which an injured suffers for an injury and also the effect or loss to be sustained by him in future life due to injury, can not be determined accurately, the element of speculation in the matter of assessment of compensation payable is followed.

While assessing damages for personal injuries no questions of allocating specific sum to the different heads of damages could ordinarily arise. The assessment will have to be made by way of global figure for a lump sum but when judges take over the function of the primary assessment of damages, it would be required to be stated how much has been allocated by them to some or to each of the appropriate heads. It is a settled principle that in disablement cases the compensation awards are always higher than even in cases of death because the compensation has to be given to a living victim, both for his personal loss and for the economic loss.

10.2.5 Compensation for violation of Article 21:- In **Secretary, Ministry of Railways V. S. Santhanamary** (2005 Cri LJ T 42 (Mad)); The deceased was taken into custody by railway police for interrogation. He died in police custody within a short span of 5 hours. Deceased a young man of 20 years would not expire suddenly due to natural causes as claimed. No material in form of inquest or post mortem report was placed on record to prove that death was due to natural causes. In absence of any prima facie acceptable material, inevitable conclusion was that the deceased must have died due to torture. Direction was issued to pay compensation amount of Rs 50,000/- with interest at the rate of 9 percent to parents of deceased in addition to sum of Rs 50,000/- disbursed during pendency of appeal.

In **Fattuji Dajiba Gedam V.Superintent of Police** (2003) Acc 434 (Bom) (DB). The deceased had received 21 injuries. Cause of death opined by medical officer as syncope was due to sudden cardiac arrest due to multiple injuries sustained caused by hard blunt object. Police failed to prove how those injuries were suffered by deceased while in police custody. As guidelines laid down in **DK Basu V State of West Bengal** (AIR 1997 Sc 610) Where not followed, State Government was directed to deposit a sum of Rs 1,75,000/- in the high court to be paid to legal heirs of deceased and take disciplinary proceedings against the officers who were responsible for death of the deceased.

In **Priti Thepper V.State of Punjab** 2004 Cr LJ 3722(P & H), the deceased aged 28 years died inside jail under mysterious circumstances. He was survived by wife and minor children. Held that his wife and children were entitled to compensation of Rs 2.50 Lakhs. State could recover amount from officers who abused their powers or were found to be negligent.

10.2.6 Compensation under Motor Vehicles Act 1988:- In **United India Insurance Co. Ltd V.Janebai III** (2003) Act 714 (Bom); death of a scooterist was due to his own rash and negligent driving. Claim by mother was held under sections 140 and 166. Tribunal had awarded compensation of Rs 50,000/- under section 140 for no fault liability. Tribunal also treated claim application under section 163-A, allowed claim petition and directed insurance company to pay Rs 1,00,000/- together with interest. On appeal the High Court held that the choice to claim compensation is either under section 140 or under section 163A but not under both. Accordingly the appeal is allowed.

In **Kulbhushan Singhal V.Gyan Singh (**AIR 2004 Uttaranchal 36); a car which deceased was driving had collided with bus resulting into his death. Deceased, a medical doctor in hospital having MD degree was aged 36 years. His salary has been estimated at Rs 9000/- per month. Deducting 1/3rd towards personal expenses value of loss of dependency would be Rs 6,000/- per month. Looking into the age of two minor children who are claimants, compensation of Rs 8,64,000/- was awarded by applying multiplier of 12. The two minor children were also awarded a separate compensation of Rs 9,72,000/- for the death of their mother in the same accident who was also a doctor aged 35 working on a salary estimated at Rs 8,000/- per month by applying deduction of 1/3rd of salary and multiplier of 15.

10.2.7 Compensation Under Railway Act, 1989:- Railway accident rules had provided for Rs 2 Lakhs as compensation in respect of one persons death. But by amendment on 1st

November 1997 the said amount was enhanced to Rs 4 Lakhs. In **Saraswati Das V. Union of India** (AIR,2003 Gau .II) death of deceased in bomb blast at the railway station occurred after amendment of Rules. The court held that the claimants were entitled to Rs 4 Lakhs compensation irrespective of earning capacity of deceased and loss suffered by them. Accordingly parents of the deceased were awarded Rs 75,000/- each and Rs 1,25,000/- each to wife and child of deceased in the interests of justice.

No destination should be made for award of compensation to adult or child. In **Sidheswar Prasad Lal V. Union of India** (2003 Act 1422 Pat), the Railway claims tribunal had awarded Rs 2 lakhs for the death of claimant's wife but awarded only Rs 50,000/- for death of his 8 months old daughter. Held that railway claims tribunal had erred in awarding only Rs 50,000/- for the death of the claimants daughter because it had been indicated in schedule that amount of compensation for death of passenger is Rs 2 Lakhs and Rule 3 also did not make any distinction adult and child in the award of compensation.

10.2.8 Torts : Compensation for Negligence:- One guiding factor, for determining compensation as per decision in **M.S.Grewal V. Deep Chand Sood** AIR 2001 SC 3660) is placement in society or financial status of claimants. In **Daranidhar Panda V. State of Orissa,** (AIR 2005 Ori 36), there was death of two school children on account of collapse of pillar and portion of boundary wall of school. Claim for compensation was filed by claimants. One of whom was a village priest and other one was housewife. Deceased children had been admitted to Government Primary School. Fee structure of which was nominal. Applying the principle laid down by the Supreme Court compensation of Rs 75,000/- with 6 percent interest from the date of filing till payment was awarded to each of the claimants.

In **University of Kerala V. Mollay Francis** (AIR 2004 Ker11) a student who was declared failed had applied for revaluation, but there was delay of more than one year in declaration of result of revaluation in which she was declared passed. University had a duty to publish result of revaluation before next examination starts. Thus, she had to appear in supplementary examination due to delay in declaration of result of revaluation before next examination starts. Thus, she had to appear in supplementary examination due to delay in declaration of result of revaluation. Held she was entitled to damages and amount of Rs 10,000/- awarded for mental agony was not exorbitant. Amount of Rs 1,000/- awarded for expenses for appearing for next examination and Rs 3,000/- for loss of one year was also proper.

10.3.1 Penalty:- According to Wharton's Law Lexicon the word 'Penalty' may be described as 'a sum agreed to be paid on non-performance of the condition of a bond. i.e. a written acknowledgement; A sum recoverable by action from a reason infringing a statute. The term 'penalty' is a slippery word and has to be understood in the context in which it is used in a given statute. All penalties do not flow from an offence as is commonly understood but offences lead to a penalty. Where as the former is a penalty, which flows from a disregard of strict statutory provisions, the latter is entitled when there is mensrea and is made the subject matter of adjudication in a prosecution launched for the purpose in a criminal court.

10.3.2 Penalty Clause:- The parties who enter into a contract no doubt express that the contract would be carried out; but they also contemplate the possibility of the contract not being carried out and provide for such a case. If in making provision for breach of contract the promise stipulates from the promisor on the breach only for such compensation, as the court would deem reasonable in the circumstances, then there is no penalty and the stipulation is not penal. But if, on the other hand, the court would on a proper consideration come to a conclusion that the stipulation was put in not by way of reasonable compensation to the promise but in order that by reason of its burdensome or oppressive character it may operate in terrorem over the promisor so as to drive him to fulfill the contract, then the stipulation is one by way of penalty. Thus, the question whether any particular situation is only by way of compensation or by way of penalty should depend upon the construction of the particular document or contract and on the circumstances of each case.

According to Arnold and Mayee in their works on determining the true intention of parties. 1) where a contract provides that, upon the non-payment of a certain sum of money, larger sum shall thereupon become forth with payable the later is always deemed to be a penalty; 2) where a contract contains a condition for payment of a sum of money to secure the performance of several stipulations of varying degrees of importance, and for breach of some of which the damages might be deemed to be liquidated but for others unliquidated, such a sum is, prima facie, a penalty and not liquidated damages; 3) where the damage resulting form breach of contract is altogether uncertain, especially if only a single breach is specified and yet a definite sum of money, reasonable in amount is expressly made payable in respect of it, such provision is not in the nature for penalty. But liquidated damages and 4) where a single lump sum is to be paid by way of compensation in respect of many events, some occasioning serious, some trifling, damage, and the damage caused by each and every one of these events, however varying in importance, is of such an uncertain nature that it cannot be accurately ascertained, it is again, not a penalty, but liquidated damages.

In **Magee V. Lavel** (1874) where the plaintiff entered into an agreement for the transfer of his tenancy in a public house and the sale of good will thereof to the defendant. The agreement contained a variety of stipulations with regard to the transfer of the licenses, the payment of rates and taxes, purchases of the furniture, fixtures and stock and a provision that if either party shall refuse or neglect to perform all and every part of the agreement, he shall pay to the other the sum of Rs 100/- damages. It was held that the stipulated sum of Rs 100/- was not liquidated damages but a penalty.

In **Law V. Redditch Local Board** (1892),there was a contract for the construction of sewage works, which provided that the works shall be completed in all respects by a specified date, and that in default of such completion, the contractor should fore it and pay the sum of £ 100/- and £ 5/- for every seven days during which the work should be incomplete after said date as and for liquid damages. On the failure to complete the works according to agreement, it was held that the plaintiffs were entitled to recover, in as much as the sums agreed to be paid were payable on a single event only , viz. the non-completion of the works and they must, therefore, be regarded as liquidated damaged and not penalties.

In India, however, the distinction between penalty and liquidated damages has been fortunately done away with by a bold stroke of the legislature. Section 74 of the Indian contract Act 1872 makes a provision for payment of compensation in all cases in which the parties named a seen in the contract as the amount to be paid in case of a breach there of, irrespective of the question whether the seen named is treated as a penalty or liquidated damages.

10.4 Damages in shape of Penalty:-

Damages as imposed by section 14-B, Employees' provident Funds and miscellaneous provisions Act includes a punitive sum quantified according to the circumstances of the case. In exemplary damages this aggravated the element is prominent. Constitutionally speaking such a penal levy included in damages is perfectly with on the are a of implied powers and the legislature may while enforcing collections, legitimately and reasonably provide for recovery of additional sums in the shape of penalty so as to see that avoidance is obviated. Such a penal levy can take the form of damages because the preparation for the injury suffered by the default is more than the narrow computation of interest on the contribution. The expression damages' occurring in section 14-B is in substance, a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty under section 14-B is not merely to provide compensation for the employees. It serves both the purposes, namely to penalise defaulting employer as well as to provide perpetration for the amount of loss suffered by the employers. It is not only a warning to employers in general not to commit a breach of the statutory requirements of section 6, but at the same time it is meant to provide compensation or redress to the beneficiaries, to recompense the employees of the loss sustained by them. It has been thus observed by the supreme court in **Organo Chemical Industries V. Union of India** (AIR 1979 sc 1803).

10.5 Summary:-

The fundamental right to receive compensation for violation of legal right is regulated by a number of legal maxims. The subject of damages normally involves the question of liability and the quantum of damages. The dividing line between these questions according to jurists is always difficult.

Compensation is the money paid for damage caused by any breach of contract or wrong to the agreed party. The amount of compensation will be assessed by taking in to account the pecuniary loss, direct and indirect suffered. A person is compensated for the loss which he suffers because of the injury. The term damages is distinguishable form compensation Damages is the pecuniary recompense awarded for a wrongful act, whereas compensation is used in reation to lawful act that caused the injury.

There is no exact or uniform rule for measuring the value of damages. Compensation on the restitutionary basis is impossible in the cases of non-pecuniary losses. In such cases the element of speculation is followed for the assessment of compensation. In disablement cases the compensation awards are always higher than in cases of death

The statutes like Motor vehicles Act, Railway Act, Workmen's Compensation Act provide for compensation payable to the injured. In recent times the courts are liberally awarding monetary compensation for violation of fundamental rights guaranteed under the constitution as well as under law of torts.

Penalty is the sum agreed to be paid on non-performance of the condition of agreement. The Question whether any particular situation is only by way of compensation or by way of penalty would depend upon the construction of the particular document and on the circumstances of each case.

10.6 Self Assessment Questions:-

1. Explain the award of damages as compensation and as penalty.
2. What constitutes compensation and Distinguish damages from compensation**.**

10.7 Suggested Readings:-

1. C.Kameswara Rao's law of damages by M.C.Desai 5th Edn. 1988.vol.1
2. Law relating to Damages, claims and compensation. By S.C Mitra 1st End.2006.

Lesson Writer

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LESSON - 11

KINDS OF DAMAGES

Objective:-

After going through this lesson you should be able to:

- Describe various kinds of damages.

Structure:-

11.1 INTORDUCTION:-

Damages may be defined as pecuniary compensation which may be awarded to a person for injury caused to him by the wrongful acts of another. They are limited to the loss which has actually been sustained by the aggrieved party and are intended not only to serve as a satisfaction to the party aggrieved, but also as a punishment to the wrong-doer with a view to deter him from committing such a wrong in future. There are various kinds of damages. They are contemptuous, nominal, substantial, exemplary or punitive and prospective damages.

11.2 Contemptuous Damages:-

As the very name suggests contemptuous damages are expressive of ridicule or scorn. They consist of what is called derisory amount marking a disapproval of the plaintiff's conduct in going to court. For example half a penny or one rupee, is awarded when although the plaintiff has proved his case, the action ought never to have been brought. In case where A assaults Band B proves it, but if it seems that it was B's claim being unmeritorious he may be awarded only a Triffiling sum by way of contemptuous damages. It is also likely that the plaintiff will also be deprived of his costs under the circumstances.

Contemptuous damages are frequently awarded in libel cases. The case of **Kelly V. Sherlock** (1896) is an instance in point. In that case the defendant had libelled the plaintiff in violent terms in

his newspaper. The plaintiff retorted with vitriolic counter-attack describing the defendant's newspaper as the dregs of "provincial journalism." The plaintiff was awarded only contemptuous damages of one farthing. In **Poliakoff V. News chronicle Ltd** (1939) for an action of libel jury found that the statement complained of was defamatory of the plaintiff but never the less did not award any sum by way of damages. The court of appeal refused to disturb the verdict and order re-trail on the ground that, as the plaintiff had suffered no damage in fact, the verdict was equivalent to the award of contemptuous damages.

But one has to note that where the question of loss of liberty is involved there is no room for contemptuous damages as could be observed in **Ashby V. White** (1703) and Constantine **V. I.L Hotels** (1944) cases.

11.3 Nominal Damages:-

Nominal damages are a small sum of money, awarded not by way of compensation for any actual loss suffered, but merely by way of recognition of the existence of some legal right vested in the plaintiff and violated by the defendant. Normally, they are awarded where a tort is actionable per se to mark the infringement of the plaintiff's right even though he has suffered no actual loss. Trespass to person or property is an example of a tort in which nominal damages may be awarded. Nominal damages are so called because they bear no relation even to the costs and trouble of suing and the sum awarded is so small that it may be said to have no existence in point of quantity.

In **ASHBY V. WHITE** (1703), it was held that an elector had a right of action against a returning officer, who wrongfully and maliciously rejected his vote at an electron even though the candidate for whom he intended to vote was actually elected. Holt C.J. Observed." If a man gives another a cuff on the ear, though it cost him nothing. Yet he shall have his action, for it is a personal injury. Similarly in **Constantine V. Imperial London Hotels** (1944), it was held that a well known West Indian cricketer had a right of action as he was not received by the defendants into one of their hotels to which he wished to go though, they provided him with lodgings in another of their hotels. In both the cases nominal damages were awarded but these established and vindicated the legal rights of the plaintiffs.

The word nominal used here should not be taken to connote the small amount of compensation that is awarded, but it is the establishment of the right that is important here. Nominal damages can be distinguished from contemptuous damages. In the latter the plaintiff ought never to have brought the suit, while in the former the suit is filed for the purpose of vindication of ones right leaving a side the question of money compensation as less important. Therefore, it should not be understood that small damages are necessarily nominal damages. Small damages are also different from substantial or ordinary or real damages wherein the real or actual loss sustained by the party is compensated.

11.4 ORDINARY, REAL or SUBSTANTIAL DAMAGES:-

Such damages are commonly awarded as a compensation for the damage actually suffered by the plaintiff. But what he recovers as a real damage is compensation and not restitution. So it is also known as compensatory damages. In such cases amount which are determined as damages is as far as possible, very near to the amount which brings the plaintiff in the same situation in which he was before the injury was caused to him. In **Moss V. Christ Church R.D.C** (1925) the

college of **Mrs. Moss** was destroyed by fire caused by a spark from the defendants steamroller. It was held that measure of damages was not the fair cost of rebuilding as before, but the difference between the money value of the plaintiff's interest before and after the fire.

Where a thing is partially damaged the plaintiff can recover the amount by which the value is reduced. Distinction between the compensatory and a substantial or real damages dependants on the nature of rights infringed. Compensatory damages are given only in cases which are actionable per se, while real damages are mainly given in such cases where real damage is proved before the court.

11.5 EXAMPLARY, VINDICTILE or PUNITIVE DAMAGES:-

Exemplary damages are awarded where ever the wrong or injury is of a grievous nature, done with a high hand or is accompanied with a deliberate intention to injury or with words of contumely abuse. Although in general damages in tort are confined to the actual loss sustained by the plaintiff, where the tort was committed in, or accompanied by, aggravating circumstances, such as malice, wanton insult or persistent repetition or where tort involves an attack on the plaintiffs character, the court may if it thinks fit, award a sum in excess of the loss actually suffered. Such damages are called exemplary, vindictive, punitive, aggravated, or retributive damages. They are also known in America as smart money".

Just as in case of contemptuous damages, the court takes into account the plaintiff's moral conduct; the exemplary damages are the result of the courts indignation at an especially outrageous attack on the plaintiff's security or at a wanton miss conduct on the part of the defendant. **Huckle V. Money** (1763) is an illustration of outrageous attack on the plaintiff's security. In that case the plaintiff was under arrest for no more than six hours in consequence of a search warrant issued against him. It was found that when under arrest, the defendant treated the plaintiff very civilly by entertaining with beef sticks and beer. Yet the court refused to interfere with a verdict of £300 damages. The learned judge remarked that to enter a man's house by virtue of a nameless warrant, in order to procure, is worse than the Spanish inquisition it is a most daring attack made upon the liberty of the subject." In **Merest V. Harvey** (1814) the plaintiff had a shooting party on his own estate which adjoined the highway. The defendant, who was a banker, a magistrate and a member of parliament, and who had dined and drunk freely, left his carriage on the highway and insisted with oaths and threats in joining the spot. The plaintiff who through out behaved with laudable and dignified coolness was awarded £500 as damages. This case was regarded as one of a wanton misconduct on the part of the defendant.

There is no yardstick with which to measure the exemplary damages, except that there must be some reasonable relation between the amount of damages and the wrong suffered. Nor is it possible to define with precision what are exemplary damages. A malicious motive, an arrogant or insolent manner are things which justify the award of exemplary damages.

There are two conflicting theories regarding the exemplary damages. One view is that damages are not awarded to compensate the injury done to the plaintiff but to punish the wrongdoer. According to the second theory, such damages are regarded as a solution for wounded dignity and feelings. The better view seems to be that exemplary damages are consolatory rather than penal

resting upon the principle that where there is malice, the plaintiff suffers from a sense of wrong and he is entitled to a solution for that mental pain.

However, the scope of exemplary damages has been drastically narrowed down by the decision of House of Lords in **Rookes V. Barnard** (1964). Lord Devlin expressed that such damages can be awarded only in three types of cases.

(1) where allowed by a statute.

(2) In case of oppressive, arbitrary or unconstitutional action by servants of the government; and

(3) In cases where 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 that case there was a threat of strike by the union, as a result of which the appellant an employee of the BOAC at London Airport was dismissed by BOAR. It was held that he should recover damages against the respondents as he had established a good cause of action at common law for the tort of intimidation. The award of exemplary damages in this case was considered to be in appropriate**.**

The House of Lords also made a fine distinction between punitive or exemplary damages and aggravated damages which was hitherto thought to be insignificant. When amount of damages is aggravated because the court takes into account motives and conduct of the defendant, the damages represents compensation for injury to plaintiff's feelings dignify and pride. Punitive damages on the other hand are awarded to punish the defendant and to deter him from committing wrongs in future. The distinction is, however, theoretical. The result is practically the same.

In India judicial opinion ultimately followed **Rookes V. Barnard** (1964) ruling on the question of award of exemplary damages. In **Bhim Singh V. State** of **Jammu and Kashmir** (AIR 1986 Sc 494) the Supreme Court awarded exemplary damages when there was a wrongful detention. In that case **Bhim Singh**, a member of Legislative Assembly was arrested and detained to prevent him from attending the Assembly session. His detention was challenged in the Supreme Court through a writ petition but by the time of the decision, he had been set free. There was now no need to order that he be set at liberty but the Supreme Court considered it to be an appropriate case for awarding exemplary damages amounting to Rs 50,000/- to him, which the state Government was required to pay within 2 months. Similarly in **Sebastian M. Hongary V. union of India (**AIR 1984 Sc 1026) two persons, who were detained by the army authorities could not be produced in the court and were stated to be missing. There was a possibility of their having been killed in detention. The Supreme Court ordered that the wives of the two missing, who had passed through the torture, agony and mental oppression be paid one Lakh rupees each as exemplary damages.

In **Shiv Sagar Tiwari V. Union of India** (AIR 1997Sc 83) the Petitioner had challenged through the public interest litigation the validity of allotment of 52 shops and stalls made by **Smt. Sheela Kaul**, the then Minister for Housing and Urban Development, Government of India. The Supreme Court held that the allotment of shops by the Minister was arbitrary, malafide, and unconstitutional as it was done without following any policy or criterion and hence she was directed to pay Rs 60 Lakhs as exemplary damages done to the Government exchequer.

In common cause, **A Registered Society V. Union of India** (AIR 1996 Sc 3081) captain **Satish Sharma**. The petroleum minister made allotment of petrol pumps arbitrarily infavour of his relatives and friends. The Supreme Court in a public interest litigation Quashing the allotments directed the minister to pay 50 Lakh Rupees as exemplary damages to the public exchequer and 50 thousand Rupees towards costs.

11.6 PROPECTIVE or FUTURE DAMAGES:-

Prospective or future damages means compensation for damage which is quite likely the result of the defendants wrongful act but which has not actually resulted at the time of the decision of the case. For example if a person has been crippled in an accident the damages to be awarded to him may not only include the loss suffered by him up to the date of the action but also future likely damage to him in respect of that disability.

In **Subhash Chander V. Ram Singh** (AIR 1972 Delhi 189) the appellant, a seven-year-old boy was hit by a bus belong to the state of Punjab and driven by the respondent, Ram Singh. He suffered various injuries resulting in permanent disability, as a result of which he could not do certain acts due to his artificial legs. The Motor Accidents Claims Tribunal awarded him compensation amounting to Rs 3,000/- under the heading probable future loss by reason of incapacity and diminished capacity of work which was increased to Rs 7,500 by the Delhi High Court. Similarly in **Y.S.Kumar V. Kuldip Singh** (AIR 1972 P and H 326) the respondent was hit by a motorcycle, resulting in physical injuries at the ankle and permanent disability which affected enjoyment of his normal life. He was awarded compensation of Rs 7,200 calculated at Rs 50 per moth for a period of 12 years on account of physical disability and loss of enjoyment of normal life.

All kinds of damages resulting from the same cause of action past, present or future or certain and contingent must be recovered at one time because there cannot be more than one suit for the same cause of action. This rule was laid down in **Fetter V. Beale** (1701). In that case the plaintiff had recovered damages from the defendant for battery. Subsequently he discovered that his injuries were more serious than was at first supposed and a surgical operation became necessary for removing one of the bones of his head. Consequently he brought a second action for additional damages. The court while dismissing the suit held that the plaintiff was entitled to bring one action for the same cause of action which he had already exhausted by getting damages in his first action.

The rule propounded in **Fetter V. Beale** that “more than one action will not lie on the same cause of action” has certain exceptions. They are (a) where same wrongful act violates two distinct rights; If the same wrongful act violates two district rights, successive actions may be brought in respect of each of them. It can be illustrated by reference to **Brundson V. Humphrey** (1884) in that case due to the negligence the defendant collided with the plaintiff’s car as a result the plainti9ff sustained bodily injury and his car was also damaged. In the first action the plaintiff had recovered damages for the damage caused to his car. Subsequently he brought another action for damages for bodily injuries caused to him. The defendant’s contention that the plaintiff’s suit was not maintainable on the ground that for one cause of action two actions cannot be brought was rejected. The court held that the plaintiff was entitled to bring second action also as it was for the violation of a different right.

(b) Where two distinct acts violate the same right:- if the defendant violates the same right of the plaintiff by two distinct acts a separate action will lie for each wrongful act.

(c) Where the cause of action is a continuing one :- when the cause of action is a continuing, separate action can be brought for each unlawful act causing fresh damages. Continuing cause of action arises when the acts or omissions of the same kind, is repeated again and again.

11.7 Summary:-

Damages are of various kinds. Generally damages are compensatory because the idea of civil law is to compensate the injured party for the loss which he has suffered. Some times, the Court may award contemptuous damages. Although in such a case, the plaintiff has suffered greater loss but the amount of compensation awarded is trifling because the court forms a very low opinion of the plaintiff's claim and thinks that the plaintiff does not deserve to be fully compensated.

Nominal damages are awarded where an action was a proper one to bring, but the plaintiff has not suffered any special damage, and does not desire to put money into his pocket. Such damages are given when the purpose of the action is merely to establish a right. Every infringement of a right involves a claim to nominal damages.

Ordinary, real or substantial damages are awarded where it is necessary to compensate the plaintiff fairly for the injury he has in fact sustained. The law does not aim at restitution but compensation, and the true test is, what sum would afford under the circumstances of each case. Plaintiff's own estimate is regarded as the maximum limit.

Exemplary, vindictive or punitive damages are awarded wherever the wrong or injury is of a grievous nature, done with high hand, or is accompanied with a deliberate intention to injure or with words of contumely and abuse. In such cases the injury done is so grave and of so reprehensible a character that it is next to impossible to measure damages by any strict numerical rule. The object of giving exemplary damages is to make a public example of the defendant to deter all others from the commission of similar act.

Damages resulting from the same cause of action must be recovered at one and the same time as more than one action will not lie for the same cause of action. If a person is beaten or wounded, if he sues he must sue for all his damages past, present and future. He cannot maintain an action for a broken arm and subsequently for a broken rib, though he did not know of it when he commenced the action. But if the same wrongful act violates two rights, successive actions may be brought in respect of each of them. If a person sustains two injuries from a blow, one to his person and another to his property, he can bring two actions in respect of that one blow. Similarly, where the cause of action is a continuing one a fresh cause of action arises every day, and it is open to the plaintiff to bring fresh action.

11.8 Self Assessment Questions:-

1. Describe various kinds of damages available to the plaintiff against the defendant in a civil suit for damages.
2. Write a note on the following:
   (a) Contemptuous damages.
   (b) Nominal damages.
   (c) Exemplary Damages.
   (d) Substantive Damages.
   (e) Prospective Damages.

11.9 Suggested Readings:-

1. C.Kameswara Rao's Law of Damages and Compensation by M.C. Desai 5th Edn.Vol.1.1988.
2. Law of torts by Anand and Sastry 5th Edn. 1985.
3. Law of Torts by B.M. Gandhi 1987.
4. The Law of Torts by Ratan Lal and Dhiraj Lal 21st Edn.1987.

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LESSON - 12

MEASURE OF DAMAGES

Objective:-

After going through this lesion you should be able to describe.

- Measure of Damages.
- General and Special Damages.
- Restitutio in integrum and
- Mitigation of Damages.

Structure:-

12.1 Meaning:-

The expression 'Measure of Damages' is a technical phrase, which signifies the basis, the footing or the standard upon which the amount of damages in any given case is calculated. There are several factors which influence the judge in determining the quantum of damages, to be awarded to plaintiff complaining of an injury at the hands of the defendant. There is no invariable and fixed rule to be followed in the determination of the question, as to what is the amount of compensation which the injured party is entitled to, and courts of law have often to speculate in a vague field, in their endeavour to place the plaintiff, in the same position he occupied before he sustained the injury. As pointed out by Lord Halsbury, L.C the whole region of injury into damages is one of extreme difficulty.

But yet, eminent judges have, from time to time, laid down certain rules and standards in accordance with which courts of law have to be guided in awarding compensation for a given injury. These rules have become known as measure of damages, by which you determine the quantum of damages payable to the injured party. In actions for breach of contracts, it may be found possible to measure the damages with precision and a near approach to accuracy but more often they are not commensurate with the loss actually suffered. In actions on tort to property, the

measure of damages can be more accurately calculated, but in cases of personal wrongs no hard and fast rule can be laid down and the measure depends upon a variety of circumstances. More often they are not given to the full extent of a perfect compensation commensurate with the injury sustained.

Since damage is a compensation for injury caused by tort, hence its real determination depends on many factors. In **Gobald Motor Services V. Velluswami** (AIR 1964 S.C.1) the Supreme Court of India has affirmed the principles for determination of damages as laid down by Viscount Simon L.C in **Benham (v) Gambling** (1941). In that case a two and half year old child died in a motor accident. The House of Lords held that the damages for loss of expectation of life should be reduced from £1200 to £200. The House of Lords laid down the following principles for determination of damages:

(a) Expectation of the deceased, his age, bodily health and

(b) Estimate of his wife's future expenses.

(c) Estimated annual amount must be multiplied by estimated number of years and.

(d) Additional reductions from the benefit due increase of interest in the window's estate.

(e) Had the husband remained alive for the whole of his life then additional deduction must be done for expectancy of his wife's death before his death.

(f) In case of such a claimant who is widow to improve his financial condition the expectancy of her marriage should also be kept in mind.

In **Karnataka state road transport corporation V. Krishna** (AIR Kar.11), as a result of collision between two buses two passengers, aged 26 years and 40 years were injured and their left hands had to be cut off below shoulders. They were working as spinners in a factory. In an action for damages by them for compensation for the loss of their hands and their earning capacity the court ordered compensation to be paid to them according to the workmen's compensation Act which was as follows:

(a) As regards plaintiff aged 26 years and whose salary was Rs 400 Pm. disability was assessed to be 80 percent i.e. loss in earning capacity of Rs3:20 Pm which came to be Rs 3840 per anum using 10 as multiple the amount was calculated at 38400 which is the total compensation to be paid to him keeping in view of special damage also Rs 40,000/- .

(b) As regards the other plaintiff aged 40 years, his salary was Rs 400/- P.m. having regard to his age the total compensation payable was fixed at Rs 35,000/- which was reasonable.

In **union of Indian V. Savite Sharma (AIR 1979 J&K 6)** a girl aged 18 years of age had been seriously injured when the tempo in which she was traveling was knocked down by a military vehicle. Her one leg had to be amputed from knee. The court was of the view that she must have been in great agony after the accident and after that she had to use artificial leg, which needed replacement every year. Her prospects for marriage was considerably affected. She was awarded compensation of Rs10,000/- for medical expenses, Rs 15,000/- for pain and suffering, Rs 12,000/

- for permanent disablement and Rs 6,000/- towards expenses of Rs 150/- per year for replacement of artificial leg for 40 years i.e. period of her life expectancy.

In **Hiralal Road Transport V. Miss Neene (AIR 1987 HP 32),** in motor accident four teeth of the upper jaw of an young girl were broken which could not be replaced. She was awarded a total amount of Rs 40,000/- as compensation. The high court held that the driver was negligent and the compensation awarded by the tribunal was correct. The court said that in such cases for awarding compensation mathematical formula cannot be used.

Different courts have awarded different amount of compensation in cases of death of 10 to 15 years aged children. **In CK Subrammaniyan Ayyer V.T.K.Nayer** (AIRE 1990 Sc 376) the Supreme Court upheld the compensation of Rs5,000/- awarded to a boy aged 8 years as just compensation.

12.2 General Damages:-

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

As the privy council has observed in **Madan Mohan Dass V. Gokul Dass** "the principle applied to actions of tort is, the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damages he has laid, unless the a special damages is the gist of the action."

But where special damage is the gist of the plaintiff's cause of action and he fails to prove such damage, he is precluded from recovering ordinary damages. The law is settled that general damages are to be awarded for the injury, pain and suffering and loss of amenities and disability incurred, if any. The loss of future income should also be taken into consideration, if there is any real disability which reduced the earning capacity of the victim.

12.3 Special Damages:-

Special damages on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore they must be claimed specifically and proved strictly. As pointed out by Bown,L.J.in **Ratcliffe V. Evans** (1892): the term special damages is not always used with reference to similar subject-matter, nor in the same context. At times it is employed to denote that damages arising out of the special circumstances of the case, which properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right. In all such cases the law presumes that some damages will follow in the ordinary course of things from the mere invasion of plaintiff's rights and calls it general damage. Special damage in such a context means the particular damage, beyond the general damage, which results from the particular circumstances of the case and plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trail. But where no actual and positive right, has been disturbed, it is the damage done that is the wrong; and the expression

special damage when used of this damage, denotes and actual and temporal loss which has, in fact, occurred. The term special damage has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway to denote that actual and particular loss which plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being as is obvious, the cause of action"

Accordingly, the expression special damage has three different meanings: In the first place, it means the actual damages sustained which may be proved beyond what are known as general damages, i.e. the particular damages which results in the particular circumstances of the case. In this class of cases special damages, if properly alleged and proved, can be recovered in addition to the general damages which flow from the wrongful act complained of, and such special damages are recoverable both in action founded on breach of contract as well as in tort.

In the second place, where it is the damage done that is the wrong or where it otherwise said that damage is the gist of the action, and no positive right is violated, at means the actual and temporal loss that has in fact occurred. When used in this sense it is synonymous with 'express loss' or 'particular damage' or 'damage' in fact".

In the third place, the term special damage means the particular loss which the plaintiff has suffered beyond what is sustained by the general public and which is itself the cause of action. i.e. where the act complained of is a public nuisance.

When used in this sense special damages is not confined to merely pecuniary loss, but means includes very great inconvenience, and in some cases it was even held that narrowing a highway so as practically to block it amounts to special damages.

Explaining the difference between special and general damages Lord Goddard in the case of **British Transport Commission V. Gourley** (1956) has observed: **"**In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage which has to be specifically pleaded and proved. Thus consists of out of pocket expenses and loss of earnings incurred down to the date of trail, and is generally capable of substantially exact calculation. Secondly, there is general damage which in law implies and is not specially pleaded. This includes compensation for pain ands suffering and the like, and if the injuries suffered are such as to continuing or permanent disability, compensation for loss of earning power in the future.

Thus it is clear that special damages claimed should be specified in the plaint and proved in the evidence, where as general damages have to be presumed by the Court.

12.4 Restitutio in integrum:-

There are three fundamental principles upon which the law proceeds to determine the measure of damages. The first and foremost principle is that of restitution in integrum. This principle means that as for as possible the amount of damages should be such as would put the injured person in the same position in which he would have been if the alleged wrong had not been committed. This principle is easy to apply in case of pecuniary loss and therefore, is more popular in law of contract but in cases of personal injuries restitution or actual compensation is impossible.

As Lord Dunedin has forcibly put it “restitution in integrum is a phrase which is properly applied when you wish to express a condition which is imposed upon a person seeking to rescind a contract. I do not think it can be properly applied to questions of tort, and the illustration I give is a very simple one. If by somebody’s fault I lose my leg and am paid damages, can any one in his sense say, I have had restitution in integrum. The true method of expression, I think, is, that in calculating damages you are to consider what is the pecuniary sum which will made good to the sufferer, in so far as money can be, the loss which he has suffered as the natural result of the wrong done to him”. (Admiralty commissioner V.S.S Valeria, 1922).

There is no particular limit to the amount of damages that can be awarded by a court of law, and in proper cases the amount may rise to almost any sum of money while on the other hand, it may be a single farthing. It is largely in the discretion of the judge or the jury, but is regulated by well-established rules.

12.5 Mitigation of Damages:-

The next principle in determining damages, whether in contract or tort is that which underlines the rule as to mitigation of damages. In all claims for damages, a duty is cast upon the plaintiff to mitigate or minimize the damages that is to take all reasonable precautions to reduce the amount of loss or damage arising from the wrongful act of the defendant.

In **Davis V. London and North-western Railway Co**.(1958), it was said that although a plaintiff in a suit in respect of injury done to him, really has a right of action against the defendant, the jury are entitled to look at all the circumstances of the case, and the conduct of both the parties, and if they think that in going on with the action, the plaintiff has acted in an obstinate and perverse manner, they may take that into consideration in estimating the damages”. Thus the sole question to be considered is whether the plaintiff has acted, as a reasonable and prudent man would do under the circumstances. If by the exercise of reasonable diligence he could have avoided the damage in whole or in part he is to that extent not entitled to recover.

The burden of proving that the plaintiff had means at hand for mitigating the damage and did not avail himself of them is on the defendant. It is also essential for him to plead thev specific matters in mitigation of the damage.

Thus, in **workmen V.G.W RLY.** (1863), where in consequence of an embankment constructed by the defendant the flood-waters of a river were held back and flooded the plaintiff’s land. The defendant was allowed to adduce evidence to show that even if there were no embankment the waters would have flowed a different way and reached the plaintiff’s land causing some damage though in a lesser degree. The measure of damages in such a ease is the difference between the two amounts that is damages with the embankment and damages with out the embankment. In **Older shaw V. Hold .** (1840), where the plaintiff had given the defendant an indemnity against the very damage for which he is suing, such indemnity is a bar to the action, if he goes to the entire claim and would be admissible in reduction of damages, if it only counts in part.

But evidence in mitigation can never be admitted, if it contravenes any established principle of law. In **Robinson V.Horman** (1848), where the defendant agree in writing to grant a good and valid lease of property to the plaintiff the defendant, in any action for breach of such agreement cannot adduce evidence to show that the plaintiff knew that a good title could not be made out.

Though there is a duty on the person who has been tortuously injured to take all reasonable steps to mitigate the damages resulting therefrom, if the steps taken by him reasonably led to an unexpected aggravation of the injury and the consequent enhanced damages, the law protects him and enables him to recover the additional damages which cannot be said to be too remote to be recoverable from the tortfeasors. Applying this test in **Maricar Motors Ltd; V. Dr. Mrs Neelambal Ramaswamy** (AIR 1982 Mad. 65), the court finds that the conduct of the injured in subjecting himself to an operation for reduction of the fracture in his thigh in the hands of an orthopedic surgeon cannot be said to be unreasonable. While subjecting himself to the operation for reduction of the fracture, he could not have reasonably anticipated or foreseen the circumstances which led to his death ultimately. In this view of the matter, the court has to hold that the appellants have been rightly held liable to pay compensation for the death of the deceased and not merely for the actual injuries sustained by him.

More over, the duty to mitigate the damages does not require that the injured party must take prompt action to bring into question the wrongdoer conduct in committing the wrong. Thus, in **Bala Subramanya Sastry V. Ponuswami Iyer** (541.C 721) where the trustees of a temple wrongfully eject the archaka, they cannot be heard to say, in an action for recovery of damages, that the plaintiff's laches in taking steps to test the propriety of their conduct should deprive him of the right to recover damages.

It is settled Law that there is a duty cast on the victim to mitigate the damages. In **H.Huchappa V. Anantharaman** (1981 TAC 154). The claimant refused to have plaster cast for six weeks more. Not merely that he refused to under go operation also as advised by the doctor. According to the evidence the patient should have been cured of all the defects and he should have been able to walk without pain and stand if he Co-operated with the doctor. Now, therefore, if any little defects are left over that it is entirely due to non co-operation of the victim with the qualified surgeon and his failure in trying to mitigate the damages. Hence, such defects cannot be considered for purchases of awarding damages.

Remoteness of damages is the third fundamental principle in assessment of damages.

12.6 Summary:-

The expression measure of damages means the scale or rule by reference to which the amount of damages to be recovered is to be assessed in any given case. Damages may rise to almost any amount, or they may dwindle down to a nominal figure.

General damages are those which the law will imply in every violation of a legal right. They need not be proved by evidence. They arise by inference of law even though no pecuniary loss can be shown. On the other hand special damages are such as the law will not infer from the nature of the complained of. They must be claimed on the pleadings and proved at the trail.

Restitutio in integrum is the fundamental principle of assessment of damages both in tort as well as in case of breach of contract. According to which that as far possible the amount of damages should be such as would put the injured person in the same position if the alleged wrong was not committed. This principle is more popular in law of contract than in tort cases.

An injured person cannot claim damages for any loss which he could have avoided by taking reasonable care. If the plaintiff aggravates his injury by refusing to take treatment he cannot recover for the aggravation. The defendant has to prove that the plaintiff had means at hand for mitigating the damage and failed to avail it. If the steps taken by the plaintiff for mitigation of damages led to an unexpected aggravation of the injury, he is entitled to enhanced damages.

12.7 Self Assessment Questions:-

1. Define Measure of Damages and explain it with the help of decided cases.
2. Analyse Mitigation of damages.
3. Describe the following:
   (a) General and special Damages.
   (b) Restitutio in Integrum.

12.8 Suggested further Readings:-

(1) C.Kameswara Rao's Law of Damages and Compensation by M.C. Desai 5th Edition Vol1.1988.

(2) The Law Torts by Rattan Lal and Dhiraj Lal 21st Edition 1987.

(3) Damages claims and Compensation by S.C. Mitra 1st Edition 2006.

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LESSON - 13

ACTION FOR PERSONAL INJURIES

Object:-

After going through this Lesson You should be able to describe.

- Non-Pecuniary and Pecuniary loss.
- Basis of assessment
- Deductions
- Interest on Damages.

Structure:-

13.1 Non pecuniary loss:-

The limits to which damages can go cannot be precisely defined. Damages for personal injuries are very much at large but the amount must be fair and reasonable. In personal injury cases damages awarded broadly fall into two divisions. They are (1) Damages for non-pecuniary

loss and (2) Damages for pecuniary loss suffered. It is well settled that a person injured by another's wrong is entitled to general damages for non- pecuniary loss such as his pain and suffering, past and future and his loss of amenity and enjoyment of life. Such damages constitute a conventional sum. A set of conventional principles have been evolved providing a provisional guide to the comparative severity of different injuries and indicating a bracket damages into which a particular injury will currently fall. The particular circumstance of the plaintiff including his age and any unusual deprivation he may suffer is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of damages at certain key points. In **State of Gujarat V. Dushyantbhai N. Patel** (1981 GLH 121) a young unmarried man of 25 met with an accident and suffered, having remained unconscious for a period of 35 to 40 days after accident. During this period three operations were performed. There were four fractures and there was a partial loss of memory after the accident. The after-effects of the accident were multiple and permanent. Such as permanent disability in the left arm and both the legs, as a whole to the extent of 75 percent. Marriage prospects adversely affected. Against a claim of Rs 1,10,000/- the Tribunal awarded Rs 10,000/- but in appeal to the High Court the amount was enhanced to Rs 22,500/- taking into account comparable cases. The trend of the court in awarding damages in permanent disability cases is seen to have been going upwards.

13.2.1 Pain and Suffering:- If as a result of defendant's negligent Act pain and suffering is caused to the person he shell be entitled to compensation. "Pain" is the immediately felt effect on the nerves and the brain on account of some lesion or injury to a part of body giving rise to a feeling of distress or, agony. It includes for the qualification of damages, any pain caused by the medical treatment or surgical operation rendered necessary by the accident injury.

"Suffering" is the distress which is not felt as being directly connected with any bodily condition. The term would seem to include fright at the time of the injury or fright reaction, fear of future incapacity, either as to health, sanity or the ability to make a living and embarrassment caused by disfigurement if any. Damages include suffering and they will vary with its intensity. If the plaintiff after receiving injury became unconscious or unable to experience pain he will get no damages under this head, however, serious the injury may be.

13.2.2 Loss of Amenity:- Loss of amenities and enjoyment denotes inconvenience and curtailment of the enjoyment of life not on account of any positive unpleasantness born out of pain and suffering but, in a more negative way, because of the inability to pursue the ordinary activities of life, i.e. deprivation to indulge in enjoyable pursuits. It also takes in impairment in the discharge of the day-to-day functions of life arising out of injury to one or more of the limbs, internal organs, senses or faculties. Under this head may be included the varied not-pecuniary losses and burdens, past, present, and future arising out of the accidental injury-past and prospective pain and suffering and past and prospective loss of amenities and enjoyment.

Until the decision of the Court of Appeal in **Wise V. Kaye** (1962), if was not clear whether damages were awarded in respect of objective loss of amenities itself or in respect of subjective mental suffering which comes with the appreciation of such loss. In that case the plaintiff remained unconscious from the time of injury for more than 3 years. Awarding

damages majority of the Court of Appeal held that although the fact of plaintiff's unconscious may be relevant for not awarding anything for pain and suffering it had no bearing on damages for loss of amenities. This decision was approved by House of Lords in **H.West and son Ltd V. Shephard** (1964). In India the courts recognized loss of amenities as a distinct head of damages.

13.2.3 The Injury Itself:- The injury itself represents loss of faculty where as the consequences of the injury on the plaintiff's activities represents loss of amenity ,e.g. loss of job satisfaction, loss of leisure activities and hobbies and loss of family life. It is rarely necessary to distinguish between these heads because the courts usually award a single global sum to cover all the plaintiff's non-pecuniary losses. The courts operate a tariff system Rs x for the loss of leg, Rs Y for the loss of an arm, Rs Z for the loss of an eye and son. This is arbitrary, but inevitably so, and no one pretends that such loss can be truly compensated by the payment of money. It is a pragmatic solution which allows for some degree of uniformity between comparable injuries, and facilitates the settlement of claims. In **Housecraft V. Burnett** (1986) the court of Appeal set a figure of Rs 75,000/- for an average case of tetraplegia with no complications. The tariff is not preciously fixed. There is a bond or range of figures for particular injuries which allows the courts to take account of subjective factors.

13.2.4 Basis of Assessment:- The matters that can be taken into account in assessment of general damages are 1) pain and suffering endured, past, present and future**,** 2) Inconvenience and loss of enjoyment of life sustained, past, present and future and injury to health, and 3) A shortened expectation of life. The damages must give the plaintiff a reasonable compensation for the injuries sustained and the suffering entailed.

In **Rehana V A.M.T Service** (AIR 1976 Guj 37), the plaintiff a girl of 16 years was injured and the accident resulted in permanent disability to her in one leg which became limp. The Gujarat High Court observed that in cases of personal injury the general damages can be given under three heads; namely 1) Personal suffering and loss of enjoyment of life**,** 2) Actual pecuniary loss resulting in any expenses reasonably incurred by the plaintiff, 3) The probable future loss of income by reason of incapacity or diminished capacity for work. The damages awarded under the first head were Rs 10,000/- the amount incurred for medical expenses, compensation for the loss of enjoyment of life account for her inability to participate in sports and household work and the diminished prospects for her marriage due to her permanent injury or disability were also considered and a suitable sum was awarded.

In **Sushil Kumar V.Roshanlal** (AIR 1973 Del 241) a six-year-old boy was struck down by a rash truck driver and one of his legs was to be amputated. He claimed Rs 50,000/- as damages but the tribunal awarded Rs 10,000/- as general damages and Rs 3,000/- as special damages. The Delhi High Court keeping view, the prospects of a long life facing the appellant, the lost hope of leading a normal and active life, the loss of one leg for the rest of life and carrying on life with the deprivation of enjoying the fullness of life forever and the dependence of the boy who was condemned to lead his life with adversely affected future earning capacity, enhanced the sum of Rs 10,000/- to Rs 20,000/- as it was very low.

The factors that should weigh with the court while assessing damages in accident cases have been summarized in **Joharilal V. P.C.H.Reddy** (AIR 1975 Raj 232). They are 1) The impossibility of equating money with human suffering or personal deprivations must be taken into account**.** 2) The compensation awarded should be reasonable, sensible and fair in the circumstances and should be assessed with moderation. 3) In the process of awarding such compensation there must be an endeavour on the part of court to secure some uniformity in the general method of approach and 4) Comparable injuries should be compensated by comparable awards.

The prime factor in assessing damages for shortened expectation of life according to **Benham V. Gambling** (1942) is in the prospect of a predominantly happy life and that what is to be fixed is a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness.

In **Donnelly V.Joyce** (1974) the infant plaintiff was injured in an accident due to defendant's negligence. His mother gave up her part time employment in order to nurse her son. Against the defendant's arguments that the plaintiff was not entitled to recover his mother's loss of wages, it was held that the plaintiff's loss included the existence of a need for nursing and the mother's loss of wages was to be taken as the proper and reasonable cost of supplying that need.

The award of compensation for disablement is always higher than even in cases of death because the same has to be given to a living victim both for his a) personal loss and b) economic loss.

The method most commonly adopted in the assessment of prospective loss is to state in general terms what the loss of earning capacity is and then to state that in the ordinary course of events the plaintiff must have expected to continue to earn at the pre-accident income, for, say, x years. It is of course impossible to say with any certainty what multiple should apply to the basic net annual loss. It will vary from case to case.

More over, the fact that a man at the time when the accident happens earns nothing, does not lead to an inference that hereafter, had there been no accident he would have continued earning nothing. A fair measure of damages for loss of earning capacity has to be awarded.

13.3 Pecuniary Loss:-

Pecuniary loss is the damage that is capable of being directly calculated in money terms. The commonest example is loss of earnings, both actual and future, but it includes all other expenses, attributable to the tort, such as medical expenses traveling expenses, the cost of special equipment or of employing someone to carryout domestic duties which the plaintiff is no longer able to perform, or loss of pension rights.

13.3.1 Loss of earnings:- Loss of earnings constitutes an important pecuniary loss for which damages are allowed. It is not usually difficult to calculate the plaintiff's actual loss of earnings from the date of the injury to the date of assessment. This is the net loss, after deducting income tax and social security contributions. An employee's contributions to a pension scheme are also deducted in calculating his actual loss of earnings. As the principle

behind the award of damages for loss of earnings is restitutio in integrum, the court has to make deductions also in respect of monetary benefit coming to the deceased because of the injury suffered by him.

The calculation of future loss of earnings however, present real problems, largely because the court has to engage in the exercise of prophesying both what will happen to the plaintiff in the future and what would have happened if he had not been injured, in order to estimate the difference. The starting – point in this process is to workout the plaintiffs net annual loss of earnings. The loss of earnings may be total, or partial if the plaintiff's injuries are such that he can take a lower-paid job. The net annual loss is known as the multiplicand, and will be adjusted to take account of the plaintiff's individual prospects of promotion, but no allowance is made for real increases in average earnings generally. This figure is then multiplied by another figure, called the 'multiplier', which is based initially on the number of years that the loss is likely to continue. So a person aged 45, who were expected to continue working until age 65, but can no longer work at all, will suffer a loss of earnings over 20 years. The multiplier is then reduced, or discounted to take account of a)the uncertainty of the prediction the plaintiff might have lost his job in any event at some point in the future, e.g. thorough redundancy or illness; and b)the fact that the plaintiff receives the money now as a capital sum, instead of in installments over the rest of his working life. Thus the plaintiff is compensated on an annuity basis. It is expected that he will invest the award of damages, and use both the income and part of the capital to meet his living expenses over the 20-year period, so that at the end of that time the whole award will be exhausted.

13.3.2 Loss of earning capacity:- Where a person suffers a permanent disability which affects his ability to earn in the future which at the same rate as he earned before his injury, then he may or may not suffer a loss of earnings. His loss of earnings may be total if he is unable to work at all, or partial, if he is able to take a less remunerative job. But in cases, although his injuries have affected his ability to earn, the plaintiff suffers no loss of earnings because his employer continues to employ him at the same rate of pay. In these circumstances the plaintiff is entitled to damages for his loss of earning capacity, if there is a real risk, that he could lose his existing employment, because his capacity to find an equivalent job has been reduced. This applies most clearly in the case of children who have never been employed, where it is obvious that there is no actual loss of earnings.

There is no real distinction between damages for loss of earning capacity and damages for future loss of earnings. A reduction in the plaintiff's present earning capacity is ultimately likely to have some impact on his level of future earnings.

13.3.3 "The lost years":- If the plaintiff's life expectancy has been reduced by his injuries, can be claim for the earnings that he would have received in the period between his expected date of death and the date that he would have stopped working but for the accident? The court of appeal in **Oliver V.Ashman** (1962**)** held that losses incurred in these 'lost years' were not recoverable, on the basis that a plaintiff cannot suffer a loss during a period when he will be dead.

However, the House of Lords has overruled the ruling in Oliver's case in **Pickett V. British Rail Engineering Ltd.** (1980). Damages for prospective loss of earnings, are now awarded for the whole of the plaintiff's pre-accident life expectancy, subject to a deduction for the money that the plaintiff would have spent on his own living expenses during the lost years. The object of pickets ruling was to prevent dependents losing out. Though, there is no guarantee that the plaintiff will use the damages to make provision for his dependants in the lost years. Moreover, the plaintiff is still entitled to such an award, even though he has no dependants.

13.3.4 Deductions:- A person who suffers personal injury may receive financial support from a number of sources other than tort damages. The most common source is social security but others include for example, sick, pay, pensions, private insurance and charitable donations. In theory, the compensatory principle of tort should mean that these receipts are deducted in full from the award of damages, since they reduce, the plaintiff's 'loss'.

There must be some casual connection between the plaintiff's entitlement to benefit and the tortuous injury for the benefit to be deducted. If the plaintiff's incapacity for work is not attributable to the tort the benefits payable in respect of that incapacity will not be deducted. To the extent that benefits are not fully deducted the plaintiff is doubly compensated for the same loss, once through tort damages and again through social security benefits. This is clearly wasteful and has no social justification. This view has received considerable support in the courts in recent years. In **Hodgson V.Trapp** (1988), Lord Bridge observed 'that if' we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of impecuniosity or disability are met by the taxpayer. To allow double recovery (where the statutory benefit and the damages meet the identical expenses) seems to me incapable of jurisdiction on any rational ground". Accordingly, the House of Lords held that both attendance allowance and mobility allowance should be deducted in full.

In England the Social Security Act 1989 introduced a radical scheme for the recoupment of social security benefits from tortfeasors, which is now incorporated in Social Security Administration Act 1992.

Where the plaintiff has received compensation or pecuniary benefits from another source, other than social security, the question of deduction depends upon the nature and the source of the benefit. Certain receipts are disregarded as collateral benefits. The proceeds of a personal accident insurance policy taken out by the plaintiff are ignored, on the basis that otherwise the plaintiff's foresight and thrift would benefit the defendant. Similarly gratuitous payments to the plaintiff from charitable motives are not deducted, on the assumption that the donor intended to benefit the plaintiff rather than the defendant.

13.3.5 Expenses:- The plaintiff is entitled to recover his medical transport and other similar expenses reasonably incurred. Accrued expenses will be awarded as part of the special damages; where as future medical expenses will be estimated and awarded as general damages. The court does not exercise any control over how the plaintiff uses the award of damages in respect of future treatment.

If the plaintiff has to live in a special institution, such as a nursing home or receive attendance at home he is entitled to the cost of that, provided that it is necessary. **(Shearman V. Folland** (1950). But in **Pritchard V.J.H. Cobden Ltd** (1987**)** the Court of Appeal held that, where the plaintiff's injuries lead to the break up of his marriage, the financial consequences of the divorce are not recoverable from the defendant, either on the basis that loss is too remote or on the ground of public policy.

13.3.6 Other Pecuniary Loss:- It often happens that a third person, such as a relative or friend, bears part of the cost of the plaintiff's injury, either in the form of a direct financial payments, or by providing nursing assistance. Sometimes a spouse or a close relative may give up paid employment in order to care for the plaintiff. The third party has no direct claim in tort against the defendant, and the question arises whether the plaintiff can recover this cost. At one time it was thought that he could not, unless he was under some legal obligation to pay for the services or repay the financial services he had received. However, in **Donnely V.Joyce** (1974) the court of Appeal held that the existence of a legal or moral obligation to reimburse the third party is irrelevant. It was incorrect, said the court, to think of this as someone else's loss. It was the plaintiff's loss. His loss was the existence of the need for nursing services or special equipment, not the expenditure of money itself. So far as the defendant is concerned, the question from what source the plaintiff's needs have been met, who has paid the money or given the services or whether the plaintiff is under a legal or moral obligation to repay, are all-irrelevant. The measure of the loss is the 'proper and reasonable cost' of supplying those needs. In the case of a relative who has given up paid employment this would be atleast the loss of earnings, subject to a ceiling of the commercial rate for supplying those services to the plaintiff.

13.4 Interest on Damages for Personal Injury:-

In England the courts assess damages under several 'heads' but for the purpose of calculating interest, there are three broad heads. Namely 1) Accrued pecuniary damages, 2) Non-pecuniary damages, and 3)loss of future earnings. The court has discretion to award simple interest on all or any part of the damages. In the case of personal injuries or death exceeding Rs 200/- the court must award interest unless there are special reasons for not awarding so (Section 35A Supreme Court Act 1981). Where the plaintiff has delayed in bringing a claim to trail the court has discretion to disallow all or part of a claim for pre-trail interest. In the case of special damages for accrued pecuniary loss, interest will normally be awarded at half the special investment rate on money paid into court, from the date of accident to the date of trail. No interest is awarded on future pecuniary loss, such as prospective loss of earnings, because the loss has not yet accrued.

Interest on damages for non-pecuniary loss is awarded at a moderate rate, currently 2 percent from the date of service of the writ to the date of trail. The reason for this low rate is that a large proportion of nominal interest rates is presented by inflation and inflation is taken into account when the court assesses damages for non-pecuniary loss by the general up-rating of 'Tariff's'. Interest at 2 percent represents an approximate real rate of return for the plaintiff not having the use of his money.

In India, interest on the amount of damages awarded runs from the date of filing the petition or the suit, till the date of payment at the rates of 6 percent to 12 percent at the discretion of the court deciding the matter.

In **Lim Poh Choo V.Camden and Islington Area Health Authority** (1979), the plaintiff was a senior psychiatric registrar and at the time of accident was aged 36 years. In 1973, she was admitted to a hospital controlled by the defendant for a minor operation. Due to the negligence of one of the hospital staff, the plaintiff suffered cardiac arrest and irreparable brain damage. She was reduced to a helpless invalid for her life. Her condition was such that there was a total loss of her earning capacity and she needs total care for the rest of her life. But her expectation of life which was estimated to be 37 years had not been reduced. The award of damages as modified by the House of Lords was as under. Pain and suffering, loss of amenities £20,000/- out of pocket expenses £3,596/-; cost of care to the date of judgment of the House £14,213; cost of future care i.e. from the date of judgment of the House by applying a multiplier of 12- to 76,800/-; and loss of future earnings from the date of judgment at the trail by applying a multiplier of 14- £ 84,000/-; and loss of pension £ 8,000; Total 2,29,298.64 pounds.

In **Joyce V.Yeomans** (1981) a boy aged 10 was injured in a car accident. He sustained severe injuries including a head injury. As a result, he began to have epileptic fits. The court of appeal allowed him £ 6000 with interest for pain and suffering and loss of amenities and £7500 without interest for future loss of earning capacity. The amount allowed for loss of earning capacity was not assessed by applying multiplier, as the circumstances were uncertain in the case.

In **R.D.Hatlangade V. M/s Pest Control (India) Pvt. Ltd** (AIR 1995 SC 755) the plaintiff who was an advocate aged 50 had suffered 100 percent disability and he could move only in a wheel chair. The court awarded pecuniary damages for cost of medical treatment present and future, cost of care present and future and loss of earnings present and future. In addition to damages for pecuniary loss, the plaintiff was also awarded £ 1,50,000/- for pain and suffering and the same amount for loss of amenities i.e. total £ 3,00,000/- for non-pecuniary loss.

In **Nawab Deen V.Sohan Singh (**AIR 2002 H.P 143**),** the plaintiff aged about 29 years at the time of the institution of suit was a bodily fit person. The defendants pelted stones on him thereby causing grievous injuries. As a result the plaintiff suffered great pain, remained under treatment till the date of the institution of the suit and there after incurred certain degree of physical disability despite having spent huge amount on treatment. The court held that since the plaintiff did not suffer any permanent disability because of injures caused to him he is not entitled to compensation for alleged permanent disability and future loss of income. However, he was entitled to compensation for loss of income during the period he could not do his work because of bodily injuries caused to him, pain and suffering and medical expenses. Accordingly the court granted Rs 1,20,000/- with interest at the rate of 12 percent per annum.

13.5 Summary:-

In most actions for personal injuries the plaintiff suffers two distinct types of loss. They are pecuniary loss and non-pecuniary loss.

Non-pecuniary losses are such immeasurable matters as pain and suffering caused by the injury, and loss of amenity attributable to a disability. Here the principle of restoring the plaintiff to his pre-accident position is inapplicable. No amount of money can restore a lost limb or take away the plaintiff's experience. The principle applied by the courts to the assessment of non-pecuniary losses is said to be that damages should be 'fair' and 'reasonable'. In practice the court adopt a 'tariff' for specific types of injury, which has the effect of suggesting that such losses can be objectively measured.

Pecuniary loss is the damage that is capable of being directly calculated in money terms. The commonest example is loss of earnings, both actual and future, but it includes all other expenses attributable to the tort, such as medical expenses, transport, the cost of special equipment or employing some one to carryout domestic duties which the plaintiff is no longer able to perform. Damages under this head up to the date of judgment are easily assessed. For the loss of future working life they are assessed by the multiplier method. Any receipts by the plaintiff from the social security or other sources are deducted in full from the award of damages.

Interest is allowed on damages awarded. No interest allowed on future pecuniary loss. Interest is calculated from the date of the claim to that of the judgement in England at two per cent and in India at the rate of six to twelve per cent.

13.6 Self Assessment Questions:-

1. Explain the various types of damages that can be awarded for personal injuries with the help of decided cases.
2. Critically examine the following.
   a) Non pecuniary loss
   b) Pecuniary loss.
   c) Basis for Assessment of damages.

13.7 Suggested Readings:-

1. Tort by Winfield and Jolowicz.
2. The law of torts by Rattanlal and Dhirajlal 21 Edn 1987.
3. Law of tort by B.M.Gandhi 1987.
4. Tort by Michael A.Jones 1995.

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LESSON - 14

Loss or Damage to Property

Objective:-

After going through this lesson you should be able to Analyse – the law relating to damage to both movable and immovable property.

STRUCTURE:-

14.1 Introduction:-

As a general rule in measuring damages for injuries to property there is no material distinction in tort and contract. In both types of cases the general principle is restitution in integrum, which means that the damages should be so assessed so as to place the party injured in the same position as if the contract had not been performed and in case of torts as if no wrong has been done. Damages for injuries to property rights may be claimed under different heads.

14.2.1 Movable Property:- As has been mentioned already, in case of loss or damage to property the governing principle is restitution in integrum. In case of total loss of property such as goods or machinery the normal measurement is the market value of that property at the time and place of the loss or destruction so as to enable its owner to replace it. But the bare cost of replacement as represented by the market value may not be enough in case of profit earning properties. In such cases compensation to be assessed is the value of the chattel as a joint concern at the time and place of the wrong. Thus, in **Liesbosch Dredger V.S.S.Edision** (1933) the House of Lords Held that the plaintiff could recover not only the value of the comparable dredger but also cost of its adoption and transport to the

place where it was working as well as compensation for disturbance and loss caused in carrying out contract. But the plaintiff's claim for extra expenses which they had to incur because of their inability to purchase another dredger was rejected. In that case by negligent navigation Edison sank Liesbosch the owners of which required it for completing the work within the specified time.

Even in the case of non-profit earning chattels the plaintiff is entitled to claim for loss of use as has been decided in **Brandeis Goldschmidt and Co.Ltd. V. Western Transport Ltd** (1981). In such a case the damages can be measured by the cost of hiring a substitute, or in last resort as interest on the capital value of the property, **The Hebridean coast case** (1961).

Where property has been damaged, but not destroyed, the measure of damages is the diminution in value, and with damaged chattels this is normally the cost of repair, the **London Corporation** (1935). Some times the depreciation in value of a thing because of the very fact that it has had to be repaired exceeds the cost of repair, in which case the plaintiff recovers his loss, **Payton V. Brooks**(1974). The cost of repair is normally calculated as at the time of the damage, expect where the damage was not discoverable until later, or where it was reasonable for the plaintiff to have postponed repair **Martindale V. Duncan** (1973). Repair means reasonable repair, not meticulous restoration. The cost of unreasonable repair is not recoverable, but it is not always easy to determine what is reasonable. At one end of the spectrum stands a case which decided that a plaintiff who was sentimentally attached to his car could not recover the cost of repair, which far exceeded its market value, and the technical reason given for this was the rule about the need to take reasonable steps to mitigate the damage, **Darbishire V. Warron** (1963). At the other end stand cases dealing with damage to unique items where the courts are prepared to sanction the recovery of high repair costs. In **O,Grady V. Westminister Scaffolding** (1962) the owner of a damaged vintage car has been held entitled to recover the higher repair costs because of the legitimately sentimental value.

In **K.Ramakrishna V. P.Pannayan** (AIR 1974 Mad.33) the plaintiff claimed Rs 4,800 as damaged from the defendant who knowingly damaged the plaintiff's five lorry tyres, three headlights, two parking headlights, windscreen glass and the hind lights. Out of Rs 4,800 Rs 3,100 were in respect of damage to tyres and Rs 1,700 were for other miscellaneous damages. The tyres were not new, but were worn out and due to the damage done they could not be used now. The value of new tyres was Rs 3,100. the perplexing Question for the Court was, what amount was to be allowed for the five tyres that were lost to use. Quoting Winfield as to the replacement cost of the thing lost: "…….though the normal measure of damage is the value of the article at that time of damage, normally such damage is ascertained at the replacement cost of the thing lost where no market exists in which such prices can be ascertained."

In the instant case as the tyres were old and worn out as its price before the damage done was not known, nor any evidence to that effect was forthcoming, it was not possible to put them into original condition, or to get them repaired the court allowed the plaintiff the replacement cost of the tyres.

14.2.2 Action in Detinue-Extent of damage:- Detinue consists in wrongful detention of the possession of movable property even though the original possession may be lawful. Thus, a bailey is liable in detinue if he holds over after the bailment is determined. In an action in detinue the plaintiff is entitled to recover the movable property or its value, besides damages for detention. Detention being a containing wrong, the damages accrue from day to day and, therefore, the claim for damages for a period of three years before the date of the suit would be within time, but in assessing damages it is necessary to bear in mind that the plaintiff cannot recover damages exceeding the value of the property itself, **Bansi V. Goverdhan** (AIR 1976 M.P 125).

Merely to be in possession of goods of another person without title is not a tort of any kind. If a bailey merely holds over he may be liable in breach of contract not in tort. The usual method of proving that detention is adverse is to show that plaintiff demanded the delivery of chattel and the defendant refused or neglected to comply with the demand. In **Gouri Shankar Surajaml V. Mool Chand pannalal** (AIR 1958 M.P 415) the plaintiff lent money to one Rustam Khan who manufactured charcoal. At the material time he had 800 bags of charcoal for sale with the defendants. He sold those 800 bags for a sum to the plaintiff and wrote a delivery order directing defendants to deliver charcoal on demand. The plaintiff demanded charcoal but the defendants refused delivery on the ground that they were pledged with them for a loan which had taken by Rustom Khan. The defendant's story was proved to be false and they were held liable for detention.

If the defendant had possession he is liable to be sued in detinue even if he wrongfully parts with it e.g where a bailey returns goods to a wrong person. In **Dhian Singh V. Union of India** (AIR 1958 Sc 274), the appellants hired out two trucks to the respondents for imparting tuition to military personnel. In June 1942 the respondents gave notice terminating the agreement from August 1942. There upon appellants went to the officer commanding on August1, 1942 to remove the trucks but they were not delivered to them. The respondents pleaded that the trucks were returned to one Surian Singh alleged to have been the appellant partner. But the appellants controverted the position and filed a suit for wrongful detention after due notice, under section 80 of the code of civil procedure. The respondent contended that at the most it was guilty of conversion, for trucks were delivered to another person and it was in no longer in possession of them.

The Supreme Court held that the respondent was guilty of wrongful detention damages as follows: (1) Rs 3,500 as value of the trucks as on the date of judgement and interest at the rate of 6% on it (2) Additional damage for wrongful detention Rs 6,457 (3) Costs in Trial Court, High Court and Supreme Court (4) The whole amount was to bear an interest at the rate of 6% from the date of judgement till payment. The court also held that where bailey has parted with the goods, bailor can elect his remedy and can sue either for conversion or wrongful detention.

14.2.3 Trespass to Goods:- Trespass to goods is an unlawful interference with the possession of goods by seizure or removal or by direct act of causing damage to goods. Therefore a person, who is in possession the property, has a right to maintain an action of trespass. A person who has immediate right of possession can also sue in certain circumstances. In **Kanhaiya Lal V. Badri Lal** (AIR 1963 Raj 121) the plaintiff alleged that the defendant had

obtained a decree against **Ganpat and Bhura** and in execution of that decree they had got attached two she-buffalos and a female calf. These cattle were handed over by the plaintiff to them for grazing. Even the fodder for feeding these cattle was supplied by the plaintiff to them. After the attachment the cattle were kept in the custody of the defendants as **supurdar.** It was found that all the cattle died natural death without any negligence on the part of the defendants. In an action for trespass to goods, the defendants contended that the cattle were seized from the possession of **Bhura and Ganpath,** not from the possession of the plaintiff. The court held that in the circumstances of the case **Bhura and Ganpath** were holding the cattle as agents of the plaintiff without acquiring any right in them and the plaintiff was entitled to sue for trespass inspire of the fact that he was not in immediate possession of the cattle.

In cases of simple bailment of cattle by way of loan or deposit the bailey holds the chattel merely as an agent of the bailor. The bailey has actual possession and the bailor has right to possession and either of them may sue for a wrongful act of the third party. On the other hand an owner of goods, who has neither actual possession nor is entitled to possession cannot sue for trespass. He can have right to sue for trespass only if there has been some permanent injury to the goods regarding which trespass has been committed. A person having possession can maintain trespass even if he acquired possession wrongfully. But a person in wrongful possession of chattel cannot maintain action of trespass against the owner of it.

14.2.4 Conversion:- An Act of willful interference without lawful justification with another's chattel in a manner inconsistent with the right of such another person whereby he is deprived of use and possession of it is called conversion. Refusing to deliver the plaintiff's goods, putting them to ones own use or consuming them, transferring the same to a third party, destroying them or damaging them in a way that they lose their identity, or dealing with them in any other manner which deprives the plaintiff to its use and possession are some of the examples of the wrong of conversion. In **Moorgate Mercantile Co.Ltd V. Finch** (1962) the defendants used the plaintiff's car for transporting uncustomed watches. The car was seized and forfeited by the customs officials under the Custom and Excise Act, 1952. Forfeiture of the car was held to be the natural and probable consequences of the defendants act and he was deemed to have intended the same and as such the defendant was held liable for conversion.

In **Consolidated Co. V. Curtis** (1892) the owner of some household furniture assigned the furniture to the plaintiff by the bill of sale. She subsequently engaged the defendants who were auctioneers, to sell the same for her. The defendants, knowing nothing of the bill of sale sold the furniture and also delivered the same to a purchaser. The defendants were held liable for conversion.

In **M.S.Chokkaligam V. State of Karnataka** (AIR 1991 Kant 116) the respondent, through its forest department, purchased 206 rosewood logs from the petitioner and refused to pay for the same for 9 years in spite of repeated demands. It was held that the conduct of the respondent in retaining the amount to which the petitioner is entitled in spite of the demands, amounts to conversion. The Karnataka High Court directed the respondents to pay to the petitioner the sum of money equivalent to the value of 206 logs of rosewood with

interest at 6 percent from the date of delivery of logs until payment of the value, and costs of Rs 2000/-.

14.3.1 Immovable Property:- Where the damaged property consists of land or building, the same rules apply, except that there is more flexibility in allowing claims for repair costs even though they exceed the diminution in market value. Land is not readily replaceable as chattels, and is to some extent treated in the same manner as a unique chattel. The Question depends on the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution of capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repair is the damage; clearly the cost of repairs is the true measure. And there may be in-between situations. In **Moss V. Chrisstchurch Rural District Council** (1925) the plaintiff's cottage, which was let, was destroyed by a spark from the defendant's steamroller. The measure of damages was the difference between his interest before and after the fire.

In **Baxter V.Gapp (F.W) and Co.** (1939), the plaintiff, relying on a valuation of freehold property by the defendants, advanced money on mortgage to the owner of the property. The valuation was excessive, it having been made without the skill and care which the defendants owed to the plaintiff, and the plaintiff suffered loss owing to the default of the mortgagor. It was held that the plaintiff's damages were not limited to the difference between the amount of the valuation and the true value of the property at the time of the valuation, but that he was entitled to recover the actual loss suffered by him as a result of his lending the money, including the difference between the sum advanced by him and that received by him when, having entered into possession of the property, he sold it; the amount of interest which the mortgagor had failed to pay; the cost of insuring the property and of maintaining it in repair, while it was in the plaintiff's possession; legal charges during that period; the expenses of abortive attempts to sell the property; estate agent's commission and the conventional sale of the property and legal charges in connection with the sale.

The **Karnataka High Court in Venkatesh V. Gulbarga Municipality** (AIR 1973 Knt 62) considered the following two rules in regard to damages where damage is done to a building. They are (1) the injured party is entitled to recover the difference between the value of the real property immediately before and immediately after the injury (often referred to as the diminution value rule). (2) the injured party is entitled to recover the cost of repairing the property by restoring it to its condition immediately prior to the injury (Generally referred to as restoration cost of repair rule).

If the second rule is followed, the cost of reconstructing the building at about the time of the injury is determined and then allowance is made for depreciation having regard to the age of the building. Interest is awarded from the date of injury till the date of the decree. The High Court made it clear that in suits for damages for injury caused to immovable property damages on account of mental worry or anguish would not be generally allowed.

14.3.2 Trespass to Land:- It has been said that every unauthorized entry upon land, including buildings, in the possession or occupation another constitutes a trespass for which an action is maintainable. Every persons land is presumed to be surrounded by a fence, and the law encircles it with an imaginary in closure to pass which is to break and enter his

close. The mere act of breaking through this imaginary boundary constitutes a cause of action as being violation of the right to property although no actual damages may ensue. In order to maintain an action of trespass, the plaintiff must establish (1) That he is in actual or constructive possession at the date of trespass and (2) that the defendant has unlawfully disturbed his possession, the entry contemplated being again either actual or constructive. To constitute the wrong of trespass, neither force, nor unlawful intention is necessary. The triviality of the act of trespass is no defense, and the maxim de minimis non curat lex" i.e. law does not take note of trifles has no application. Thus, in **Entick V. Carrigton** (1765), it has been held that every invasion of private property be it ever so minute is trespass.

The appropriate remedy in case of trespass is a suit for injunction and an action for damages. Where the court finds that the party injured cannot be adequately compensated by award of damages it will not refuse injection. In **Goodson V. Richardson (1874),** it was held that even where no actual damage is caused the plaintiff is entitled is entitled to injection. In respect of injury done to land the principle of measurement of damages is the depreciation in the selling value of the land and not the amount required to be spent on repairs**, Krishna Lal V. Radhika Moha (AIR 1931 cal 462). In Ramasami V. Suppiah (AIR 1935 Mad 699),** it has been held that whether real damage is caused to land or not if the trespasser acted wantonly in disregard of the plaintiff's rights or used violence or persisted in it with intemperate behavior the plaintiff is entitled to substantial damages not only for act of trespass but also an aggravated amount representing compensation for injuries to his feelings.

Where the plaintiff is dispossessed of his land three remedies are available to him. They are (1) He can sue for element or recovery of land. (2) He can bring an action under section 6 of the specific Relief Act, 1963. this action should be brought within 6 months from the date of the dispossession. In this action the plaintiff need not prove title. It is enough if he proves effective and exclusive possession at the time of dispossession. (3) He can initiate proceedings under section 145 of the code of criminal procedure. Under this section if the Magistrate is satisfied that any dispute on possession is likely to cause breach who had possession on the date of his order provided that if that other person was forcibly dispossessed within two months before the date he received information of the dispute, he would restore possession to such person. This is a summary remedy to maintain status Quo and avoid breach of peace.

In addition to recovery of possession the plaintiff will also be entitled to mesne profits which the adverse occupant must have earned during the period of such occupation. If the plaintiff so likes, he may sue in element and mesne profits in the same action.

14.4 Claim for emergent Repairs:-

The emergent repairs are those which are urgently necessary to stop further damages to property. When the property of the plaintiff is subjected to damage the claim for emergent repairs came up in **Lotus Line Private Ltd. V. State of Maharashtra** (AIR 1965 Sc 1314) In that the appellant defendant's vessel caused damage to the respondent plaintiff's jetty while dismounting the vessel. Emergent repairs were carried out by the state at Rs 2,783 and later at Rs 1,233. the cost of special repairs was estimated at Rs 26,400/-. The trail court allowed decree for the actual sum spent and the claim for special repairs amount was rejected. On appeal the High Court held that on principle a plaintiff was entitled to compensation but not to restitution of property. Consequently

it took the same way as the trail Court. However, the High Court differing from the trail Court held that the above principle did not apply in case of a corporation or a trustee charged with the maintenance of a highway or other public work. On this basis the High Court allowed Rs19038 following naturally the decision in the **Mayor of Wednesbury Corpn V. L.H.Colliery Co.Ltd**(1907) which says that a person to whom a wrong is done is entitled to full compensation for restoring the thing damaged to its original condition. But the Supreme Court of India in appeal disagreed with the High Court's decision drawing a distinction between a private person and a corporation or a trustee. It allowed a sum of Rs 16,400, the cost of estimated repairs, disallowing the claim for Rs 2,783 and Rs 1,233, which were on account of emergent and simple repairs.

14.5 Summary:-

The general rule applied in measuring damages in case of any loss or damage to property is restitution in integrum. In case of total loss of profit making movable property such as goods or machinery bare cost of replacement as represented by the market value is not enough. Even in case of non-profit making chattels the injured party is entitled for loss of use such as the cost of hiring a substitute or interest on the capital value of the property. If the property has been damaged but not destroyed, the measure of damages is the diminution in value and the cost of repairs at the time of damage. In case of detention of chattel, which is a continuing wrong the damages accrue from day to day basis but not to the extent of exceeding the value of the chattel itself. If the defendant had possession he is liable detinue even if he wrongfully parts with it. Similarly the wrongdoer is liable in cases of trespass to goods and for the wrong of conversion.

In case of damage to immovable property there is more flexibility in allowing claims for repair costs even though they exceed diminution in market value. The amount of damages depends on the plaintiff's future intentions as to the use of the property and reasonableness of those intentions. Trespass to land is actionable per se although no actual damage to property may ensue. To become successful in an action of trespass to land the plaintiff must prove that he is in actual or constructive possession of the land and the defendant's interference was unlawful. The judiciary has not recognized the claim for costs of emergent repairs while awarding damages to the property subjected to injury.

14.6 Self Assessment Questions:-

(1) Explain the Law relating to award of damages for the loss or damage to property.

(2) Describe the Law of damages it the cases of both movable and Immovable properties.

14.7 Suggested Readings:-

1. C.Kameswara Rao's Law of damages and compensation by M.C. Deasi Vol 5th Edn 1988.
2. Tort Law by R.W.M. Dias 1984.
3. Law of tort by B.M Gandhi 1987.

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Lesson - 15

PRINCIPLES OF LIABILITY, MACHINERY FOR ADJUDICATION OF CLAIM AND ASSESSMENT OF DAMAGES IN RESPECT OF ACCIDENTS COVERED BY MOTOR VEHICLES ACT 1988 (AMENDED IN 2000)

Objective:-

After going through this unit you should be able to describe principles governing:

- Compulsory third party insurance.
- Liability without fault.
- Liability in cases of hit and run accidents.
- Establishment, powers and procedure followed by the Motor Accidents Claims Tribunal under the Motor Vehicles Act 1988.

Structure:-

15.1 Introduction:-

In order to provide expeditious relief to the victims of motor accidents the Motor Vehicles Act 1939 was passed. To make the relief provisions more effective the Act of 1939 has been subjected to amendments from time to time i.e in 1954, 1982, 1994 and it has been replaced by the parliament by the Motor Vehicles Act1988, which is again amended in 2000 and 2001.The main object of the M.V Act 1988 is to provide speedy remedy in cases of deaths or injuries in a motor vehicle accident instead of a civil suit. The Question of liability of the parties, which was governed by the law of torts, is unaffected by the M.V.Act. It only changes the forum taking away the jurisdiction of the Civil Court. While fixing the amount of damages the tribunal should ascertain separately and determine

under different heads pecuniary and non-pecuniary damages awarded. Although the sum awarded must be a lump-sum it must be made up of its constituent parts.

The act provides for compulsory third party insurance of all motor vehicles. The Act also provides for the establishment of Motor Accidents Claims Tribunals for the award of compensation to the victims of motor vehicles accidents.

15.2 Compulsory Third Party Insurance:-

The Motor Vehicles Act, 1988 makes the insurance of motor vehicles compulsory. The owner of every motor vehicle is bound to insure his vehicles against third party risk. The insurance company (the insurer also known as second party) covers the risk of loss to the third party by the use of the motor vehicle. Thus, if there is insurance against third party risk, the person suffering due to the accident caused by the use of motor vehicle may recover compensation either from the owner or the driver of the vehicle or from the insurance company or from all of them jointly.

The 1988 Act, chapter XI, sections 145 to 164, contains provisions concerning insurance of motor vehicles against third party risks. According to section 146(1) no person can use, except as a passenger, or cause or allow any other person to use a motor vehicle in a public place unless an insurance policy against third part risks, as required by this chapter, is in force in relation to the use of the vehicle.

Third party Rick insurance is not required in respect of any vehicle owned by the Central Government or a State Government and any local authority and used for non commercial purposes the appropriate government has power to grant exemption from the operation of third party insurance to any vehicle owned by them, any local authority or any state transport under tacking and used for any commercial purpose also. However if such vehicles commit any accident these authorities will have to pay compensation from a fund established by them for the purpose.

According to section 196 of the 1988 Act driving an uninsured motor vehicle or causing or allowing it to be driven is punishable with imprisonment which may extend to Rs 1000/- or with both.

Second 146 and 147 are confined to the use of motor vehicles in 'public place' as defined in section 2 (24) the court gave a liberal construction of the expression public place. In **Pandurang chinagi Agale V New Indian life assurance company Ltd** (AIR1988 Bom 248) it was held that a place where members of the public have access whether by permission or as a right, and so a private road or place where public have a permission access has been held to be a public place.

In **Life Insurance Corporation V. Karthyani** (Air 1976 Orissa 21) the factory area of Hindustan Steel Ltd. Rourkela where visitors are allowed only after obtaining special permission was held to be not a public place. The insurer will not be liable for damage caused by accident there.

However if the insurance company by agreement undertakes to take liability for accident in a private place there is nothing to prohibit it. Thus in **Madarasab sahabala V. Nagappa Vitappa** (Air 1981 Knt 117) where the policy stated that the company shall be liable to indemnify the insured against "all sums including claimant's cost and expenses which the insured shall become legally liable to peep" the court held that the language used in the policy included damage cased in a

private place. In that case a truck was driven in the field over a person sleeping there and killed him. Though the accident was not in a public place yet the court held the insurer liable for damages.

As to the extent of liability section 147(2) provides that in case of death or personal injury the insurer shall be liable for the whole amount incurred but in case of damage to property liability is limited to Rs 6000/-.But this statutory limit can be increased by agreement between the owner of the vehicle and the insurer. Comprehensive insurance of the vehicle and payment of higher premium on this score, however do not mean that the limit of liability with regard to third party risk becomes unlimited or higher than the statutory limit. In **United India Insurance company Ltd V.K.Subramanyam and others** 11(1991)Acc 520 it was held that the insurance company can not be made liable to pay compensation if the offending vehicle was being driven by a person not holding a valid driving licence at the time of accident. On the other hand the **Punjab and Haryana High Court in Champadevi V. Ram Sarup**(1994 Acc C.J 635 (P&H) and M**.P High Court in National Insurance Company V. Prem Narain Sahu** (AIR 11997 M.P 66) held that the insurer cannot escape liability merely on the ground that the driver was driving with out a driving licence.

Liability of the insurer is to owner of the vehicle only. According to section 2(30) owner is (1) the person in whose name the vehicle is registered, (2) where the person, in whose name the vehicle is registered, is minor is the guardian of the minor, and (3) where the vehicle is the subject of higher purchase or an agreement of lease or an agreement of hypothecation the person in possession will be treated as the owner.

In **Divisional manager LIC V.Rajkumari Mittal** (1985 ACJ 179 All) a car in the use of **Mr.B.S.Ahuja** which was financed by LIC under hire purchase agreement was registered and insured in the name of Divisional Manager LIC of India, varanasi. It was to be transferred in the name of B.S Ahuja on payment of the last installment. The car was involved in an accident. The high court held that under the general law divisional manager was the owner but in view of definition of owner and therefore the DM of LIC was not liable.

According to section 157 of the Act of 1988 the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favor of the person to whom the motor vehicle is transferred with effect from the date of its transfer. However, the transferee shall apply with in 14 days from the date of transfer in the prescribed form to the insurer who shall make the necessary changes in the certificate and the policy.

The Act provides for liability for damage caused by ‘Use’ of a vehicle in public place. The expression ‘use’ dose not mean that the vehicle must be running at the time. It will be taken to be in use even when it is parked in **oriental fire and general insurance company V. S.N Rajguru** (1985)Act 243 (Bom) an oil tanker was parked on the foot path near a public road. Suddenly it burst and due to explosion a person was thrown at a distance of about 10 feet. He was seriously injured and later died .The insurer contended that the tanker was not in use at the time of accident the court rejected this argument and held insurer liable.

Section 147 of the M.V Act as amended in 1994 mentions classes of persons to whom the insurer will be liable. Liability extends in respect of death or bodily injury to any person including the owner of goods or his authorised representative carried in the vehicle or damage to property of any third party. Under the Act of 1988 the insurer was not liable to owner of the goods or to his authorized

representative who accompanied goods in the vehicle. In a public service vehicle liability is owed to any passenger. Section 147 (b) (i) excludes liability in respect of death or bodily injury arising out of and in the course of employment of employee engaged in driving the vehicle or in case of public vehicle engaged as conductor or for examining tickets or in case of goods carriage employee carried in the vehicle. However, they are covered by the Workmen's Compensation Act 1923.

The insurer's liability commences as soon as the contract of insurance comes into force and remains operative during the operation of the policy. In case of renewal of an existing insurance policy, the risk is covered from the moment the renewal comes into force. In **National Insurances Company Ltd V.J.N.Dhabi** (AIR 1997 Sc 2147) the contract of renewal of an insurance policy came into force at 4,P.M on 25-10-1983, where as the accident in Question had occurred at 11.14A.M on 25-10-1983, that is before the renewal of the contract. The Supreme Court that the insurer could not be made liable for such an accident.

In **Kishori V. Chairman, Tribal Service Co. operative Society Ltd**. Air 2996 ACJ 562 (MP), about 125 bags of urea, belonging to the consignee, being carried in a goods vehicle, were destroyed having fallen in a Naala. The question was whether the goods of the consignee were of a third party so as to make the insurer liable. The M.P High Court in **United India Insurance Company Ltd. V. Janarthiram** (1988 ACJ 636 Madras) held that the consignee was not a third party and therefore the Claims Tribunal had no jurisdiction to entertain the claim.

In **Subhosh Chander V. State of Haryana** (1975 ACJ 164) it has been held that if a gratuitous, passenger traveling in a jeep dies, the insurance company cannot be made liable for the same. In **New India Assurance Company V. Bhajnoo** (1996 ACJ 367 H.P), it has been held that if the policy covers to a gratuitous or other passenger, the insurer can be made liable for the death or bodily injury to such a passenger.

15.3 Liability without Fault:-

With the increase in number of accidents and insurance facilities there has been a recent trend towards liability without fault so that an innocent victim should not be left without remedy. A number of high courts supported this view. The observation of V.R. Krishna Iyer of Kerala High Court in **Keshavan Nair V. State insurance officer** (1971 ACJ 219) worth noting. He observed thus out of a sense of humility and having due regard to the handicap of the innocent victim in establishing negligence of the operator of the vehicle a blanket liability must be cast on the insurer. This healthy trend was reversed in **Minu B. Mehta V. Balakrishna** (AIR 1977 Sc 1248) in which the a Supreme Court held that proof negligence was necessary before the owner or the insurance company could be held to be liable for payment of compensation in a motor accident claim case.

To overcome the difficulty created by the decision of the Supreme Court the M.V. Act 1939 was amended in 1982 inserting a new chapter VII A consisting of sections 92 A to 92 E to impose liability without fault in certain cases. Those provisions are now contained in chapter X comprising of sections 140 to 144 of the M.V Act, 1988. According to section 140 where death or permanent disablement of any person results from an accident arising out of the use of a motor vehicle or motor vehicles the owner or owners shall jointly and severally be liable to pay compensation in respect of such death or disablement. The amount of compensation has been fixed at Rs 50,000/- in case of death (increased from Rs 25,000/-) and Rs 25,000/- in case of disablement (increased from Rs 12,000/-) with effect from 14-11-1994. In any claim of compensation under this section,

the claimant shall not be required to plead or establish that the death or disablement was due to any wrongful act, neglect or default of the owner or owners of vehicles. The claim shall also not be defeated by reason of wrongful act, neglect or default of the person in respect of whose death or disablement compensation is claimed, nor shall the Quantum of compensation be reduced because of any wrongful act, neglect or default on the part of the victim.

The claim for compensation under any other law shall not be defeated because of compensation received under section 140. But Quantum of compensation under any other law shall be reduced from the amount payable under is liable to pay section 140 or 163A of the Act of 1988, where a person is liable to pay compensation under section 140 and also section 163A he shall first pay compensation under section 140, then if compensation under section 163A is more than what is payable under section 140 then he shall pay the remaining amount (section 141).

As per section 142 for purposes of liability without fault permanent disability shall be deemed to have resulted if such person suffers (1) permanent privation of sight of either eye or hearing of either ear or privation of any members or joint, or (2) destruction or permanent impairing of any member or joint, or (3) permanent disfigurement of head or face.

Provisions which deal with liability without fault have overriding effect on other Laws. Section 143 provides for modification of the provisions of workmen's compensation Act,1923. Award under section 140 of the 1988 Act is not final award but interim in nature. Normally the High Court cannot in exercise of its writ jurisdiction interfere with the interim award of the Tribunal.

There is no uniformity in decisions of various High Courts on the point whether section 140operates retrospectively. In **National insurance company Ltd V. Usha Devi** (1993 2 Acc 80 Gau.H.C.D.B.) it has been held that provisions of section 140 cannot be applied to pending claims for compensation under the unamended provisions i.e. section 92-A of M.V. Act 1939. But in **T. Srinivasulu Reddy V.G.Goverdhana Naidu** (AIR 1990 AP 289), the Andhra Pradesh High Court held that the said provision was introduced as a welfare measure to benefit the persons who are victims of road accident. There is also lutely no reason why provision should be given restricted application. It should apply t5o pending claims also.

15.4 Liability in Cases of hit and Run Motor Accidents:-

Sections 161 to 163 of the, Act of 1988 provides for compensation in cases of hit and run motor accidents, that is cases in which identity of motor vehicles causing accident cannot be traced. The general insurance corporation and the insurance companies carrying on general insurance business In India shall provide for paying compensation In respect of the death of, or grievous hurt to persons resulting from hit and run motor accidents. The compensation to be paid shall be (1) in respect of the death of any person, a fixed sum of Rs 25,000/- and (11) in respect of the grievous hurt to any person, a fixed sum of Rs 12,500/- Before 14.11.1994 the amounts payable in case of death and grievous hurt were Rs 8,500 and Rs 2000/- respectively.

In **Threeti and others V. Motor Accidents claims Tribunal and others** (1996 ACJ 609 Kerala), in an accident between a car and a lorry, a passenger traveling in the car died, the lorry sped away and could not be traced. It was held that section 140 of the 1988, Act laying down no fault liability was operative as identity of at least one of the vehicles involved in the accident was

ascertainable. It will become a hit and run case to make section 161 applicable when the identity of the vehicle or vehicles involved in the accident cannot be ascertained in spite of reasonable efforts.

If a vehicle is not insured against third party risk, the claimant still has a right to claim compensation. In such a case the responsibility will be fixed on the negligent driver or the owner of the vehicle and such a person will have to pay the claim out of his own money.

As the insurer is liable in respect of a judgement obtained by the claimant a special procedure has been laid down to give notice to the insurer, through the court so that he may, before such judgement is pronounced defend the action on any of the grounds. By enabling the insurer to defend the action, the procedure has been simplified. Instead of there being two actions, one by the third party against the insured and then another action for indemnity by the insured against the insurance company, there is only one action under which the insurance company is treated as a judgement debtor for a claim against the insured. The opportunity of the insurance company to be a party to the proceedings serves the purpose of safeguarding itself against any possible collusion between the third party and the insured in the proceedings.

15.5.Motor Accidents Claims Tribunal:- A new forum called Motor Accidents Tribunal (in short claims Tribunal) has been created by the Motor vehicles Act for cheaper and speedier remedy to the victims of accidents of motor vehicles. It excludes jurisdiction of civil courts. Unlike civil courts in Claims Tribunal there is no necessity of payment of advalorem Court fee. The Claims Tribunal can follow summary procedure. An appeal from the decision of the claims Tribunal lies directly to the High Court. The Motor Vehicles Act does not lay down any substantive law, it only lays down a self- contained code of procedure for adjudication of claims. The Claims Tribunal has to look to the substantive law of Tort's, or enactments like Fatal Accidents Act 1885 etc.

State Government may, by notification in the official Gazette, constitute one or more Claims Tribunals for such area as may be specified in the notification. It shall consist of such number of members as the State Government may think fit to appoint. Where there are two or more members one of them will act as chairman. A person shall not be appointed as a member of the 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 to be appointed as a Judge of a High Court.

Claims Tribunals are constituted for the purpose of adjudicating upon claims for compensation, (i) inrespect of accidents arising out of use of motor vehicles, and (ii) involving (a) the death of, or bodily injury to persons, or (b) damage to property of third party so arising, or (c) both.

Motor vehicle according to section 2(28) means any mechanically propelled vehicle. If it is not a mechanically propelled vehicle, the Claims Tribunal has got no jurisdiction to entertain the application. In **Sri Krishna V. Dayaram** (1967 ACJ 104) the owner urged a few boys to push the truck chassis, which was without any engine, and one of the boys fell down and was run over by the said vehicle as a consequence of which he died. In an action by the parents of the deceased boy to claim compensation, it was held that the Claims Tribunal had no jurisdiction to entertain the claim because the truck chassis without an engine was not a motor vehicle within the meaning of the term.

An application for compensation may be made (1) by the person who has sustained the injury or (2) by the owner of the property, (3) where death has resulted from the accident, by all or any of legal representatives of the deceased, or (4) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be.

Every application for compensation shall be made at the option of the claimant to the Claims

Tribunal having jurisdiction over the area in which the accident occurred or the Tribunal within whose jurisdiction claimant resides or carries on business or within whose jurisdiction defendant resides. The time limit for making the application for compensation is six months from the occurrence of the accident. The Tribunal may, however, entertain the application after the expiry of the said period of six months if it is satisfied that the applicant was prevented by sufficient cause from making the application in time.

On receipt of an application for compensation the Claims Tribunal shall after giving the parties an opportunity of being heard, hold an enquiry into the claims and may make an award determining the amount of compensation, which appears to it to be just. The award must specify the person or to whom the compensation shall be paid and also specify the amount which shall be paid by the insurer or insured or driver of the vehicle involved in the accident or by all or any of them. Amount of compensation to be awarded to the victim must be proportionate to the injury caused. The Question of compensation was discussed in detail by Supreme Court in **Gobald Motor Services Ltd V. R.M.K Veluswami** (AIR 1962 S.C.L) In that case due to negligence of the appellants, there was an accident resulting in severe injuries to one Rajarathnam, aged 34 years, and his consequent death after 3 days. The Supreme Court while awarding Rs 5,000/- as compensation for mental suffering and loss of expectation of life, referred to the following observation of the house of lords in **Davies V.Powell Duffryn Associated Collieries Ltd.**(1942). The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in dimunition of the damages must be considered… the actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other any pecuniary advantage which from whatever source comes to him by reason of the death.

Claims Tribunal at its discretion may allow simple interest at such rate from such date not earlier than the date of making claim. It may also award costs in appropriate cases. The remedies provided under the Motor Vehicles Act 1988 and the workmen's compensation Act 1923 are alternative but not simultaneous and cumulative.

The Claims Tribunal has inherent power to review under section 169 of the Act when the error happens to be that of law and is apparent on the face of the record. In **National Insurance Company Ltd.V Lachibai** (AIR 1997 MP 272), the M.P High Court held that claims Tribunal cannot refuse to review its award on Question of law and remanded the matter to it for review on merits in accordance with law.

A person aggrieved by an award of Claims Tribunal can prefer an appeal to the High Court within ninety days by depositing Rs 25,000/- or 50 Percent of the amount so awarded, which ever is less, in the manner prescribed by the High Court. The High Court may entertain an appeal after the expiry of 90 days if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time. If the amount in dispute in appeal is less than Rs10,000/- no appeal shall lie against any award of the Tribunal.

The Claims Tribunal, on an application made by a person entitled to the money under award, will issue the certificate to the collector for the amount who shall proceed to recover the same in the same manner as an arrear of land revenue.

15.6 Motor Vehicles (Amendment) Act 2000:-

The Motor Vehicles Act, 1988 is further amended by parliament in 2000, which introduced a few modifications. Sections 58(4) and 66 3 (h) of the Act, 1988 were omitted section 52(1) of the Act, 1988 which provided that no owner of a motor vehicle shall alter the vehicle in such a way that the particulars contained in the certificate of registration are no longer accurate without a notice to and approval obtained from the registering authority of the area is substituted. The new clause (1) of section 52 provides that no approval is necessary for making any change in the unladen weight of the motor vehicle by addition or removal of fittings or accessories, if such change does not exceed 2 percent of the weight entered in the certificate of registration by the owner of ten or more vehicles. However, the fact of such alteration shall be informed to the authorities within 14 days. Section 217 – A added by the 2000 amendment provides for renewal of certificate of fitness or registration or license or permit issued under the motor vehicle Act, 1939.

15.7 Summary:-

The Motor Vehicles Act 1988 makes the insurance of motor vehicles to be used in public places against third party risks compulsory. The insurer is liable to indemnify the person or class of persons, specified in the policy against death, bodily injury to any person or damage to property of a third person. The insurer cannot be made liable for damage to a gratuitous passenger in the absence of any contract to the contrary. The insurer's liability arises, if, the use of the motor vehicle in a public place. The insurer cannot avoid his liability merely on the ground that the driver was driving without a license. The Central and State Govts and Local Bodies are exempted from compulsory third party risk insurance. However, they should pay compensation from a fund to the victim of their vehicles.

The Act provides for liability without fault. In case of death of a person Rs 50,000/- and in case of permanent disablement Rs 25,000/- can be claimed as compensation without pleading or establishing any fault of the owner or the driver of the vehicle. The insurer who has paid compensation under this head has a right to recover the same from the owner of the vehicle.

The Act also provides for liability to pay compensation in case of hit and run motor accidents that is the accident arising out of the use of a motor vehicle the identity whereof cannot be known in spite of reasonable efforts. As per the 1994 amendment made to the Act, inrespect of death of a person a fixed sum of Rs 25,000/- and inrespect of grievous hurt Rs 12,500/- are payable. If a vehicle is not insured against third party risks, the driver and the owner of the vehicle are liable to compensate the victims of accident.

The Act provides for the establishment of Motor Accidents Claims Tribunal, for cheaper and speedier remedy. It substitutes civil Courts, and there is no need to pay advalorem court fee. The Tribunal follows summary procedure. In receiving an application for compensation from the aggrieved party within the stipulated period of six months from the date of accident, The Claims Tribunal holds an enquiry and makes an award of compensation. The award is executable by the collector as arrears of land revenues. Any person aggrieved by the award of Tribunal may prefer an appeal to the High Court within 90 days. However, no appeal shall lie against the award of a claims Tribunal if the amount in the dispute in the appeal is less than Rs 10,000/-. The Tribunal has inherent power to review its award on Question of law.

15.8 Self Assessment Questions:-

1. Explain the Law as laid down in the Motor Vehicles Act 1988 providing for compensation to the victims of road accidents.
2. Describe the following:
   (a) Compulsory Third Party Insurance.
   (b) Liability without fault.
   (c) Liability in cases of hit and run.
   (d) Motor Accidents claims Tribunal.

15.9 Suggested Readings:-

1. Accidents, Compensation and the Law, by V.P.Srivastava 1978.
2. Motor Accident Compensation, by A.S.Bhatnagar 1992.
3. Guide to Motor Accident, Claims and Compensation by J.P.Bhatnagar 1995.

Lesson Writer

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