CHAPTER 2

Meaning, Historical Evolution and General Principles of Tort Law

2.1- Introduction-

In this chapter the researcher studies the basic meaning, historical evolution and general principles of Tort law as before analyzing and studying the Indian tort law it is important to understand the basic concepts. Thus, below the researcher has discussed tort law in gist which shall act as an introduction for the upcoming chapters.

Any rule of Human conduct which is accepted by the society and the State enforces it is termed as Law. In wider sense all human actions whether in religion, politics and socio-moral fields are governed by certain approved conducts termed as law. It is worth mentioning here that among all approved conducts only those which are enforceable and to those which the State give protections are the laws which constitute the law of the land. Thus, civil and criminal are the two branches in which Law can be divided broadly.

Civil wrong gives the plaintiff the right to sue the defendant when some rights of the plaintiff are infringed by the defendant better known as Civil Proceeding. For example, a suit for specific performance of contractual obligation, an action to recover debt, an action to restore property etc. The person who initiates the civil proceeding is known as claimant or plaintiff who claims the enforcement of his rights and the redressal claimed by him is in the form of compensation or prevention. [3]

On the other hand Criminal Proceedings are initiated against offenders who have committed wrongs not against the victim but against the State and his criminal liability is decided by criminal courts. The main objectives of Criminal Law are to punish the offender.

On the basis of the above classification a tort is a civil wrong in the sense that it is committed against an individual (which includes legal entities such as companies) rather than the state. Tort is a remarkably wide-ranging subject and this chapter will attempt to explain some of the basic principles which underlie the law of tort.

[3]Fleming.J.G, *An Introduction to the Law of Torts* (Clarendon, 2nd edn., 1985)

2.1.1- Meaning of Tort

The term tort is the French equivalent of the English word 'wrong' and of the Roman law term 'delict'. The word tort is derived from the Latin word tortum which means twisted or crooked or wrong and is in contrast to the word rectum which means straight.[4] Everyone is expected to behave in a straightforward manner and when one deviates from this straight path into crooked ways he has committed a tort. Hence tort is a conduct which is twisted or crooked and not straight. As a technical term of English law, tort has acquired a special meaning as a species of civil injury or wrong. It was introduced into the English law by the Norman jurists.

Tort now means a breach of some duty independent of contract giving rise to a civil cause of action and for which compensation is recoverable. In gist tort law protects certain interests of a person by awarding a sum of money, known as damages, for infringement of a protected interest or by issuing an injunction, which is a court order, to refrain the defendant from doing something.

2.1.2- Definition of Tort

Though numerous attempts have been made so far to define tort but an entirely satisfactory definition of tort law is still awaited. Still a tort in general terms may be defined as a civil wrong independent of contract for which the appropriate remedy is an action for unliquidated damages. Some other definitions for tort are given below:

Winfield and Jolowicz- Tortuous liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.[5]

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

Sir Frederick Pollock- Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related in

[4]Dr.J. N. Pandey, *Law Of Torts* (Central Law Publication, 5th edn., 2005)
[5]Williams,G. L. and Hepple, B. A, *Foundations of the Law of Tort* (Butterworths, 2nd edn., 1985).

one of the following ways to harm (including reference with an absolute right, whether there be measurable actual damage or not), suffered by a determinate person:-

a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm and does cause the harm complained of.

b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.

c) It may be an act violation the absolute right (especially rights of possession or property), and treated as wrongful without regard to the actor's intention or knowledge.

d) It may be an act or omission causing harm which the person so acting or omitting to act did not intend to cause, but might and should with due diligence have foreseen and prevented.

e) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely or within limits, to avoid or prevent.

2.1.3- Nature of Tort Law

An *act* or *omission* committed by the defendant who *causes damage* to the claimant gives rise to tort. The damage must be caused by the fault of the defendant and must be a *kind of harm* recognised as attracting legal liability.[6]

This model can be represented:

Act (or omission) + causation + fault + protected interest + damage = liability.[7]

This model can be illustrated by a motor accident, which is the most frequent occurrence leading to tortuous liability.

Example-*A* drives his car carelessly with the result that it mounts the pavement and hits *B,* a pedestrian, causing *B* personal injuries. The act is *A* driving the vehicle. This act has caused damage to *B.* The damage was as a result of *A*'s carelessness, i.e. his fault. The injury suffered by *B,* personal injury, is recognised by law as attracting liability. *A* will be liable to *B* in the tort of negligence and *B* will be able to recover damages.

[6]Ellis Washington**,** *General Principles of Tort Law,* Part I (15 April, 2014).
[7]*Ibid*

2.1.4- Scope of Tort Law

The main aim of implementing tort law was to use it as a tool to make people to follow the behaviour of a reasonable prudent man and to make them respectful towards each other's rights and duties. In order to achieve its aim law of torts allows the victim to claim compensation for the infringement of his right. But here it is needed to be mentioned that only certain accepted pattern of behaviour is recognised by law which when infringed by others becomes redressal under tort law. Hence all expectations of individuals or group of individuals are not redressable as only recognised interests are protected by law.[8]

Thus to summarise the scope of tort one can conclude that every wrongful act is not a tort. To constitute a tort,

a) Commission of wrongful act by a person;

b) The nature of the wrongful act should be such to have a resort to legal remedy and

c) Unliquidated damages should be the legal remedy for the wrongful act.

I. Wrongful Act

An act becomes a wrongful act if only it violates a legal right of another individual. In *Rogers v. Ranjendro Dutt*[9], the Judges opined that the act for which the plaintiff is complaining should be a legal wrongful act. Thus, mere harm in to another person's interest is not sufficient but the act should be in prejudice to his legal right.

'A legal right, as defined by Austin, is a faculty which resides in a determinate party or parties by virtue of a given law, and which avails against a party (or parties or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. Rights available against the world at large are very numerous. They may be divided again into public rights and private rights. Every right carries a legal duty or obligation to perform some act or refrain from performing an act. Therefore, liability for tort arises, when the wrongful act complained of amounts to either an infringement of a legal private right or a breach or violation of a legal duty.'

[8]Fleming.J.G, *An Introduction to the Law of Torts* (Clarendon, 2nd edn., 1985).
[9]*Rogers vs Rajendro Dutt* [(1860) 8 MIA 108].

II. Damage

Generally, a tort consists of some act done by a person which causes injury to another and for which damages are claimed by the latter against the former.[10] One must have a clear notion with regard to the words damage and damages to understand this. Ordinarily to convey any loss, injury or if anyone is deprived from anything the word damage is used, whereas damages mean the compensation claimed by the injured party and awarded by the court. Damages are claimed and awarded by the court to the parties. The word injury is strictly limited to an actionable wrong, while damage means loss or harm occurring in fact, whether actionable as an injury or not.

The real importance of a legal damage is explained by two maxims, namely, Damnum Sine Injuria and Injuria Sine Damno.

(i) Damnum Sine Injuria (Damage in absence of Injury)

There are several acts that in spite of being' harmful aren't wrongful and provides no right of action to one who suffers from their effects. Damage thus done and suffered is termed Damnum sine Injuria or damage in absence of injury. Damage while not breach of a right won't represent a tort.[11] They're instances of damage suffered from excusable acts. An act or omission committed with lawful justification or excuse won't be a explanation for action even if' it ends up in hurt to a different as a mix in furtherance of trade interest or lawful user of one's own premises. In Gloucester Grammar School Master Case[12] , it had been decided that the litigator school master had no right to complain of the gap of a replacement school. The injury suffered was mere damnum absque injuria or Damage in absence of Injury. *Acton v. Blundell*[13], within which a mill owner drained off underground water running into the plaintiff's well, totally illustrate that no action lays for mere damage, even if it's substantial, caused though it does not violate others right.

Other than legal wrongs there can some moral wrongs for which there is no legal remedy, in spite of the fact that those moral wrongs can actual cause real loss or damage.

[10]Supra
[11] Ibid
[12]*Gloucester Grammar School Masters Case* [(1410) Y B 11 Hen IV 27]
[13]*Acton v. Blundell* [(1843) 12 M. & W., 324]

Thus, loss or injury is not sufficient enough to give rise to a valid cause of action unless it has caused any legal injury i.e. violation of legal right.

(ii) Injuria sine Damno (injury in absence of damage)

This means an act which causes infringement of a legal personal right with none actual loss or injury. In such a case the person whose right has been infringed incorporates a smart explanation for action. It's not necessary for him to prove any special damage as a result of each injury as each injury imports a damage once a person is hindered of his right. Every person has an absolute right to property, to the immunity of his person, and to his liberty, and an infringement of this right is unjust as such. Actual perceptible injury isn't, therefore, essential to be the foundation of associate an action. It's decent to point out the violation of a right within which case the law can presume injury. Therefore in cases of assault, battery, imprisonment, libel, trespass toward land, etc., the mere wrongful act is unjust while not proof of special injury. The court is sure to award to the litigator a minimum of nominal damages if no actual damage is evidenced. This principle was firmly established by the election case of Ashby v. White[14], in which the plaintiff was unlawfully detained and prevented by the returning officer in Parliamentary election from casting his vote. Against which the plaintiff sued the defendant even though no actual loss was caused to him in real sense as the candidate to whom he would have casted his vote had in any case won the election. In this case the plaintiff claim for compensation for malicious prosecution was acknowledged and Lord Holt expressed here that as the plaintiff's legal right was infringed, legal injury was caused to him and hence his loss was actionable under law of torts.

III. Remedies

The maxim 'ubi jus ibi remedium' which means 'there is no wrong without a remedy' is the core behind the evolution of law of torts. When any right is vested in an individual it only makes sense if in event of its violation it can be enforced by way of legal remedy. Hence, a right is meaningless if there lies no remedy for its infringement.

2.2 Classification of Tort-

There are primarily three types of torts:

[14]*Ashby v White* [(1703) 92 ER 126]

- Intentional torts;
- Negligence; and
- Strict liability.

An intentional civil wrong could be a wrongdoing that happens once the bad person engages in intentional conduct that ends up in damages to a different. Hitting another person during a fight is an intentional act that will be the civil wrong of battery. Hitting someone accidentally wouldn't be an intentional civil wrong since there wasn't intent to strike the person. This may, however, be a negligent act. Careless conduct that ends up in injury to a different is negligence.[15]

Generally, tortuous liability solely arises wherever the suspect either meant to cause hurt to the litigator or in things wherever the suspect is negligent. However, in some areas, liability will arise even once there's no intention to cause hurt or negligence. As for instance, in most states, once a contractor uses dynamite that causes rubbish to be thrown onto the land of another and damages the landowner's house, the possessor could recover damages from the contractor although the contractor wasn't negligent and didn't will cause any hurt. This is often referred to as strict liability or absolute liability. Basically, it is the expression of the society that the activity is so dangerous to the general public that there should be liability. However, society isn't going to the extend to outlaw the activity.

Acme Construction Company was constructing a road. It had been necessary to blast rock with dynamite. The corporation's workers did this with the best of care. In spite of their precautions, some flying fragments of rock broke a neighbouring house. The owner of the house sued the corporation for the damages. The corporation raised the defence that the owner was suing for tort damages which such damages couldn't be obligatory as a result of the corporation had been free from fault. This defence was not valid. Whereas commonly fault is the basis of tortuous liability, there are cases within which absolute liability is obligatory on the actor. This implies that once hurt is caused,

[15]Graham Stephenson, *Sourcebook on tort law* (Routledge Cavendish, 2000)

it's no defence that none had the intention or that ordinary care had been exercised to stop the hurt.[16]

Other samples of absolute liability things would be hurt caused by storage of inflammable gas and explosives, crop dusting once the chemical that's used is dangerous, factories that turn out dangerous fumes, smoke or soot in inhabited areas, and also the production of nuclear material.

2.2.1- Intentional Tort

Intentional tort happens once someone intends to perform an action that causes hurt to a different. For intentional tort to be evidenced it's not needed for the person inflicting the hurt to designedly cause an actual injury, they need to solely intend to perform the act. Parenthetically, if someone designedly frightens someone with a weak heart, who then incorporates an attack as a result of the action, it might be an intentional tort despite the fact that the person didn't have the intention of inflicting the heart attack. To explore this idea, one has to take into account the subsequent components of intentional tort.

Elements of Intentional Tort

Proving an intentional tort needs that the victim shows the suspect acted with the particular intent to perform the act that caused the injuries or injury. The suspect doesn't essentially have to be compelled to apprehend that injuries would occur as a result of the act, simply which the act is subject to consequences. For a successful action of intentional tort against someone, some basic components should be in place: [17]

Intent

Intent is outlined as acting with purpose or having information that the act in question will cause injury or hurt to a different person. If the component of intent isn't in place, it will be observed merely as a tort.

Acting

Acting needs the person to perform an act that ends up in hurt or injury to a different. Considering or plan to perform an act doesn't represent acting.

[16] Fleming.J.G, *An Introduction to the Law of Torts* (Clarendon, 2nd edn., 1985)
[17] Graham Stephenson, *Sourcebook on tort law* (Routledge Cavendish, 2000).

Actual Cause

This component needs the victim to prove that, in absence of the defendant's actions or "causes," the injuries or injury wouldn't have occurred.

Examples of Intentional civil wrong

1. A toddler named John kicks Adam during recess in school and also the kick causes important injury as Adam already suffers from an incapacity. John doesn't apprehend that Adam suffers incapacity; however he will apprehend that kicking somebody can cause discomfort. This constitutes intentional tort since John "intended" to kick Adam knowing the "act" might cause hurt. If John had not kicked Adam, the "actual cause" of the injury wouldn't have occurred.

2. Bob and Rick get into an argument and Bob punches Rick within the face, breaking his nose. Bob feels guilty as a result of, despite the fact that he was mad and meant to hit Rick, he didn't intend to break his nose. Rick sues Bob for medical expenses concerning the injury and wins the suit. The Judge rules that, despite the fact that Bob didn't intend to break Rick's nose, he did intend to hit him and he had the information that touching another person might cause injury.[18]

Basic Types of Intentional Tort

There are many varieties of intentional tort with the foremost common types:

- **Conversion** – the act of someone taking another person's property and converting it to his own use. This is often conjointly called "stealing" in several jurisdictions.

- **Trespassing** – the act of using or occupying another person's real property without permission.

- **Battery** – the illegal act of harmful or offensive contact with another person's body. The word comes from the term "to batter" and it covers an array of activities together with firing a gun at somebody or using the hands to cause hurt to a different person.

[18]Fleming.J.G, *An Introduction to the Law of Torts* (Clarendon, 2nd edn., 1985)

- **Assault** – an intentional act creating in another person apprehension or fear of being harmed. Assault is allotted by threat of inflicting bodily hurt, along with the victim's perception that the aggressor has the flexibility to cause hurt.

- **Intentional Emotional Distress** – the act of causing mental anguish to another person through outrageous conduct, injury, or different hurt.

- **False Imprisonment** – act of holding someone against their will without legal authority. In accordance to law, a subject isn't allowed to limit the movement of another person while not his consent. Business owners can, however, detain individuals suspected of shoplifting.[19]

- **Fraud** – the act of intentionally deceiving a person or entity for the purpose of monetary gain. [20]

2.2.2- Negligence

Negligence could be a failure to exercise the care that a fairly prudent person would exercise in like circumstances. The realm of tort law called negligence involves hurt caused by carelessness, not intentional hurt.

According to Jay M. Feinman of the Rutgers University faculty of Law;

"The core plan of negligence is that folks ought to exercise charge after they act by taking account of the potential hurt that they could foresee aptly cause to others."

Essential Elements in claims for negligence

Negligence suits have traditionally been analyzed in parts, referred to as components, kind of like the analysis of crimes. A very important idea concerning components is that if a litigator fails to prove anyone component of his claim, he loses on the complete tort claim. Parenthetically, if one assumes that a specific tort has five components, every component should be evidenced. If the litigator proves solely four of the five components, the litigator has not succeeded in creating out his claim.

[19]Intentional Tort Definition, *available at* : http://www.legaldictionary.net (Visited on 12th August,2015)
[20] Intentional Tort Definition, *available at* : http://www.legaldictionary.net (Visited on 12th August,2015)

Common law jurisdictions could dissent slightly within the actual classification of the elements of negligence, however the elements that have to be established in each negligence case are: duty, breach, causation, and damages. Negligence can be perceived of having simply three components - conduct, feat and damages. More often, it's aforesaid to possess four (duty, breach, feat and retaliatory damages) or five (duty, breach, actual cause, proximate cause, and damages). Each would be correct, betting on what quantity specificity somebody is seeking.[21]

2.2.3- Strict Liability

In tort law, strict liability isthe imposition of liability on an individual or individuals in absence of fault (such as negligence or tortuous intent). The claimant would have to solely prove that the tort occurred for which the suspect was accountable. The law imputes strict liability to things it considers to be inherently dangerous. It discourages reckless behaviour and unneeded loss by forcing potential defendants to require each attainable precaution. It conjointly has the result of simplifying and thereby expediting court selections in these cases.

A classic example of strict liability is that the owner of a tiger rehabilitation centre. Regardless of however sturdy the tiger cages were, if an animal escapes and causes injury, the owner is to be liable. Another example could be a contractor hiring a demolition contractor that lacks correct insurance. If the contractor makes a blunder, the contractor is strictly accountable for any injury that happens. An additional everyday example is that of a traveller on conveyance who was unable to get a legitimate price tag for the journey due to extraneous circumstances, akin to being unable to get a price tag for no matter reason. According to strict liability it doesn't matter if the price tag machine was broken, or the train was early, or there have been no workers at the counter. The obligation for holding a legitimate price tag falls on the traveller and also the traveller mustn't have travelled while not one despite the circumstances.[22]

In strict liability things, though the litigator doesn't have to be compelled to prove fault, the suspect will raise a defense of absence of fault, particularly in cases of product liability, wherever the defense could argue that the defect was the results of the plaintiff's actions and not of the merchandise, that is, no logical thinking of defect ought to be

[21]Deaking, *Tort Law*, 218
[22] Dr. J. N. Pandey, *Law OF TORTS* (Central Law Publication, 5th edn., 2005).

drawn exclusively as a result of an accident that happened. If the litigator proves that the suspect knew concerning the defect before the damages occurred, extra damages will be awarded to the victim in some jurisdictions.

The doctrine's most famed advocates were Learned Hand, Benjamin Cardozo, and Roger J. Traynor.

Under English and Welsh law, in cases wherever tortious liability is strict, the suspect can usually be held liable just for the fairly predictable consequences of his act or omission (as in nuisance).

Strict liability is usually distinguished from absolute liability. In this context, a misconduct is also exempted from strict liability if due diligence is evidenced. Absolute liability, however, needs solely misconduct.[23]

2.3 Historical Evolution of Tort Law-

Tort is derived from a French word whose equivalent English word is 'wrong'. It is called 'delict' in Roman. The Latin word 'Tortum' which means 'twisted' or 'crooked' is the word from which the phrase 'Tort' is derived. The word is used to convey the meaning that there is a deviation from the normal, straight or correct conduct. The French-speaking English lawyers and judges, particularly from the Courts of Normandy and Angevin Kings of England paved the way of the use of the word ‘tort’ into English Law. Till the middle of the 17th century the term ‘tort’ suffered from lack of clarity.[24]

2.3.1- Origin of Tort Law under Roman and Development under Common Law

The provisions for torts were incorporated in Roman law as delict. The jurisdiction of civil law in Europe also gradually came under its influence. But under the common law an independent and distinct set of law aroused which finally took the shape of English tort law. The first use of the word 'tort' in a legal context was seen in the 1580s. Prior to this time different terms and words were used for similar concepts.

In an attempt to find a general theory of tort, almost a century ago, a scholar Oliver Wendell Holmes, Jr., examined the history of negligence which is one of the most used

[23]Deakin, *Tort Law*, 218.
[24]Malone.W.S, *Ruminations on the Role of Fault in the History of the Common Law of Torts* (Louisiana Law Review, 1970).

concepts in tort law. He concluded that 'from the earliest times in England, the basis of tort liability was fault, or the failure to exercise due care.' The defendant would be liable for an injury caused to another whenever there was failure on the part of the defendant "to use such care as a prudent man would use under the circumstances.'

Thereafter, with the passage of time one of the scholar Morton J. Horwitz came to the conclusion while re-examining the history of negligence that negligence primarily was not confined to carelessness or fault[25]. Rather, negligence meant "neglect or failure fully to perform a pre-existing duty, whether imposed by contract, statute, or common-law status." Irrespective of the fact that whether the defendant was at fault or not, he is liable for the breach of his duty. Further, Horwitz adds that it was strict liability and not fault theory which was the decisive factor in determining the liability of the defendant.

According to him the fault theory of negligence was not established in tort law until the nineteenth century by judges who sought "to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development."'[26] Biased judges' economic interest of benefitting the business group's metaphor the concept of negligence under modern tort law and inclined towards fault theory substituting the principle of strict liability.

Tort law in its nascent stage generally evolved around two types of cases. The first type which was frequent under common law for years was the one where parties were into a prior relationship and there was negligence on the part of one of the parties which was an undertaking, calling, or office. The second types of cases were those where the involved parties were not into any prior relationship. The defendant's failure to perform his duty due to unforeseen reason was sufficient to give the plaintiff a firm cause of action. The last quarter of the seventeenth century saw an increasing number of such cases though few instances were also seen earlier.

2.3.2- Medieval Period

At common law, justice for crimes and other wrongs were same and were based on the notion or planetary system of providing compensation to the victims. In Anglo-Saxon Law, the remedy available for wrongs was payment of compensation either in money or

[25]Bruce R. O'Brien, *The Oxford International Encyclopedia of Legal History*, vol. 1 (Oxford: Oxford UP, 2009).
[26]Bruce R. O'Brien, *The Oxford International Encyclopedia of Legal History*, vol. 1 (Oxford: Oxford UP, 2009).

in kind to the victim or to his clan. In case of wrong against the public, the amount was paid to the king or to the presiding officer of a court. To prevent cases of murder a fine termed as *Weregild* was imposed on accused for murder and the amount of fine was decided was the basis of the victim's worth. *Botleas* which means that which is unable to be compensated was the word which was used in some latter codes for wrongs like theft, open murder, arson, treason against one's lord. The convicts of *Botleas* were left at the king's mercy. Items or creatures which caused death were also destroyed as deodands i.e things given to God or forfeited. Assessing intention was a matter for the court, but Alfred's code did distinguish unintentional injuries from intentional ones, whereas culpability depended on status, age, and gender.

The concept of fine got altogether a new objective and became a source of revenue after the Norman Conquest as now all fines were paid only to courts or the king. The term tort or trespass was used to mean a wrong and pleas were divided into civil pleas and pleas of the crown.

In 1166 the remedy for dispossession from freehold land the petty assizes (assize of novel disseisin) were established. One of the primitive type of civil pleas where damages were paid to the victim was that for an action of trespass and failure would lead to imprisonment. The other major types of plea which were raised in local courts were of slander, breach of contract, or interference with land, goods, or persons. Gradually the action for trespass became frequent and by 1250s the writ of trespass was introduced to make it available as right and not in lieu of fee. The writ was termed as *de cursu* and its application was restricted to interference with land and for instances where there were breach of King's peace due application of force.

The Statute of Westminster 1285 passed in the 1360s, the element of use of force for an action of tort was replaced by "trespass on the case". Later on with the increase in its scope it changed to only "action on the case". Finally, The English Judicature Act passed 1873 abolished the system of separate actions for "actions of trespass" and "trespass on the case".[27]

[27]Malone.W.S, *Ruminations on the Role of Fault in the History of the Common Law of Torts* (Louisiana Law Review, 1970).

The Principle of Strict Liability was imposed for the escape of fire in 1401 in the English case *Beaulieu v Finglam.* The possible reason behind these was the lack of sufficient fire fighting resources and the massive capacity of negligent handling of fire to cause destruction. Additionally, the principle of strict liability also started to be used in cases of release of cattles. Around 1400, the liability for common carrier also gained importance. In the medieval period unintentional injuries were comparatively less due to the simpler form of community life. But with the advent of 18th and 19th centuries, cases of collisions and carelessness started to increase due improved transportation and development in carriages. William Blackstone, an imminent English Scholar rules out the existence of litigation related to champerty and maintenance. The restriction which was imposed in the assigning of cause of action was a rule mostly based on public policy.[28]

2.3.3- Tort by mid-19th Century

Gradually, the English scholars started acknowledging the rights of the victims to be redressed as one of the basic right of an individual. In fact, in the end of 18th century Blackstone's *Commentaries* was published with volumes on "private wrongs" as torts and vice-versa. The tort law of the United States was not an exception and it was influenced by English Principles and Blackstone's treatise. Number of States adopted constitutions with specific remedies for an action of tort which were inclusive of statues based on English law.

In Spite of the existence of tort in a nascent form, even by the mid of 19th century it was considered to be an undeveloped branch of law. In 1860's the first American treatise on torts was published. However, the subject gains popularity with the publication of Oliver Wendell Holmes Jr. on the same. Holmes' writings have been described as the "first serious attempt in the common law world to give torts both a coherent structure and a distinctive substantive domain"[29]

2.3.4- Modern Development

[28]David.Ibbetson, *The Oxford International Encyclopaedia of Legal History*, vol. 5 (Oxford: Oxford UP, 2009), 467.

[29]J.C.P. Goldberg, *The constitutional status of tort law: Due process and the right to a law for the redress of wrong*, Yale Law Journal,(2005).

The industrial revolution was a boast to the development of tort law and it significantly increased the scope and significance of tort law. The increased use of steam engines, locomotives, motor vehicles and hazardous products also increased the number and severity of accidents. This in turn resulted in the development of modern tort law, specially the doctrine of negligence and it is worth mentioning here that the applicability of principle of strict liability also saw a growth in slow pace though in fields involving dangerous activities. However, there still existed some gaps in tort law due to which many accident claims remained unanswered.

Thereafter, with the developments and advancement of the society in all aspect tort law is not an exception and so new concepts like product liability, liability for medical malpractice, environmental liability, liability for torts in the marketplace, extended liability of the corporation have developed in tort law. Again, the improvement in information technology has increased the field of wrongs committed on one hand and on the other hand it has also made easier to establish and impose tortious liability on the wrongdoer ignoring distance and time. Hence, the development of tort law is slow in comparison to other branches of law but with time it has definitely gained.[30]

2.4 General Principles of Tort Law-

Like any other branch of law, Tort law is also based on certain basic principles which provide the guidelines on the basis of which liability, extent of compensation and grounds for defenses are decided. Below an attempt has been made to highlight those basic principles of tort.

2.4.1-The Nature and Liability in Tort:

There are two theories with regard to the basic principle of liability in the law of torts or tort. They are:

1) Wider and narrower theory- all injuries done by one person to another are torts, unless there is some justification recognized by law.

2) Pigeon-hole theory- there is a definite number of torts outside which liability in tort does not exist.[31]

[30]J.C.P. Goldberg, *Ten Half-Truths About Tort Law*, Valparaiso University Law Review, (2008).
[31]R.K.Bangia, *Law of Torts* 5(Allahabad Law Agency, Faridabad, 17th edn., 2003).

The first theory was propounded by Professor Winfield. According to this theory, if one injured his neighbour, he can be sued in tort, whether the wrong happens to have a particular name like assault, battery, deceit or slander, and the offender will be liable if he fails to prove lawful justification. Thus leading to the principle with wider interpretation that all unjustifiable harms are tortious. This enables the courts to create new torts and make defendants liable irrespective of any defect in the pleading of the plaintiff. This theory resembles the saying, "my duty is to hurt nobody by word or deed". Pollock supported this theory and the domain of the law of torts was extended repeatedly by the court. For example, negligence became a new specific tort only by the 19th century AD. Similarly the rule of strict liability for the escape of noxious things from one's premises was laid down in 1868 in the leading case if Rylands v. Fletcher.

The second theory was proposed by Salmond. According to this theory, one can injure his neighbour with the fear of he being sued one in tort provided his conduct falls under the specific slot of assault, deceit, slander or any other nominate tort. The law of tort consists of a neat set of pigeon holes, each containing a labelled tort. If the defendant's wrong does not fit any of these pigeon holes he has not committed any tort. The advocates of the first theory argue that decisions such as Donoghue v. Stevenson shows that the law of tort is steadily expanding and that the idea of its being cribbed, cabined and confined in a set of pigeon holes in untenable. However Salmond argues in favour of his theory that just as criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability. Whether one is prosecuted for an alleged offence or sued for an alleged tort it is for one's adversary to prove that the case falls within some specific and established rule of liability and not for one to defend him by proving that it is within some specific and established rule of justification or excuse. For Salmond the law must be called The Law of Torts rather that The Law of Tort.[32]

However, either of the theories failed to gain complete recognition. In an Indian decision, *Lala Punnalal v. Kasthurichand Ramaji*[33] , it was pointed out that there is nothing like an exhaustive classification of torts beyond which courts should not proceed, that new invasion of rights devised by human ingenuity might give rise to new

[32]R.K.Bangia, *Law of Torts* 5(Allahabad Law Agency, Faridabad, 17th edn.,2003).
[33]*Lala Punnalal v. Kasthurichand Ramaji*, (1945) 2 MLJ 461.

classes of torts. Even the recent decisions of competent courts gives an impression that the courts have preferred to follow the first theory of liability.

Thus it is a matter of interpretation of courts so as to select between the two theories. The law of torts is one such field of law which has developed by courts starting right from the simple problems of primitive society to those of our present complex civilization.

2.4.1.1- Fault based liability

This principle establishes that it is not sufficient for the claimants to prove only damage caused by the defendants act but he also needs to prove that the defendant was at fault. Fault in tort means malice, intention or negligence. Where fault does not have to be proved it is said to be a strict liability tort. By nineteenth century the fault theory in tort law started developing mostly due to certain policies. In absence of availability of insurance in general, damages were mostly paid by the defendant personally. The Courts started introducing the trend of proving fault in order to establish a successful claim under law of torts. The ulterior motive behind this was to protect the developing industries. The economic argument in favour of fault was supported by the moral and social arguments that fault-based liability would deter people from anti-social conduct and it was right that bad people should pay. One consequence of this development was that workers in industry who suffered industrial accidents were largely deprived of compensation.[34]

Under the English Law the concept of establishing fault has always been a basic principle for most of the actions under tort. With the spread of insurance the courts had to increase the standard of conduct in certain situations though the meaning of moral wrongdoing remains the same. It has been shown that many errors by car drivers which are classed as being negligence (fault) are statistically unavoidable. Where this is the case, the moral and deterrent arguments for fault are certainly reduced if not extinguished. The shift of liability of paying the compensation by the insurer instead of the defendant has definitely caused vital changes in the principle of fault liability under law of tort. What has happened is that fault has often moved away from being a state of

[34]*Moral Theories of Torts: Their Scope and Limits: Part I*, Law and Philosophy, 1: 371-90(1982)

mind to being a judicially set standard of conduct which is objectively set for policy reasons.[35]

2.4.1.2-Strict liability

Strict liability means no fault liability. Fault is a positive concept whereas strict liability is a negative idea. More emphasis was given on fault based liability in the preceding century in comparison to strict liability. Still some areas are governed by strict liability and the Parliament has added more areas to it.

These areas are not linked coherently. In offences like trespassing livestock which was the major crime during an era when agriculture was the main source of State's economy, the principle of strict liability was used. The judiciary made a failed attempt to handle the problems largely created due to industrial revolution by developing the principle of strict liability in ***Rylands* v *Fletcher.*** The rule that an employer is vicariously liable for the negligence of their employee in the course of their employment, in the absence of any fault on the part of the employer, is a pragmatic response to a particular problem.[36]

The Parliament has chosen legislation based on strict liability rather than fault-based liability for sensitive areas like industrial safety. But even within the scope of strict liability principle the standard of liability to be imposed varies from one tortuous action to another. There are also certain areas where the liability becomes absolute and no defences are available. On the line of it the Nuclear Installations Act 1965 was enacted. Most actions, however, permit some defences or exemptions from liability.

2.4.1.3-Doctrine in Ryland-v-Fletcher

Rylands in order to supply water to his powered textile mill constructed a reservoir on his land. Fletcher was the owner of the neighbouring land where he operated mines and had excavated up to the disused mines. The mines were under the land where the defendant's reservoir was located.

To build the reservoir some independent contractors and engineers were employed by the defendant. The contractors came across some mine shafts that that were no longer in use and made 'no attempt' to fix the shafts. The work was completed and during use of

[35]*Theories of Tort Law*, Stanford Encyclopedia of Philosophy (22 September, 2003).
[36]*Theories of Tort Law*, Stanford Encyclopedia of Philosophy (22 September, 2003).

the reservoir once there was heavy rainfall and subsequently water busted from the reservoir and caused flood in the land and mines of Fletcher.

Fletcher argued the enjoyment of his land had been invaded and Rylands ought to be accountable for the damages caused by inherently dangerous activities thus the philosophy of strict liability ought to be applied. Rylands argued that he was acting lawfully and within reasons on his land and may not be liable to be blamed for an accident that resulted with none negligence.

The Court of Liverpool dominated in favour of the litigant on the premise of each nuisance and trespass. Rylands wasn't happy and applied for the case to be detected before the judges of the exchequer during which he succeeded. The judges overruled the primary ruling on the concept of trespass requiring an instantaneous personal involvement within the invasion of the quite enjoyment of land. This type of invasion 'required proof of intent or negligence'.

The defendants weren't negligent on the premise that he had no idea of the existence of the shafts. Fletcher appealed to the exchequer chamber wherever the previous call was overturned; this time in favour of Fletcher.

Blackburn J held:

"..any person, who for his own intentions brings on to his land, accumulates and keeps on that land anything likely to cause trouble if it escapes, must keep it at his own risk, and, if he does not do so is prima facie, answerable for all the damage which is the natural effect of its escape."

The judges relied on the premise of liability for damages of land through the misconduct of personal chattel of trespass, the misconduct of nuisance likewise as 'the scienter action'. Rylands appealed to the House of Lords.

HOLs laid-off Rylands claim on the premise that he had turned the land to a non-natural use and was thus accountable for the escape of the water he had collected.

The judges held that the defendants need to pay damages to the litigant and from the judgement within the principle of Rylands the case developed strict liability.

The primary justification for this was premised upon the idea that the rights of people mustn't be sacrificed within the furtherance of the general public interest in cases wherever the acts were "one off" and thus tough to be liable for nuisance which needs the acts to be continuous or wherever it had been tough to prove that the litigator had not taken all affordable precautions to forestall the mischief since the escape wouldn't are predictable. Thus if the water had accumulated on Fletchers land naturally, the rule on strict liability wouldn't apply. The appliance of strict liability is contentious as it takes into consideration the harmful result instead of the conduct. This is often terribly completely different from the standard fault-based formulation in negligence.[37]

Distinct components of Rylands v Fletcher

The Defendant should have brought something onto His Land

The rule refers to things accumulated by the defendant that are things bought onto the property by the defendant, and not one thing that accumulated there naturally; in Rylands v Fletcher the defendant bought water onto his land.

In Healy v Bray, a rock had dislodged from the defendant's land and rolled down the Hill towards the litigant. The court decided since the rock was there naturally and a part of the land itself, it had been not bought onto the land.

It should be a Non-Natural use of the Land

Lord Cairns LC stressed down the need that there should be a non-natural use of the land. Non-natural suggests that 'some special use bringing it an inflated danger to others, and should not simply be the standard use of land or such a use as is correct for the overall profit for the community'.

In Rylands, the defendant's use of water was 'non-natural' on the premise that domestic use of water is natural use however accumulating giant quantities of water is non-natural.

And if it escapes it should be doubtless to cause mischief

The defendant should have accumulated a dangerous item that is something doubtless to try to do mischief if it escapes. The court can examine the item and therefore the circumstances of the build up. In such a scenario the defendant keeps it in at his peril.

[37]*Theories of Tort Law*, Stanford Encyclopedia of Philosophy (22 September, 2003).

Escape

There should be an escape from the land that the defendant occupied and it should effectively relate to the dangerous substance.

The case of Rylands v Fletcher arranged the premise on that the one that has suffered may be authentic to be remedied. The one that has suffered injury may be paid if he will prove injury on his property.

Where there's injury to neighbour land, there are a variety of various causes of action on the market, akin to negligence, trespass, nuisance and Rylands v Fletcher, based on the circumstances.[38]

Negligence depends on the existence of a breach of duty of care owed by one person to a different. This duty may be a normal of guardianship that a personal is needed to stick to while performing any act that might foreseeable hurt others.

Private nuisance's typically relates to a wrongful disturbance with a person's use or enjoyment of land involving a harmful escape. The intention of the person inflicting a nuisance is typically not relevant however malice could flip an inexpensive act into an unreasonable one.

The distinctive issue is nuisance issues the protection of the employment and delight of land whereas negligence isn't restricted to the protection of any explicit interest. Rather liability is predicated on the defendant's conduct, and will be obligatory in respect of a large vary of interests broken by that conduct. [39]

The two overlap therein a claim in nuisance regarding injury to property or land, definitely with relevancy to the encroachment of tree roots.

In Low v Haddock, Judge Newey held:-

'Nuisance, when knowledge and foresight of consequences are required for it, bears a strong resemblance to negligence …'[40]

[38]R.K.Bangia, *Law of Torts* (Allahabad Law Agency, Faridabad, 17th edn., 2003).
[39]Ibid.
[40]R.K.Bangia, *Law of Torts* 5(Allahabad Law Agency, Faridabad, 17th edn., 2003).

Nuisance involves an unbroken action instead of one event not like Rylands or negligence and doesn't need lack of care or guiltiness. However, there has been an application of nuisance principles to isolated escapes akin to Tenant v Goldwin.

Holt CJ held that nuisance is usually an action of strict liability instead of requiring "fault" of negligence.

There can never be a case where a litigant will succeed in Rylands v Fletcher while not additionally succeeding in nuisance and there'll seldom be a case wherever a litigant would succeed in nuisance while not additionally succeeding in negligence. This proof supports the argument against Rylands.

Despite the judicial tendency to limit the pertinence of the strict liability principle, it remains relevant, augmenting the law of nuisance and negligence by providing a mechanism whereby risk is allotted justly and expeditiously. Despite negative views on the principle being expressed within the House of Lords it's been applied by English Courts.

Rylands was a serious development in trending law and has influenced several succeeding rulings. The modification in negligence law as a field of torts has in some jurisdictions incorporated the Rylands rule as for example in Australia.[41]

2.4.1.4-Vicarious liability and State Liability

Vicarious Liability is that the tortious wrong that imposes responsibility upon one person for the failure of another, with whom the person encompasses a special relationship (such as Parent and kid, employer and employee, or owner of car and driver), to exercise such care as a fairly prudent person would use underneath similar circumstances.

Vicarious liability could be a legal belief that assigns liability for an injury to someone who did not cause the injury however whose agency encompasses an explicit legal relationship to the one that did act negligently.[42] It's additionally observed as imputed Negligence. Legal relationships which will cause imputed negligence embrace the connection between parent and kid, husband and spouse, owner of a vehicle and driver,

[41]Mark Wagenbuur, *Strict liability in the Netherlands* (21 February, 2013).
[42]K.La.Mance, *Contract and Tort Law* (2013).

and employer and employee. Normally the independent negligence of one person isn't attributable to a different person.

Other theories of liability that are premised on imputed negligence embrace the Respondeat Superior doctrine and also the family car doctrine.

The belief of respondeat superior (Latin for "let the master answer") relies on the employer-employee relationship. The belief makes the employer accountable for a scarcity of care on the part of an employee in regard to those to whom the employer owes a obligation of care. For respondeat superior to use, the employee's negligence should occur inside the scope of the employment.[43]

The employer is charged with accountability for the negligence of the employee as a result of the employee being an agent of the employer. If a negligent act is committed by an employee acting inside the overall scope of her or his employment, the employer is considered chargeable for damages. As for example, if the driver of a gasoline van runs a red light while going to a service station and strikes another automobile, inflicting injury, the gasoline delivery company are accountable for the damages if the driver is found to be negligent. As a result, the company can mechanically be found liable if the driver is negligent, respondeat superior could be a kind of Strict Liability.

Another common example of imputed negligence is attributing liability to the owner of a automobile, wherever the driver of the automobile committed a negligent act. This kind of relationship has been labelled as the family automobile doctrine. The belief relies on the idea that the top of the house provides an automobile for the family's use and, therefore, the operator of the automobile acts as an agent of the owner. When, for instance, a child drives an automobile, registered to a parent, for a family purpose, the parent is accountable for the negligent acts of the kid at the wheel.

Liability can even be imputed to an owner of an automobile who lends it to a friend. Here, the driver of the automobile is acting in the capacity of an agent of the owner. If the owner is harmed by the driver's negligence and sues the driver, the owner will lose the case as a result of the negligence of the driver is imputed to the owner, thereby

[43] Supra

rendering him contributory negligent. This concept is understood as imputed contributory negligence.[44]

State liability means the liability of the State for the tort committed by its servants which includes any act or omission, voluntary or involuntary and brings the State before Court of Law in a claim for unliquidated damages.

2.4.1.5- Product Liability

Product liability is a new concept which is that area of law in which products manufacturers, distributors and sellers are held responsible for the injuries caused by their products. Generally, a products liability claim is based on a design defect, a manufacturing defect, or a failure to warn. This topic is closely associated with negligence, breach of warranty and consumer protection.

2.4.2- Principles of Negligence:

Negligence could be a tort that arises from the breach of the duty of care owed by one person to a different from the perspective of a prudent person. Though attributable as showing within the United States in Brown v. Kendall, the later Scottish case of *Donoghue v Stevenson* [1932], followed in European country, brought European country into line with the United Staes and established the 'tort of negligence' as opposed to negligence as a element in specific actions.[45] In Donoghue, Mrs. Donoghue drank from an opaque bottle containing a rotten snail and claimed that it had made her sick. She couldn't sue Mr. Stevenson for damages for breach of contract and instead sued for negligence. The bulk determined that the definition of negligence is divided into four element elements that the plaintiff should prove to establish negligence. The elements in deciding the liability for negligence are:

- The plaintiff owed a obligation of care through a special relationship (e.g. doctor-patient) or another principle
- There was a dereliction or breach of that duty

[44]K.LaMance, *Contract and Tort Law* (2013).
[45]F.Ferrari, *Donoghue v. Stevenson's 60th Anniversary*, Annual Survey of International & Comparative Law (1994).

- The party directly caused the injury [but for the defendant's actions, the plaintiff wouldn't have suffered an injury].
- The plaintiff suffered harm as a result of that breach
- The harm wasn't too remote; there was proximate cause to point out the breach caused the harm

In certain cases, negligence is assumed underneath the belief of res ipsa loquitur (Latin for "the factor itself speaks"); significantly within the United States, a connected thought is negligence per se. [46]

2.4.2.1- Duty and standard of care

In tort law, a obligation of care could be a legal obligation that is obligatory on a person requiring adherence to a standard of reasonable care while doing any acts that would foreseeable hurt others. It's the primary component that has to be established to proceed with an action in negligence. The claimant should be able to show an obligation of care obligatory by law that the defendant has broken. In turn, breaching an obligation could subject a personal to liability. The duty of care is also obligatory by operation of law between people with no current direct relationship (familial or written agreement or otherwise), however eventually become connected in some manner, as outlined by common law.

Duty of care is also thought of a rationalization of the accord, the implicit responsibilities held by people towards others within society. It's not a demand that an obligation of care be outlined by law, although it'll typically develop through the jurisprudence of common law.

2.4.2.2- Contributory negligence

Contributory negligence in common-law jurisdictions is mostly a defense to a claim based on negligence, an action in tort. This principle has relevancy to the determination of liability and is applicable once plaintiffs/claimants have, through their own negligence, contributed to the hurt they suffered. It can even be applied by the court in a tort matter no matter whether or not it absolutely was pleaded as a defense.

[46]Twerski, *Negligence Per Se and Res Ipsa Loquitur*, Wake Forest Law Review (2009).

For example, a pedestrian crosses a road negligently and is hit by a driver who was driving negligently. Since the pedestrian has additionally contributed to the accident, they'll be barred from complete and full recovery of damages from the driver (or their insurer) as a result of the accident was less probably to occur if it weren't for his or her failure to keep a correct lookout. Another example of carelessness is wherever a litigator actively disregards warnings or fails to require reasonable steps for his or her safety, and then assumes an explicit level of risk in a given activity; as for instance diving in shallow water without checking the depth first.

In some jurisdictions, the belief states that if a victim, who is guilty to any degree, even if he is guilty for only one percent, is also denied compensation entirely. This can be referred to as pure contributory negligence.

2.4.2.3- Res ipsa loquitor

In the common law of torts, res ipsa loquitur (Latin for "the thing speaks for itself") could be a belief that infers negligence from the very nature of an accident or injury, in the absence of evidence on how any defendant behaved. Although modern formulations have a different jurisdiction, common law originally expressed that the accident should satisfy the required components of negligence, that are duty, breach of duty, causation, and injury. In res ipsa loquitur, the elements of duty of care, breach and causation are inferred from an injury that doesn't normally occur in absence of negligence.

Elements of res ipsa loquitur

1. The injury is of the type that doesn't normally occur in absence of negligence.

2. The injury is caused by an agency or instrumentality inside the exclusive management of the defendant.

3. The injury-causing accident isn't the result of any voluntary action or contribution on the part of the plaintiff.

4. Defendant’s non-negligent clarification doesn't utterly justify plaintiff’s injury.

2.4.2.4- Proof of damage

Even though there's breach of duty, and also the explanation for some injury to the plaintiff, a litigator might not recover unless he will prove that the defendant's breach

caused a monetary injury. This could not be mistaken with the wants that a plaintiff needs to prove hurt to recover. As a general rule, a plaintiff will solely claim a legal remedy to the purpose that he proves that he suffered a loss. It means that one thing over monetary loss could be a necessary component of the plaintiff's case in negligence. Once damages don't seem to be a necessary component, a plaintiff will win his case while not showing that he suffered any loss; he would be entitled to indemnification and the other damages consistent with proof. Negligence is completely different therein the plaintiff should prove his loss, and a selected kind of loss, to recover. In some cases, a defendant might not dispute the loss, however the need is important in cases wherever a defendant cannot deny his negligence, however the plaintiff suffered no loss as a result. If the plaintiff will prove monetary loss, then he can even get damages for non-pecuniary injuries, such as emotional distress.[47]

The requirement of monetary loss is shown in a variety of ways. A plaintiff who is physically harmed by allegedly negligent conduct could show that he had to pay a bill. If his property is broken, he might show the financial gain lost as a result of he couldn't use it, the value to repair it, though he might solely recover for one in every of this stuff.

The harm may be physical, strictly economic, both physical and economic (loss of earnings following a private injury), or reputational (in a defamation case).

In English law, the right to assert for strictly economic loss is limited to variety of 'special' and clearly outlined circumstances, typically concerning the character of the duty to the plaintiff as between client and lawyers, financial advisers, and different professions wherever money is central to the consultative services.

Emotional distress has been recognized as an unjust tortious wrong. Generally, emotional distress damages had to be parasitic. That is, the plaintiff might recover for emotional distress caused by injury; however provided it was with a physical or pecuniary injury.

A claimant who has suffered solely emotional distress and no monetary loss wouldn't recover for negligence. However, courts have recently allowed recovery for a plaintiff to recover for strictly emotional distress underneath some circumstances. The state courts

[47]D.Simon , Angus Johnston, Basil Markesinis , *Markesinis and Deakin's Tort Law*. (Oxford University Press, 2003).

of California allowed recovery for emotional distress alone – even in the absence of any physical injury, once the plaintiff physically injures a relative of the plaintiff, and the plaintiff witnesses it.[48]

2.4.2.5- Negligent mis-statement

The tort of negligent statement is outlined as an "inaccurate statement created honestly however carelessly typically within the kind of recommendation given by a party with special talent/knowledge to a party that doesn't possess this skill or knowledge"

In order to prove that negligent mis-statement occurred, one has to prove that the components of negligence were broken as most torts have common elements that include;

FAULT; there needs to be proof conferred showing that one party committed the tortuous act either by choice or negligently.

ACTUAL DAMAGE; the plaintiff would have the liability to prove that they suffered actual damage/injury/loss as a results of the tortuous act by the party.

REMEDY; because the law of Torts is bothered with compensating the victim instead of punishing the offender, the rule applied by the Courts is to place the plaintiff/victim into an edge they enjoyed before the wrongful act occurred.

DUTY OF CARE: A person/party should at the start owe a duty of care to the opposite person/party so as to be chargeable for negligence.

2.4.3-Nuisance:

Under the common law, persons in possession of material possession (land house owners, lease holders etc.) are entitled to the quiet enjoyment of their lands. But this does not embrace guests or those that are not thought of to own an interest within the land. If a neighbour interferes with that quiet enjoyment, either by making smells, sounds, pollution or the other hazard that extends past the boundaries of the property, the affected party could create a claim in nuisance.

Legally, the term nuisance is historically employed in three ways:

[48]D.Simon, Angus Johnston, Basil Markesinis , *Markesinis and Deakin's Tort Law*. (Oxford University Press, 2003).

1. To explain an activity or condition that's harmful or annoying to others (e.g., indecent conduct, a garbage dump or a smoking chimney)

2. To explain the hurt caused by the before-mentioned activity or condition (e.g., loud noises or objectionable odours)

3. To explain a legal liability that arises from the mix of the above two. However, the "interference" wasn't the results of a neighbour stealing land or invasive on the land. Instead, it arose from activities happening on another person's land that affected the enjoyment of that land. [49]

The law of nuisance was created to prevent such teasing activities or conduct once they immoderately interfered either with the rights of different personal landowners (i.e., personal nuisance) or with the rights of the overall public (i.e., public nuisance)

A nuisance is an unreasonable interference with the public's right to property. It includes conduct that interferes with public health, safety, peace or convenience. The unreasonableness is also proved by statute, or by the character of the act, together with however long, and the way dangerous, the results of the activity is also.

A private nuisance is solely a violation of one's use of quiet enjoyment of land. It does not embrace trespass.

To be a nuisance, the amount of interference should rise on top of the just aesthetic. As for example if ones neighbour paints their house purple, it should offend one; but, it does not rise to the amount of nuisance. In most cases, traditional uses of a property which will represent quiet enjoyment cannot be restrained in nuisance either. As for example, the sound of a crying baby is also annoying, however it's an expected a part of quiet enjoyment of property and doesn't represent a nuisance.

Any affected possessor has standing to sue for a private nuisance. If a nuisance is widespread enough, however encompasses a public purpose, it's typically treated at law as a public nuisance. Owners of interests in material possession (whether owners, lessors, or holders of an easement or different interest) have standing solely to bring nuisance suits. [50]

[49]William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 997 (1966).
[50]Chisholm, Hugh, "*Nuisance*", Encyclopaedia Britannica **19** (Cambridge University Press, 1911).

2.4.3.1- Public nuisance

A public nuisance is an unreasonable interference with the public's right to property. It includes conduct that interferes with public health, safety, peace or convenience. The unreasonableness is also proved by statute, or by the character of the act, together with how long, and how dangerous, the results of the activity are also.

In English criminal law, public nuisance could be a category of common law offence within which the injury, loss or harm is suffered by the area people as a whole instead of by individual victims.

2.4.3.2- Private nuisance

Private nuisance could be a continuous, unlawful and indirect interference with the utilization or enjoyment of land, or of some right over or in reference to it.

Essentials

1. Continuous Interference

There should be a nonstop interference over an amount of one’s time with the claimant's use or enjoyment of land.

De Keyser's Royal Hotel v Spicer Bros Ltd - screaming pile driving at the hours of darkness throughout temporary building works was held to be a non-public nuisance.

There are few rare examples wherever one act has been held to amount to a non-public nuisance:

Crown River Cruises v Kimbolton Fireworks it was held that a firework show entrenched a nuisance once it was absolutely inevitable that for 15-20 minutes dust of a ignitable nature would light upon close property, thereby damaging the property in the ensuing fire.

2. Unlawful Interference/Unreasonableness

The plaintiff should prove that the defendant's conduct was unreasonable, thereby creating it unlawful. The rule is set on utere tuo ut alienum non laedas (So use your own property as to not injure your neighbour's). On impairment of the enjoyment of land, the

governing principle is that of reasonable user - the principle of give and take as between neighbouring occupiers of land. [51]

The court can take the subsequent factors under consideration in assessing the reasonableness or otherwise of the defendant's use of land:

The neighbourhood

It was expressed in *Sturges v Bridgman* (1879) eleven Ch D 852 that: "What would be a nuisance in Belgravia Square wouldn't essentially be thus in Bermondsey."

Sensitivity of the plaintiff

The standard of tolerance is that of the 'normal' neighbour. Therefore, abnormally sensitive plaintiffs are unlikely to achieve their claims for personal nuisance. Contrast:

Robinson v Kilvert The Petitioner's claim was for harm to abnormally sensitive paper kept in a cellar that was plagued by heat from neighbouring premises. The claim failed as standard paper wouldn't get plagued by the temperature. In *McKinnon Industries v Walker*, fumes from the Defendant's mill damaged delicate orchids. Since the fumes would have broken flowers of standard sensitivity there was a nuisance.

The utility of the defendant's conduct

It will be unlikely for an activity to result in a nuisance if it's helpful for the community as a whole taking under consideration all the encompassing circumstances, such as neighbourhood and also the length of the activities.

Malice

It is not necessary to determine malicious behaviour on the part of the litigator however it should be thought to be proof of unreasonableness. Contrast:

In *Christie v Davey*, the Petitioner had been giving music lessons in his dwelling house for many years. The defendant, irritated by the noise, banged on the walls, shouted, blew whistles and beat tin trays with the malicious intention of annoying his neighbour and spoiling the music lessons. An injunction was granted to restrain the Defendant's behaviour.

[51]"Private Nuisance", *available at:* http://www.lawteacher.net (Last Modified on August 10, 2015).

In *Bradford Corporation v Pickles*, the Petitioner deliberately caused diversion of water flowing through his land, far from his neighbour's property. The Petitioner had the intention to force them to buy his land at an inflated worth. It was held that he was committing no legal wrong as no-one encompasses a right to uninterrupted flow of water that percolates through from neighbouring property.

In *Hollywood Silver Fox Farm v Emmett* the defendant, impelled by pure spite, deliberately fired guns close to the boundary of P's land so as to scare the P's silver foxes throughout breeding-time. It was considered to be a nuisance following *Christie v Davey.*[52]

The state of the defendant's land

An occupier should take such steps as are reasonable to forestall or minimise dangers to neighbouring land from natural hazards on his land.

In *Leakey v National Trust*- the defendant had land upon that there was an oversized mound of earth that was being bit by bit scoured by natural processes, and was sliding onto the Petitioner's property. It was held that an occupier should take such steps as are reasonable to forestall or minimise dangers to neighbouring land from natural hazards on his land.

3. Interference with the utilization or enjoyment of land or some right over or in reference to it

The claimant should typically prove harm, i.e. physical harm to the land itself or property; or injury to health, as for instance headaches caused by noise that prevents someone enjoying the utilization of their land. Case examples include:

In *Bliss v Hall* (1838) 4 Bing NC 183 - smells and fumes from candle creating offensive invasion into neighbouring land. *Solloway v Hampshire brass* - permitting tree roots to suck wet from neighbouring soil, thereby inflicting subsidence.

2.4.3.3- Remedies

Under the common law, the sole remedy for a nuisance was the payment of damages. However, with the event of the courts of equity, the remedy of an injunction became

[52]"Private Nuisance", *available at:* http://www.lawteacher.net (Last Modified on August 10, 2015).

obtainable to forestall a litigator from continuation of the activity that caused the nuisance and specifying penalty for contempt if the litigator is in breach of such an injunction.

The law and social science movement has been concerned in analyzing the foremost economical alternative of remedies given the circumstances of the nuisance. In *Boomer v. Atlantic Cement Co*.[53] a cement plant interfered with number of neighbours, however the price of obliging with a full injunction would have been much more than a good value of the cost to the plaintiffs of continuation. The New York court allowed the cement plant owner to 'purchase' the injunction for a mere amount—the permanent damages. In theory, the permanent damage quantity should be the worth of all future damages suffered by the plaintiff.

2.4.4- Trespass:

Trespass is outlined by the act of knowingly getting into another person's property with no permission. Such action is held to infringe upon a property owner's right to enjoy the advantages of possession. According to Tort Law, a possessor could bring a Civil Law suit against a entrant so as to recover damages or receive compensatory relief for injury suffered as an immediate results of a trespass. In an action for tort, the claimant should prove that the bad person had, however knowingly violated a duty to respect another person's right to property that resulted in direct injury or loss to the claimant.[54]

2.4.4.1- Trespass to Land

Trespass to land is these days the tortuous wrong most ordinarily related to the term trespass; it takes the shape of "wrongful interference with one's possessory rights in [real] property". Generally, it's not necessary to prove hurt to a possessor's wrongfully protected interest; liability for unintentional trespass varies by jurisdiction. "At common law, each unauthorized entry upon the soil of another was a trespass", however, as per tort law established by the Restatement of Torts, liability for unintentional intrusions arises solely underneath circumstances evincing negligence or wherever the intrusion concerned a extremely dangerous activity.[55]

[53]*Boomer v. Atlantic Cement Co* ,26 N.Y.2d 1020 ,1970 N.Y
[54]Elliott, Catherine and Francis Quinn,' *Tort Law'*, (Pearson Longman, 2007).
[55] ibid

2.4.4.2- Trespass to Person

Trespass to the person traditionally comprised of six separate trespasses: threats, assault, battery, wounding, mayhem, and maiming. Through the evolution of the common law in varied jurisdictions, and also the codification of common law torts, most jurisdictions currently broadly speaking acknowledge three trespasses to the person: assault, that is "any act of such a nature on excite a fear of battery"; battery, "any intentional and unpermitted contact with the plaintiff's person or something attached to that and much known with it"; and imprisonment, the "unlawful obstruction or deprivation of freedom from restraint of movement".

Trespass to chattels, additionally referred to as trespass to merchandise or trespass to non-public property, is outlined as "an intentional interference with the possession of private property … proximately inflicting injury". Trespass to personal estate doesn't need a showing of damages. Merely the "intermeddling with or use of … the private property" of another provides explanation for action for trespass. Since *CompuServe Inc. v. Cyber Promotions*, varied courts have applied the principles of trespass to personal estate to resolve cases involving unsolicited bulk e-mail and unauthorized server usage.[56]

2.4.5- General Defences:

In spite of a plaintiff providing proof for the existence of all the essential components of a tortious wrong, it's potential in some cases for the defendant to require sure defences which may take away his liability, These defences are nothing however specific things or circumstances within which a defendant is given a relinquishing for his wrongdoing action. These are as follows -

2.4.5.1- Volenti non fit injuria

When someone consents for infliction of hurt upon himself, he has no remedy for that in tort. That means, if someone has given consent to try and do something or have given permission to a different individual to try and do something, and if he's harmed due to that, he cannot claim damages. As for instance, A purchases tickets for a Car race and while witnessing the race, an collision of cars happens and also the person is harmed. Here, by agreeing to watch the race, that could be a risky sport, it's assumed that he

[56]Elliott, Catherine and Francis Quinn, *Tort Law*, (Pearson Longman, 2007).

voluntarily took on the chance of being hurt in an accident. Thus, he cannot claim compensation for the injury. Such consent may be implied or expressed. As for instance, someone practising the game of Fencing with another impliedly consents to the injury which may happen while taking part in it. In *Woolridge vs Sumner*1963[57], the plaintiff a creative person was taking pictures at a horse show, throughout that one horse rounded the bend too quick. Because the horse galloped furiously, the litigator was frightened and he fell within the course. He was seriously harmed. It was held that the defendants had taken correct care in closing the course and also the litigator, by being within the show, gave implied consent to take the chance of such an accident. The defendants weren't held liable.

However, the action inflicting hurt should not transcend the limit of what has been consented. As for instance, in a sport of fencing, someone consents to an injury that happens while taking part as per the rules. If he's harmed as a result of an action that violates the game rules, he will claim compensation since he had never consented to an injury while taking part in the game where rules were not followed. In *Laxmi Rajan vs Malar Hospital* 1998[58], a girl consented for a surgery to get rid of a lump from her breast. However the hospital removed her womb furthermore with none real reason. It was held that removing of her womb exceed on the far side what she had consented for.

Also, the consent should be free. It should not be due to any compulsion. Thus, if a servant was compelled by the master to try and do an explicit task despite his protests, and if he's harmed whereas doing it, the master cannot take the defence of volenti non match injuria as a result of the consent wasn't free.[59]

Exceptions - within the following conditions, this defence cannot be taken though the plaintiff has consented-

1. **Rescue Conditions** - once the plaintiff suffers injury while saving somebody. As for instance, A's horse is out of management and paces towards a busy street. B realizes that if the horse reaches the road it'll hurt many folks then he courageously goes and held's the horse. He harmed in doing thus and sues' A. Here A cannot take the defence that B did that act with his own consent. It's considered as a justified action in public

[57]*Wooldridge v Sumner*, 2 QB 43(1963).
[58]*Lakshmi Rajan v. Malar Hospital III* (1998) CPJ 586.
[59]R.K.Bangia, *Law of Torts* (Allahabad Law Agency,Faridabad,17th edn.,2003).

interest and also the society ought to reward it rather than preventing him from obtaining compensation.

2. **Unfair Contract Terms** - wherever the terms of a contract are unfair, the defendant cannot take this defence. As for instance, though a laundry, by contract, absolves itself of all liability for harm to garments, someone will claim compensation since the contract is unfair to the customers. [60]

2.4.5.2- Mistake

Generally, mistake isn't a legitimate defence against an action of tort. Thus, causing hurt to someone underneath the mistaken belief that he's invasive on your property, won't be defendable. However, in sure cases, it may well be a legitimate defence. As for instance, within the case of malicious prosecution, it's necessary to prove that the defendant acted maliciously and while not an affordable cause. If the prosecution was done solely by mistake, it's not unjust. Further, honest belief in the truth of a statement could be a defence against an action for deceit. [61]

2.4.5.3- Act of God

An act of God in an exceedingly legal sense is a rare prevalence of circumstance that couldn't be foretold or prevented and happens due to natural causes. No one can predict, prevent, or shield from a natural disaster such an earthquake or flood. Thus, it's unreasonable to expect someone to be chargeable for damages caused by such acts of God. There are two essential conditions for this defence - the event should flow from to a natural cause and it should be extraordinary or one thing that could not be anticipated or expected. As for instance, significant rains within the monsoon are expected and if a wall falls and injures somebody, it cannot be termed an act of god as protection for such expected conditions ought to be taken. However if a building falls due to a huge earthquake and injures and kills individuals, this defence is used. In *Ramalinga Nadar vs Narayan Reddiar* [62], it was held that criminal activities of an unruly mob aren't an act of God.

2.4.5.4- Inevitable accident

[60] Ibid
[61] R.K.Bangia, *Law of Torts* (Allahabad Law Agency,Faridabad,17th edn.,2003).
[62] *Ramalinga Nadar vs Narayan Reddiar*, AIR 1971, Kerala 197.

Accident means a surprising occurrence of a thing that would not be foretold or prevented. In such a case, the defendants won't be liable if that they had no intention to cause it and if the litigator is harmed due to it. As for instance, in *Stanley vs Powell 1891*[63], the plaintiff and also the defendant were members of a shooting party. The defendant shot a bird however the bullet ricocheted off a tree and hit the plaintiff. The defendant wasn't held liable as a result of it since it was an accident and also the defendant had no intention and neither he could have prevented it.

However, the defence of inevitable accident isn't a license to negligence. As for instance, A has employed B's automobile. While driving, one of the tires burst and caused accident injuring A. Here, if the tires were wiped out and were in poor shape, it might be negligence of B and he would be held chargeable for A's injuries.

2.4.5.5- Statutory authority

An act that's approved by the law-makers or is finished upon the direction of the law-makers is exempted from tortious liability even if in traditional circumstances, it might be a tortious wrong. Once an act is finished underneath the authority of an Act, it's an entire defence and also the victim has no remedy except that's prescribed by the statute. In *Vaughan vs Taff Valde Rail Co* 1860[64], sparks from an engine caused fireplace in appellant's woods that existed in his land neighbouring the railway track. It was held that since the company was licensed to run the railway and since the company had taken correct care in running the railway, it absolutely was not chargeable for the harm.

2.4.5.6- Plaintiff the wrong doer

A person cannot make profit of his own wrong. This principle has been in use since a protracted time because it is simply and equitable. As for instance, someone trespasses another's property is injured as a result of darkness. He cannot claim compensation since he was harmed due to an action that was wrong on his half. However, this defence exists providing the injury happens due to a wrongful act of the plaintiff. It doesn't exist if the injury happens due to a wrongful act of the defendant though the plaintiff was doing a wrongful but unrelated act. As for instance, in *Bird vs Holbrook* 1828[65], the plaintiff was

[63]*Stanley vs Powell* (1891) 1 QB 86.
[64] *Vaughan vs Taff Valde Rail Co* [1860] EngR 749.
[65]*Bird v Holbrook (1828)*, 4 Bing 628, 130 ER 911.

invasive on the defendant's property and he was hurt due to a gun. The defendant had place spring guns with no notice and was therefore held liable.

2.5.5.7- Self Defense

As per section 96 of IPC, nothing is an offence that's done in exercise of the right of personal defence. Thus, law permits the utilization of reasonable and necessary force in preventing hurt to body or property and injuries caused by the utilization of such force don't seem to be unjust. However, the force should be just and not excessive. In *Bird vs Hollbrook* 1892, the defendant used spring guns in his property with no notice. It was held that he used excessive force; hence he was chargeable for plaintiff's injury even if the plaintiff was invasive on his property.

2.4.5.8- Necessity

If the act inflicting harm resulted to forestall a bigger hurt, it's excusable. For example, a Ship ran over a tiny low boat causing hurt to two individuals so as to forestall collision with another ship which might have hurt many individuals is excusable. Thus, in *Leigh vs Gladstone* 1909[66], force feeding of a hunger striking captive to save her was held to be an honest defence to an action for battery.

To sum up, in this chapter the researcher studied the evolution and basic principles of tort law as it is important for an indebt analysis of tort law in India. In the next chapter the researcher shall study and analyse the existing laws and tort system of countries namely, The United Kingdom, The United States of America and China which are considered to be countries with modern and developed legal framework.

[66]*Leigh vs Gladstone* (1909) 26 TLR 139.