

Remedies of tort may strengthen the pillar of civilization

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Abstract: Civilization has not come in a day rather human being have been civilized with a long passage of time .Civilization is the result of many elementary things; such as progress in the agriculture, urbanization, occupational specialization etc. Society got a civilized shape by these elements and it become orderly after the enforcement of written code or law. Since remedy based on tort is a legal remedy, it may add and ensure the comfort of the people who are suffered from subtle and minor pang resulting people are more cautious about their rights and duty which may culminate a strong civilized society.

Key words: Law of tort and civilization.

1. Introduction

Men being a rational animal, order and peace are high age-old aspiration. It is impossible to think coherence for man without law, order and peace. Without it civilization is unattainable, injustice is unchecked and triumphant. The life of men is ‘solitary, nasty, brutish and short’ [1]. Therefore, law plays a vital role against the anarchy and despotism as it is in essence a barrier upon these arbitrary power. ‘The law in its purest and most perfect form would be realized in a social order in which the possibility of an arbitrary or oppressive use of power by private individuals and by government has been successfully obviated’ [2]

2. Methodology

To conduct the study systematically it is required to follow one or more research methods for scientific investigation. This research is qualitative in nature. Therefore, this research needs the use of the method of documentation or content analysis. This research has been conducted theoretically, analytically and in a limited extent empirically. It is based

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on both primary and secondary sources. Primary includes case laws, statutes, regulations, ordinances, etc. Secondary data have been used to construe primary data.

Primary data has been collected through direct interview method from the stakeholder. Secondary data has been procured from perusal of relevant research work and article, textbooks, journals, newspapers and related websites.

Thus the article has been accomplished with the adoption of descriptive and observation method.

3. Limitation

No greater limitation is found in any other law as is in the law of tort, because there is no specific Act prescribed for the law of tort. Though many Acts of Parliament encompass much tortuous matter, these are not exhaustive.

Second, this article is basically based on secondary information, so the writer had to rely upon the various books, articles, and research paper, reports of many writers rather than his own investigation and inspection at field level.

Thirdly, in as much a proverb prevalent that Law does not emphasize trifling matter the author wants to stress the nimble grief and pain and predicts an orderly society by means of tortuous remedy. But the author does not guarantee that remedy of tort brings stronger civilized society.

This research is the outcome of author's own concept and conjecture.

4. Tort defined

The word tort is of French origin. It is derived from the Latin word 'tortam', which means twist and implies, twisted or tortious conduct.[3] In earlier time tort was used as a synonym of wrong. But later on it derailed from the meaning of wrong and achieved a specific meaning which is much narrower than that ascribed to the word wrong. Many writers gave up the idea of attempting to define tort, whereas many tried to define it but none succeeded in giving an exact, accurate and exhaustive definition. However, an account of a few definitions given by prominent writers shall assist in perceiving the scope and ambit of this branch in the whole of the legal system. Definition of tort, given by Salmond is worth noting. He defines tort as a 'civil wrong for which remedy is a common law action of unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation'[4]. All wrongs may be grouped under two heads, viz, criminal wrongs and civil wrongs. Civil courts give the remedy stems from the tortuous act. But a tort is not a civil wrong.

However, the best definition of tort, which is considered by some writers,[5] is that of Winfield. He defines thus:

‘Tortious liability arises from the breach of the duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for *unliquidated* damages.’[6] According to under hill "A tort is an act or omission which is unauthorized by law and independently of contract-(i) Infringes either—

- (a) Some absolute right of another; or
- (b) Some qualified right of another causing damage; or
- (c) Some public right resulting in some substantial and particular damage to some person beyond that which is suffered by persons generally and

(ii) Gives rise to an action for damages at the suit of the injured party".

In fact an accurate definition is not possible rather a tort may be defined as an act or omission on the part of a person which violates another person’s interest, created and protected by law, irrespective of any agreement between the parties and for which remedy by way of an action for *unliquidated* damage is available.

5. Differences between tort and contract

i) A tort is violation of a right in *rem*. i.e. a right exercisable against the whole world, whereas a breach of contract is an infringement of a right in *personam*. ie. a right exercisable against a definite person or persons. A right in *rem* is a right available against the whole world. Thus, every person has a right not to be defamed or assaulted, and this right is available to him, not against particular persons like X, Y or Z, but against everybody in general. As opposed to this, a right in *personam* is available and enforceable only against a particular person or persons. Thus, if X enters into a contract with Y, and Y fails to fulfill the terms of the contract, X has a personal remedy against Y, and strangers to the contract are in no way concerned with the same. A contract always gives rise to a personal right, i.e., a right in *personam*.

ii) In the case of a tort, the duty is imposed by the law, and is owed to the society in general; in the case of a contract, the duty is fixed by the will and consent of the parties, and it is owed to a definite person or persons. It must be remembered that when parties enter into a contract, they create for themselves rights and duties under such a contract.

iii) In a contract, the obligation is founded on the consent of the parties. In a tort, the obligation arises independently of any consent, i.e., a tort is

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inflicted against the will and without the consent of the other party. Thus, if X assaults Y, without any lawful cause or excuse, X commits a tort. Here, the duty imposed i.e., the duty not to cause unlawful harm to another person, is a duty imposed by law. But if X agrees to sell 10 bales of cotton to Y, and later, fails to perform the contract, this illustrates a breach of contract. Here, X owes a duty only to Y, and not to the community at large.

iv) In a contract, there must always exist privity between the parties, i.e., a binding legal tie between them. No such privity exists in tort, where the harm is always inflicted against the will of the party injured.

v) So far as damages are concerned, there are three points of difference between a tort and a breach of contract which are as follows:

a) In a tort, the measure of damages is not limited or fixed with precision. The Court may award any sum of money as it thinks fit and just. In other words, in case of a breach of contract, the suit is for *unliquidated* damages, in a breach of contract, the measure of damages is determined either by an agreement between the parties or according to fixed legal principles, the suit, therefore, is for *liquidated* damages.

b) The rules as to remoteness of damages in tort are different from those in contract. Thus, in tort, a man may be held liable for damages arising from special circumstances of which he had no knowledge. If there are special circumstances under which a contract was made, and they were wholly unknown to the party breaking the contract, then they are not liable for damages due solely to those special circumstances. [7]

c) In a breach of contract exemplary damages are normally not awarded, whereas in tort exemplary damages can be given in fit cases. (Exemplary or punitive) damages are sometimes referred to especially in the U.S.A) as smart money.

v) In a contract for purposes of considering whether a suit is time barred, time runs from the date of the breach; in tort, it usually runs from the date when the damages are suffered.

vi) In cases of breach of contract the motive of the defendant is generally immaterial, while in the case of a tort, it is often (though not always) taken into consideration.

6. Differences between tort and crime

i) A tort is a private wrong. It is an infringement of the private or civil rights belonging to an individual, a crime, on the other hand, is an invasion of public rights and duties affecting the whole society.

ii) In tort, the wrong-doer has to compensate the injured party; in crime, he is punished by the State. The underlying principle of redress is, therefore, different in both. Crimes involve punishment of the offender in order to deter him from committing it again; in torts, compensation is awarded to the person injured.

iii) It is true that in some cases, a Court may order a person convicted of a crime to pay a sum of money to the injured party by way of compensation. This, however, should not blur the essential distinction between a tort and a crime, for such compensatory sums do not form the principal subject-matter of the criminal suit, they are always in addition to some other punishment, as for instance, a jail sentence.

iv) In tort, the suit is filed by the injured party himself. In crime, the proceedings are taken and conducted in the name of the State, inasmuch as the party injured by a crime is the State, which conducts the prosecution either on its own initiative or on a complaint of a private party.

There are some acts which amount to a tort and also to a crime. For instance, assault and libel are torts as well as crimes. Thus, in the case of assault, the right which is violated is one which every man has and which guarantees that his bodily safety shall be respected. But the matter does not stop here. The act of violence is also a menace to the safety of the society in general, and will, therefore, be punished by the State also. In such cases, both the rights, viz., rights in *rem* and rights in *personam* co-exist. In these cases, the wrong-doer may be ordered in a civil action to make compensation to the injured party, and may also be punished by a criminal Court and ordered to be imprisoned or fined.

7. Civilization

Civilization is sometimes a controversial term that has been used to indicate various meaning. Primarily the term has been used to refer to the material and instrumental side of human cultures that are very crux in terms of technology, science and division of labor. In a classical context, civilized people are supposed to be estranged from the barbarians, savages, primitive, indigenous and tribal people. It is remarkable to mention here that people are generally prone to use civilization as a synonym of culture. The level of advancement of a civilization is often measured by its progress in agriculture, international trade, specialization in profession and occupation, a special governing class and urbanism. But for these core elements, a civilization is often marked by any combination of a number of secondary elements,

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including a developed transportation system, writing, standardized measurement, currency, contractual and tort-based legal systems, characteristic art and architecture, mathematics, enhanced scientific understanding, metallurgy, political structures, and organized religion.

8. Application of the law of tort in Bangladesh

Tort is a civil wrong that arises from neglect to perform or from omission to perform a legal duty but it does not arise from a breach of contracts. Trespass, nuisance, defamation, negligence etc. are examples of tortuous acts. The earliest remedy for tortuous act is found in the judicial pronouncements of judges of England based on common law in the 15th century. With growing awareness of individual's right, legislatures have enacted laws providing of remedial measures for tortuous acts. Negligence to removal garbage and refuses from the city of Dhaka, by the Municipal Corporation of Dhaka, is tortuous act. Similarly, negligent treatment of a patient by a doctor detriment to the health of the patient, and negligent handling of a case by a lawyer causing loss of property of his client are also tortuous acts. Throwing of garbage and refuses in a public place thickly populated by the city dwellers or similar other places or throwing toxic industrial effluents from tanneries into the river are instances of nuisance. Willful fraudulent misrepresentation by either words or conduct with intent to induce a person to act and to cause harms is deceit and so tort. Illegal entry upon the land of another is trespass and is a tortuous act. When a person plants a fruit-bearing tree upon his own land, but the branches overhang the airspace of another or discharges water on the land of others or even after determination of his tenancy remains in possession against the will of the landlord he commits offence of trespass. Where a person restrains another from his movement unlawfully either by force or threat he commits false imprisonment. In Bangladesh under the Fatal Accidents Act, 1855 for the death of a person caused by wrongful act, neglect or default, the party injured is entitled to maintain an action for tortuous act, and compensation for such death can be recovered for the benefit of the wife, husband, parents and child of the deceased. Under the Labour Code, 2006 suit lies for payment of compensation to the worker for the injury caused to him for negligence of the employer. A suit for damage lies under the Irrigation Act, 1876 for damage done in respect of any right to a water-course or the use of any water to which any person is entitled under the law of limitation. Similarly, for obstruction to a way or a water course remedy lies in a suit for compensation under the

Limitation Act, 1908. Suit for compensation also lies for any malfeasance, misfeasance or nonfeasance independent of contract. A suit for compensation lies where any right to any land not acquired under Agricultural and Sanitary Improvement Act, 1920 and right to fishery, drainage, use of water and other right of property is injuriously affected by any act or work done under the Act. A suit for compensation for special damage and injunction against a wrongdoer lies under Specific Relief Act, 1877 and right to fishery, drainage, use of water and other right of property is injuriously affected by any act or work done under the Act. A suit for compensation for special damage and injunction against a wrongdoer lies under Specific Relief Act, 1877. The purpose or aim of the law of torts is to discourage a wrongdoer from committing an offence (not in general sense) and to compensate present injury and damage caused to a property of a person. This remedy does not only lie against an individual but equally also lies against a juridical person i.e.; a Municipal corporation or any other statutory authority. In Bangladesh legal action for tortious acts lies for the following acts: The Fatal Accidents Act, 1855; The Irrigation Act, 1876; Specific Relief Act, 1877; The Easements Act, 1876; The Easements Acts, 1882; Agriculture and Sanitary Improvement Acts, 1920 ; Women's Compensation Act, 1923; The Dhaka Municipal Corporation Ordinance, 1983. However, the list is not exhaustive.

9. Remedies of torts

The remedies available with respect to a tort are of two kinds: (a) Judicial, and (b) Extra-judicial remedies. Remedies are said to be judicial when they are granted by the Court in a suit filed by the injured party against the wrong-doer. The Court then normally awards damages to the injured party. This is the usual remedy. The remaining two forms of judicial remedies are the granting of injunction and the restitution of property. Extra-judicial remedies are those which an injured party adopts when he takes the law into his own hands, as it were, and helps himself in the matter, e.g. expulsion of a trespasser, re-entry on land, abatement of nuisance, etc.

10. Remedies in the law of torts and civilization

Family is the primary unit of a state. Civilization reflexes the gentility of the society. When a person can freely enjoy his legal rights and get easy access to justice he is aware of his rights and also vigilant to the rights of others. In the like circumstances a person even gives importance to the silly and subtle

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matters. If we analyze the law and order of the developed cities of the world, we see that general people are law abiding citizens and they show respect to the law though they have chance to evade the law. Say for example in a state [8] of USA after consumption of food like ice-crème, biscuit etc. People even the children have the practice to throw the disposals in the proper place, i.e. –dustbins. On the other hand, in our country and also in neighboring country like India, people in general throw garbage's hither and thither omitting the consequence whether it creates vexatious situation or not. So if people get redress for the tortuous conduct of other then they become more civilized. However, the following notable cases shall make this point more clear:

I) Allen v Flood[9]

a) Facts

A trade union official told an employer his members would not work alongside the claimants. The employer was pressured to get rid of the claimants. For the loss of work, the claimants sued the trade union official. An important fact is that all the workers in the case were only hired day by day. Therefore, the trade union official had never threatened a breach of contract because the contracts began afresh with a new day's work.

b) Judgment

i) High Court

Kennedy J presided over the trial where the jury found that the plaintiffs had suffered damage to the extent of £20 each, and assessed the damage accordingly.

ii) Court of Appeal

Lord Esher MR, Lopes LJ and Rigby LJ held that the action was maintainable against the district delegate.

iii) House of Lords

The House of Lords held that even though there was a malicious motive, this could not render the conduct unlawful, because the effect actually complained of (not rehiring) was in itself entirely lawful.

In the course of his judgment Lord Davey pointed out an 'employer may refuse to employ [an individual] for the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but the workman has no right of action against him.'

Cave J said,

The personal rights with which we are most familiar are:

1. Rights of reputation;
2. Rights of bodily safety and freedom;
3. Rights of property; or, in other words, rights relating to mind, body and estate

In my subsequent remarks the word 'right' will, as far as possible, always be used in the above sense; and it is the more necessary to insist on this as during the argument at your Lordship's bar it was frequently used in a much wider and more indefinite sense. Thus it was said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or liberty to fire off a gun, so long as he does not violate or infringe any one's rights in doing so, which is a very different thing from a right, the violation or disturbance of which can be remedied or prevented by legal process

II) Ashby v White[10]

a) Facts

Mr. Ashby was prevented from voting at an election by the misfeasance of a constable, Mr. White, on the apparent pretext that he was not a settled inhabitant.

At the time, the case attracted considerable national interest, and debates in Parliament. It was later known as the Aylesbury election case. In the House of Lords, it attracted the interest of Peter King, 1st Baron King who spoke and maintained the right of electors to have a remedy at common law for denial of their votes, against Tory insistence on the privileges of the House of Commons.

Sir Thomas Powys defended William White in the House of Lords. The argument submitted was that the Commons alone had the power to determine election cases, not the courts.

b) Judgment

Lord Holt CJ was dissenting from the judgment in the Court of King's Bench, but his dissent was upheld by the House of Lords by a vote of fifty to sixteen. His judgment reads as follows

Lord Holt CJ, by Richard Van Bleeck, ca 1700

So in the case of *Mellor v Spateman*, 1 Saund. 343, where the Corporation of Derby claim common by prescription, and though the inheritance of the common be in the body politic, yet the particular members enjoy the fruit and benefit of it, and put in their own cattle to

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feed on the common, and not the cattle belonging to the corporation; but that is not indeed our case. But from hence it appears that every man, that is to give his vote on the election of members to serve in Parliament, has a several and particular right in his private capacity, as a citizen or burgess. And surely it cannot be said, that this is so inconsiderable a right, as to apply that maxim to it, *de minimis non curat lex*. A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendant thing, and of an high nature, and the law takes notice of it as such in divers statutes: as in the statute of 34 & 35 H. 8, c. 13, intituled An Act for Making of Knights and Burgesses within the County and City of Chester; where in the preamble it is said, that whereas the said County Palatine of Chester is and hath been always hitherto exempt, excluded, and separated out, and from the King's Court, by reason whereof the said inhabitants have hitherto sustained manifold disherisons, losses, and damages, as well in their lands, goods, and bodies, as in the good, civil, and politic governance, and maintenance of the commonwealth of their said county, &c. So that the opinion of the Parliament is, that the want of this privilege occasions great loss and damage. And the same farther appears from the 25 Car. 2, c. 9, an Act to enable the County Palatine of Durham to send knights and burgesses to serve in Parliament, which recites, whereas the inhabitants of the County Palatine of Durham have not hitherto had the liberty and privilege of electing and sending any knights and burgesses to the High Court of Parliament, &c. The right of voting at the election of burgesses is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it. These reasons have satisfied me as to the first point.

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal...

And I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is

thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there. And in these cases the action is brought *vi et armis*. But for invasion of another's franchise, trespass *vi et armis* does not lie, but an action of trespass on the case; as where a man has *retorna brevium*, he shall have an action against anyone who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompence...

To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation...

Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents; but on the reason of the law, and *ubi eadem ratio, ubi idem jus*. This privilege of voting does not differ from any other franchise whatsoever. If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections, but we must not be frightened when a matter of property comes before us, by saying it belongs to the Parliament; we must exert the Queen's jurisdiction. My opinion is founded on the law of England.

III) Bird v. Jones[11]

a) Facts

Part of a highway is closed off for spectators of a boat race, who paid for their seats. Bird (the plaintiff) wanted to walk through the enclosure, and after hopping over the enclosure is stopped by two officers (one of whom is Jones, the plaintiff). The officers told Bird that he could not pass through the enclosure (where the seats were) (in addition he had

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the barriers of the water in one direction and part of the enclosure in the other)- but they DID tell him he was free to move in the other direction.

Proc. Hist.: the first jury trial found in favor of the plaintiff, appealed by the defendants and ruled in the appellants favor. Remanded.

b) Issue(s)

This is a tort of false Imprisonment: -is prohibiting a party to go in one direction or path imprisonment, if that party is free to move along another path.

c) Holding and Dissent(s)

NO, if the person has an alternate route that he is free to take, he is not imprisoned.

Reasoning: partial obstruction and disturbance is not equivalent to the total obstruction and demerit that is NECESSARY for false imprisonment. To be a prison/imprisonment the party must be confined within a boundary (not necessarily tangible, can be a threat or other impairment to movement). Restriction vs confinement.

Judgment: Remanded and concurring opinion omitted.

Dissents:

1) Lord Denman; basically saying that since one CAN escape doesn't mean that they are not imprisoned. This gets into the degree with which one is imprisoned,

d) Analysis and Discussion

"Three walls does not a prison make" - argument for the defendants. Discussing the degree of "humiliation and disgrace" usually associated with false imprisonment in the case of the woman filing against her husband for being "falsely imprisoned" on her yacht with frequent trips ashore. Intent is necessary for liability under false imprisonment UNLESS physical harms occur. And in the Restatement of Torts the intentionality becomes greater with smaller spaces.

IV) Bolton v. Stone[12]

a) Introduction

Bolton v. Stone is a leading House of Lords case in the tort of negligence, establishing that a defendant is not negligent if the damage to the plaintiff was not a reasonably foreseeable consequence of his conduct. The plaintiff was hit by a cricket ball which had been hit out of the ground; the defendants were members of the club committee.

b) Facts

On 9 August 1947, during a game of cricket against the Cheetham 2nd XI at Cheetham Cricket Ground in Manchester, a batsman from the visiting team hit the ball for six. The ball flew out of the ground, hitting the claimant, Miss Stone, who was standing outside her house in Cheetham Hill Road, approximately 100 yards (91 m) from the batsman.

The club had been playing cricket at the ground since 1864, before the road was built in 1910. The ground was surrounded by a 12-foot (3.7 m) fence, but the ground sloped up so the fence was 17 feet (5.2 m) above the level of the pitch where the ball passed, about 78 yards (71 m) from the batsman. There was evidence that a ball had been hit that far out of the ground only very rarely, about six times in the last 30 years, although people living closer to the ground reported that balls were hit out of the ground a few times each season.

The claimant argued that the ball being hit so far even once was sufficient to give the club warning that there was a risk of injuring a passer-by, fixing it with liability in negligence for the plaintiff's injuries. The claimant also claimed under the principle in *Rylands v Fletcher*, that the ball was a dangerous item that had "escaped" from the cricket ground, and in nuisance.

c) Judgment

i) High Court

Oliver J. heard the case at first instance in the Manchester Michaelmas Assizes on 15 December 1948. He delivered a short judgment on 20 December 1948, dismissing each ground of the claimant's case, holding that there was no evidence of any injury in the previous 38 years, so there was no negligence; *Rylands v Fletcher* was not applicable; and a single act of hitting a cricket ball onto a road was too isolated a happening to amount to a nuisance.[13]

ii) Court of Appeal

The claimant's appeal was heard in the Court of Appeal on 13 October and 14 October 1949, and judgment was delivered by on 2 November 1949. All three judges, Somervell, Singleton and Jenkins LJJ, dismissed nuisance on the same grounds as Oliver J. Somervell LJ, dissenting, held that the claimant had failed to establish that the defendants had not

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taken due and reasonable care, so was not negligent either. However, the majority, Singleton and Jenkins LJJ, held that an accident of this sort called for an explanation, and that the defendants were aware of the potential risk. On that basis, applying the legal maxim of *res ipsa loquitur*, the defendants were found negligent.[14]

iii) House of Lords

The House of Lords heard argument on 5 March and 6 March 1951, delivering their judgment on 10 May 1951.

The House of Lords (Lord Porter, Lord Normand, Lord Oaksey, Lord Reid and Lord Radcliffe) unanimously found that there was no negligence, although most considered it a close call based on whether the reasonable person would foresee this as anything more than an extremely remote risk. Most of the Lords agreed that the key issue was that of making the key question one of determining the fact of what the reasonable person would have in mind regarding assumption of this risk. Facts may be determined by judges, but may also be determined by lesser mortals in juries. This was not considered to be a point of law, which is the province of judges. In this case the risk was considered (just) too remote for the reasonable person, in spite of the observation by Lord Porter that hitting a ball out of the ground was an objective of the game, "and indeed, one which the batsman would wish to bring about". The Lords believed there were policy implications in terms of the message of what liability would have meant in creating restrictions in what we can do in our everyday lives in an urbanised modern society.

In words of Lord Atkin in *Donoghue v Stevenson*, "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." Whether the defendant had a duty to the claimant to take precautions to take into account the foreseeability of the risk and the cost of measures to prevent the risk. The risk in this case may have been foreseeable, but it was so highly improbable that a reasonable person could not have anticipated the harm to the claimant and would not have taken any action to avoid it. In the words of Lord Normand, "It is not the law that precautions must be taken against every peril that can be foreseen by the timorous."

V) Donoghue v Stevenson[15]

a) Introduction:

Donoghue v Stevenson is a foundational case in Scots delict law and English tort law by the House of Lords. It created the modern concept of negligence, by setting out general principles whereby one person would owe another person a duty of care.

Also known as the "Paisley snail"[15] or "snail in the bottle" case, the facts involved Mrs Donoghue drinking a bottle of ginger beer in a café in Paisley, Renfrewshire. A dead snail was in the bottle. She fell ill, and she sued the ginger beer manufacturer, Mr Stevenson. The House of Lords held that the manufacturer owed a duty of care to her, which was breached, because it was reasonably foreseeable that failure to ensure the product's safety would lead to harm of consumers.

b) Facts

May McAllister was born on 4 July 1898 in the Glasgow parish of Cambuslang; she was the daughter of James and Mary Jane McAllister. McAllister married Henry Donoghue on 19 February 1916 and had four children with him; however, all but one, Henry, was born prematurely and lived no longer than two weeks. The couple separated in 1928 and McAllister, now Donoghue, moved into her brother's flat at 49 Kent Street, Glasgow[16]. Gilmour Street station, the station Donoghue arrived at in Paisley.

On the evening of Sunday 26 August 1928, during the Glasgow Trades Holiday, Donoghue took a train to Paisley, Renfrewshire, located seven miles west of Glasgow; the journey would have taken around thirty minutes[17]. In Paisley, she went to the Wellmeadow Café. At approximately 20:50 a friend who may have travelled with Donoghue, was with her and ordered a pear and ice for herself and a Scotsman ice cream float, a mix of ice cream and ginger beer, for Donoghue[18]. The owner of the café, Francis Minghella, brought over a tumbler of ice cream and poured ginger beer on it from a brown and opaque bottle labelled "D. Stevenson, Glen Lane, Paisley". Donoghue drank some of the ice cream float. However, when Donoghue's friend poured the remaining ginger beer into the tumbler, a decomposed snail also floated out of the bottle. Donoghue claimed that she felt ill from this sight, complaining of abdominal pain[19]. According to her later statements

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of facts (condescendences), she was required to consult a doctor on 29 August and was admitted to Glasgow Royal Infirmary for "emergency treatment" on 16 September[20]. She was subsequently diagnosed with severe gastroenteritis and shock.

The ginger beer had been manufactured by David Stevenson, who ran a company named after his identically-named father and produced both ginger beer and lemonade at 11 and 12 Glen Lane, Paisley, less than a mile away from the Wellmeadow Café. The contact details for the ginger beer manufacturer were on the bottle label and recorded by Donoghue's friend[21].

Donoghue subsequently contacted and instructed Walter Leechman, a local solicitor and city councillor whose firm had acted (albeit unsuccessfully) for the claimants in a factually similar case, *Mullen v AG Barr & Co Ltd*[22], less than three weeks earlier.

Despite the ruling in *Mullen*, Leechman issued a writ on Donoghue's behalf against Stevenson on 9 April 1929[23]. The writ claimed £500 in damages, the same amount a claimant in *Mullen* had recovered at first instance, and £50 in costs[24]. The total amount Donoghue attempted to recover would be equivalent to at least £27,000 in 2012[25].

c) Judgment

Stevenson's counsel, Wilfrid Normand KC (Solicitor General for Scotland and later a Law Lord) and James Clyde (later the Lord President of the Court of Session and a Privy Counsellor), responded that "it is now firmly established both in English and Scottish law that in the ordinary case (which this is) the supplier or manufacturer of an article is under no duty to anyone with whom he is not in contractual relation"[26]. They denied that ginger beer was intrinsically dangerous or that Stevenson knew that the product was dangerous (the two established exceptions for finding a duty of care) and argued that the third exception that Donoghue was attempting to introduce had no basis in precedent[27].

The House of Lords gave judgment on 26 May 1932 after an unusually long delay of over five months since the hearing [28]. The court held by a majority of 3–2 that Donoghue's case disclosed a cause of action [29].

VI) Gee v Metropolitan Railway[30]

a) Facts

Plaintiff is injured by falling out of a door on defendant's underground train, immediately after leaving station. The doors were controlled by the driver.

b) Judgment

The defendant was liable for controlling of closing doors and injury was likely caused by negligence, although exact cause not known.

VII) Read v J Lyons & Co[31]

a)Facts

An explosion occurred in a munitions factory and injured an inspector who was present during the explosion and sued the company arguing that liability should be based on the principle of strict liability. The argument was based on the principle that if a person engages in ultra-hazardous activities then he/she should be responsible for any injury that occurs regardless of where or how it happens. No evidence that the company was negligent.

b)Issue

Does the doctrine of Strict Liability apply in this case?

c) Judgment

Dismiss in favor of the defendant.

IX) Richards V. Lothian[32]

a) Facts

The claimant ran a business from the second floor of a building. The defendant owned the building and leased different parts to other tenants. An unknown person had blocked all the sinks in the lavatory on the fourth floor and turned on all the taps in order to cause a flood. This damaged the claimant's stock and the claimant brought an action based on the principle set out in Rylands v Fletcher.

b) Judgement

The defendants were not liable. The act which caused the damage was a wrongful act by a third party and there was no non-natural use of land.

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X) Robinson v Kilvert[33]

a) Facts

A landlord's cellar maintained an 80 °F (27 °C) temperature for its business, and the heat affected a tenant's paper warehouse business on a floor above.

b) Judgment

The court held that the tenant had no remedy because the landlord was a reasonable user of his property.

XI) Rylands v Fletcher[34]

a) Facts

In 1860, John Rylands paid contractors to build a reservoir on his land, intending that it should supply the Ainsworth Mill with water. Rylands played no active role in the construction, instead contracting out to a competent engineer. While building it, the contractors discovered a series of old coal shafts and passages under the land filled loosely with soil and debris, which joined up with Thomas Fletcher's adjoining mine[35]. Rather than blocking these shafts up, the contractors left them[36]. On 11 December 1860, shortly after being filled for the first time, Rylands's reservoir burst and flooded Fletcher's mine, the Red House Colliery, causing £937 worth of damage[37]. Fletcher pumped the water out, but on 17 April 1861 his pump burst, and the mine again began to flood. At this point a mines inspector was brought in, and the sunken coal shafts were discovered [38]. Fletcher brought a claim against John Rylands, the owner, and Jehu Horrocks, the manager of Rylands's reservoir[39] on 4 November 1861.

b) Judgment

The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

11. Recommendations and Conclusion

If the door of court is easily accessible and less expensive, the general mass may not feel hesitated to take the shelter of law and thereby peace and order run simultaneously where these elements are pre-requisites to the civilization.

Therefore: - 1. The subtle and minor matter should be taken into account.

2. Program relating to awareness of general cause should be broadcasted.

3. Dispute settlement mechanism should be kept easily accessible.

4. Quick and speedy remedy should be given.

5. Tortuous acts should be framed within legal ambit.

The above-mentioned things may aid to implement the expected result, assisting the nation to be more civilized.

References

- [1] Hobbes: Leviathan, Chap. 13
- [2] Edger Bodenheimer : 1974 the philosophy and method of Law
- [3] Union of India v. Sal Pal A.I.R. 1969 J & K. 128.
- [4] Salmond : Law of Torts ,14th Edn p. 15.
- [5] Clerk & Lindsell on Torts, 13edn,p.1.
- [6] Winfield: The province of law of Tort, p.32
- [7] Ibid
- [8] Washington D.C
- [9] [1898] AC 1
- [10] (1703) 92 ER 126
- [11] 115 Eng.Rep. 688 (K.B. 1845)
- [12] [1951] AC 850, [1951] 1 All ER 1078¹ [1949] 1 All ER 237
- [13] [1950] 1 KB 201, [1949] 2 All ER 851, 65 TLR 683, 48 LGR 107, 93 Sol Jo 710
- [14] [1951] AC 850, [1951] 1 All ER 1078, [1951] 1 TLR 977, 50 LGR 32, 95 SJ 333
- [15] [1932] UKHL 100
- [16] Wylie, A. F. "The Paisley Snail MiniTrial". *Donoghue v Stevenson Digital Resources*. Scottish Council of Law Reporting. Retrieved 18 September 2012.
- [17] Chapman, Matthew (2010). *The Snail and the Ginger Beer*. Great Britain: Wildy, Simmonds & Hill Publishing. ISBN 9780854900497. Retrieved 10 September 2012.

Remedies of tort may strengthen the pillar of civilization

- [18] Taylor, Martin R. (2004). "Mrs Donoghue's Journey". *Donoghue v Stevenson Digital Resources*. Scottish Council of Law Reporting. Retrieved 7 September 2012.
- [19] Ibid
- [20] Coleman, Clive (20 November 2009). "The legal case of the snail found in ginger beer". *BBC News*. Retrieved 10 September 2012.
- [21] Morton, Geo.; Milligan, W. R.. *Donoghue v Stevenson Appeal Papers: The Appellant's Case*. Chapman, Watson & Co. Retrieved 11 September 2012.
- [22] Ibid
- [23] *Mullen v AG Barr & Co Ltd*, 1929 SC 461 (ScotCS 20 March 1929).
- [24] *Donoghue v Stevenson*, 1932 SC (HL) 31 (UKHL 26 May 1932).
- [25] Ibid.
- [26] Morton, Geo.; Milligan, W. R.. *Donoghue v Stevenson Appeal Papers: The Appellant's Case*. Chapman, Watson & Co. Retrieved 11 September 2012.
- [27] "UK £ relative values". *Measuring Worth*. Retrieved 11 September 2012.
- [28] Rodger, Alan (April 1992). "Lord Macmillan's speech in *Donoghue v Stevenson*". *Law Quarterly Review* (Sweet & Maxwell) **108** (2): 236–259.
- [29] Ibid
- [30] (1873) LR 8 QB 161
- [31] [1947], AC 156
- [32] [1913] AC 263 Privy Council
- [33] (1889) LR 41 ChD 88
- [34] [1868] UKHL 1, (1868) LR 3 HL 330
- [35] Bohlen (1911) 298
- [36] Elliott (2007) 288
- [37] Simpson (1984) 212
- [38] Ibid 241
- [39] Ibid 239