THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

Mt. Abu - May 1969

What is legally right between the parties?

by

Jos T. Manjooran*

People in their associated capacity form a political community and subject themselves to the dominion of a Government for the promotion of their general welfare and to safeguard their individual and collective rights. The members of each political community are governed by their own laws. Law derives its authority from politically organised society. The object of the securing of the governance of the members of the political community by their laws is the establishment of a peaceful and orderly society eliminating the possibilities of violence and injury arising out of the conflicts between man and man in his persuit for profit or generally in his persuit of a predominantly happy life within the community. Recognition of individual rights and duties and the legal obligation to honour them remains the unique formulae to resolve conflicts and preserve peace and order in the community. Rights and duties are created and are made enforceable by the machinery of the state, with a view to govern the relationship between individuals living in a political community. However it would be misleading to infer that law has no other function. If the nenateenth centuary pampered and patronised individual rights, the twentieth centuary is witnessing a more radical phenomehon. The emphasis clearly is now on his duties to the community. The spate of modern legislation is with a view to achieving the welfare of the community at large even if it might operate as a substantial check on individualam. The movement is a shift in the emphasis from the protection of the interests of the individual to the promotion of the welfare of the community. This only proves

---

* Lecturer, Law College, Ernakulam.

the close connection between law and morality. The historical school has clearly postulated the idea "that it is impossible to determine the content of law a priori, for law is relative to tine and place and is a peculiar product of each nation's culture. For all time the historical school disposed of the notion that immutable and universal rules of law could be discovered and the recognition of the close relationship between man and the community has rendered less popular the attempt to discover rules drawn from the needs of man considered in isolation." [1]

Having noted that the content of law is changing it is necessary for our discussion to briefly note the relation between law and morality. Lord Atkin in his abberated judgement, in Donoughe V Stevenson gives a graphic picture of how rules of law has its basis in the precepts of morality. ". . . . . " In English law there must be and is, some general conception of relations giving rise to a duty of care of which the particular cases found in the books are instances. The liability for negligence.. .... is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omissions which any moral code could censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour, becomes in law, you must not injure your neighbour . . . ." [2] Evidently what is legally objectionable should be also morally reprehensible, for law of a community generally reflect its ethical and moral values. But as Lord Atkin points out it is not possible for law to condemn all acts which any moral code would censure. We may not be wide off the mark to suggest that legal duties are often less stringent than the duties prescribed by moral codes. What is morally unworthy or reprehensible may not necessarily receive censure from a court of law. Though the creation of legal rights and duties aim at achieving what is morally desirable, no code of law has succeeded to achieve the equation of legal and moral obligations. There evidently is a gulf between law and morality. C.K. Allen pertinently makes the observation that "Whatever may be the rule of law, it can hardly be doubted that many of the decisions lend sanction to business methods which fall short of sound commercial morality....., it is impossible to

---

1. Paton, Jurispredence 1955 Page 90.
2. (1932) A.C. 562, 580.

read the cas es without feeling that trade interests may coyer a multitude of sins from which a business man of scrupulous honour would shrink. In the present state of the law there is apparently nothing to prevent one powerful trader from commercially assasinating a weaker rival by offering extravagant advantages to other traders, or by issuing to them intimations which whether they be termed "threats" or warnings an difficult indeed to distinguish from the pointed pistol ....."[3] It is not wrongful to combine if the purpose of the combination is to advance and protect their trade[4] is to promote the porifit earning capacity of the combiners even if the consequence be to liquidate and distory their brotheren in trade. The court does not adjudicate upon the reasonableness of the conduct of the combiner for from engaging itself in an enquiry as to whether the conduct of the combiners is honourable or wicked, moral or henious. The ideal must be to achieve the greater approximation of law to morality. The realisation of the objective can be made possible only by giving due emphasis to the obligations of the individual to his neighbour and to the community. The courts of the land should be conscious of the need for "further moralisation" or socialisation of the rights as they are involved in the process of and are perhaps ultimately responsible for the enforcement of rights and preservation of justice. If there evidently is a gap between law and morality and there is need to bridge the gap the question that immediately arises for consideration is what are the principles that stand in the way of the harmonisation of law and morality.

It has to be frankly conceded that there has always been and will always be ample scope for honest differences of opinion relating to questions of morality. Neverthless some of the decisions manifest a highly disturbing tendency. If one is to evaluate the tendency of a judgment, dealing with problems directly bearing on the judicial approach to questions of ethical propriety, it is necessary to consider the prevailing political philosophy and the social consciousness of the people. Even assuming that no moral blemish was attached to property was regarded sqcrosanct, the principle, relating to the irrelevance of motive, laid down in Bradford corporation V Pickles,[5] in such sweeping fashion is by any objective standard highly indefensible.

The decision of the case on the facts was perhaps not so objectionable or intriguing as the principle enunciated

---

3. C.K. Allen Legal Morality and the Jus Abutendi, Legal Duties.
4. Mogul Steamship Co. V Mcgregor, Gow & Co. (1892) A.C. 25.
5.

Without in any way attempting at an expost facto justification, it may be observed that the conduct of the defendant was not so morally reprehensible as is at times sought to be made out. "The defendant obstracted water percolating htrough undefined c'innels beneath his land which would otherwise have reached the plaintiff's adjoining reservior." [6] As one of the judges pointed out, the defendant bon no malice either towards the plaintiff or towards the people in the locality. All that he manoured for was to secure a price for what legitimately belonged to him. "The possession of land carries with it in general, by our law possession of everything which is attached to or under that land." [7]

Moreover to go a step further one is constrained to believe that the maxim Damnum sine injuria is neither opprobrious nor redundant. There can very well be situations when in the bonafide exercise of one's rights damage may ensue without committing any legal injury. In Phipps V. Pears [7a] (1965) the defendant by demolishing his house exposed the plaintiff's neighbouring house to the weather, whereby damage to it resulted. The plaintiff had no remedy because there is no easement to protection against weather. It is difficult to contend that there is a general right not to be damaged. [7b]

What is objectionable is the general principle expounded by Lord Machaghten "It is the act not be motive for the fact that must be regarded. If the act apart from motive gies rise merely to damage without legal injury, the motive hoever, reprehensible it may be will not supply that element." [8] The House of Lords in unqualified terms affirmed the irrelevance of evil motive. The legality of the conduct was not in any way affected by malice, illwill or spite. What is morally reprehensible may be legally permissible. The language used in Bradford Corporation V Pickles and Allen V Flood is clear and unambiguousunile-ss you wish delibdrately to distort its meaning - and it leaves no room to doubt the principle enunciated there in. Moreover the principle has been regarded as an axiomatic truth, that for quite some time nobody appears to have ventured to challenge the reasonableness of the principles.

6.

7.

7a.

7b.

8. Only three years after, the House of Lords in Allen V Flood (1898) A.C.1 affirmed the principle. Provided your have the right, your motive in the exercise there of is irrelavent to the law. Keep within the law and you may gratify your malice to your hearts content. "Within the ambil of his own land a man may be churcish, selfish and grasping if the act apart from the motive gives rise merely to damage without legal injury...

However it is even doubtful whether this principle has been favourably regarded by the courts before the decision in Bradford Corporation V Pickles. The evidence we have points to the opposite inference. Two years prior to the decision in Bradford Corporation V Pickles (1895) North Jissued an injunction against the defendant[9] because he had acted "deliberately and maliciously for the purpose of annoying the plaintiff". The ground for issuing the injunction was the presence of evil motive. Motive of the defendant was relevant and was clearly decisive. Even the decision in Christic V. Davey is not without precedent.[10] So till the decision in Mayour of Bradford V Pickles, it is not unreasonable to assume that evil motive was not irrelevant in the law of tort. Even assuming that Allen V Flood is good law, the cases of exceptions to the rule are quiet considerable.[11] On the basis of the rule, enunciated in Mayor of Bradford V Pickles Dr. Glanville William expresses his apprahension in "risking any generalisation".[12] He merely states that to start with it must be admitted that there are several cases where, as the law now stands, the addition of a wrongful motive does not alter the legal complexion of an act."[13] He would it seems prefer to treat rule in Mayor of Bradford V Pickles viz., that when both plaintiff and defendant have a "common right" to appropriate something (e.g. Percolating water or a lost watch) and the defendant success in appropriating or diverting it at first, the motive by which he is promoted is immaterial.[12]---as one of the several cases where evil motive does not affect the legality of the act.

Moreover Lord Halsbury and the other noble and learned Lords who participated in the decision, "fails to account for a number of particular rules that are inconsistent with it". Abuse warranting remedies, is not a concept foreign to English law. The writ of conspiracy for preventing abuse of legal procedure was limited it is refreshing to reflect that the need for remedying abuse of legal process was clearly recognised as early as the 15tj century.[13] If a

---

contd. footnote No.8.
"....." An Act lawful in itself is not converted into a totious act by a malicious or bad motive.

9. Christe V Davey (1892) 1 ch 316
10. Kuble V Hickeringill (1705) 574 where Holt C.J. observed "Where a Violent or malicious act is done to a man's occupation, profession or way of getting a livilihood: then an action lies in all case." See the observa-tion of Lord Selbourne in Gaunt V Fynney (1872) L.R.8 ch at p.12.
11. Winfield, The Law of Tort.
12. Dr. Glanville Williams, The Foundation of Tortious liability PP. 126, 127.
13. History of conspiracy and the abuse of legal procedure (1921) Winfield.

remedy for abuse of legal procedure was available in the 15th century why not provide for a remedy for abuse of individual rights. Recourse to legal procedure must be for a bonafide purpose to achieve legitimate ends. The courts allowed a remedy in case the process of court was used malafide to achieve an illegitimate object. On the same analogy if individual rights are exercised, not to achieve a legitimate or justifiable object, causing injury why not allow the injured person to recover compensation?

The germs of the tort of Malicious prosecution can be traced to the writ of conspiracy. In an action for malicious prosecution it is incumbent on the plaintiff to prove that the defendant acted maliciously. It cannot for a moment be contended that motive is irrelevant to the tort of malicious prosecution. Even when the plaintiff proves that the prosecution lacked reasonable and probable cause, he would lose his action if he fails to prove malice on the part of the defendant. In the absence of malice a prosecution without cause for "thinking that the plaintiff was probably guilty of the crime imputed" will not amount to the tort of malicious prosecution. Cave V define malice as "some other motive than a desire to bring to justice a person whom he (the accuser) honestly believes to be guilty". The right to prosecute is granted with a view to bringing criminals to justice. That this right should not be exercised to harass and villify another is the reason behind granting a right to bring an action for malicious prosecution. If this freedom of action is exercised with a motive other than to bring the criminal to justice, the prosecutor may become liable for malicious prosecution. The idea behind the rule is that the right must be exercised for the purpose for which it is given and if the prosecutor abuses his right to achieve an illegitimate object he becomes liable in tort. It is interesting to recall that Brown V Hawkes was decided in 1891.

Another area in which evil motive is held to be relevant to liability is conspiracy. The essence of the law of conspiracy lies in combination plus bad faith. If two or more persons "combine for the purpose of wilfully causing damage to the plaintiff."[15] the tort of conspiracy is committed. A consideration of the decisions is Sorrel V. Smith[16] and Crofters Hand Woven Harris Tweed Co. V Veitch[17]

---

14. Brown U Hawkes (1891) 2 Q B 718, 723.
15. Winfield P.664.
16. (1925) A.C. 700
17. (1942) A.C. 435
    It is interesting to read the decision in Quinn V Leathem (1901) A.C.495, where how Allen V Flood did not affect the law of conspiracy is anxiously explained.

would show that what is made culpable under the law of conspiracy is the evil motive of the conspirators. If the real purpose of the combination is not to injure another but to advance, forward or defend the trade of the combiners no tort is committed, although damage to that other arises, provided the purpose is not affected by illegal means. So the right or the freedom to combine can be legitimately exercised to promote commercial interests of the combiners. But if the right of association is exercised with an evil motive the exercise of the right may become unlawful. It is possible to find other areas in law of tort where evil motive is relevant.[18]

If the law of tort was read without the pronouncements in Mayor of Bradford V Pickles and Allen V Flood, it would have been easily possible to spell out the proposition that evil motive is not irrelevant to liability in torts. It is more an account of the potential mischief of the deicisions encouraging the tendency to divorce law and morality that many jurists have come down heavily on the generalization attempted in the above decisions. One of the most powerful attacks on the decisions come from the pen of Prof. C.K. Allen. "Principles of liability in the last analysis" he asserts" must be derived from the moral sense of the community, and to this extent the whole of our law of crimes and torts is intimately connected with morality. This inevitably is the foundation. But as rules grow and take shape, owing to practical necessities in their interpretation and application, artifical accretions are certain to obscure their moral basis. It would be absurd to consider the present English law of torts as a set of moral rules. But it is equally unscientific and unhistorical to consider it merely as a comport of technical formulae without any underlying principles of duty, morality, policy or convenience."[19] In so far as Mayor of Bradford V Pickles sounds a highly discordant note to the idea of harmonising law and morality, Prof. Allen Joins hands with Prof. Pound and pleads "for consigning the theory of unlimited legal right . . . . . to an inevitable doom." "It will die hard in England" writes Allan but hopes "the sooner we are able to pronounce life extinct, and follow it decently to the grave, the better, I believe, for English Jurisprudence"[20] Prof. Roscoe Pound indicating that he is not expounding anything new feels that "the jus abataridi as an incident of ownership is becoming absolete". Gutteridge is more cautious when he observes that "it would be unsafe to go beyond forbidding abuse of a proprietary right from a wholly in proper motive".

---

18. Law of Tort, Winfield 1963, p.57, 1963
19. Legal duties, C.K. Allen, p.111, 1931
20. Legal Duties, C.K. Allen p.118, 1931,

Should there not be a remedy against an upper Riparian owner who far in excess of his requirements maliciously drains away all the available water and allows the fields of the lower Riparian owner to dry up and be destroyed? Should there not be a remedy against an owner of property who want only refuses a right of way to his neighbour to take a tractor for ploughing his fields. There is nothing in English law "to prevent a man from capreciously setting fire to his own cornfield, blocking up his neighbours prospect by a spitefence or indulging in any other act of senseless spleen or prodigality which does not happen to fall within some definite tort or crime".[21] Wuite conoievably there can arise numerous situations, where under the guise of unlimited individual right, one may only be striving to satisfy his baser instincts and spitefully cause damage to his neighbour. Courts may fail to dispense justice to individuals and to society if they are fettered in their descretion by the rule of law laid down in Mayor of Bradford V Pickles. It is not necessary to unreservedly subscribe to the theory of rights Prof. Ducuit[22]. . . . . nor to abandon oneself completely to the concept of state Socialism to realise the need for substantially modifying — even if one does not completely disociate oneself from the spirit of the law found in Mayor of Bradford V Pickles — the rule relating to the irrelevance of motive. Gutteridge writing in 1933 states that there is a hinterland to our law of torts where the kings writ does not run — a veritable legal Alsatia in which greed envy and spitefullness are permitted to reign supreme".[23] Allen, Gutteridge and Winfield would suggest the borrowing of the idea of "Abuse of Rights" developed in several European states to remedy the injustice that can concievably arise from the application of rule postulated by Lord Halsbury.

It would appear that the concept of Abuse of Rights has gained great approval as a principle of justice. It has been applied by international courts.[24] The principle it has been suggested is on the way of being accepted as a principle of international law. A considerable number of legal systems place the principle on a transcendantal

---

21. Law of Tort 1963, Winfield P56
22. Read C.K. Allen, Legal duties P156
23. Gutteridge in (1933) C.L.J.31
24. German interests in Polish upper Silesia (P.C.I.J.)
Trail Smilton Arbitration, L.C. Green
International Law through cases 786 - 87 etc.

plane. If the inductive approach is any sensible and valid test to gauge the utility and wort of a principle, no one would reasonably question the wisdowm in suggesting the reform of English Law by incorporating the idea of Abuse of Rights in the law of tort. The suggestion can not merely be dispensed with as an instance of the mania for acclecticism. However one has to exercise a measure of caution in incorporating a principle of exotic origin. Every legal system evolved by the genuis of the people adopting it has rules and principles peculiar to itself for the purpose of securing justice. Every rule or principle forms part of a scheme or system. These parts blending harmoniously form a systematic whole. The very idea therefore of adopting a rule or principle evolved by one system into another system can be attempted only after careful and thorough investigation. It is pertinent to observe that legal opinion in France "seems to be evenly divided concerning the juridical basis of l'abus du droit (abuse of rights). According to one view, every legal right carries in itself its own limitation, and involves a duty to use the right properly and innocently . . . . . The objection urged against this theory is that it makes the standard of legal right too varriable and capricious, because it leaves too much to subjective judgement. Accordingly, the opposing school holds that the theory of "abuse or right" means only that a right which was thought to be unlimited is declared by judicial decision to be in fact limited. The intent to injure, upon which the first school insist as the source of liability is irrelevant, the court merely says that this act which was supposed to be rightful was in fact wrongful and that damages must be paid accordingly."[25] The uncertainty regarding the juridical basis of the principle hightens the need for circumspection.

Can we concievably rely on any principle formulated and developed under the English system to tide over the dilema created by the intriguing rule laid down by the House of Lords in Mayor of Bradford V Pickles. In the days when it would still have been regarded, impious and schismatic to challenge the validity of the principle affirmed in Allen V Flood, the court had either to pronounceits loyalty to precedent or declare schism and depart from the generalisation relating to irrelevance of motive in Hollywood Silverfox farm case. The court of King's bench apparently did both.[26] In the case of Hollywood Sliver Fox Farm V Emmitt (1936) 2 K.B.468 Macnaghten J has held that the discharge of a gun by the defendant on his land with the intention of interfering with the plaintiff's business of breeding Silver Foxes was an actionable nuisance. The decision was based upon the

---

25. C.K. Allen, Legal duties p98. 1931

26. Christic V Dairy (1893) 1 ch 316 was followed without adverting to the decision in Mayor of Bradford V Pickles.

principle that a lawful act which injures another gives rise to a cause of action if it is done with the intention (evil motive) of injuring that other. The principle acted on in Silverfox Farm case is evidently opposed to the principle in Mayor of Bradford V Pickles. Either the one or the other should be regarded as the true principle. There have been faint hearted attempts to reconcile these decisions. Winfield observes that the decisions in Christe V Davey and in Emmets case are "reconcilable with Bradford V Pickles on the ground that the malice displayed by the defendants made their acts unreasonable.. . . . . and therefore nuisance. As has been seen, the law in judging what constitutes a nuisance takes into consideration the purpose of the defendants activity and acts otherwise justified on the grounds of reciprocity if done want only and maliciously with the objective of injuring a neighbour are devoid of any social utility and cannot be regarded as reasonable".[27] . . . . . The term "reasonable means something more than merely taking proper care". It signifies "what is legally right between the parties," taking into account all the circumstances of the case.[28] . . . . . "Whether an act constitutes a nuisance cannot be determined merely by an obstract consideration of the act itself, but by reference to all the circumstance of the particular case, the time and place of its commission, the manner of committing it, whether it is done wantonly or in the reasonable exercise rights and the effect of its commission, that is whether these effects are transitory or permanent, occasional or continous so that the question of nuisance or no nuisance is a question of fact."[29]

The princoples enunciated by Winfield in respect of the offence of nuisance can be held to be of general application. The purpose and to a considerable extent the function of law would vary as the concept and content of the rights and duties of the individual and the concept of his obligation undergo changes. An individual has his obligations to his neighbour and to the society of which he is a member. The rights which the member of a political community may claim to receive legal protection can only be rights recognised by the society as deserving protection. Broadly certain interests whether of person, reputation or proerty are deemdd in the inferests of the individual and the society worthy of protection. Some interests may be more important than others deserving greater protection. For the protection of the interest, it is necessary to invest the individual with rights. So it is natural to assume that the individual should exercise his rights to safeguard the interests for the protection of which rights are recognised.

---

27. Winfield, Law of Tort P.404
28. Cited with approval in Russel transport Ltd. V Ontario Malleable Irion Co., Ltd., (1954) 4 DLR 719.
29. Winfield, Law of Tort 397.

Apart from the aspect that the freedom to exercise individual rifhts is recognised with a view to preserve certain interests, it is simultaneously necessary to realise the duty of an individual to respect the interests of his neighbours and the society. He must refrain from conduct which he can reasonably for see as likely to injure his neighbour or as likely to injure the interests of society. There are jurists who would even go to the extent of holding that an individual has no right except the right to perform his duties. I find it difficult to convince myself of the wisdom or practical utility of their theory which perhaps aims at the very exhalted and one can only hope for the evolution of a society of selfless people striving to exercise their only right to discharge their duties. In the realm of religion or morality, it may appeal. But finding consolation in the thought that I have rights, rights meant to safeguard my socially recognised interest, I shrink from the prospect of claiming my neighbours pound of flesh, even where I may conceivably be possessed of a legal right to demand the same. Can any system of law hopefully rely on the slim prospect of finding graceful Portias to save such incredible situations? It is plainly difficult to regard the rights of an individual in isolation from the interests of his neighbour and the society. To treat the function of law courts as merely to enforce the rights of individual, regardless of the legitimate interests of others and the community would be failing to visualize the role of the judiciary to administer justice. Whatever else be the purpose of law, its mission of administering justice cannot consciously be disputed. That law is closely related both to justice and ethics was recognised by the Greeks. Plato wanted the execution of justice to be carried out by Philosopher Kings who were to equipped for the job by training and education. It is to the judges that we have assigned this role. Aristotle regarded justice either as "What is lawful, or what is fair and equal" that is what is legally right and fair between the parties.

In this context it is rewarding to examine the judicial function in deciding disputes arising out of the tortious claims. Of great importance is the consideration that the branch of the law of torts is basically judge-made. In a statute, the rights and duties are precisely defined. The ambit or limits are also contemplated with as much prescision as is possible. But when a tortious claim is being adjudicated, it is for the judge to decide whether a duty was owed by the defendant to the plaintiff. "Duty means a restriction of the defendants freedom of conduct." The court may upon the analysis of the facts of the case say that such circumstances presented an appreciable risk of harm to others as to entitle them to protection against unreasonable conduct by the actor". Even where the claim of the plaintiff is denied by the defendant by asserting that his act was done in the exercise of a legally recognised sight the court has power to decide that the defendant owed a duty to exercise the right for a bonafide purpose. Misuse of a right would destory the legitimacy of his action. If the conduct of the defendant resulting in injury to the plaintiff

is malicious or malafide, he has committed a breach of the duty to exercise the right in good faith. Here the act done by the defendant would not be legally right between the parties. The concept of abuse as warranting remedial justice is not foreign to English law. Whether the defendant, in a given circumstances owes a legal obligation is in the ultimate analysis to be decided by the court. It may be quiet true that when the court states that the defendant is under a duty of a care the court may be stating "as a conclusion of law what is really a conclusion of policy". The idea of the defendant owing a duty can very well arise even when the defendant is doing an act in the exercise of a legal right. So the court when deciding whether the impugned conduct is legally right between the parties can hold that the defendant owes a duty to exercise his rights so as not to injure the interests of others. In spite of all alleged Vagueress, the maxim "Sic utere tuo ut alienum non lae das" deserves to be reasonably observed.