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Liability in the Law of Torts - based on Fault or nofault or loss-spreading capacity?

by

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There are two opinions amongst the legal historians as regards the trend of development in respect of basis of liability under the law of Torts; as the function of this law is to shift the losses from one shoulder to other, there should be some basis for this shifting. The first opinion held by Justice Holmes is that the development has been from liability based on actual intent or moral fault to a gradual acceptance of external standards. "While the law does still & always, ..., measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continuously transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated." (Holmes, common law, page 33). The second opinion is that the development is from strict liability to the acceptance of moral fault as the basis of legal liability. There is a third opinion amongst the wellknown writers in this field that since the last century, the liability in torts does not depend on moral fault or blameworthiness, but it is strict i.e. without any fault on the part of the defendant. I will postpone the discussion of this third trend till I track down the correct possible view from the first two opinions.

I am discussing the development of the basis of liability only with reference to the uniontended harms inflicted by the defendant. Because in respect of intended acts, no theory is required to hold a man liable for the consequences. If the consequences which flow from the intended or desired act, and if these consequences or the intended act with or without these consequences, are forbidden, the doer will be liable and no theory, is required.

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Justice Holness while discussing the liability for unintended harm says at page 86 of the common law, - "The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, & education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty & awkward, is always having accidents & hurting himself or his neighbors,........ his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, & the courts which they establish decline to take his personal equation into account.

"The rule that the law does, in general determine liability by blameworthiness, is subject to the limitation that mintue differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those of gifts, it is our misfortune;.... But he who is intelligent & prudent does not act at his peril, in theory law. On the contrary, it is only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences."

Justice Holmes further states that the law presumes or expects a man to posses ordinary capacity to avoid harming his neighbours, unless there is a clear & proved case of abnormality or incapacity in the particular defendant, like a blind man or an infant, and lays a completely different proposition on page 88 "but that, on the other, it (law) does not in general hold him liable for unintentional injury, ..." This means that Holmes meant some internal or moral shortcoming which will exclude his liability.

Further he argues that "If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, &, however much it may take moral consideration into account, it does no only for the purpose of drawing a line between such bodily motions & rests as it permits, and such as it does not. What the law really forbids,........, is the act on the wrong side of the line, be that act blameworthy or otherwise."

Any legal standard, which we call as external standard, must be capable of being known, so that men in society may know & follow them. When these standards are capable of being known, we can say that every person is supposed to have known what the law is. And when a man is made to pay damages, he is supposed to have broken the law or deviated from the external standard set up by the court. In negligence cases legal fault does not coincide with moral fault. The standard applied by law to determine his liability has always been external, objective standard. Where there is a duty to use care, one must act as a prudent man would act in similar circumstances. This prudent man, or sometimes even called as the reasonably prudent man, is not a party to the action nor is he a living person to enable, the courts to put him in the witness box. He is an 'idealised abstraction', a fictitious person. He is endowed with the qualities of the person whose conduct is being judged. But many of the actor's shortcomings, like awkwardness, faulty or poor judgment are not taken into account if they fall below the general level of behaviour of the community.

According to the second view the law held a person liable who caused harm to his neighbour to make good the loss irrespective of any fault or intent to harm on the part of the doer. In adjudicating upon questions of civil liability the law made no attempt to try the intent of man because "the thought of man shall not be triable, as the devil himself knoweth not the thought of man" (Per Brian C.J). The early law asked "Did the defendant do the physical act which damaged the plaintiff? And not whether he had intended. The general rule was that a man was liable for the harm which he has inflicted upon another by his acts, whether intentionally, negligently or accidently. This principle had been applied to cases of damage done by a man's animals or anything under his charge or control. Even the lunatics & infants were not excused;

they were civilly liable to pay damages to the injured party, though the state might remit penalties. In all civil acts, the law does not so much regard the intent of the actor, as the loss & damage of the party suffering. "If a man rising in his sleep walks into a china shop & breaks everything about him, his being asleep is a complete answer to an indictment for trespass, but be must answer in an action for everything he has broken." (Pollock, law of Torts, 15th edition.)

Though the words 'fault' & 'negligence' appeared in some of the early cases, it was clear that such terms didnot carry the meaning attached to them in modern law. In Weaver v. Ward, examples were given - 'As if a man by force take my hand & strike you, or if here the defendant had said that the plaintiff ran against his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable & that the defendant had committed no negligence to give occasion to the hurt'. However, there were occasions recognised by law for inflicting some kind of harm, for example, the public interest may demand the infliction of harm, i.e. trespass on a private land for defending the country against the foreign invasion; for the protection of private rights to person or property harm could be inflicted.

This was the period when liability was independent of fault. The chief aim of law in this primitive society was to keep the peace & maintain law and order. The emphasis was on the good of all, the entire community, and the individual wrongdoer's consequences were taken into account and not the reason (mental element). The interest of the state was supreme, and it was on 'unmoral' period, in as much as the 'morals' of the individual wrongdoer was not taken into account. When the emphasis shifted to the welfare of the individual and the morals of the individual and the moral minded society, there was an attempt to adjust the loss according to popular notions of good, fairness and fault. This idea that legal liability should follow moral or social fault is corollary to the modern notion that ordinarily it is unjust to require a person who innocently or accidentally causes harm to pay for it.

The chief expounder of the first view that a man's liability is judged by external standard, is Justice Holmes. And that of the second view that the liability is based on fault, moral or social, is Prof. Wigmore. Of the two theories, Prof. Wigmore's theory has been accepted as

nearer the truth. The chief supporters of the second theory are Sir William Holdsworth and Sir F. Pollock. Sir Holdsworth spoke of 'the dominant concept of Anglo-saxen law', was 'the idea that a man acts at his peril'. Sir F. Pollock said - "In a rude state of society the desire of vengeance is measured by the harm actually suffered & not by any consideration of the actor's intention; hence the archaic law of injuries is a law of absolute liability for the direct consequences of a man's acts, tempered only by partial exceptions in the hardest cases." (Pollock on Torts, 15th edition, Page 12). It is true that the some facts would often afford ground for action under the criminal law and under the civil law. In criminal law there was an absolute liability period. Ancient criminal law determined the liability of the doer by looking to the harmful consequences. It held the doer (or the thing) liable, whether it be animate or inanimate. The thing was forfeited as deodand. The same facts when brought under the civil law, wherein the injured claimed, not the punishment of the doer; but compensation to himself, the law had to apply the same principle. And that is why there is a greater support to Prof. Wigmore view for determining the civil liability. Salmond in his book on Law of Torts (14th edition, Page 29) says - "Reason demands that a loss shall lie where it falls, unless some good purpose is to be served by changing its incidence, and in general the only purpose so served is that of punishment for wrongful intent or negligence". The main aim of Law of Torts is adjustment of losses and stronger reason is required for shifting the losses from one shoulder to the other.

This principle of civil liability "obviously takes account; not of the moral shortcomings of the defendant, but only of the loss of the plaintiff; and this characteristic is reminiscent of the days when the compensation payable was regarded, not as a penalty for wrongdoing, but as a means whereby the plaintiff was induced to forgo his right to take revenge." (Holdsworth, History of English law Vol. VIII Page 447).

As regards these two views Prof. Nathan Isaacs is of the view that they supplement each other. They are the two ends within which the pendulum swings." The law has moved in cycles. A period of strict liability, an 'unmoral' period, is succeeded by a period of fault liability, a 'moral' period, and then the pendulum swings back again." (Salmond, Torts, 14th edition Page 31). "The history of tort law records lapses from the moral fault basis and returns to it rather than a single movement in any one direction. There is, in fact, an alteration between periods

of the tendency that Justice Holmes described when cases of acting at one's peril multiply in the law and periods of the kind professors Ames and Wigmore describe, when morals are reinfused into the law." (31 Harvard Law Review, Page 966).

Whatever be the conflict inrespect of these theories and the development of the tort liability, it is certain that neither of the two theories is in vogue now and neither is followed exclusively. It is, I would say, a period of strict liability. Man acts at his peril. But his conduct, wrongful or innocent, is judged not by the moral or social fault according to the standard of the doer, but by an external standard. It is a moral shortcoming judged by the individuals judgment, capacity, etc., but the law applies an objective test or external standard. For determining his liability, the law does not takes into account the shortcomings, defect, lack of knowledge, lack of capacity, lack of foresight, etc, in the doer (defendant), but the law calls for the 'ideal man' in the society and determines his conduct in those situations posthumously and the judge (and the jury) sit as doctors doing a 'post-mortem' on the conduct or behaviour of the defendant. The law has not, and cannot, lay down before hand, by any hard & fast rule, as to how a 'reasonable man' (or prudent, ideal, average man) in a society would act. If it is so done, it will be a sort of guide to men in the society. The laws prevailing in the society, whether codified or uncodified, are made known to all men, so that they need not do those acts which are either expressly or impliedly prohibited by the state. If the same is done in respect of an 'ideal conduct', it will serve as a guide to the judge (& jury) who decide the case and also to men living in society. A reasonable conduct is the conduct of a reasonable man in society i.e. 'the man in the street' or 'the man on the clapham omnibus', or 'the man who takes the magazines at home & in the evening pushes the lawn mower in his shirt sleeves'. In respect of a reasonable man in India, we can say he is a 'man who travels by the state buses or in III class of a train, or one who purchases his foodgrains and sugar on the ration card issued by the Revenue authorities'.

According to these standards of judging the liability of the defendant, the individual's state of mind, intention, knowledge, or the subjective elements are not taken into account, e.g. while determining the liability of the defendant is compared with the conduct of the reasonable man. As such, in this respect the theory propounded by Justice Holmes is still followed.

Now as regards the basis of liability, neither view is entirely correct. As stated in the beginning of this article, the third opinion, that the law has concentrated, since the last century, on strict liability. Liability does not depend upon moral fault or blameworthiness and their is a shift towards liability based on capacity to pay the losses.

By the end of the last century, new torts had been recognised, which undermined the then existing principle. The then tendency was to regard the area of strict liability as an exception to the general rule. It was felt that there was an adjustment between law and morals since under it a man was generally held liable only where he had been guilty of some kind of fault. But the recent tendency and the development of the case law in England is towards a stricter liability, without adverting to the absence of fault in the defendant.

The first notable decision creating a new tort & new liability is the case of Rylands v. Fletcher (1868). It referred to the conduct & the mode of using one's own property. Whoever brought anything on his land which was not there naturally, was to keep it at his peril, and if it escapes & causes damage, he shall be held liable, though he has taken due & proper care for its custody. This case is considered to be the case which recognised the tort of strict liability. Prior to the creation of this tort, there were torts already in existance which could also be brought under this category. For example, trespass to land or person. Any invasion of the rights to property land or goods or person, were considered as wrongful and though the act was done accidentally, in good faith or due to an error of judgment (mistake), these were considered as invalid defences. Trespass to land through a person or a cattle, were both tortious. In respect of conversion, the liability was strict, though there was a bonafide belief of the defendant that the goods were his. A house holder was liable for damage caused by his fire, even though that damage was occasioned not by his act, but by the act of his servants or guests. Another illustration is that of the law as to keeping of animals. The liability for the damage caused by ordinary tame animals was modified by the growth of scienter rule but the old strict liability remained if the animal was naturally wild or it scienter could be proved. The owner of cattle was held liable for cattle trespass on to his neighbourer's land.

The vicarious liability principle is another example in this direction. The innocent master is held liable for the wrongs of his servant and sometimes his independent contractors.

The tort of defamation, also, does not take fault into account. The fact of defamation, and not the intention to defame, is material for determining the defamer's liability.

Barring a handful of torts requiring a particular mental element, all the other torts are instances of strict liability.

So it is not 'the actual intent' of Justice Holmes theory or 'moral fault' of Prof. Wigmore's theory that is prevailing.

As Prof. Fleming points out in his book on An Introduction to the Law of Torts (1967 edition), since the beginning of this century there has been a widening of the tort liability. "Viewed in the broad perspective of history the law of torts entered its second stage around the turn of the 19th century as turnpike and burgeoning industry were vastly accelerating the pulse of human activity and confronting human society with an accident problem of hitherto unprecedented dimensions. The legal response to this dramatic challenge was neither disoriented nor timid. In one respect it stimulated an expansion of legal protection, in another a contraction." (Page 4 of Fleming on law of Torts). The courts were faced with novel and manifold cases like perils of highways, city streets, along railroad tracks, factories, manufacturers, occupiers of property etc. The three defences of contributory negligence, assumption of risk, & the doctrine of common employment exempted the master from vicarious liability for any injury his servant inflicted on a fellow servant. It was in 1897 by the a workmen's compensation Act and the abolition of the doctrine of common employment in 1948 which assured the English working class a security against the accidents 'arising in or out of the course of employment'. The basis of workman's claim against the employer was not employer's negligence or fault but the accident. This was so because the employer may, & he can, insure against such liability. Till 1932 (Donoghue v. Stevenson), the doctrine of privity of contract 'screened negligent manufactures from claims for injury by ultimate consumer or user of the goods manufactured. By the occupiers' liability Act, 1957, the occupier owes a common duty of care to all lawful visitors of his premises.

From the above account it is clear that the law of Torts is moving towards a stricter liability. Fault is no more the basis of liability; however careful the doer be. It is the loss suffered by the plaintiff that is the amount to be adjusted.

The new policy of the law deals with situations where the defendant's dangerous or unusual activity exposes the community to an unusually great risk and will not be less even if he does it with every possible precaution. The basis of liability, under this changed policy period, is the intentional behaviour in doing an unusual act resulting in exposure of the community to such a risk. "The courts have tended to lay stress upon the fact that the defendant is acting for his own purposes, & is seeking a benefit or a profit of his own from such activities, & that he is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim. The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex & dangerous civilisation, and liability is placed upon the party best able to shoulder it. The defendant is held liable merely because, as a matter of social engineering, the conclusion is that the responsibility should be his. This modern attitude, which is largely a thing of the last four decades, is of course a far cry from the individualistic viewpoint of the common law court". (Prosser on Torts, 2nd edition, page 318).

When the defendant is at fault, moral or social, there will be no difficulty in holding him liable. The real difficulty comes up when neither party is to be blamed. The law feels sorry for the poor plaintiff and equally sorry for the defendant. The only element which influences the courts in adjusting the losses is who can best bear the loss & then to shift the loss on to such person even if there is no fault on his part. This shifting of the loss will nodoubt be onerous to the person on whom it is shifted. But the recent trend in the policy behind shifting is that such a person is in a position to absorb this loss by spreading it on to the society, through insurance, increase in prices, rates, taxes etc., In respect of advance countries like America, England, Japan, Germany etc., the defendants have deep pockets, they are public utility bodies, industrial corporations, etc, they pay first and recover later by spreading. So the emphasis has changed from loss-shifting to loss-spreading. "The decisive factor in this reorientation, which is destined ultimately to recast much of contemporary accident law, is the growing realisation that tort law can,

& often does, perform the function not merely of shifting, but also of spreading the loss; that the defendant instead of having to foot the bill single handed is in actual fact more often than not only a conduit through which the cost is channelled so as eventually to be disseminated in minute and almost imperceptible fractions among the whole on an appreciable section of the community." Fleming, An Intruduction to the law of torts, 1967 edition, page 8. He then gives an example of a manufacturer, who pays compensation to third parties for the injuries sustained and adds to his cost as overhead charges and will calculate the price he will charge for each unit of his product and that will eventually be spread in negligible amounts over the large number of ultimate consumers. This spreading of the cost may also be achieved by the device of liability insurance. In balancing the interests, the courts have been guided by the relative ability of the respective parties to bear the loss which must fall on one or the other. In doing this the judges are not favouring the poor against the rich. It is a question of their capacity to absorb the loss and spread it, that matters much.

After looking to this bright and satisfactory picture of the poor (plaintiff) workman in England & America, when we come to the Indian counterpart we are very much disappointed. There is a striking contrast between the two. England and America are highly progressive and industrialised countries. Even after lapse of a century we may not be in a position to reach in the near vicinity of these countries. It is due to this highly progressive, industrialized, commercial urbanization that the communities of these countries have become rich. When these advanced countries are inventing new things day by day, when they are trying to reach the moon, we are wasting our energies and resources on petty quarrels like communal riots, boundary disputes, river water, gheraoes, bandhs, strikes, dharanas etc. Our legislaters are no exceptions to this. Every person having some power is looking to his own interest, instead of looking to the benefit of the community, society, state and nation. The energies and money of the government is spent in meeting these challenges, instituting judicial inquiries and in rebuilding what was lost or destroyed in the disturbances. I am not blaiming here only the government; there is also a blame on the part of the society as a whole. There should be broad thinking and cooperation on the part of both, the society i.e. the ruled and the administrators i.e. the rulers. There should be allround improvement. Curruption, nepotism, red-tapism must all be curbed. There is tall-talk by all leaders

about 'Socio-economic justice'. Our five year plans are made with a view to make India a welfare state and to bring in sociolism in all respects. We have achieved something but not every-thing. We have not achieved as we should have in these 22 years after our independence. Take for example Japan. Even after the bombing during the second world war, it has improved to such an amazing extent, that there is no trace of it being bombed. It has now become one of the most progressive, advanced and industrialised countries in the world. I wonder when we shall have such a day.

This 'tall-talk about Socio-economic justice' is not merely made by our political leaders, but also by our judges, in public speaches or functions, or off the courts. But when they get the chance of setting these things right by shifting the loss on the person who can best bear it, the judges become conservatives and show their reluctance. This fine opportunity was present in a recent leading case decided by the Supreme Court. The learned Chief Justice, with due respect, in that case escaped from facing this challenge of the time by drawing a distinction between sovereign and non-sovereign functions, and holding the government liable only in respect of activities which come in the latter category. Chief Justice Gajendragadkar in <u>Kasturilal</u> v <u>State of Uttar Pradesh</u> (A.I.R. 1965 S.C. 1039) at page 1049 said 'In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the state. <u>That, we think, is not a very satisfactory position in law. The remedy to cure this position however lies in the hands of the legislature</u>'. At page 1048 para 30 the learned Chief Justice of India says 'it is time that the legislatures in India seriously consider wiether they should not pass legislative enactments to regulate and control their claim from immunity in cases like this on the same lines as has been done in England by the Crown Proceedings Act, 1947.' From these statements coming from a person no less than the Chief Justice of India, it is clear that the courts hesitate to adapt to social changes and the problem confronting the law. The judges are satisfied that the present law is unsatisfactory. The courts are not incompetent to impart justice. In fact, without there being any corresponding legislation in India, the Indian courts have followed the principles from the English Acts, for example Law Reform (Married women and joint Tortfeasors) Act, 1935 and the Law Reform (Contributory Negligence) Act, 1945.

These two acts have changed the common law in England. And the Indian courts, after these acts, have been follow-wing the common law, with these changes. Secondly, the Indian courts have been acting on the principles of justice, equity and good conscience. On this principle the Indian Courts, especially the Supreme Court in Kasturilal's case, could have followed the modified common law in England after the Crown Proceedings Act, 1947 was passed. The Supreme Court could have set an example to all other courts in India.

All this does not lead us to the inference that in India it is not possible to shift the loss and spread it over the society. It is possible only in cases of big industrial magnates. But such persons are limited in number considering the area of the country and the population. Secondly, it is possible through insurance. Thirdly, it will be possible by legislation. It has been successful to some extent in shifting the loss to the employer and then to loss spreading by Workmen's Compensation and Employers Liability Act, etc.

Of these, the first possibility is limited. The third depends upon the legislaters. In enacting these statutes, the law framers will be guided by their own interests. The only outlet for loss spreading is liability insurance. But it is not much in practice. Only a few concerns would have insured against such losses. If liability insurance is made compulsory, it is possible to determine liability without adverting to fault, but by adverting to the loss bearing capacity.

There are some more important reasons which distinguish the American situation from Indian situation and prevents the Indian courts from applying in India this loss shifting and loss-spreading ideas followed in England and America. Firstly, in India there is no litigation - consciousness. May be because the Indians are comparatively poorer and do not have source nor feel like vindicating their right. Compared with the American's, Indians are very lethargic and very slow to take actions. Secondly, in America every third man has a Car. It is a necessity for him, with the result that there are many cars on the road necessitating the owner to ensure against accident losses. Whereas in India the situation is quite the contrary. Thirdly, the salary of the peon, the lowest in the life of Office, gets about Rs. 100/- p.m. whereas the President of India, the first man of the nation or the top-most man gets Rs.10,000/-p.m. So the ratio is 1:100. In America the disparity is not too much. The

standard of living is very high in America and so an American never hesitates to assert his right or claim compensation, however small it be. In India the standard of living or the per capita income is very low. Fourthly, the extraordinary delay in deciding cases in India hampers the growth of this branch of the law, as it is essentially an uncodified law. Take, for example, the case of Kasturilal v. State of Utter Pradesh. It took 17 years for the case to be finally decided and ultimately the poor plaintiff got nothing but spent everything. Justice delayed is justice denied. Hence many Indians do not enter the courts. Added to this delay there is a high cost of litigation, which is outside the reach of common man. Fifthly, as has been rightly pointed out by Prof. S.M. Hasan in 1966 An. Sur. I.L. at page 114 that the tendency of the courts in awarding damages is discouraging and that is why there is a dearth of litigation in India under the law of Torts. "Phool Chand v. Shrimati Jai Devi (A.I.R. 1966 527) reflects the tendency of our courts in regard to the quantum of damages in cases involving trespass to person. The unfortunate woman who was dragged by a Ruffian was awarded damages in a sum of Rs. 600/- only, whereas in a comparable case in England, Loudon v. Ryder, the woman concerned recovered £5,500." There will be a miscarriage of justice if in such serious cases the court declines to award exemplary damages.

All these various reasons hamper the growth litigation in the field of law of torts. Only when there is a flood of litigation, the courts, in accordance with the principle of justice, equity and good conscience, will think of shifting the loss on a capable person. Not it is too early for the Indian Society to bear this loss. Majority of the people do not go in for the goods which have become costlier, by the addition of these losses to the cost of production; they shift to a substitute product or go in for a cheaper product. If if is an essential product, all people will go in for that product, notwithstanding the high price.

In order to achieve the stage reached by American and other advanced courtries in allocation of losses, we have to (1) Educate the masses (2) raise the standard of living (3) quicken the disposal of cases (4) prepare a society to meet the challenge of the moving and developing time and its problems (5) and the attitude of the court must be to help the victim; the judges must have a progressive outlook. If all these are achieved then only the poor victim can be compensated by the society in which he is living.

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