TORT OF NEGLIGENCE IN INDIA

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ABSTRACT

The law of torts in India presently, is mainly the English law of torts which itself is based on the principles of the common law of England. As a technical term of English law, tort has acquired a special meaning as a species of civil injury or wrong. It was introduced into the English law by the Norman jurists. However the application of the English law in India has therefore been a selective application. Tort is the French equivalent of the English word "Wrong" and of the Roman law term "delict". The word tort is derived from the Latin word "Tortum" which means "twisted" or "Wrong". Hence tort is a conduct which is twisted or crooked and not straight.

KEYWORDS : Tort, Negligence, Liability and wrong

DEFINITION OF TORT

Sir John Salmond: "Tort as a civil wrong for which the remedy is common law action for unliquidated damages and which is not exclusively the breach of contract or the breach of trust or other merely equitable obligation."

The definition given by the Salmond fails to underline the essential characteristics of tortions acts. According to this definition tort is a wrong but it does not explain what is wrong and what kinds of wrong explaining jural features of tort. Moreover the expression "civil wrong" itself requires explanation. The definition is more informative but this is also not perfect.

Prof. P H Winfield: Tortious Liability arises from breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.

NEGLIGENCE (Lat. negligentia, from neglegere, to neglect, literally "not to pick up something") is a failure to exercise the care that a reasonably prudent person would exercise in like circumstances[1]. The area of tort law known as negligence involves harm caused by carelessness, not intentional harm.

[1] . "Negligence". Encyclopedia Britannica. Meriam Webster. http://www.merriam-webster.com/dictionary/negligence. Retrieved 6/12/2011.

According to Jay M. Feinman of the Rutgers University School of Law, "The core idea of negligence is that people should exercise reasonable care when they act by taking account of the potential harm that they might foreseeably cause to other people[2]."

"those who go personally or bring property where they know that they or it may come into collision with the persons or property of others have by law a duty cast upon them to use reasonable care and skill to avoid such a collision." Fletcher v Rylands ([1866] LR 1 Ex 265)

Through civil litigation, if an injured person proves that another person acted negligently to cause his injury, he can recover damages to compensate for his harm. Proving a case for negligence can potentially entitle the injured plaintiff to compensation for harm to their body, property, mental well-being, financial status, or intimate relationships. However, because negligence cases are very fact-specific, this general definition does not fully explain the concept of when the law will require one person to compensate another for losses caused by accidental injury. Further, the law of negligence at common law is only one aspect of the law of liability. Although resulting damages must be proven in order to recover compensation in a negligence action, the nature and extent of those damages are not the primary focus of negligence cases.

ELEMENTS OF NEGLIGENCE CLAIMS

Negligence suits have historically been analyzed in stages, called elements, similar to the analysis of crimes (see Element (criminal law)). An important concept related to elements is that if a plaintiff fails to prove any one element of his claim, he loses on the entire tort claim. For example, let's assume that a particular tort has five elements. Each element must be proven. If the plaintiff proves only four of the five elements, the plaintiff has not succeeded in making out his claim.

Common law jurisdictions may differ slightly in the exact classification of the elements of negligence, but the elements that must be established in every negligence case are: duty, breach, causation, and damages. Each is defined and explained in greater detail in the paragraphs below. Negligence can be conceived of as having just three elements - conduct, causation and damages. More often, it is said to have four (duty, breach, causation and pecuniary damages) or five (duty, breach, actual cause, proximate cause, and damages). Each would be

[2] Feinman, Jay (2010). Law 101. New York: Oxford University Press. ISBN 978019539513-6.

correct, depending on how much specificity someone is seeking. "The broad agreement on the conceptual model", writes Professor Robertson of the University of Texas, "entails recognition that the five elements are best defined with care and kept separate. But in practice", he goes on to warn, "several varieties of confusion or conceptual mistakes have sometimes occurred[3]."

DUTY OF CARE

A decomposed snail in Scotland was the humble beginning of the modern English law of negligence

The case of Donoghue v. Stevenson [1932][4] illustrates the law of negligence, laying the foundations of the fault principle around the Commonwealth. The Pursuer, Donoghue, drank ginger beer given to her by a friend, who bought it from a shop. The beer was supplied by a manufacturer - a certain Stevenson in Scotland. While drinking the drink, Ms. Donoghue discovered the remains of an allegedly decomposed slug. She then sued Stevenson, though there was no relationship of contract, as the friend had made the payment. As there was no contract the doctrine of privity prevented a direct action against the manufacturer, Andrew Smith.

In his ruling, justice Lord MacMillan defined a new category of delict (the Scots law nearest equivalent of tort), (which is really not based on negligence but on what is now known as the "implied warranty of fitness of a product" in a completely different category of tort--"products liability") because it was analogous to previous cases about people hurting each other. Lord Atkin interpreted the biblical passages to 'love thy neighbour,' as the legal requirement to 'not harm thy neighbour.' He then went on to define neighbour as "persons who are 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 that are called in question." Reasonably foreseeable harm must be compensated. This is the first principle of negligence.

In England the more recent case of Caparo v. Dickman [1990] introduced a 'threefold test' for a duty of care. Harm must be (1) reasonably foreseeable (2) there must be a relationship of proximity between the plaintiff and defendant and (3) it must be 'fair, just and reasonable' to impose liability. However, these act as guidelines for the courts in establishing a duty of care; much of the principle is still at the discretion of judges.

BREACH OF DUTY

Once it is established that the defendant owed a duty to the plaintiff/claimant, the matter of whether or not that duty was breached must be settled. The test is both subjective and objective. The defendant who knowingly (subjective) exposes the plaintiff/claimant to a substantial risk of loss, breaches that duty. The defendant who

[3] Deakin, Tort Law, 218

[4] Donoghue v. Stevenson [1932] AC 532

fails to realize the substantial risk of loss to the plaintiff/claimant, which any reasonable person [objective] in the same situation would clearly have realized, also breaches that duty.

Breach of duty is not limited to professionals or persons under written or oral contract; all members of society have a duty to exercise reasonable care toward others and their property. A person who engages in activities that pose an unreasonable risk toward others and their property that actually results in harm, breaches their duty of reasonable care. An example is shown in the facts of Bolton v. Stone,[5] a 1951 legal case decided by the House of Lords which established that a defendant is not negligent if the damage to the plaintiff was not a reasonably foreseeable consequence of his conduct. In the case, a Miss Stone was struck on the head by a cricket ball while standing outside her house. Cricket balls were not normally hit a far enough distance to pose a danger to people standing as far away as was Miss Stone. Although she was injured, the court held that she did not have a legitimate claim because the danger was not sufficiently foreseeable. As stated in the opinion, 'Reasonable risk' cannot be judged with the benefit of hindsight. As Lord Denning said in Roe v. Minister of Health[6], the past should not be viewed through rose coloured spectacles. Therefore, there was no negligence on the part of the medical professionals in a case faulting them for using contaminated medical jars because the scientific standards of the time indicated a low possibility of medical jar contamination. Even if some were harmed, the professionals took reasonable care for risk to their patients.

- United States v. Carroll Towing Co. 159 F.2d 169 (2d. Cir. 1947)

FACTUAL CAUSATION (DIRECT CAUSE)

For a defendant to be held liable, it must be shown that the particular acts or omissions were the cause of the loss or damage sustained. Although the notion sounds simple, the causation between one's breach of duty and the harm that results to another can at times be very complicated. The basic test is to ask whether the injury would have occurred before, or without, the accused party's breach of the duty owed to the injured party. Even more precisely, if a breaching party materially increases the risk of harm to another, then the breaching party can be sued to the value of harm that he caused.

Asbestos litigations which have been ongoing for decades revolve around the issue of causation. Interwoven with the simple idea of a party causing harm to another are issues on insurance bills and compensations, which sometimes drove compensating companies out of business.

[5] Bolton v. Stone, [1951] A.C. 850

[6] Roe v Minister of Health (1954) 2 AER 131

LEGAL CAUSATION OR REMOTENESS

Sometimes factual causation is distinguished from 'legal causation' to avert the danger of defendants being exposed to, in the words of Cardozo, J., "liability in an indeterminate amount for an indeterminate time to an indeterminate class[7]." It is said a new question arises of how remote a consequence a person's harm is from another's negligence. We say that one's negligence is 'too remote' (in England) or not a 'proximate cause' (in the U.S.) of another's harm if one would 'never' reasonably foresee it happening. Note that a 'proximate cause' in U.S. terminology (to do with the chain of events between the action and the injury) should not be confused with the 'proximity test' under the English duty of care (to do with closeness of relationship). The idea of legal causation is that if no one can foresee something bad happening, and therefore take care to avoid it, how could anyone be responsible? For instance, in Palsgraf v. Long Island Rail Road Co[8]. the judge decided that the defendant, a railway, was not liable for an injury suffered by a distant bystander. The plaintiff, Palsgraf, was hit by scales that fell on her as she waited on a train platform. The scales fell because of a far-away commotion. A train conductor had run to help a man into a departing train. The man was carrying a package as he jogged to jump in the train door. The package had fireworks in it. The conductor mishandled the passenger or his package, causing the package to fall. The fireworks slipped and exploded on the ground causing shockwaves to travel through the platform. As a consequence, the scales fell[9]. Because Palsgraf was hurt by the falling scales, she sued the train company who employed the conductor for negligence[10].

The defendant train company argued it should not be liable as a matter of law, because despite the fact that they employed the employee, who was negligent, his negligence was too remote from the plaintiff's injury. On appeal, the majority of the court agreed, with four judges adopting the reasons, written by Judge Cardozo, that the defendant owed no duty of care to the plaintiff, because a duty was owed only to foreseeable plaintiffs.

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[7] Ultramares Corp. v. Touche(1931) 255 N.Y. 170, 174 N.E. 441

[8] Palsgraf v. Long Island Rail Road Co. (1928) 162 N.E. 99

[9] Interestingly, the plaintiff's physical injuries were minor and more likely caused by a stampede of travelers on the platform rather than the concussion of the exploding fireworks. These details have not, however, stopped the case from becoming the source of extensive debate in American tort law.

[10]She could have sued the man or the conductor himself, but they did not have as much money as the company. Often, in litigation, where two defendants are equally liable but one is more able to satisfy a judgment, he will be the preferred defendant and is referred to as the "deep pocket."

Three judges dissented, arguing, as written by Judge Andrews, that the defendant owed a duty to the plaintiff, regardless of foreseeability, because all men owe one another a duty not to act negligently.

Such disparity of views on the element of remoteness continues to trouble the judiciary. Courts that follow Cardozo's view have greater control in negligence cases. If the court can find that, as a matter of law, the defendant owed no duty of care to the plaintiff, the plaintiff will lose his case for negligence before having a chance to present to the jury. Cardozo's view is the majority view. However, some courts follow the position put forth by Judge Andrews. In jurisdictions following the minority rule, defendants must phrase their remoteness arguments in terms of proximate cause if they wish the court to take the case away from the jury.

Remoteness takes another form, seen in the Wagon Mound (No. 1)[11]. The Wagon Mound was a ship in Sydney harbour. The ship leaked oil creating a slick in part of the harbour. The wharf owner asked the ship owner about the danger and was told he could continue his work because the slick would not burn. The wharf owner allowed work to continue on the wharf, which sent sparks onto a rag in the water which ignited and created a fire which burnt down the wharf.

The UK House of Lords determined that the wharf owner 'intervened' in the causal chain, creating a responsibility for the fire which canceled out the liability of the ship owner.

In Australia, the concept of remoteness, or proximity, was tested with the case of Jaensch v. Coffey[12]. The wife of a policeman, Mrs Coffey suffered a nervous shock injury from the aftermath of a motor vehicle accident although she was not actually at the scene at the time of the accident. The court upheld in addition to it being reasonably foreseeable that his wife might suffer such an injury, it also required that there be sufficient proximity between the plaintiff and the defendant who caused the accident. Here there was sufficient causal proximity.

HARM

Even though there is breach of duty, and the cause of some injury to the defendant, a plaintiff may not recover unless he can prove that the defendant's breach caused a pecuniary injury. This should not be mistaken with the requirements that a plaintiff prove harm to recover. As a general rule, a plaintiff can only rely on a legal remedy to the point that he proves that he suffered a loss. It means something more than pecuniary loss is a necessary element of the plaintiff's case in negligence. When damages are not a necessary element, a plaintiff can win his

[11] Overseas Tankship (UK) Ltd v Miller Steamship Co Pty [1966] 2 All E.R. 709

[12] Jaensch v. Coffee (1984) 155 CLR 578

case without showing that he suffered any loss; he would be entitled to nominal damages and any other damages according to proof.

Negligence is different in that the plaintiff must prove his loss, and a particular kind of loss, to recover. In some cases, a defendant may not dispute the loss, but the requirement is significant in cases where a defendant cannot deny his negligence, but the plaintiff suffered no loss as a result. If the plaintiff can prove pecuniary loss, then he can also obtain damages for non-pecuniary injuries, such as emotional distress. The requirement of pecuniary loss can be shown in a number of ways. A plaintiff who is physically injured by allegedly negligent conduct may show that he had to pay a medical bill. If his property is damaged, he could show the income lost because he could not use it, the cost to repair it, although he could only recover for one of these things. The damage may be physical, purely economic, both physical and economic (loss of earnings following a personal injury), or reputational (in a defamation case).

In English law, the right to claim for purely economic loss is limited to a number of 'special' and clearly defined circumstances, often related to the nature of the duty to the plaintiff as between clients and lawyers, financial advisers, and other professions where money is central to the consultative services. Emotional distress has been recognized as an actionable tort. Generally, emotional distress damages had to be parasitic. That is, the plaintiff could recover for emotional distress caused by injury, but only if it accompanied a physical or pecuniary injury. A claimant who suffered only emotional distress and no pecuniary loss would not recover for negligence. However, courts have recently allowed recovery for a plaintiff to recover for purely emotional distress under certain circumstances. The state courts of California allowed recovery for emotional distress alone – even in the absence of any physical injury, when the defendant physically injures a relative of the plaintiff, and the plaintiff witnesses it[13].

DAMAGES

Damages place a monetary value on the harm done, following the principle of restitution in integrum (Latin for "restoration to the original condition"). Thus, for most purposes connected with the quantification of damages, the degree of culpability in the breach of the duty of care is irrelevant. Once the breach of the duty is established, the only requirement is to compensate the victim.

One of the main tests that is posed when deliberating whether a claimant is entitled to compensation for a tort, is the "reasonable person". The test is self-explanatory: would a reasonable person (as determined by a judge or jury) be damaged by the breach of duty. Simple as the "reasonable person" test sounds, it is very complicated. It

[13] See Dillon v. Legg, 68 Cal. 2d 728 (1968) and Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916 (1980).

is a risky test because it involves the opinion of either the judge or the jury that can be based on limited facts. However, as vague as the "reasonable person" test seems, it is extremely important in deciding whether or not a plaintiff is entitled to compensation for a negligence tort.

Damages are compensatory in nature. A compensatory damage addresses a plaintiff/claimant's losses (in cases involving physical or mental injury the amount awarded also compensates for pain and suffering). The award should make the plaintiff whole, sufficient to put the plaintiff back in the position he or she was before Defendant's negligent act. Anything more would unlawfully permit a plaintiff to profit from the tort.

TYPES OF DAMAGE

- Special damages - quantifiable dollar losses suffered from the date of defendant's negligent act (the tort) up to a specified time (proven at trial). Special damage examples include: lost wages, medical bills, and damage to property such as your car.
- General damages - these are damages that are not quantified in monetary terms (e.g., there's no invoice or receipt as there would be to prove special damages). A general damage example is an amount for the pain and suffering one experiences from a car accident. Lastly, where the plaintiff proves only minimal loss or damage, or the court or jury is unable to quantify the losses, the court or jury may award nominal damages, sometimes the symbolic $1 you see the jury award in movies.
- Punitive damages - Punitive damages are to punish a defendant, they are NOT to compensate plaintiffs in negligence cases. Therefore, punitive damages are NOT obtainable in a negligence case. Punitive damages are awardable only in cases where a defendant has been found "guilty" of intentional, reckless or malicious wrongdoing, such as fraud, defamation or false imprisonment. The easy way to remember this concept is to think about a car accident where there is physical injury. If the defendant driver was negligent (say by running a red light) then punitive damages cannot be sought. But if the defendant driver was drunk then punitive damages could be awarded.