Chapter 5

COMMON LAW LIABILITY

While undertaking a study of the Legal framework of Sustainable use of Automobile in India, something will be amiss if a chapter on civil wrong law or Tort law is unavailable. In the earlier days when there were no special laws dealing with air pollution, The law of Torts especially the torts of Nuisance, Negligence, Strict Liability, more particularly Absolute Liability filled the void. It's a total different issue that the law of nuisance, negligence, and strict liability was not designed to address the problems vehicular pollution, but a search is being undertaken as to whether these common law remedies can be explored and beneficially utilized to address the problem at hand. It must be very clear that the problem of vehicular pollution was not discernable at a time when there were other grave consequences of Industrial and other similar activities related to problems of air pollution. But examining the above concepts of tort law in relation to vehicular pollution - a major component of air pollution in the present post 21st Century scenario- will allow both academicians and anti pollution advocates to find more area of remedies to curtail the pollution of air better. It will help an anti pollution advocacy, especially dealing with urban air pollution. In a short and meaningful statement we can say there will be more ammunition in the arsenal of the various groups concerned with the curbing of Global Warming.

The domain of law of Tort[1] is a reflective of a journey from retributive penal to restitutive and compensatory justice. This has been innovated to suit the prestige and requirement of the victim of the tortious act. The remedy under the law of torts is mainly compensation to the victim irrespective of any inherent

[1] The author has used the phrase 'Law of Tort' in some paragraphs and 'Law of Torts' in other paragraphs but they mean the same thing. This is done purposefully to manifest that this writer subscribes to both the *Salmond* and the *Winfield* schools of thought.

social dangerousness of the tort committed. The movement has been well explained by Salmond[2]:

> ".....Historically torts has its roots in criminal procedure. Even today there is punitive element in some aspects of the rule of damages...It is settled that not every breach of criminal statute gives rise to an action in tort. But its often the case that the same wrong is both civil and criminal capable of being made the proceedings of both kinds, e.g. Assault, defamation, etc., are wrongs of this kind."

In India, Tort is a developing branch of law. However, the social cultural milieu and the judicial costs have proved to be significant deterrents in its use. It is manifest in the least occupancy of tort cases in important law reporters and journals in the country. In the year 2005, the Supreme Court and various high courts have come made a commitment to render compensatory justice even by using the constitutional provisions such as articles 32, 132, 142 and 226 in particular.[3]The Supreme Court has attempted through a catena of cases to compensate the violations of certain rights of an individual and evolved certain new principles of law applicable to the tort cases.

The Law of Torts is a division of the Common Law of England, i.e. the body of rules which have been affirmed by decisions of the courts of common law and their successor, the High Court of Justice. Common Law originally signified the law laid down by the King's Courts for all people and all parts of the country as opposed to local customs administered in the communal and feudal courts in the different parts of the country. Here it means the case law or precedents of the common law courts and is distinguished from statute law or laws enacted by the Acts of Parliament. The English Law of torts is in the main, the case-laws of the courts but has also been supplemented by some statutes. As a separate division of the substantive law, the

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[2] R.F.V.Heuston and R.A.Buckley, *Salmond and Heuston on the Law of Torts (20th edn)*, Butterworths,(1998), p.9

[3] M.P.Singh, *Tort Law,* Annual Law Survey of India, (2005), p.557.

law of torts is of modern growth. The recognition of the law of torts as a division of law in England may be said to date from 1860 when the first treatise on the subject was published[4]. Since then this branch of law has advanced considerably in volume and importance in England and the United Stated, on account of the great increase in litigations due to the extensive use of mechanical inventions and the expansion of urban populations in these countries. It is still in the process of expansion to meet the needs of the changing social and economic policy of the modern World[5].

This is a branch of law governing actions for damages for injuries to certain kind of rights, like rights to personal security, property and reputation. The award of pecuniary reparation for such injuries was the subject of regulation by the laws of all communities ancient and modern. In England the rules regarding it has been slowly developed by the courts during several centuries. After the middle of the nineteenth century these rules had to undergo a process of great expansion to meet the needs of an urban and industrial civilization. The invention of the steam engine, the motor car(automobile and the aircraft among other things, the development of industry and commerce have brought many advantages to the citizen but have also increased the chances of injury to his private rights. This branch of law has therefore attained great proportions and attracts a very large amount of litigation in England and the United States, though not to the same extent in India. It is still in the process of development and adaptation to the conditions of the changing world. It is a live and growing branch of law and, as its main theme is the definition of the individual's rights and duties in conformity with the prevalent standards of reasonable conduct and public good and convenience.[6]

A Tort is a civil wrong, which is derived from the Latin word *tortus* which means twisted, crooked, contorted, and distorted.

[4] Addison, *Law of Torts*; Frank Hillard's *Law of Torts of Private Wrongs* appeared in the previous year in the US and the late Sir Frederick Pollock's *Law of Torts* appeared in England in 1886 in Ramaswamy Iyer's *Law of Torts* (Butterworths),p.23.

[5] The novelty of action is no bar; *Best v Samuel Fox & company,* [1950] 2 All ER 798(CA), *Id.* note1.

[6] A. Lakshminath, *Ramaswamy Iyer's The Law of Torts (9th edn.),* Butterworths, (2003), p.1.

When we say civil wrong, it means that someone has committed a civil wrong if he or she has breached a legal duty owed to another.

A legal duty is to act in a particular way as required by law to act in such a way. To find out how the law requires us to act in such a particular way, one has to look to the statutes enacted by the Parliament and Cases decided by the courts. Thus a Statute passed by Parliament, not subsequently repealed and previous decisions of the courts, that have not been subsequently overruled or likely to be overruled determines our legal duties. The former is known as *Statutory Duty* and the latter *Judge-made Duty.*[7]

Legal duties or duties may be divided into duties that are owed to other people and duties which are owed to no one in particular.

It means a breach of some duty independent of contract which gives rise to a civil cause of action and for which compensation is available. A civil tort for which an action of damages will not lie is not a tort, e.g. Public nuisance, for which no action for damages will lie by a member of the public. The person committing the tort or wrong is called a wrong doer or tortfeasor, and his misdoing is a tortious act. The principle aim of the law of torts is compensation of victims or their dependants. Grant of exemplary damages is in certain cases shows that deterrence of wrongdoers is also another aim of the law of torts

A protected interest gives rise to a legal right which in turns gives rise to a legal duty. Some legal rights are absolute in the sense that mere violation of them leads to the presumption of a legal damage. There are other legal rights where there is no such presumption and actual damage is necessary to complete the injury which is redressible by the law. An act which infringes a legal right is a wrongful act. But every wrongful act is not a tort. To constitute a tort or civil injury (1) there must be

[7] Nicholas J.McBride and Roderick Bagshaw, *Tort Law (1st Indian Reprint)*, Pearson Education Ltd., (2003), p.1

wrongful act committed by a person; (2) the wrongful act must give rise to legal damage or actual damage and (3) the wrongful act must be of some nature as to give rise to a legal remedy in the form of action for damages.

The act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, prejudicially affect in some legal right; merely that it will, however directly, do harm in his interest is not enough.

An act prima facie innocent may become tortious, if it invades the legal right of another person. A familiar instance is the erection on one's own land of anything which obstructs the light to a neighbour's house. The crucial test of a wrongful act or omission is its prejudicial effect on the legal right of another. A right to life extended to enjoy a clean and healthy environment is a fundamental and obviously a legal right. A person's right to breathe pollution free air and such air not be polluted by the emissions from vehicles can be said to be a legal right. Such a right if violated can give rise to an action for unliquidated damages and compensation. The legal obligation and duty arising out of such a right upon the using such motor vehicles are to keep them in good condition and such duty is in the form of statutory duty where the emission levels are to be kept within the permissible limits.

The real significance of legal damage is illustrated by two maxims, namely, Injuria sine damno and Damnum sine (absque) injuria. By Damnum is meant damage in the substantial sense of money, loss of comfort, service, health, or the like. By injuria is meant a tortious act; it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie.

In cases of injuria sine damno, i.e. infringement of an absolute private right without any actual loss or damage, the person whose right is infringement has a cause of action. There are two kinds of torts those which are actionable *per se,* i.e. without any proof of actual damage and those which are actionable only on the proof of actual damage.

In cases of Damnum sine injuria, i.e., actual and substantial loss without infringement of any legal right, no action lies. Mere loss of money or money's worth does not itself constitute a tort. The most terrible harm might be inflicted by one man on another without legal address being obtainable. There are many acts which, though harmful, are not wrongful and give no right of action

The results of the two maxims, is that there are moral wrongs for which the law gives no remedy though they cause great loss or detriment; and, on the other hand there are legal wrongs for which law give a legal remedy, though there can only be a violation of a private right, without any; loss or detriment in the particular case. As already seen, there are torts which are not actionable per se. In these cases what is violated is a qualified right as distinguished from an absolute right in the sense that actual damage is an ingredient of the tort and the injury or the wrong is complete only when it is accompanied by actual damage. Such damage is called variously, "express loss", "particular damage", "damage in fact", "special or particular loss".

A tort is a civil injury, but all civil injuries are not torts. The wrongful act must come under the category of wrongs for which remedy is a civil action for damages. The essential remedy for a tort is an action for damages (unliquidated), but there are other remedies also, e.g., injunction may be obtained in addition to damages in certain cases of wrongs. But it is principally the right to damages that brings such wrongful acts within the category of torts. There also exist a large number of unauthorized acts for which only a criminal prosecution can be instituted.

The law of torts is said to be a development of the maxim *Ubi jus ibi remedium* (there is no wrong without remedy). Jus here signifies the 'legal authority to do or to demand something; and remedium may be defined to be the right of action, or the means given by law, for the recovery or assertion of a right. The maxim does not mean, as it is sometimes supposed, that there

is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue.[8]

Tortious liability is constantly expanding and a plaintiff's claim will not be prejudiced by his inability to find specific label for the wrong in question; the principle is where there is a wrong there is a remedy. Rights and remedy coexist; want of right and want of remedy are reciprocal. With the social advancement there is a greater willingness to look sympathetically at a wider spectrum of complaints ranging from either recovery of damages for disappointment over a ruined holiday, or closure of industrial and trading concerns on mass scale in the event of spillage of toxic chemical. However substantial areas of liability for accidents and other infringements have been removed from the regime of tort and with the growth of insurance and vicarious liability wrongdoers are seldom personally called upon to meet the effects of their wrongs[9].

A distinction has been made between nominate and innominate torts. The former refers to those torts which originated in the various writs issued in England by the chancery in the middle ages. Innominate torte are of recent origin and development, and do not fit under any of the historically recognized and accepted categories of tort liability; they have emerged as a result of judicial action. The legal concept of a wrong is gradually corresponding more and more with the popular or general notion of wrong, and courts have increasingly broadened the scope of tortious liability so as to take into account new social and moral developments.[10]

Introduction

At the very outset there was no distinction between various wrongs[11]and there was no compartmentalisation like crime, tort, breach of contract, so on and so forth. Various writs –

[8] Singh, G.P. (Justice), *Ratanlal & Dhirajlal's The Law of Torts,* Butterworths, 25th edn (2009), pp.14-16.

[9] *Halsbury's Laws of India [Tort]* 29(1) Butterworths, 2001, p.18.

[10] *Ibid*

[11] Tort is said to be a civil wrong other than mere breach of contract or trust and is redressible by unliquidated damages.

particularly writs of trespass and trespass on the case – governed the position. Most part of the law of torts grew out of the writs.

In the fourteenth century, the success of an action depended upon the availability of a writ. There were various kinds of writs which could be made available under various situations. If the situation was such that no writ was existing to cover a certain situation, the plaintiff – person against whom a wrong is said to have been committed – could not bring an action in the court of law, howsoever justified the same was. The law prevailing in those days was *Ubi remedium ibi jus* i.e. where there is a remedy then only there was a right. The law then did not look from the point of view of the right of the person with an idea to provide a remedy for the violation of such right. Moreover, the plaintiff required to be careful to choose the particular writ to substantiate his action. If his choice of the writ was such that it did not cover his case, his case failed. Such emphasis on the procedural aspect of the availability of a remedy in the form of a writ in determining the success of a case went on / continued for some five hundred years. Though some amendments took place in 1832 and 1833 to improve the prevalent law, it was ultimately the Common Law Procedure Act of 1852 which abolished the dominance of the writs. Thus it was no more necessary to mention any particular form of writ or action by which the plaintiff's action was covered. Further, the Judicature Act 1873 further provided that the pleading was to contain only a statement or summary of material facts relied upon by a party exercising his legal right. Now the maxim Ibi jus ubi remedium (where there is a right there is remedy) became the law of the day. Thus creation of new species of torts now and then substantiates the fact and law that where there is an unjustifiable interference with a right of a person, the courts have provided a remedy for the same.[12]

Where there is a remedy there is a right was the guideline for anybody striving to exercise his or her right under the law

[12] R.K.Bangia, *Law of Torts* (11th edition), Allahabad Law Agency (1994), p.1

torts, a creation of the English common law peppered and polished by statutes. Such polishing common law principles by statutory laws marked the positive and progressive developments of the body of the Tort law also known popularly as judge made laws.

The Law of Torts is mainly the product of judicial decisions and the courts in England have shown a favourable attitude towards recognition of an action in novel situations or even recognising new torts. Here it is pertinent to mention that Salmond[13] had posed a question as to whether these class/ kind of law was to be known by the nomenclature, Law of Tort or was it to be called law of Torts. Specifically he had asked whether the Law of Torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kind of harmful activity, and leaving all the residue outside the sphere of legal responsibility. While Winfield was on the forefront of the first of these alternatives he himself preferred the second, also known as the *pigeon-hole* theory. To show this difference in approach Winfield's book on the subject is titled 'Law of Tort" whereas Salmond's book is named 'Law of Torts'. According to Winfield: " If I injure my neighbour, he can sue me in tort whether the wrong comes under a specific name, nuisance, negligence, defamation, etc., or whether it has no special title at all; and I shall be liable if I cannot prove lawful justification.[14] This theory seemed to recognise and strengthen the principle, Ubi jus ibi remedium – where there is a right there is a remedy. Salmond said: "There is no general principle of liability and if the plaintiff can place his wrongs in any of the pigeon-hole, each containing a labelled tort, he will succeed. Each theory received some support in the legal fraternity but nobody rubbished them.

Winfield found subscribers of his theory in Holt, C.J. and Pratt, C.J. in *Ashby v. White,* Holt, and C.J. said: "If man will multiply injuries, action must be multiplied too: for every man

[13] Salmond, *Torts*, 2nd edition pp. 8-9
[14] Winfield, *Tort*, 6th edition, p.14

who is injured ought to have recompense."Similarly in *Chapman v. Pickersgill*, Pratt, C.J. said: "Torts are infinitely various and not limited or confined." Pollock also supported this view in his book[15] on the subject but his editor, London disagreed with him[16]. Some noted supporters of Salmond were Heuston,[17]Dr.Jenks, and Dr. Glanville Williams. Heuston said that Salmond was misunderstood whereas Dr. Williams went on to the extent of saying that the pigeon holes were neither incapacious nor were they incapable of being added to/expanded. He tried to sum up the controversy like this[18]: "The first school has shown that some rules of liability are very wide whereas the school has shown that some rules of absence of liability are very wide, but neither have shown a general rule either of liability or of non-liability to cover novel cases that have not yet received the attention of the courts." He further adds, "In a case of first impression – that is, a case that falls under no established rule or that falls under two conflicting rules – there is no ultimate principle directing the court to find for one party or the other..... why should we not settle the argument by saying simply that there are some general rules creating liability .....and some general rules exempting from liability ..... Between the two is a stretch of disputed territory, with the courts as an unbiased boundary commission. If, in an unprovided case, the decision passes for the plaintiff, it will be not because of liability but because the court feels that there is a case in which existing principles of liability may probably be extended."

Winfield modifying his stand regarding his own theory thought that both his and Salmond's theory were both correct, his theory from a broader point of view and Salmond's from a narrower point of view. He summed up in this manner: "If we concentrate attention on the law of tort at the moment (which is what most practitioners do), entirely excluding the development

[15] Pollock, *Law of Torts*, 15th edition,pp.16-18
[16] Ibid. pp.40-43
[17] Editor of *Salmond's Torts*, 17th Edition, p.17
[18] "The Foundation of Tortious Liability," (1939) 7 C.L.J.,111 as seen in R.K.Bangia, *Law of Torts*, 17th ed.(reprint) 2004, p.15

of the law- past and future- then it corresponds to the second theory. But if we take the wider view that the law of tort has grown for centuries and is still growing, then the first theory seems to be at the back of it. It is like treating a tree as an inanimate for the practical purposes at the moment, e.g., for the purpose of avoiding collision with it, it is as lifeless as a block of marble and realising that it is animate because we know that it is grown and is still growing."

It is thus a question of approach and looking at things from a certain angle. Each theory is correct from its own point of view.

Indian Developments/Scenario

During British rule, courts in India were enjoined by Acts of parliament[19] in the UK and by the Indian enactments[20] to act according to equity, justice and good conscience if there was no specific rule of enacted law applicable to the dispute in a suit. These statutes however, directed that disputed related to marriage, inheritance, succession, caste or religion usage among the Hindus according to their personal laws and the Muslims, according to theirs. In regard to suit for damages for torts, the courts followed the English common law insofar as it was in consonant to equity, justice and good conscience. They departed from it when many of its rules appeared unreasonable and unsuitable to Indian conditions. An English statute dealing with tort law is not by its own force applicable to India but may be followed here unless it is not accepted for reasons mentioned just mentioned. Unlike most branches of law, e.g. crime, contract, property trusts, etc., there is no code for law of torts, it is yet to be codified. The obvious reason of such non codification is that this branch of law is still in the process of growth and as such it would not also help a proper development of the law to do so. It would be perhaps wiser to start with enactments on particular topics on which the case laws in England and India has been satisfactory and has to be rectified.

[19] The earliest enactments were (1781) 21 Geo III, c 70, (1797) 37 Geo III, c 142, s.13. These words are repeated in the later Indian Acts establishing civil courts in different provinces.

[20] Madras Civil Courts Act, 1873, s. 16 (c).

One of the first recommendations for legislation made by the Law Commission appointed by the Government of India is on the subject of liability of the government for the torts committed by its servants.[21]

Enactments have also become necessary in order to reproduce the British statutes passed in the recent years as a result of the recommendation made by the reform committees appointed by the Lord Chancellor. Among those statutes are those which relate to the tort of contributory negligence,[22] contribution or Indemnity between wrongdoers[23] and common employment.[24] One reason why an Indian code on this branch of law is premature, is that that there is very little tort litigation in our courts and there have not been sufficient opportunities for applying principles elsewhere or evolving principles appropriate to Indian conditions. At present, it is a singular circumstance that very few cases of torts go before the Indian courts. The Indian law Reports furnish in this respect a striking contrast to the English and American. The physical injuries due to negligence and nuisance are not rare in occurrence but it is worth investigating why there are few claims about them. Negligence or default of statutory duties on the part of the government and local, municipal and other authorities is at least as likely to happen here as in England, but Indian courts have had far less occasion than the English, to exercise their functions of enforcing such duties. The failure of aggrieved persons to assert their legal rights is perhaps to be ascribed not merely to insufficient appreciation of such rights but to other causes as well, e.g., difficulties in proving claims and obtaining trustworthy testimony, high court fees, delay of courts. However the situation is fast changing. There is a steady increase in the number of cases based on civil wrongs and courts are inventing new principles of liability to compensate victims. Still the

[21] The First Law Commission Report, 1950; recently the National Commission for Review of Working of the Constitution(NCRWC), headed by the former CJ Venkatachaliah, in its report recommended a law to give liability of state for the torts of its employees.
[22] Law reform(Contributory Negligence) Act,1945
[23] Civil Liability(Contribution)Act,1978
[24] Law Reform(Personal Injuries) Act 1948

inordinate delay in adjudication, increasing costs, corruption are impending the tort litigation.

It is hardly necessary to emphasise the need to promote a study of this branch of Law and bring about a wider appreciation of its value in fostering orderly relations among people

The law of torts as administered in India in modern times is the English Law found suitable to Indian conditions and as modified by the Acts of the Indian Legislature.[25] Before this, tort had a much narrower conception under the then prevalent personal laws, namely the Hindu and Muslim laws, than the English Law of Torts.[26] The punishments of crimes under these systems were given more leave or occupied a more prominent place than the compensation of wrongs. Thus advent/origin of the law of torts is linked with the establishment of the British Courts in India, namely, or the first being the establishment of the Mayor's Courts in Calcutta, Madras and Bombay in the eighteenth century. The charters which established these courts required them to give judgement and sentence according to justice and right, and the Englishmen administering them normally drew upon the common law and statute law of England as found suitable to India conditions in doing so. This ultimately led to the introduction in these courts the jurisdiction of the English common and statute law in force at the time so far as it was applicable to Indian circumstances.[27]

The Supreme Courts which later replaced the mayor's Courts in the abovementioned three towns were modelled on the English pattern and had such jurisdiction and authority as the court of King's Bench by the common law of England. Further the High Courts which superseded these Supreme courts in the said three towns of Calcutta, Madras and Bombay and continued the jurisdiction to administer the English common law in the exercise of their original jurisdiction as distinguished from there appellate jurisdiction – the jurisdiction to hear appeals from

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[25] Setalvad, *The Common Law in India,* p.110[See Ratanlal & Dhirajlal, Law of Torts,(22nd edition, 1992) p.1]

[26] Ramaswamy Iyer, *Law of Torts (7th Edition),* Butterworths, (1975), Appendix Pages591,592,

[27] Setalvad, *The Common Law in India,* N.M.Tripathi Pvt.Ltd., Bombay (1970), pp.12,13.

decrees of Mofussil courts. As regards other courts in India, established almost by local Acts, there is no express provision for the administration of English common law but these Acts contain a section which requires them to act according to "justice, equity and good conscience", in the absence of any specific law or usage.[28] The expression "justice, equity and good conscience" has been interpreted by the Privy Council in diverse cases[29] to mean the rules of English law if found applicable to Indian society and circumstances. In Union *Carbide Corporation v. Union of India,* the court has held that section 9 of the Civil Procedure Code, which enables a Civil Court to try all suits of civil nature, impliedly confers jurisdiction to apply the Law of Torts as principles of justice, equity and good conscience.

The law of torts or civil wrongs in India are thus almost wholly the English law which is administered as rules of justice, equity and good conscience meaning applying English law according or suitable to Indian conditions. In *Rohtas Industries Ltd. V. Rohtas Industries Staff Union,*[30] Krishna Iyer, J has observed, "We cannot incorporate English law without adaptation to Indian law" while delivering a verdict in dealing with a tort of conspiracy. We can safely say that the application of the English Law in India as rules of justice, equity and good conscience, has, therefore, been a selective application and as such the courts in India are not restricted to the common law in applying the English law on a particular point. The English law of torts consists both of common and statute law, and the Indian courts can see as to how far rule of common law has been modified or abrogated by statute law of England. If the new rules of the English statute law replacing or modifying the common law are more in consonance with justice, equity and good conscience, it is open to the courts in India to reject the outmoded rules of common law and to apply the new rules.[31]It is

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[28] Singh, G.P. (Justice), *Ratanlal &Dhirajlal's Law of Torts,(22nd Edition),* Wadhwa & Co., (1992), p.2.

[29] *Wagela Rajsanji v. Seikh Masludin,* ILR (1887) 11Bom.551 (556), *Vidyavati v. M.P. State Road Transport Corporation,* AIR 1975, MP 89.

[30] AIR 1976 SC 425.

[31] *Ratanlal & Dhirajlal's The Law of Torts, (22nd Edition),* Wadhwa & Co. (1992), p.2-3

on this reasoning that the principles of the English statute, the Law Reform (Contributory Negligence) Act, 1945 were applied in India in *Vidyawati v. M.P. State Road Transport Corporation.*[32] On the other hand in *Nawal Kishore v. Rameshwar,*[33]the Allahabad high court has held that the rule enacted in the English statute, the Law Reform (Married Women and Tort-feasors) Act, 1935, that although it is possible to bring separate actions against joint tortfeasors, the sums recoverable under these judgements by way of damages are not in the aggregate to exceed the amount of the damages awarded by the judgment first given was not in consonance with the principles of justice equity and good conscience and as such not applicable in India. Similar reasoning was followed in the future situations and as such English law was applicable under Indian conditions in the garb of justice, equity and good conscience.

Looking at the workings of the English law itself manifests that it itself is not clouded with rigidity but with the flexibility and capacity to adapt itself to newer situations. Such manifestations of the English courts itself indicates to the Indian courts that they are not to be influenced negatively by the notion that in applying the common law they have no authority to take a progressive view.[34]

As stated by Lord Scarman in *Mcloughlin v. O'Brian,*[35] "The Common law, which in a constitutional context means judicially developed equity, covers everything which is not covered by statute. It knows no gap: there can be no casus omissus. The function of the court is to decide the case before it, even though the decision require the extension of adaptation of a principle or in some cases the creation of a new law to meet the justice of the case. But whatever the court decides to do, it starts from the baseline of existing principle and seeks a solution consistent with or analogous to a principle or principles recognised. The real risk to the common law is not its movement to cover new situations

[32] AIR 1975 MP 89; see also *Subhakar v. Mysore State Road Transport Corporation,* AIR 1975 Ker 73; *Rural Transport Service v. Bezlum Bibi,* AIR 1980 Cal 165 .
[33] AIR 1955 All 594(596).
[34] *Supra* note 28.
[35] (1982) 2 All E R 298(310) (H.L.)

and new knowledge but lest it should stand still halted by a conservative judicial approach. If that should happen, there would be a danger of the law becoming irrelevant to the consideration, and inept in its treatment of modern social problems. Justice would be defeated. The common law has, however avoided this catastrophe by the flexibility given to it by generation of judges".

A recent decision of the Supreme Court[36], which laid down that an enterprise engaged in a hazardous or inherently dangerous industry owes an absolute and non delegable duty to the community shows that if an occasion arises the court can be more progressive than the English courts and can evolve a new principle of tort liability not yet accepted by the English law. In the words of BHAGWAT, C.J.: "We have to evolve new principles and lay down new norms which will adequately deal new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be construed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence."[37]

Whatever strides taken by the judiciary in the development of tort law in India, this body of law has been making a sluggish progress since the judiciary has been deprived by the absence of litigators even in the presence of apt cases of litigation. Suits as they are called seldom reach the courts which impede the working of the judicial activism in this particular arena. Historically, the main reasons for such inept/ callous attitude of the prospective litigators and there disinterest/ discouragement in filing suits to exercise their rights are pegged to be the cost of filing a suit litigation; the duration taken for a proper conclusion of a suit/litigation; even in the event of a successful conclusion

[36] *M.C.Mehta v. Union of India*, AIR 1987 SC 1086(1087).
[37] *Ibid.*

of a dispute through the machinery of the courts, the redress is not substantive.[38]

One major reason for the lack of tort litigation in India is the lack of consciousness about one's rights and the spirit of toleration, which is generally found as a matter of attitude in a common man in India. The emphasis on the performance of one's duty rather than an assertion of rights is the basis of such an attitude. It can further be blamed upon the lack of education and awareness among the citizens of the country and also the access of forums. In England level of consciousness of one's legal rights are on a higher plane, there an action is brought in cases when a person locked inside a public lavatory for a short duration of time due to defective door handle,[39] or a person suffered skin disease due to defective underwear,[40] or a decomposed body of a snail was found in a bottle of ginger ale, [41]etc. In contrast, numerous cases of injury cases in India in the form of unlawful detention, excesses by police authorities, mass deaths due to spurious and adulterated, foodstuff, medicines, alcohol, etc., sufferings due to wrong and negligent treatments in hospitals, loss in businesses due to voltage fluctuations or unannounced power cuts, loss and damage due to water contamination, atmospheric pollution and millions of such similar violations are put up by the people of this country without approaching the courts, not even the administrative authorities.[42]

High cost of litigation beyond the means of an average person, undue delay in the final disposal of the cases are some of the other major factors contributing to the lack of tort litigation in India. Even when an action has been acknowledged and successfully pleaded the damages awarded is a paltry sum in India. In this context *Shyam Sunder v. State of Rajasthan*, [43]is the perfect example. Here a widow of an accident victim was

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[38] R.K.Bangia, *Law of Torts(11th edition)*, Allahabad Law Agency(1994), p,2-3.
[39] *Sayers v. Harlow Urban District Council*, (1958) 2 All E.R. 342.
[40] *Grant v. Australian Knitting Mill Co.*, (1936) A.C. 85.
[41] *Donoghue v. Stevenson*, (1932) A.C. 562.
[42] *Supra* note 28.
[43] AIR 1974 S.C. 890.

dragged up to the Supreme Court to obtain compensation of less than Rupees fifteen thousand that to after a period of twenty one years.

In addition to this the attitude of the courts was also not very encouraging. For instance, a case[44] where a candidate was wrongfully barred from appearing for his Higher Secondary examination due to negligent and incorrect calculation of attendance by the authorities was dismissed due to lack of precedent. In H.C. Municipality v. Anil Kumar Dey,[45] the Calcutta high court dismissed an injunction petition for apprehended nuisance on the ground that the drain, assumed to cause nuisance, had not yet been constructed.

The present age of urbanisation, industrialisation and modern scientific advancement has brought with it problems of its own peculiar kind. Automobiles are one of the offsprings of such development.

THE EVOLUTION: The law of tort, which derives its origin from the French word tortum-wrong, is the law of civil liability for wrongfully inflicted injury, or atleast a very large part of it. Tort is itself a very old concept older than crime. According to Sir Henry Maine, crime was not the penal law for ancient communities; it was nomenclatured as wrongs and would be suitably equated with tort in English law. Such law developed during the days when the states were not sufficiently organised to have a proper and centralised prosecuting authority and as such the alternative task of punishing wrongful conduct was left to the private individual.

The Roman law of tort, as it was more usually called delict, developed in a piecemeal fashion and the civil jurisdiction which took it as their model sought to systemise the Tortious liability principles, eliminating its anomalies and diminishing its complexities. Their codes, which mainly date from the Napoleonic era and thereafter has reduced the law of tort to bare essentials. Almost the whole of the French word of delict

[44] *Vishnu Dutt v. Board of H.S. & Inter. Education,* AIR 1981 All 81.
[45] AIR 1981 N.O.C. 142(Cal).

rests on a mere five articles in their Code Civil which has remained in force virtually unchanged for the past two centuries.

The Germans[46], unlike the French, resisted the temptation of generalising the imposition of liability for all consequences of one's fault, and deals with Tortious liability under three more limited but still broad principles.

Thus the other civil jurisdictions of Europe, except Scotland (which took on with the English set up), took too varying positions, some closely aligning with the French approach whereas some with the Germans

The English law of torts stand in stark contrast to the above authorities. It appears to make use of the courts power to award damages as a weapon for the redress of wrongs and for the prevention of unsocial conduct, more than the laws of the other countries have attempted to do. For this purpose, it has a large and detailed body of rules defining with precision, rights and duties and there limits required by considerations of public good and expediency. Other system of law seemed to be content with a few general rules The common law of torts started out by having specific types of liability just like Roman law, but whereas on the continent legal scholars iron out the ld distinctions between the several delicts to the point where a general principal of delictual liability not only became a possibility but an actuality in most legal systems. It should however be understood that inspite of occasional lapses due to its history, the English Law of Torts represents a large body of just and sound sense and principle. Besides, in the recent times, the process of the reform of law and the elimination of anomalies and abuses in it has been more active than before. Since 1934, committees of judges and jurists selected by the Lord Chancellor have from time to time examined the different branches of the law and recommended necessary reforms in them. The reforms have been in many cases carried out by legislation.[47] The spirit

[46] *Burgerliches Gesetzbuch*(BGB).

[47] Some of the Statutes are: Law Reforms(Contributory Negligence Act, 1945; Law reform(Personal Injuries) Act, 1948; Defamation Act, 1952; Occupiers' Liability Act, 1957; Employer's

of reform is also more in evidence in the judgement of the House of Lords and the court of appeal than it was before.[48] The English law of torts has been substantially adopted by the courts in the United States, the British Dominions and India.

The English law of torts has been substantially adopted by the courts in the United States except were variations are called for by local conditions. On the account of the diversity of decisions of various states, the American law Institute, an association of eminent lawyers and professors, has compiled restatement of this[49] and other branches of law. They form a great contribution to the study of law and are bound to influence its development in the United States and elsewhere.

Anglo American lawyers have largely adhered to the separate type of case and separate torts which developed under the writ system. It is perhaps this lack of principle which led the great American judge and jurist, Oliver Wendell Holmes, to pronounce: Torts is not a proper subject for the law books[50]. However he overcame his earlier prejudice and wrote in his masterly analysis, the common law (originally published in 1881) an account of the law of torts which remains rewarding and insightful read today.

Holmes set himself the task of discovering whether there is any common ground at the bottom of all liability in tort and if so what that ground is. He considered that that this was not an easy task. The Law did not begin with a theory. It has never worked out. He found that discussions of general principle had been darkened by historical controversies that had no contemporary relevance. Nevertheless, he felt that a full account of the law required a knowledge of its history, asserting at the

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Liability(Defective Equipment) Act, 1969; defective Premises Act, 1972; Fatal Accidents Act, 1976; Torts(Interference with Goods) Act, 1977; Occupiers' Liability Act, 1984.

[48] *United Australia Ltd. V. Barclays Bank* [1941] AC 1, 29 per *Lord Atkin*, 'When these ghosts of the past (referring to the old forms of actions and principles connected with them), stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred', See also *Fiberosa Spojka Accyjna v Fairburn etc Ltd.* [1943] AC at pp63,64, per *Lord Wright*, These ghosts have been allowed to intrude into the ways of the living and impede vital functions of the law.

[49] Prof. Francis H Bohlen was the reporter or Chief Editor of this work. Published in 1934 by the American Law Institute (4 vols.) superseded by *Second Restatement* published in 1965.

[50] (1871) 5 Am L Rev 340.

beginning of the his great work that in order to know what it is we must know what it has been.

To understand the position we have to dwell in the history of the English common law to which the law of torts has its origin. For most of its history, English common law developed through the procedural mechanisms that used to bring an action before the courts. Such forms of actions well known as writs and purchased from the courts of the chancery so that it could be brought in the royal courts.

Earlier writs were on adhoc basis and as such were impractical, thus standard forms of writs started to develop. They were in the form of complaints of the injured against the wrongdoer. There were different writs for different actions and it as during this period that the foundations of the modern day Law of Torts were set down. Among the writs, undisputed place of pride goes to the writ of trespass, According to Maitland – the fertile mother of all actions.

The writ of trespass was one of the original writs and it became relatively common after 1250. Trespass was a writ of wrong rather than a writ of right. It complained of a wrong rather than demand the reinstatement of a right. The mode of trial was by jury and the remedy was damages. A number of different forms of trespass were recognised.

There were various kinds of writs for different wrongs.[51] The writs dealing with trespass to the person took various forms corresponding to the modern torts of assault, battery and false imprisonment. The commonality between these various writs were the requirement was to show that the defendant had acted vi et armis (with force and arms and contra pacem (in the breach of the {kings} peace. So vital was the allegation of vi et armis that injury was inflicted with force and arms and often, for good measure, 'with swords, bows, arrows and clubs were made in the most unlikely circumstances.[52] These requirements were

[51] The writ of trespass *quare clausum fregit correspons* to the modern tort of trespass to land and that trespass *de bonis asportatis* to modern trespass to goods.

[52] Milsom, (1958) 74 LQR195.

actually imposed in order to prevent the king's court being overwhelmed with actions/business. The cases not involving violence and threat to public safety were lefty to be dealt with in the local courts.

The plaintiff bringing the action against the defendant was not comfortable that he has a set of facts which if put in perspective would allow him the action against the defendant. He has to make the right selection of the writ - the form of action – according to which he sought a remedy (*Ubi remedium ibi jus*).[53] The choice available to the plaintiff from the various recognised writs was the choice between methods of procedure adapted to cases of different kinds.

The differences between the several forms of action have been of very great practical importance– "a form of action"- which implies a particular original process, a particular mesne process, a final process, a particular form of pleading, of trial, of judgment. But to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon hole consists of its own rules of substantive law, and it is with great caution that we may argue from with what is found in one to what is found in another, each has its own precedent it is quite possible that a litigant may find that his case will fit in some two or three of these pigeon-holes. If that be so he will have a choice which will often be a choice between the old cumbrous, costly on the one hand, the modern, rapid and cheap in the other. The plaintiff's choice is irrevocable in this case and if he happens to make a wrong choice his action will fail. He can atleast take such comfort as he can from the hints of the judges that another form of action might have been the correct one and as such would have made him successful. Lastly he may find that, plausible as his case may seem, it just will not fit in any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.

[53] Where there is a remedy there is a right.

The unsatisfactory nature of the requirement that the defendant should have acted with force and arms soon became apparent. Local courts were forbidden to entertain suit if the value of the suit exceeded forty shillings without royal sanctions, making nonviolent trespass involving larger sums as a failure of justice since they were excluded from the King's Court as well. By the middle of the fourteenth century new writ of trespass as started by the clerks of the chancery, which required the plaintiff plead his special case. Even if the defendants act was not been *vi et armis*, the plaintiff had to explain why his case was nonetheless wrongful. *Rattlesdene v Grunestone (1317)* and *The Farrier's Case* are examples of the courts willingness to stretch the writs of trespass *vi et armis* and then to sanction the action on the case.

In *Rattlesdene v Grunestone*[54], one Simon de Rattlesdene complained through his attorney that had purchased wine from Richard de Grunestone for 6 marks 6s8d and had left it with the seller until he required it. The seller(Rattlesdene), *with force and arms, namely with swords and bows and arrows,* drew some of the wine from the container and put salt water in its place as a result of which the wine was spoiled and as such the plaintiff suffered a damage of 10 pounds. Most likely this was an action by a disgruntled purchaser of the wine for the loss caused by a shipping accident. The court responded positively and allowed the action to the plaintiff. In the *Farrier's Case,* Trespass was brought against a farrier for injuring a horse with a nail; and the writ said 'to show why at a certain place, he drove a nail into the quick of the horse's hoof, whereby the plaintiff lost the profit from his horse for a long time, the defendant attorney pleaded for dismissal of the case since the pleading did not say' with force and arms,' but the court held the writ good.

These are early examples of an action on the case. The court holds that it is not necessary to include the allegation, necessary in trespass, that the defendant acted *vi et armis*. Rather than relying upon evasory fiction, the court openly

[54] J. Baker and S. Milsom, *Sources of English legal History: Private law to 1750*(Butterworth, 1986), p.300.

accepts that the action in trespass has been stretched beyond its earlier limits.

Actions brought under tort law are among the oldest of the legal remedies to abate pollution. Most pollution cases in tort law fall under the categories of nuisance, negligence and strict liability. To these traditional categories, the Supreme Court has added a new class based on the principle of 'Absolute liability'[55].

In *Vellore Citizens' Welfare Forum v Union of India,*[56]the Supreme Court traced the source of the constitutional and statutory provisions that protect the environment on the 'inalienable common law right' of every person to a clean environment Quoting from Blackstone's Commentaries on the English law of nuisance published in 1876, the court held that since the Indian legal system was founded on English common law, the right to a pollution-free environment was a part of the basic jurisprudence of the land.[57]

The 1905 judgment of the Calcutta High Court in *J.C.Galstaun v Dhunia Lal Seal*[58] may be the earliest reported pollution control case in India. Apart from the historical significance, the case is important because it shows how the common law regulatory system can check polluters in a pre-industrialised society.[59]

Role of Tort in controlling vehicular Pollution

In this Chapter, an attempt or rather an effort is made to bring such pollution from vehicles, especially air pollution, under the ambit of the Law of torts. The closest tort to facilitate this endeavour would be the Tort of Nuisance. We will find in the course of this work that other torts, namely Strict liability(Rules in Rylands v. Fletcher) & Negligence has been dwelled upon briefly, but the scope granted by the tort of Nuisance is the most appropriate to deal with the matter at hand.

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[55] Divan, Shyam & Rosencranz, Armin, *Environment Law and Policy in India (2nd edn.)*, OUP, (2002), p. 88.
[56] AIR 1996 SC 2715.
[57] Ibid at 2722 seen in Divan & Rosencranz's *Environmental Law & policy in India,* p. 88.
[58] (1905) 9 CWN 612.
[59] *Supra* note 1. At p.92.

To proceed with our effort to find the remedy to the wrong arising out of "unsustainable automobile use", hereinafter substituted by the term "Vehicular pollution", under the tort of nuisance, the nearest definition possible is to be laid down first.

John Murray has made claims in his work[60] about the potential of tort and common law remedies[61] in addressing problems of environmental pollution. He writes:

> "More particularly, my enterprise shall be to show that there are sufficiently important gaps in the regulatory regime, or atleast in its enforcement, for strict liability torts of private nuisance and *Rylands v. Fletcher*.[62] to fill"

The development of the law of torts has been very significant for the prevention, controlling and abating environmental pollution but there has not been any direct action against unsustainable use of automobile been brought forth under any of the related torts in any of the courts of these countries.[63] This should not provide the death knell for those interested in exploring the use of common law remedies in harnessing the wrongs committed by the unsustainable use of automobile.

It has been seen that unsustainable use of automobile is the result of improper driving conditions and made up of various types of polluting agents like smoke, noise, etc. The ultimate result is that the victim is troubled through the medium of air. And air pollution is one of the main ingredients of environmental pollution. The term "unsustainable use of automobile" has been defined and equated with vehicular pollution and whatever connected to it in regard to polluting the environment. Such use can foul the air with the various gases, e.g. Carbon dioxide,

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[60] Murray, John, *Noxious Emissions and Common Law Liability: Tort in the Shadow of Regulation* in Lowry, John & Edmunds Rod (ed), *Environmental Protection and the Common Law*, Oxford(2000) p.52

[61] Generally in the form of compensatory damages and injunctions.

[62] (1868) L.R. 3 H.L. 330.

[63] As far as this researcher has covered the related field.

Sulphur dioxide, etc. and noise from the running of the vehicles which are improperly maintained.

Nuisance

In modern parlance, nuisance is that branch of law of tort mostly connected with the "protection of the environment".[64] Thus nuisance actions have concerned with pollution of Oil in *Esso Petroleum Co. Ltd. V South port Corporation*[65]; or noxious fumes in *St. Helen's Smelting Co. V Tipping*[66]; interference with leisure activities in *Bridlington Relay v Yorkshire Electricity Board*;[67] offensive smells from premises used for keeping animals in *Rapier v London Tramways Co.*;[68] or noise from industrial installations (Petroleum) as in *Halsey v Esso Petroleum Co. Ltd.*[69]

Nuisance has been defined to be anything done to the hurt or annoyance of the lands, tenements or heriditaments of another, and not amounting to trespass.[70] The word "nuisance" is understood to have been derived from the French word *nuire*, to do hurt, or to annoy. Blackstone describes nuisance (nocumentum) as something that "worketh hurt, inconvenience or damage".[71]

It is an injury to the right of a person in possession of property to undisturbed enjoyment of it and results from an improper use by another of his own property. This is expressed by the Latin maxim, *sic utere tuo ut alienum non laedas* which simply means use your own property as not to injure another's.[72]

Further it is important to note that the nuisance is a general term used in law and actually it is made up of both Public and

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[64] Rogers, W V H, *Winfield and Jolowicz on Torts (17th Edn.)*, Sweet and Maxwell (2006), p. 639.
[65] [1956] A.C. 218.
[66] (1865) 11 H.L.C. 642
[67] [1965] Ch. 436
[68] [1893] 2 Ch. 588
[69] [1961] 1 W.L.R. 683
[70] *Stephen, iii, 499* from (Justice) Singh, G.P., *Ratanlal & Dhirajlal on the Law of Torts,* Butterworths(25th edn.) p.601.
[71] *Ibid.*
[72] *Halsbury's Laws of India,* Vol 29(1), Butterworths, India(2001), p. 342.

Private Nuisance. Nuisances are divided into public and private, although it is quite possible for the same conduct to amount to both.

A Public or common nuisance is a crime which materially affects the reasonable comfort and convenience of a life of a class of a class of the public who come within the sphere or neighbourhood of its operation. It is affecting the public at large or some considerable portion of it and interferes with rights which the members of the community might otherwise enjoy. Acts which seriously interfere with the health, safety, comfort or the convenience of the public generally or which tend to degrade public morals have been considered as public nuisance.[73] The question whether the number of persons affected is sufficient to constitute a class is one of fact in every case and it is sufficient to show that a representative cross section of that class have been so affected for an injunction to be issued.[74] One cannot add together the effect of numerous acts aimed at individuals and thereby claim that the public is affected. Thus a malicious bomb hoax call may be a public nuisance but not a campaign of hate mail to numerous people[75]

Whereas Private nuisance may be described as unlawful interference with a person's use and enjoyment, or some right over, or in connection with it.[76] It is the using or authorising the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or affecting its enjoyment by interfering materially with his health, comfort or convenience.[77]

Some important points of distinctions[78] are:

- The tort of nuisance is a private wrong and such an action for damages lie, but in case of a public nuisance an action for damages cannot lie unless the plaintiff can

[73] *Ratanlal & Dhirajlal on Law of Torts*, p.602.
[74] Rogers, R.V.H., *Winfield & Jolowicz on the Law of Torts*, p. 643.
[75] *R. v. Rimmington*, [2005] UKHL 63 quoted in *ibid.*
[76] *Winfield & Jolowicz on Tort*, p, 646.
[77] *Supra* note 73 at p. 604.
[78] Lakshminath, A., *Ramaswamy Iyer's The Law of Torts*, Butterworths (9th edn.) p. 257.

prove that a special damage to him has been resulted from it. To bring a private action in public nuisance, a special damage must be proved by the plaintiff.[79]

- While private nuisance can be abated, a public nuisance cannot be abated except to the extent to which it causes special damage to the person who desires to abate it.
- While private nuisance can be legal by prescription[80], a public nuisance cannot be legalised after any length of time.

Public nuisance does not create a civil cause of action for any person. In order that an individual may have private right of action in respect of public nuisance, he must show a particular injury to himself beyond that which is suffered by the rest of the public. He must show that he has suffered some damage more than what the general body of the public had to suffer. Such injury must be direct and not consequential and the injury must be of a substantial character. This is followed in order to avoid the multiplicity of suits.

In India, under section 91 of the Civil Procedure Code, in the case of a public nuisance, the Advocate General, or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit though no special damage has been caused for the declaration and injunction or for such other relief as maybe appropriate in the circumstances of the case.[81]

Thus private nuisance is a tort whereas as public nuisance is a crime. The tort of nuisance is compensated basically by an award of damages or grant of an injunction but the wrong of public nuisance being a crime is to be redressed through criminal remedies of punishments in the form of imprisonment or/and fine.

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[79] *Campbell v. Paddington Corporation* (1911) K.B.869

[80] Enjoyed as a right or easement peaceably, without any interruption and continuously for a period of twenty years or above. See *Easements Act, 1882.*

[81] *Advocate General v. Haji Ismail Hasham,* (2909) 12 Bom LR 274 in *Ratanlal Dhirajlal's Law of Torts*, p. 603

Nuisance, according to Common law history finds its origin in the trespass on the case as a result of it being indirect but it was not distinguished then as it was done later on. The tort of law itself after separating from public nuisance has been developed by a huge number of actions brought in the courts of law. Such developments as we have seen earlier in this chapter took place in England as a result of which their body of law has been more mature and useful. Most of those cases or actions as they are called have also indicated that most of the environmental pollution issues have been dealt with under the auspices of this brand of law, i.e. Torts.

The essentials of the tort of Nuisance[82]are in the form of an unlawful act; and damage actual or presumed. Generally there is interference by an act, such interference is unreasonable, such unreasonable interference is with the use and enjoyment of land and as such damage of the kind mentioned above is the consequence.

The majority of disputes concerning the use of land involve complaints of discomfort or inconvenience caused by noise and smell.[83] The main ingredients of vehicular pollution are smoke and noise. This in a sense tends to steady the pursuance of this present work or chapter to bring such vehicular pollution under the common law liability.

The unreasonable interference causing the damage is actually the affecting of the health, safety, enjoyment of the plaintiff. The actual discomfort resulting from such act usually defines the unreasonability of the interference. Thus the act may seem reasonable but if the effects of that act to health, safety comfort, convenience, enjoyment, etc is such that the same cannot be achieved from the plaintiff's land as it should, then such act will be unreasonable.

The approach implied by the test of reasonableness in the context of disputes about interference with the enjoyment of

[82] *Ratanlal & Dhirajlal's Law of Torts,* p.604
[83] Buckley's, R.A., *The Law of Negligence,* Butterworths, 4th Edn.(Indian Reprint), p. 249

land is a robust one. In *Walter v. Selfe*[84] Knight Bruce, V.C. said[85]

> "..... both on the principle and authority the important point next for decision may properly, I conceive, be thus put: ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, and not merely according to elegant or dainty modes of living, but according to plain and sober and simple notions among the English people."

A typical example of a nuisance involving the use of motor vehicles, more particularly coaches (buses), and causing interference with comfort and enjoyment is provided by the case of *A-G v Gastonia Coaches Ltd.*[86] The defendant company owned a fleet of 32 coaches which they operated from their premises situated in an enclosed residential area. Eighteen of the vehicles were parked overnight on or near the premises but the remainder also visited them for refuelling and repairs. Several neighbouring householders brought an action alleging both private and public nuisance. Whitford J found the case in respect of smell caused by the emissions of the diesel fumes from the coaches and noise from the revving of their engines. On the other hand the noises caused by carrying out of repairs and cleaning were not held sufficiently serious to warrant relief. The plaintiffs were ultimately awarded both damages and an injunction, the latter suspended for one year, and four fifth of their costs.

The abovementioned case gives us a clear idea that the prospect of prosecuting the automobiles running on the road seems to be very poor. Firstly nuisance is generally a continuing offence. In the case of automobile, they are not stationery most of the time and always moving. Even if it can be shown that the

[84] (1851) 4 De G & Sm 315, from R.A. Buckley's *The Law of Negligence*, p.249
[85] *Ibid* at 322.
[86] [1977] RTR 219.

plaintiff has been facing the required discomfort or is affecting his health or is being not able to use and enjoy his property to prove the nuisance being committed, it is impossible to pin down one particular automobile to bring an action against. This does not mean that nuisance cannot be committed by the act of two or more automobiles, running independently of each other, although the act of any one of them would not sum up to committing a nuisance. An action can be brought against anyone of them. In *Thorpe v Burmfit*[87], 100 wheelbarrows were left by 100 different persons independently in a place and obstruction consists in the accumulation of these vehicles and not in the presence of any one of them. The court held that it was no defence or rather an ineffectual defence[88] that the nuisance created by independent acts of different persons, although and an act of an individual person by itself could not cause any damage to the plaintiff.

Liability in private nuisance arises only when the conduct of the defendant amounts to an unreasonable user of the land in that it causes unreasonable interference with the claimant's use of land. No precise or universal formula is possible to determine reasonableness in the above sense. Whether an act constitutes a nuisance cannot be determined merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it is done maliciously or in the reasonable exercise of rights and the effect of its commission, that is whether it is transitory or permanent, occasional or continuous. Whether conduct amounts to unreasonable user depends upon a number of factors the most important of which are the nature and extent of the damage suffered by the claimant, the locality where the alleged nuisance is committed, the duration of the nuisance, the use the claimant is making of his land, and the purpose with which the defendant acts.

[87] [1873] LR 8 Ch 650.
[88] Bangia, R.K., *Law of Torts,* Allahabad Law Agency(20th Edn.), p.219.

First the locality of the alleged nuisance taking place is of import and should be taken into consideration in deciding whether the act amounts to the commission of the alleged tort. In *St. Helen's Smelting Co. V. Tipping,* [89]the plaintiff bought property in June, 1860and several months later the defendant began extensive smelting works on its property. The plaintiff alleged that the fumes from the defendant's work had caused damage to trees and shrubs in the plaintiff's land. The judge of the trial court decided in the plaintiff's favour. In the Court of the Exchequer Chamber the defendant's appeal was dismissed. On further appeal to the House of Lords, Westbury, J. Affirming the decision of the court below observed:

> "It appears to me that it is very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regards to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefits of the inhabitants of the town and the public at large. If man lives in a street where there are numerous shops and a shop is opened next door to him, which is carried in a fair and reasonable way, he has no ground for complaint

[89] (1865) 11 HL Cas 642.

because to himself individually there may arise such discomfort from the trade carried on in that shop. But when the trade is carried on by one person in the neighbourhood of another and the result of that trade, or occupation, or business is a material injury to property, and then there unquestionably arises a very different consideration. In the case of that description, the submission which is required from persons leaving in society to that amount of discomfort which may be legitimate and the free exercise of the trade of their neighbours, would not apply to circumstances the immediate result if which is sensible injury to the value of the property."

".....the only ground, upon which your Lordships are asked to set aside the verdict, and to direct a new trial, is this, that the whole neighbourhood where this copper smelting works were carried on is a neighbourhood more or less devoted to manufacturing purposes of the similar kind..... My Lords, I apprehend that that is not the meaning of the word 'suitable', or the meaning of the word convenient, which has been used as applicable to the subject. The word 'suitable unquestionably cannot carry with it this consequence, that a trade maybe carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property."

The *St. Helen's Smelting case* set out the important distinction between activities of a neighbour which causes material injury to property (in which case the locality in which the activity is pursued is irrelevant) and which causes sensible personal discomfort (in which the locality is relevant). It was once put, "What would be a nuisance in Belgrave Square would not be so in Barmondsey,"[90]because locality is considered in atleast some cases, it can be seen that, as argued above, some form of public interest is considered, for a landowner must put

[90] *Sturges v Bridgman,* (1879) 11 Ch.D. 852 at 865 as per Thesiger, L.J.

up with inconveniences resulting from those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large. But this argument does not apply when the inconvenience is material damage to the property, for such a result can never rise from a reasonable use of property.

Generally the distinctions proved unhelpful since the common perception was that both interference with the amenity and damage to property causes sensible injury to the value of the property. Some accepted [91]the same to a certain extent, but other authors have been less enthusiastic[92] about the distinction itself.

It has been recently affirmed in *Hunter v Canary Wharf Ltd.*[93] that both material physical damage and loss of amenity amounts to a nuisance, the same factors should be considered. Even where locality is to be taken into account, it is important to recognise that a defendant's use of land may amount to a nuisance even if it is a type of activity suitable for the area. Property damage must not be inflicted wherever the defendant is carrying on his activities. The locality principle does not provide immunity; it must be weighed up against other relevant factor. A good example of this balancing exercise is *Halsey v Esso Petroleum Co. Ltd.* [94]where Veale J said:

> "So far as the present case is concerned, liability for nuisance by harmful deposits could be established by proving damage by the deposits to the property in question provided of course that the injury was not merely trivial. Negligence is not an ingredient of the cause of action and the character of the neighbourhood is not a matter to be taken in to consideration. On the

[91] "Material injury must mean physical damage to property and not mere economic loss": Weir, *Casebook on Torts*, (8th edn.), p. 437.
[92] Fleming, *The law of Torts*, 9th edn.(1998), p. 468; Rogers, W V H, *Winfield & Jolowicz on Tort (17th edn.)*, Sweet & Maxwell (2007), p.651.
[93] [1997] AC 655.
[94] [1961] 1 W.L.R. 683.

other hand, nuisance by smell or noise is something to which no absolute standard can be applied. It is always a question of degree whether the interference with the comfort or convenience is sufficiently serious to constitute a nuisance. The character of the neighbourhood is very relevant and all the relevant circumstance has to b e taken into account. What might be a nuisance in one area is by no means necessarily so in another. In an urban area everybody must put with a certain amount of discomfort and annoyance from the activities of neighbours, and the law must strike a fair and reasonable balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his property for his own lawful enjoyment."

A modern example on that count is provided by *Baxter v Camden London Borough Council (No.2)* [95]where a tenant of the defendant council complained against noise created by her upstairs neighbour. The action failed as noise was part of the ordinary use of premises and occupiers of low cost high density houses housing must be expected to tolerate higher levels of noise from neighbours than others in a more substantial and spacious premises.

The 'character' of the neighbourhood is assessed not only geographically but also temporally. It may be in course of time Belgrave Square declines and Barmondsey goes up in the world. Sometimes this change is incremental [96]and nowadays a major factor in such changes in the nature of the locality will be the planning process. If a claimant is complaining of conduct that has been authorized by a planning consent, one question that arises is that whether the locality of the neighbourhood should be judged by the reference to the locality before or after the relevant planning consent. In *Gillingham Borough Council v*

[95] [1999] 3 WLR 939.

[96] Population increase, Economic growth, Urbanisation and the related activities.

Medway (Chatham) Dock Co. Ltd, [97] The operators of a commercial dock had been granted planning permission for their activity in 1983 and operated, within the permission and as a matter of commercial necessity, on a "round the clock" basis so that that heavy lorries continually passed back and forth and caused serious disturbance to in the adjoining residential district. Acting under the powers granted by the Local Government Act, 1972, the local authorities brought an action on behalf of the residents of the district. The court, holding planning permission to be relevant indirectly, observed that where planning consent is given for a development or change of use, the question of nuisance will thereafter fall to be decided by reference to the neighbourhood with the development or use and not as it was previously. The courts observation was:

> "It has been said no doubt that correctly, that planning permission is not a license to commit nuisance, however a planning authority can, through the development plans and decisions, alter the character of the neighbourhood. They may have the effect of rendering innocent activities which prior to the change would have been actionable nuisance."

But in *Wheeler v J.J. Saunders Ltd.*[98], where a planning permission to expand a pig farm was given to the defendant, it was held that a grant of Planning Permission does not amount to Statutory Authority [99](an act authorized by the Act of Parliament), and therefore does not legalise an activity which amounts to nuisance, even if that is the inevitable consequence of the activity.

But still Planning Permission is not to be equated with Statutory Authority in deciding nuisance cases. The most it can be relevant is to the locality of the neighbourhood when question of change of character of such neighbourhood is the issue.

[97] [1993] Q.B. 343.
[98] [1996] Ch. 19.
[99] An effectual defence in a tort of nuisance. It is one of the two defences available for nuisance.

Keeping in mind the urbanisation and development taking place in the country as a result of economic growth, a lot of vehicles are bound to grow. The increase in the number of automobile in the last two decades is there for everybody to see. The reasons of such increase in the numbers of automobiles on the road are several. Some of these being the increase in the rise of income among the citizens, entry of foreign carmakers into thecountry and as result of that being access of new vehicles at reasonable prices; new found materialism connected with the elevation in status, liberal grant of loans to acquire automobiles by banks after deregularisation of financial norms, the establishment of private banks and Multinational financial institutions and non-optimum use of the automobiles already on the roads.

This has given rise to a large number of changes in the cities and towns especially regarding constructions of roads in the form of expansion and widening of roads, construction of parking lots, etc. These activities are to be done in the light of a plan project and such plan projects have the permission of the planning authority. We have seen that planning permission though not to be equated with Statutory Authority but still it is relevant in questions arising out of the change of character of a locality of a neighbourhood.

The common law has been slow to sanction the appropriation of private rights in the public interest.

Next, in considering what is reasonable, the law does not take into account of abnormal sensitivity in either persons or property. If the only reason why a person complains of fumes is that he has an unusually sensitive nose or he owns an exotic flower, he cannot expect any sympathy from the courts.[100] A person cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or for pleasure. Where the injury to the claimant is caused as a result of his especially sensitive activity, no claim will lie. In this *Heath's* case explains the sensitivity of a person whereas

[100] *Winfield & Jolowicz on Tort*, p. 652.

Robinson's case illustrates the point in regard to sensitive property.

In *Heath v Mayor of Brighton*[101], The vicar and the trustees of the church sought an injunction to stop a noise emanating from the defendant's power station which was alleged to disturb the vicar's deliberations over his sermons, but as no-one else appeared to have been bothered the injunction was refused. Recently the plaintiff's business of providing relay service for sound and television broadcasts was found by the court to be exceptionally sensitive when he sought an injunction to prevent the defendants from operating a new power line they had erected and the same interfered with the relay service.[102]

In *Robinson v. Kilvert,*[103] the plaintiff were the tenant of the premises, let to him by the defendant landlords, which were used as a paper warehouse. The defendant's retained the used of the cellar of the premises, and after the lease commenced they began a manufacturing process that required the air to be hot and dry. To achieve this, the cellar was heated, with the result that the temperature of the floor above was raised to 80F. The heat dried the plaintiff's brown paper stored in the above premises and made it less valuable. The court held that a man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade. It has been suggested that an exception to the general rule arises where the nuisance consists of releasing something which is noxious and offensive to the claimant's property but the judgment of Page Wood VC in *Cooke v Forbes*[104] does not support such exception, and it is suggested that, as far as hypersensitive use of the property by the claimant is concerned, nothing turns on the classification of the nuisance as noxious and offensive. With respect, that does not seem correct: to say that A cannot restrict the freedom of action of his

[101] (1908) 98 L.T. 718.
[102] *Bridlington Relay v. Yorkshire Electricity Board,* [1965] Ch 436.
[103] (1889) 41 Ch D 88.
[104] 91867) LRT 5 Eq 166.

neighbour by putting his property to very sensitive use is part and parcel of the idea of reasonableness. Of course that is not to say that the law's response to what was once regarded as abnormally sensitive activities may not change over time.

Since nuisance is the law of give and take, the court is inevitably concerned to some extent with the utility or general benefit to the community of the defendant's activity. Thus we must all put up with the rattle of early morning milk deliveries, probably with not the same amount of noise made by drunken neighbours.[105] This approach, however, will only justify an injurious activity up to a certain point, and that point is reached when serious damage is being done to the claimant's enjoyment of his property or to his livelihood. In such a case the court will not accept the argument that the claimant should put up with harm because it beneficial to the community as a whole, for that would amount requiring him to carry the burden alone of an activity from which many others benefit. However courts have generally ignored the utilitarian argument that where the defendant's conduct is for the public benefit, it cannot amount to nuisance, the common law being slow to appropriate private rights to public interest

In *Bamford v Turnley*[106], The plaintiff complained that the defendant's use of his land (burning bricks) resulted in smoke and smell which affected the plaintiff in the enjoyment of his land. One of the arguments of the defendant was that the defendant's activity was for public benefit. Bramwell B. observed: It is said that, temporary or permanent, it is lawful because it is for public benefit. Now in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on the individual without compensation. But further with great respect, I think this consideration misapplied in this case and many others. The public consists of all individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by

[105] *Winfield & Jolowicz on Tort*, p. 651.
[106] (1862) 3 B & S 66; 122 Er 27.

one individual, he on the whole would be a gainer. But whenever this is the case – when a thing is for public benefit, properly understood – the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain..... A money value indeed cannot be put on the plaintiff's loss but it is equal to some number of pounds or pence, 10 pounds or 50 pounds, or what not: unless the defendant's profits are enough to compensate this, I deny it is for public benefit he should do what he has done; if they are he ought to compensate.

Although the authorities suggest that public benefit is not an absolute defence, it seems that it may be a consideration taking into account in determining the reasonableness of the defendant's user of land.

Likewise, some consideration will be given to the fact that the offensive enterprise is essential and unavoidable in the particular locality, like a coal mine, quarry, or some public utility or service such as early morning milk delivery. The argument however must not be pushed too far. In particular, it should be remembered that we are here concerned with reciprocal rights and duties of private individuals, and a defendant cannot simply justify his infliction of great harm upon the plaintiff by urging that a greater benefit to the public at large has accrued from his conduct.[107].

If private rights are to be extinguished in favour of the general public this has been thought to be a matter for Parliament.[108] Much of the development of the railways took place through private acts of parliament allowing for compulsory land acquisition with the respective payment of compensation to those affected[109]

Statutory Nuisance

In addition to the common law liabilities arising out of various activities which give rise to environmental pollution, Britain also has a legislation, to act against nuisances, in the

[107] Fleming, *The Law of Torts*, p.471.
[108] *Shelfer v City of London Electric Lighting Company*, [1895] 1 Ch 287 at 316.
[109] Kostal, *Law and English Railway Capitalism 1825-1875*, (OUP, 1994) Ch.4.

form of statutory nuisance. This provision is part of the four part statutory regulation for the control of noxious into the air. The other three parts of the four separate (but interconnected) regimes are

- Integrated Pollution Control (IPC) which, broadly, regulates emissions from 'more polluting' processes.
- Local Authority Air Pollution Control(LAAPC) which, in general terms, deals with 'less polluting' processes; and
- The Clean Air Act of 1993 imposes strict criminal law liability in respect of unlawful discharges of dust, smoke and fumes.

The IPC, LAAPC and Statutory nuisance are all contained in the part I (IPC & LAAPC) and Part III (Statutory nuisance) of the Environment Act, 1990 respectively. There are two principal problems associated with the regulatory regime. First, there are gaps in the legislation itself which means there that certain forms of pollution and certain polluters are not caught. In addition there is the problem that the regulatory system does not ensure effective enforcement of its aim and objectives.

As regards the lacunae within the legislation, the most obvious example is to be found by reference to part I of the 1990 Act, where attempts made to control pollution operate only in respect of those who are engaged in one of the listed prescribed processes. Where noxious emissions into the atmosphere are generated otherwise than by such processes, the 1990 Act is of no moment, its provisions simply do not apply. The Clean Air Act of 1993 scarcely goes any further. Buses left idling at a terminus, or Lorries left running at a port or haulage yard are examples of sources of atmospheric pollution that lie outside the statutory prescribed list for the purposes of IPC and LAAPC. By contrast, it has long since been established

that such cases would be grounds for actions in the tort of private nuisance.[110]

In India, *J.C. Galstaun v Dhunia Lal Seal* [111]was said to be the earliest reported pollution case in India which has shown that common law regulatory system could check polluters in a pre-industrialised society. The facts were that the plaintiff, an owner of the garden house alleged that the defendant's shellac factory discharged refuse-liquid into the municipal drain. As a result of such discharges he alleged that the foul smelling liquid was noxious to the health of the neighbourhood and specifically to him and further it damaged him in health, comfort and market value of his garden property. The Subordinate judge decreed the suit, granted a perpetual injunction and awarded the plaintiff a thousand rupees in damages (a large amount in those days). The appeal of the defendant was dismissed by the higher court and the decree of the Subordinate judge was affirmed.

A number of cases in nuisance followed and some of the successful ones have been have been mentioned here. In *Ram Baj Singh v Babulal*, [112]the defendant created a brick grinding machine adjoining the premises of the plaintiff, a medical practitioner. The said machine generated dust other than polluting the atmosphere entered the consulting chamber of the plaintiff/doctor causing physical inconvenience to him and his patients. Such nuisance was evident by the red coating on their clothes caused by the dust. It was held that the special damages to the plaintiff had been proved and a permanent injunction was issued against the defendant restraining him from running his brick grinding machine.

In *B. Venkatappa v B. Lovis*,[113] the plaintiff was inconvenienced by the smoke and fumes of the defendant's factory due to the ill maintained chimney which was full of holes.

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[110] Murphy, John, *Noxious Emissions and Common Law Liability: Tort in the Shadow of Regulation*, p. 54-55 *in* Lowry, John & Edmunds, Rod (ed.), *Environment Protection and the Common Law.*
[111] (1905) CWN 612.
[112] AIR 1982 All 285.
[113] AIR 1986 AP 239.

The plaintiff, allowing an action for the tort of nuisance, vide its order authorized the plaintiff to seal the holes at the defendant's cost, if the defendant failed to do so. A volley of defences in the form of 'plaintiff coming to nuisance,' existence of 'other sources of discomfort,' were of no effect. Even the fact that nuisance existed long before the plaintiff moved in was countered by the court stating that he had not obtained the defence of committing nuisance by prescription.

In *Radhey Shyam v Gur Prasad*[114], the plaintiff was successful in getting an injunction against the defendants restraining them from installing and running a flour mill in their premises on the ground that the running of the mill would have adverse impacts on the health of the plaintiffs.

All these Indian cases of nuisance shows that the court is sympathetic to the discomfort of the plaintiff and more so if such activities created adverse impacts on the health of the plaintiff and others residing with him. When we turn our attention to whether the adverse impact of the unsustainable use of vehicles on the health could be brought under the glare of the courts in the tort of nuisance? The answer would be a disheartening 'no'. The reasons are very clear. The automobiles are a mobile source of pollution and as such it is difficult to bring an action against any one defendant. Further the adverse impacts on health of the plaintiff due to the running of automobiles (even if such vehicles are used unsustainably) are hard to prove. It might be only an apprehension. In *Kuldip Singh v Subash Chandra Jain*,[115] where the Trial court restrained the defendants from causing nuisance but the Supreme Court drew a distinction between an existing nuisance and a future nuisance. It observed:

> "In case of a future nuisance, a mere possibility of injury will not provide the plaintiff with a cause of action unless the threat be so certain and imminent that an injury actionable in law will arise unless prevented by an injunction."

[114] AIR 1978 All. 86.
[115] 2000(2) SCALE 582.

In a remarkable conclusion, the apex court in the above case found that the plaintiff's apprehension about a smoking oven next door causing a nuisance was not justified by the pleadings or the evidence and dismissed the suit.

Most of the cases dealt above have a static source of pollution in the form of a grinding Machine, Flour mill, defective chimney, etc. Again the nuisance has to be continuous and as such there is difficulty in proving the nuisance of a single vehicle. Chances are there for prosecution if the neighbour is dealing in cars or has an automobile workshop or is a transport depot (terminal). A single instance of interference can be nuisance if it can be shown that it has led to physical discomfort and adverse impact to health but it seems to be a tough call.

Negligence

Negligence may mean a mental element in tortious liability (or, indeed, any other form of liability) or it may mean an independent tort.[116] Here we are concerned with negligence in the latter sense which is of a recent find.[117] *Negligence as a tort is a breach of legal duty to take care which results in damage to the claimant.*[118]

In English law, the name Negligence is given to a specific kind of tort, the tort of failing in particular circumstances to exercise the care which should have been shown in these circumstances, the care of the reasonable man and of thereby causing harm to another person or property. It implies the existence of a legal duty to take care, owed to the complainant, which duty exists, in general, where there is such proximity between two persons that a want of care on the part of one is likely to affect the other injuriously, a failure to exercise the standard of care deemed right in the circumstances, which is normally defined as reasonable care, but which may be higher in particular circumstances. Negligence takes innumerable forms, but the commonest forms are negligence causing personal

[116] *Winfield & Jolowicz on Tort*, p. 132.
[117] *Donoghue v. Stevenson*, 1932 AC 562.
[118] R.F.V.Heuston and R.A.Buckley, *Salmond and Heuston on the Law of Torts*, 20th edn, 1998, p.1.

injuries or death, of which species are employers' liability to an employee, liability of occupiers of land to visitors thereon, the liability of suppliers to consumers, of persons handling vehicles to other road users, and so on. The categories of negligence are not closed and new varieties may be recognised.

The development of negligence as a separate tort is of relatively recent event and to a modern audience it is inconceivable that the law of tort could exist without the fault based law of negligence. In the medieval or early modern era to talk about the law of negligence would, if possible, be short and puzzling.

Without doubt, the tort that has dominated all others in the twentieth century is negligence; according to one writer it has attained a 'majestic pre-eminence.'[119] However, as we have seen negligence as an independent action is a relatively modern phenomenon, and the main period of its growth has been in the last eight decades approximately.

This is not because the notions of fault were unimportant, but rather that its role was obscured by the writ system which dominated the early common law. The formulaic language used on the writs was that it was not necessary to plead the state or mind or the culpability of the defendant. Intentional infliction of harm by the defendant took over the writ. But as the writ of trespass was stretched to include the cases of accidental injury – a trend that led, as mentioned earlier, led to the development of the trespass on the case – the defendant's fault could not be taken for granted. The taking of all reasonable care the defendant to avoid the injury of which the plaintiff complained was regarded as a defence.

Liability for negligently inflicted injuries was first recognised by stretching the scope of trespass, but it found a more natural home in the action on the case. As noted earlier in this chapter, the earliest examples of actions on the case involved parties in a pre-existing relationship with each other, e.g. the relationship between a vendor and a buyer. Most of these cases shall be

[119] M. Milner, *Negligence in Modern Law*, Butterworths, 1967, p.237.

finding place in the present day under the law of Contract and not Tort. Torts concern itself primarily with parties who are stranger to one another. Liability here was slower to develop than in the case of pre-existing relationships.

Two of the earlier examples of liability imposed in the absence of pre-existing relationships were for harm caused by the escape of fire or by dangerous animals (the *scienter* action). The liability was premised on the allegation that it was the custom of the realm that a particular activity should be pursued so as not to cause harm. Customs of this nature were also held to apply to innkeepers and common carriers but never developed much further as the common custom of this realm is common law and need not be pleaded[120] Liability under these customs were stricter than the modern concept of negligence, although it was difficult to ascertain whether it was absolutely strict. Actions for pure negligence were rare this was probably because the existing law covered most situations. Forcible wrongs could be remedied in trespass but if the wrong was unforcible it was probably because there had been careless performance of an undertaking, remediable by *assumpit* (which laid the foundations of modern law of contract) or that the harm had been caused indirectly. This would normally involve the escape of something dangerous, like fire or an animal, and this was covered by existing case actions. The emergence of a distant fault based tort of negligence was not prohibited by any doctrinal concerns, but the satisfactory nature of the existing remedies made any such development unlikely.

As much with the development of the common law, the impetus of change came with the lawyers to modify the legal rules for the benefit of their clients. From the latter half of the seventeenth century, writs began to appear from which a development of the tort of negligence can be traced. However a tort of negligence did not sit easily with the forms of action in which it need to be pleaded. The beginning of the problem can be traced to Mitchell and Allestree (1676). The plaintiff had been

[120] *Beaulieu v Fingham,* (1401) B & M 557 &558.

injured in little Lincoln's Inn Fields when one of the horses the defendant were trying to break in escaped and kicked her. Prima Facie it was a forcible wrong, remedial in trespass *vi et armis*. However, it was defence to trespass to show that the contact had been against the defendant's will, and if the jury was convinced that the contact was a result of the independent act of the horse, it might find for the defendant. This encouraged the plaintiff to plead the action in case, by alleging that the defendant's was to break in the horses improvidently, rashly and without due consideration of the unsuitability of the place for the purpose'. She was successful. Another reason why the plaintiff might want to choose case instead of trespass *vi et armis* was the development of vicarious liability. It was during the course of the eighteenth century that case became the appropriate form of action on which to sue an employer vicariously for tort committed by his employee. Again case was the correct action even where the employees act had been forcible vis-a-vis the plaintiff.

With the awareness in the society, and the people in general gathering consciousness about their rights, actions for damages are on the increase.

From around the beginning of the twentieth century a number of factors combined to alter the nature and structure of negligence liability. First of all, there were a number of economic changes which altered the basis on which negligence liability operated. The increasingly corporate nature of industrial enterprise by the early twentieth century meant that actions were brought against companies rather than individuals. The maxim, "It is no sin to rob an apparently rich man" was the rule of the day. Large corporate defendants were undoubtedly better able to spread losses across their business and so to pass them on to the customers or shareholders than the individual entrepreneurs and small partnerships. Added to this there was increasing availability of liability insurance. Where in the late nineteenth century it became possible to insure business losses, well into the twentieth century there were doubts whether insurance for liabilities arising out of wrongdoings was possible.

As the century progressed it became compulsory to take liability insurance in respect of certain activities, such as driving a motor vehicle. Such developments also had severe effects in the areas of liability and brought drastic change to the meanings of tortious liability.[121]

Secondly, there was an intellectual shift. The acute individualism which had characterised Victorian England began to give way to a more communitarian approach: no longer was it obvious that an individual who caused harm to another while pursuing his own economic self interest should be liable only if it could be shown that he had not taken reasonable care. Alongside this the commentators began to stress that negligence liability did not depend on the a moral principle but on a social one, It was not based on something internal to the defendant but on a failure to live up to the external standard, and that external standard was something which could be determined by public policy.

Thirdly this time affecting more the structure of liability than its incidence, the jury disappeared from the trial of negligence actions. Such practice was probably done step by step and the judicature Acts played important role. In so far as the classic structure of the tort of negligence have been largely generated by the separation between the judge and jury, the reintegration of the trial process brought about a reintegration of the elements of the tort of negligence.

According to a highly controversial but influential thesis[122](concentrated in America but he believed that it would be equally applicable in England) of Morton J. Horitz, tort law was transformed in the nineteenth century in order to provide a subsidy to the industrial concerns that sprung up in the aftermath of the Industrial Revolution. He claimed that the courts of the time abandoned the erstwhile general principle of strict liability as expressed by the Latin maxim sic utere tuo ut alienum non laedas (use your property only in such a way that

[121] *Supra* Note 119.

[122] Horitz, Morton J, *The Transformation of American Law 1780-1860,* Oxford University Press, New York(1977).

you do not harm anyone else's) and adopted instead the fault based liability of negligence.

At the beginning of the nineteenth century there was a general private law presumption in favour of compensation. For Blackstone, it was clear that even an otherwise lawful use of one's property that caused injury to the land of another would establish liability in nuisance, ' for it is incumbent on him to find some other place to do that act where it will be more offensive.' In 1800, therefore virtually all injuries were still conceived of as nuisances, thereby invoking a standard of strict liability, which tended to ignore the specific character of the defendant's acts. By the time of the Civil War (1861-1865), however many types of injuries had been reclassified under a negligence heading which had the effect of reducing entrepreneurial liability. After 1840 the principle that one could not be held liable for socially

Lord Atkin's speech made it clear that what we may call the "neighbour principle" was a vital step on the road to this general conclusion of law, not merely a test for determining whether the claimant was a foreseeable victim of the defendant's negligence.[123]

The standard of reasonability that useful activity exercised with due care became a common place of American law.[124]

Before we move on with the development of the law of negligence let's look at the ingredients that has been laid down to generalise the application of the same. The said ingredients are

(1) There must be a legal duty on the part of the defendant towards the plaintiff to exercise care in such conduct of the defendant as falls within the scope of the duty.
(2) There must be breach of that duty, i.e. a failure to come up to the standard required by law; and
(3) Consequential damage to the plaintiff which can be attributed to the defendant's conduct.

[123] *Ibid.*
[124] *Ibid.*

The concept of foreseeability plays an important part in all of these elements they cannot always be kept apart, and it has been said that, "they are simply three different ways of looking at the same problem. The primary question as to liability in a negligence case is whether a legal duty was owed by the defendant towards the plaintiff. Only after this question is answered should the process of making such defendant liable move forward. But it is not so simple because sometimes after the existence of the alleged breach will the question of whether a legal duty was owed by the defendant arises. Similarly there are times when only after the consequential damage has occurred to the plaintiff does the question of duty owed and such duty arises can be decided.

Although a tort of negligence is of very general application, it frequently occurs in a number of standard situations: accidents on roads or at work place, medical misadventure, defective premises professional advice and so on. In some of these case, although liability is based upon negligence it is put into statutory form or there are important additional statutory provisions which ret on some other basis; in others, although there has been little statutory intervention, there are enough special features in the way the law is applied to justify a separate treatment[125].

It is not that for every careless act that a person may be held responsible in tort law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care. There might be objections that duty is not confined to the law of negligence and that it is element of every tort, e.g. duty not to commit nuisance or duty not to defame, etc. But all that duty signifies in those torts is the comparatively simple propositions that you must not commit them whereas in tort of negligence, 'duty' is the core ingredient of the tort. A general liability for carelessly causing harm to others would, atleast as things perceived by the courts, be too onerous for a practical system of law and there are areas of

[125] *Winfield & Jolowicz on Tort*, p.133.

activity and types of loss where the law of negligence does not intervene or intervenes in a limited way, e.g. there is no general liability for failing to assist or protect others and in the cases of economic loss as a result of negligence, the liability does exist but is considerably more restricted than that in respect of physical damage.

Duty is the primary control device which allows the courts to keep liability for negligence within what they regard as acceptable limits and the controversies which have centred on the criteria for the existence of a duty reflect difference of opinions as to the proper ambit of liability for negligence.[126]

The first attempt to formulate a general principle was made by Brett M.R. in *Heaven v. Pender*[127] where it was stated actionable negligence consists in the neglect of the use of ordinary care or skill towards a person whom the defendant owes a the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to person or property. But by far the most important generalisation is that of Lord Atkin in *Donoghue v Stevenson.*[128]

In *Donoghue's* case, a manufacturer sold ginger beer in an opaque bottle to a retailer. He resold it to A, who treated a young woman of her acquaintance with its contents. It was alleged that this contained a decomposed body of as snail which had found its way into the bottle at the factory. The young woman alleged that she became seriously ill in consequence and sued the manger for negligence. By a majority of the House of Lords held that the manufacturer owed her a duty to take care that the bottle did not contain noxious matter and that he would be liable in tort if that duty was broken. Lord Atkin said[129]:

> "In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are instances. The liability of negligence, whether you style

[126] *Ibid* at p.134.
[127] (1883) 11Q.B.D. 503.
[128] (1932) A.C. 562.
[129] *Ibid* at p. 580.

it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure, cannot in the practical world, would be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love thy neighbour becomes, in law, you must not injure your neighbour and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be to likely to injure your neighbour. Who, then in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that is 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."[130]

Lord Atkin's speech made it clear that what we may call the "neighbour principle" was a vital step on the road to this general conclusion of law, not merely a test for determining whether the claimant was a foreseeable victim of the defendant's negligence.[131]Nevertheless for a long time there was a marked judicial reluctance to accept that the "neighbour principle" had much relevance to determining whether a duty of care might exist in other areas of activity, though it might determine the spatial and temporal limits of such duties as were held to exist. Still less did it have any impact where, before 1932, duties had been specifically rejected. Certainly new duty situations continued to be recognised, for as lord Macmillan has said in Donoghue v Stevenson, the categories of negligence are never closed.[132]

[130] *Supra* note 126 at p. 139-140.
[131] *Ibid.*
[132] (1932) A.C. 562 at 619.

There are cases where earlier liability in negligence would not have arisen but the court has granted so.

In India, the courts have made a huge effort taking cue from the decisions of the English cases and have tried to extend the applicability within the bounds of the general principles laid down earlier. They have also attempted to define the various degrees of negligence and when can serious results (gross) of such negligence give a total new meaning to the liability sometimes taking it out of the confines of civil action[133]

In *Dharnidhar Panda* v *State of Orissa,* [134] where two children died due to serious injuries as a result of a collapse of a pillar and boundary wall of a school, the court underlining the fact that where the victims belong to a vulnerable groups like children a high degree of care was required on the part of the authorities responsible observed as follows:

> "The claim of compensation cannot be resisted on the ground that the collapse of the pillar and the boundary wall was due to the pressure created by the children's swinging on the gate because children are prone to play in this manner and it is the duty of the school authorities to ensure that the pillars of the gate and the walls are strong enough to withstand such pressure."

In *Jacob Mathews* v. *State of Punjab*[135], a case of medical negligence, the Apex court attempted to explain the jurisprudential concept of negligence both in the domain of tort and crime. It observed[136]:

The term negligence is used for fastening the defendant with the liability under civil law and, at times, under criminal law.... Generally speaking, it is the amount of damages incurred which is determinative of the extent of the liability in tort, but in criminal law it is not the amount of damages, but the amount

[133] *Jacob Mathews* v. *State of Punjab,* (2005) 6 SCC 1.
[134] AIR 2005 Ori.32.
[135] (2005) 6 SCC 1; Also see *State of Haryana* V. *Raj Rani,* 2005 (7) SCALE 1.
[136] *Ibid* at 16.

ands degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence should be higher than that of the negligence enough to fasten liability the damage in civil law.

Thus the Supreme Court made a distinction between negligence and gross negligence to hold a professional liable criminally:[137]

In our opinion, the factor of grossness or degree assumes significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To the latter, the negligence has to be gross or of a very high degree.

The apex court seems to have delegislated the word negligence in section 304-A, IPC. This reveals a shift from the social dangerousness of harmful consequences involved in such cases to mainly focus on the status of the profession.[138]

Difficulties which the litigants face in pursuing a civil case in India due to its slow motion and high cost have been diluted, to some extent by the procedure introduced in the Consumer(Protection)Act, 1986. In this respect, both consumer Redressal fora at the different levels and the courts, especially the Supreme Court have been very liberal and supportive towards the consumer. The days and times of Caveat emptor (buyer beware) have gone and the emergence of Caveat Vivendi (seller beware) seems to be the norm in the present day world.

The duty relationship which has been emphasised by Lord Atkin in Donoghue v Stevenson in the various actions of negligence gives a very positive scope to bring the drivers and owners of automobiles. Already the no fault liability has been penalising the drivers and their owners in favour of the plaintiff, the accident victims or their representatives. This rule is an extension of the rule of negligence, a fault liability.

There are statutory provisions under the Motor Vehicles Act, 1988 in the field of sustainable automobile use. They include

[137] *Ibid* at 18.

[138] See, *Suresh Gupta (Dr.) v Govt. of NCT of Delhi,* (2004) 6 SCC 422, See also, *Bharat Sanchar Nigam Ltd. V B.S. Bhargava,* AIR 2005 J & K 11.

provisions regarding construction and maintenance of vehicles[139] limits of speed,[140] limits of weight and limitation on use, [141]etc. The failure to adhere to the rules made under these objectives certainly gives rise to actions under the said Act but it may also make the drivers liable under negligence on the failure to perform their legal duty to use their vehicles according to the statute. But here also the shadow of damage eclipses the opportunity to bring under the automobile user under the grip of negligence. Damage in negligence is a very important ingredient to complete the tort and sometimes the reasonable foreseeability of the damage arising out of unsustainable automobile use may appear to be a remote possibility. Thus negligence, an important tort in present day civil liability and expanding vibrantly does not seem to fulfil the demands of bringing the culprits under the common law liability through the tort of negligence.

Negligence of various electricity services resulting in electrocution have been taken seriously by the courts in awarding compensation to the victims or their dependants.[142] The Liability in such cases is based on the Supreme Court's observation in *M.P. Electricity Board v. Shail Kumar:*[143]

Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life is liable under the law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known in law, strict liability.

[139] Sec.109, Motor Vehicles Act, 1988(Act 59 of 1988)
[140] Sec.112, *Id.*
[141] Sec.113, *Id.*
[142] *AVVNL v Smt. Sarhi*, AIR 2005 Raj.248; See also *Ramesh Singh Pawar v M.P. Electricity Board*, AIR 2005 M.P.2.
[143] (2002) 2 SCC 162

Strict Liability

The Rule of Strict Liability[144] had its origins in nuisance but for most of the twentieth century was probably regarded by the majority of lawyers as having developed into a distinct principle.[145] Now it seems to have returned to what are regarded as its roots: it is a "subspecies of nuisance".[146] But on balance it still merits some separate treatment. Liability under the rule is strict in the sense that it relieves the claimant of the burden of showing fault; however it is far from absolute since there are a number of wide-ranging defences.

The concept of Strict Liability has come in vogue in the modern law of torts to mean liability without fault, i.e. without intention and negligence. Liability of this kind is that a person engaged in an ultra hazardous work of activity from which injury to others is likely to result notwithstanding his reasonable care, should pay for such injury.[147] The principle has been thus formulated in the American Restatement.[148] In England, there were no such formulations found wherein cases which recognised strict liability, but will, however, on examination, be found to rest ultimately on some such principle of policy. For instance, the rule as to cattle trespass[149], one of the oldest cases of strict liability, is capable of this explanation. A person who keeps cattle may not be able, with reasonable care, to prevent their straying and occasionally doing damage to his neighbour's crops, but it is just and conducive to the interest of agriculture that he should pay for the damage.[150] The rule of strict liability under Rylands v. Fletcher for harm due to the

[144] 'Absolute Liability' was the term widely used. *Dr. Winfield* used the term 'Strict Liability' because it was subject to certain qualifications which took away great deal of its absolute character.

[145] *Winfield & Jolowicz* on Tort, p. 693.

[146] *Transco Plc v Stockport* MBC [2003] UKHL 61, [2004] 2 A.C. 1 at 9. *per* Lord Bingham; Weir, *Casebook on Tort* (10th Edn), p.463 seen in *Winfield on Tort*, p. 693.

[147] Lakshminath, A, *Ramaswamy Iyer's Law of Torts* (9th edn), Butterworths, (2003), p. 699.

[148] *Restatement Vol III, Chap. 21*; Harper and James Vol II, p. 788.

[149] Presently there is a *Cattle Trespass Act, 1871(1977).*

[150] This seems to be the old rule procedure that the remedy for such damage was an action for trespass in which the plaintiff only had to prove the trespass and not any breach of duty on the part of the defendant.

escape of dangerous things brought by a person on his land is a modern extension of the old rule as to cattle trespass.

The common law originally had one or two instances of strict liability but more have been added in recent times. The responsibility for hazard or danger inherent in certain activities is capable of elastic interpretation and will justify other rules of strict liability under common law or statute.[151] This gives a positive signal that in addition to the compensation granted in automobile accidents, a day might come where the government asks the vehicle owners to pay for the pollution from their vehicles regardless of their fault. But it is a very tall order since a lot of procedural administrative impediments will crop up giving the size of our country in regard to population.

Strict Liability had one of its categories of liability in the case of *Rylands v. Fletcher.*[152] In this case the defendants, owners of a mill, constructed by arrangements with the owner of certain land, a reservoir on it for their mill. The plaintiff had a colliery in the locality and there were two owners of land between the reservoir and plaintiff's colliery. The soil under the reservoir had been, at some former time beyond living memory, worked for coal and the old workings communicated with those under the immediate lands. The defendants employed independent contractors and engineers, who were apparently competent, for constructing the reservoir. When the persons employed for the work were excavating for the bed of the reservoir, they found some old shafts filled up with soil and in the three of them, the timber sides remained. The reservoir had no embankment and the water level did not exceed the natural surface level of the land. Soon after water was brought into it, one of the shafts burst and water escaped through the

[151] The frequency of motor accident's accounts for legislation in Saskatchewan (Canada) providing for payment of a fixed and limited amount of compensation to the injured party regardless of any negligence: *(1952) 66 Har LR 191* seen in *Ramaswamy Iyer's Law of Torts,* p.700; See 'No Fault liability' in Motor Vehicles Act, 1988(Act 59 of 1988).

[152] (1866) L.R. 1 EX 265, (1868) 3 LR HL 330.

underground workings to those under the immediate lands and finally to the plaintiff's mines and flooded them.[153]

On these facts, the court of the exchequer held against the plaintiff. But the exchequer chamber held that the plaintiff was entitled to recover. Blackburn delivering the judgement on behalf of the court made the following well known statement of the rule.[154]

We think that the true rule of law is, that the person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

This may be regarded as the "rule in Rylands v. Fletcher," but what follows is equally important to comprehend the said liability:

> "He can excuse himself by showing that the escape was due to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noise some vapours of his neighbour's alkali works, is damnified without any fault of his own and it seem but reasonable and just that the neighbour, who has brought something in his property which was not naturally there, harmless to others so long as it is confined to his own property but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which

[153] *Ramaswamy Iyer's Law on Torts*, p. 702.
[154] (1866) LR 1 EX 279-80.

ensues if he does not succeed in confining it in his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches."

In appeal, the House of Lords approved of Blackburn J's statement of law. Lord Cairns, however rested the liability on the ground that the defendants' user of the land was 'non-natural'.[155] Though Blackburn J did not use this expression in his statement of the law, he had clearly intended the rule to only apply only to things collected by defendant as opposed to things natural on the land and it may be that Lord Cairns meant nothing more than non-natural use. However, the subsequent case law has given rather a different interpretation to it and it has been regarded as additional to the requirements set out be Blackburn J, in other words, the rule in Rylands v Fletcher must be sought in the judgements of both the Exchequer Chamber and the House of Lords.

English courts displayed an ambivalent attitude towards the rule but in the United States it, after an initial hostile reception, made a contribution towards the creation of liability for damage caused by ultra hazardous or abnormally dangerous activities which present an unavoidable risk even when due care is taken[156], this being justified on the basis that the persons carrying them on should bear all the risk associated with them and not merely those arising from negligence. According to Professor Newark, [157]all that Rylands v Fletcher did was to apply a general rule of strict liability in nuisance to situations where there was a claim for damages for an isolated rather than the more usual ongoing state of affairs. In *Cambridge Water Co. V*

[155] (1868) L.R. 3 HL 339.
[156] See *Restatement 3d.*
[157] *"The Boundaries of Nuisance"* (1949) 65 L.Q.R. 480.

Eastern Counties Leather Plc[158]the House of Lords firmly accepted Professor Newark's view of the origin of the rule. However, it is also accepted that in a number of respects the law had moved since 1868.

The rule in Rylands v Fletcher has comparatively rarely been the basis of successful in the English Courts since 1900 and it has been said that it "has hardly been taken seriously by the English court's and that "it is hard to escape the conclusion that the intellectual effort devoted t the rule by judges and writers over many years have brought forth a mouse" This has been largely because the rule is qualified by a number of exceptions which considerably reduce the scope of its operation. They are in the form of Act of God (Vis Major),[159] Act of the Stranger (third party),[160] Plaintiff's Consent (Common Benefit)[161] Plaintiff's own fault,[162] , Statutory Authority.[163] A further qualification of the rule has been suggested by the House of Lords in *Read v Lyons & Co. Ltd.* [164]that the rule only applies to damage to land or property in it and not to liability for personal injuries for which proof of negligence is necessary. To top it all up is the very respective attitude taken by many twentieth century cases to the concept of non-natural use. The tendency was to say that common large scale activities, especially services such as supply of gas or water, do not constitute a non-natural use of land even though their potential for causing damage is very great.

The deliberations made by their Lordships in the case of *Rylands v Fletcher* after passing through the Courts of Exchequer Chamber and The House of Lords resulted in the laying down of some propositions to determine the existence of the respective tort.

1. Dangerous thing

[158] [1994] 2 A.C. 264.
[159] *Nichols v Marshland,* (1875) L.R.10 Ex 255.
[160] *Box v Jubb,* (1879) LR 4 EX D 76.
[161] *Carstairs v Taylor,* (1871) L.R. 6 Ex. 217.
[162] *Ponting v. Noakes,* [1894] 2 Q.B.281.
[163] *Green v Chelsea Waterworks Co.*, (1894) 70 L.T. 547.
[164] [1947] AC 156.

Almost anything can be a dangerous thing which has escaped for the purpose of the rule in Rylands v Fletcher. Such a thing gets the title of dangerous due to its potential to create mischief on its likely escape. The rule has been applied to a remarkable variety of things: fire,[165]gas,[166] explosions,[167]electricity,[168]oil,[169]noxious fumes,[170]Colliery spoil,[171]Rusty wire from a decayed fence,[172]vibrations,[173]poisonous vegetations,[174]a flag pole,[175]a chair-o-plane in a fair ground. [176] The limit of its extension was perhaps exceeded when it was applied to human beings in *A G v Corke*[177] as noxious persons. However, there seems little point in seeking to identify the precise characteristics of a Rylands v Fletcher object. What matters is the scale of the risk presented by the defendant's activity: a box of matches or a glass of water does not fall within the rule, a million boxes of matches in a store or a reservoir may do so. The requirement that the thing must be likely to do mischief if it escapes cannot therefore be viewed in isolation from the further requirement of non-natural user, which encapsulates the element of exceptional risk which underlies the rule.[178]

2. Escape

For the rule in Rylands v Fletcher to apply, it is also essential that the thing causing damage must escape to the area outside the occupation and control of the defendant.[179]It applies only if the defendant brings or accumulates on his land that is likely to escape and do mischief. It does not apply to the escape

[165] *Jones v Festiniog Ry* (1866) L.R. 1 Ex 265, It is inapplicable to accidental fires vide *The Fire Prevention(Metropolis) Act, 1774* but there is no such rule in India.
[166] *Batchellor v Turnbridge Wells Gas Co.* (1901) 84 L.T.765.
[167] *Miles v Forest Rock Co.*(1918) 34 T.L.R. 500
[168] National Telephone Co. v Baker [1893] 2 Ch.186.
[169] *Smith v G.W.Ry.* (1926) 135 L.T.112.
[170] *West v Bristol Tramways Co.* [1908] 2 K.B.14.
[171] *Att-Gen v Cory Bros. Ltd.* [1921] 1 A.C.521.
[172] *Firth v Bowling Iron Co.* (1878) 3 C.P.D. 254.
[173] *Hoare & Co. v McAlpine*, [1923] 1 Ch. 167.
[174] *Crowhurst v Amersham Burial Board,* (1878) 4 Ex. D.5.
[175] *Shiffman v Order of St.John,* [1936] 1 All E.R. 557(obiter).
[176] *Hale v Jennings Bros* [1938] 1 All E.R. 579.
[177] (1933) Ch. 89; 49 LQR 158.
[178] *Winfield & Jolowicz on Tort,* p. 701.
[179] Bangia, R.K., *Law of Torts,* Allahabad Law Agency, 20th edn. (2007) P.388.

of things naturally on the land, e.g. rainwater flowing from an upper to lower land, rocks slipping from an upper to a lower land owing to action of the weather, weeds, vermin or wild animals naturally on land. Where a third party has brought or accumulated a dangerous thing on the defendant's land without his knowledge or leave, the defendant would not be liable unless he negligently allows it to continue, then he will be liable in negligence. Both of them will be liable if the third party has brought or accumulated the dangerous thing with the permission of the defendant. This requirement of escape was firmly set in the law by the House of lords' decision in Read v Lyons & Co. Ltd.[180] Here the plaintiff, an inspector of munitions, had been injured when a high explosive shell exploded whilst being manufactured at the defendant's factory. Negligence was not alleged here. The court rejected her claim in the pretext that there was no escape. In Ponting v. Noakes[181] the plaintiff's horse intruded over the defendant's boundary and dies after nibbling the leaves of a poisonous tree growing on his land. The court here, too, held that there was no escape. Thus, here the defendant was not liable. Liability arises when a yew (poisonous) tree overhung the plaintiff's land and his cattle died after eating the leaves from the overhanging branch.[182] The rule is probably inapplicable to a deliberate release of thing, since it can be brought under trespass. Indeed there are statements to the effect that anyone who collects the dangerous thing and has the control of it at the time of the escape would be liable even if it is being taken on the highway and it escapes there from.[183]

3. Non-Natural use of Land

Although, it is far from clear what uses will constitute non-natural uses, it is clear that Blackburn J's original pronouncements of things 'not naturally' on the land has not been followed. Lord Uthwatt stated that natural does not mean primitive in Read v Lyons case. Some of the uncertainty can be

[180] [1947] A.C. 156.
[181] [1894] 2 Q.B. 281.
[182] *Crowhurst v Amersham Burial Board,* (1878) L.R. 4 Ex.5.
[183] *Powell v Fall,* (1880) 5 Q.B.D. 597.

attributed to the judgement of Lord Moulton in Rickards v Lothian[184] where he defined non-natural use as follows:

"It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is for the general benefit of the community."

The formulation equates on-natural with non-ordinary use and it significantly limits the range of uses that may attract liability. For example it may be an ordinary use of land to build a road but can it be called natural? It is said that non- ordinary use must bring an increased danger to others. Whether the use would bring an increased danger to others would depend, amongst other things, on the foreseeable consequences of the use and likelihood of escape, factors that would be normally considered in a negligence action. Along these lines, Williams[185]argued that the non-natural use test is akin to unreasonable risk of harm in negligence. Lord Goff's suggestion was that the concept of non-natural use is related to reasonable user in nuisance rather than to unreasonable risk of harm in negligence.

The confusion over the meaning of 'non-natural use' was one of the reasons that led a majority of the Australian High Court in Burnie Port Authority v Gen. Jones Pty Ltd.[186] to declare that Rylands v Fletcher had been subsumed within the general law of negligence. They felt that the use of the terms such as 'special' or 'not ordinary' use 'goes a long way to deprive the requirement of non natural use of objective content'. However, McHugh J doubted whether Rylands could satisfactorily be incorporated into the law of negligence:

In determining the issue of non-natural use, factors that would be decisive on an issue of negligence would frequently be of only marginal relevance on the issue of non-natural use.

[184] [1913] A.C. 263 at 280.
[185] [1973] CLJ 310.
[186] (1994) 68 ALJR 331.

Often they will be irrelevant to the latter issue. In determining whether the use of land is natural, the court does not look at the particular circumstances of the individual occupier but whether, in the time, place and circumstances of a particular community, the character of the use of land by that occupier constitutes a non-natural use. Thus in a classic Rylands v Fletcher situation, land is used for a non-natural purpose even though the particular amount of water stored is small and the walls of the reservoir are thick and high. Similarly burning a domestic fire to warm a room does not constitute a non-natural use of the premises because the fire has no guard and is left unattended. Non-natural use of land is different concept from the negligent use of the land.[187]

Though the rule in *Rylands v Fletcher* has been adopted by the English courts and has become part of the common law, some difficulties in it cannot be ignores and may be stated as follows:

i) It was apparently designed to meet the danger arising from hazardous works and undertakings which were then common with the advance of science and industry, but perhaps from a sense of caution against making the responsibility too large, was hedged round with exceptions which were later added to in later cases making it less fierce.

ii) It is open to criticism that it is really unnecessary. Though it was propounded in 18676, and since invoked in numerous cases, liability could have been imposed in most of them on the ground of negligence. As the rule does not seem to do more than to cast the onus of proving negligence and causation on the defendant, it has been observed by Pollock in his work on torts that that the principle of Res ipsa Loquitor in the law of negligence would serve the same purpose.

iii) It has been seen to inadequate to meet new situations for which the doctrine of negligence is also inadequate.

[187] *Ibid* at 367.

Thus, for the dangers due to the flight of aircraft, a different rule which imposed the liability even for accidents which could not be averted by all possible care and might be due to the acts of gods was necessary and supplied by legislation

iv) In form it lacks precision and clearness. We have seen that the phrase likely to do mischief is vague and intrinsic. Similarly 'non-natural'; 'abnormal', or 'extraordinary user' is open to criticism, too. A rule intended to apply to things so imperfectly described cannot be satisfactory. Even the things considered 'dangerous' creates confusion for the application of the rule.

v) The historical basis of the rule is also open to criticism. In formulating it, Blackburn J relied on precedents in three classes of cases, cattle- trespass, injury by dangerous animals and escape of water, filth and stenches. Where the first class of cases was an instance of absolute liability, the second, as we have seen, being instances of negligence and the third class belongs to the category of nuisance arising out of wilful or negligent conduct. Viscount Simon in *Read v Lyons & Co. Ltd.*[188] observed that it was logically unnecessary and historically incorrect to refer all this instances as deduced from a common principle. So, we have a rule which equates cattle, wild animals and explosives as dangerous things by finding a common factor in them, viz, their tendency to do harm.

vi) There is now a high authority[189] against extending this rule beyond its original limits as it would then become oppressive.

In the United States, the attitude of the courts has been explained on the ground that considerations of public interest and common advantage differ in a new and undeveloped

[188] [1947] AC 167.
[189] *Read v Lyons & Co.Ltd.*, [1947] A.C. 167 per Viscount Simon.

economy from those in England during that time and the rule in Rylands v Fletcher would be its extreme insistence on the rights of landowners, unduly hamper productive enterprise. Thus, it has been followed by certain states, like Minnesota, but others like New York rejected it wholly. Some of the states, like Kentucky restricted its application to 'unusual' and 'extraordinary user'. Further the phrases 'usual', 'ordinary' and 'reasonable user' are interpreted liberally to minimise the application of the rule.[190]

In India, the doctrine of *Rylands v Fletcher* has been accepted, though rarely enforced, by the courts.[191] It is inapplicable to numerous irrigation tanks in this country which are maintained under statutory authority[192] , prescription[193] and custom.[194] Besides it has been observed that storing water in a tank for agricultural purposes in this country is natural and lawful user of the property. India being an agricultural country the construction of these tanks also got some reprieve from the courts as long as mischief committed due to escape was not due to negligence.

Another important development, if not an extension, took place in India in the late twentieth century in *M.C.Mehta v. Union of India*.[195] In this case, the Supreme Court held that the liability arising out of the rule in Rylands v Fletcher was not applicable in India. A stricter liability emerged in the form of Absolute Liability. Now there were no exceptions available in this new rule. It was really in the sense Absolute.

In this case, [196]there was a leakage of oleum gas from one of the units of the Shriram Food and Fertilizers Lt. on the 4th and the 6th of December 1985. As a consequence of this leakage one person, an advocate died and several others were affected by the same. This was the second case of a similar kind within a

[190] Bohlen, *Studies* seen in *Ramaswamy Iyer's Law of Torts*, p.719-20.
[191] *Madras Rly. Co. v Zamindar of Karvetnagar*, (1874) 1 IA 364.
[192] *Ibid*.
[193] *Ram Lall V Lil Dhary* (1877) ILR 3 Cal 776.
[194] *Shahyad Ali v Shyam Pratab* (1917) 41 IC 382 (Pat).
[195] (1987) 1 SCC 395; AIR 1987 SC 965.
[196] *M.C.Mehta v Union of India*, (1987) 1 SCC 395.

year, the first being the large scale leakage of MIC gas from the plant of the Union Carbide Corporation (UCC) in Bhopal, where the death toll was 3000 and counting lakhs of people were inflicted with various kinds of serious diseases.

The court held that the rule in Rylands v Fletcher which was evolved in the nineteenth century did not fully meet the needs of modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries were necessary to be carried on as part of the development programme and that it was necessary lay down a new rule not yet recognised by English law, to adequately deal with the problems arising in a highly industrialised economy.[197] The Court laid down the rule as follows:

> "When an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v Fletcher.*"[198]

The court earlier pointed out that this duty is "absolute and non-delegable' and the enterprise cannot liability by showing that it had taken all reasonable care and there was no negligence o its part. The bases of the new rule as indicated by the Supreme Court are two:

(1) If an enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident(including indemnification of all those who suffer harm in the accident) arising on account of such hazardous

[197] *Ratanlal & Dhirajlal's Law of Torts,* p. 503.
[198] *Supra* note 196 at 421.

or inherently dangerous activity as an appropriate item of its overheads; and

(2) The enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards.

Thus, the rule in *M.C. Mehta's*(oleum gas leak) case differs from the strict liability rule in *Rylands v. Fletcher* in that it is strict than the latter since there are no exceptions available. The rule has been rightly called the rule of 'absolute liability'. Again the Rylands v Fletcher rule requires non natural use of land by the defendant and escape from his land of the thing which causes damages. It does not cover cases where harm is cause inside the premises of such use where there is no escape.[199] The rule in 'absolute liability' requires the defendant to be engaged in a hazardous and inherently dangerous activity and not only compensates people injured from such activity but also there can be award of exemplary damages depending upon the size and prosperity of the enterprise. Further there is no such distinction between persons within the premises where the activity is carried on and premises outside the premises for escape of the thing causing the harm from the premises is not a necessary condition for the applicability of the rule.

There were doubts expressed by Misra, C.J. on the payment of exemplary damages in *Charanlal Sahu v Union of India*[200]but such doubts were not accepted in Indian Council for Enviro Legal Action v Union of India, [201] a environmental pollution case where hazardous chemical industries had released hugely toxic untreated waste water which had percolated deep into the soil rendering the soil unfit for cultivation and water unfit for irrigation, human and animal consumption resulting in untold misery to the villagers of surrounding areas.

These incidents of environmental pollution particularly the "Oleum gas leak Case" and "the Bhopal Gas Tragedy" led to the

[199] *Read v Lyons & Co.Ltd.*, (1947) A.C. 156.
[200] AIR 1990 SC 1480 at 1545, 1557.
[201] AIR 1996 SC 1446.

enactment of the Public Liability Insurance Act, 1991 together with its Rules. This Act proposes to give expeditious relief to the victims of the accidents arising out of hazardous industries in the form of prompt compensation. It has strengthened the compensation machinery by imposing a no fault liability on industries engaged in hazardous and inherently dangerous activities which usually results in environmental catastrophes.

According to the Act, the owner of such industries is to take an insurance depending upon the size and turnover of such company. It is in favour of any person other than the workmen.[202] The extent of the liability in the case death or total permanent disablement is Rs. 25, 000 and in the case of permanent partial disability is on the basis of the percentage of disability as certified by an authorised physician. Further, there is provision for reimbursement of medical expenses up to Rs 12,500 and relief for wages not exceeding Rs. 1,000 p.m. due to temporary partial disability for a maximum period of three months. Compensation for damage of property can also be claimed up to Rs. 6,000. Above all there is a provision for the creation of an environment Fund in the Act

The liability to pay relief under the Act does not take away the right of the victim or his dependants to claim higher compensation under any other law but the amount of such compensation shall be reduced by the amount of relief paid under the Act. The liability created by the Act does not in any way affect the liability under the tort law[203]except to the extent of the amount of relief paid under the Act which is reduced.

There has been a similar provision[204] in the Motor Vehicles Act, 1988 where the victims of the motor accidents are compensated on the basis of no fault liability. But such *no fault liability* arises only where 'death' or 'permanent disablement' of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles. Presently for death the

[202] They are better compensated under the *Workmen's Compensation Act, 1923.*
[203] Absolute liability, Negligence or Nuisance.
[204] 140 to 144(Chapter X) of Act 59 of 1988.

compensation amount is Rs. 50,000 and for permanent disablement, it is 25,000 only.

Other than this, there is no relief or any form of liability arising out of unsustainable automobile use. The Act does impose some checks and regulation for smoke, noise, vibrations, etc. as we have seen in the earlier chapter dealing with the Motor Vehicles Act, 1988.