THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

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"AN ANALYSIS AND TECHNIQUES OF ASSESSMENT OF DAMAGES IN TORT LIABILITY WITH SPECIAL REFERENCE TO INDIA"

By

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Remedies for torts are of two kinds i.e.

1. Judicial or
2. Extra Judicial

or we can pronounce remedies by way of an action at law, and remedies by way of self-help.

Judicial remedies obtainable for redressing torts or those for which the party injured such take resort to a court of law are of three chief kinds -

1. Damages
2. Injunction
3. Specific restitution of property.

The first of these is the ordinary and characteristic remedy. The term "damages" may be defined as pecuniary compensation recoverable for the injury done to the plaintiff. They are limited to the loss which a person has actually sustained and are designed not only as a satisfaction to the injured person, but also as a punishment to the guilty to deter him from any such proceeding in future. The wrong doer is liable for any damage which is the 'direct' consequence of his unlawful act, whether....he intended the consequence or not, and whether he could have reasonably foreseen it or not.

In this connection the first thing to notice is that damages are of various kinds.

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1. General and Special Damages

"General" damages are pecuniary compensation which the judge or jury are entitled to award upon proof only that the tort in question has been committed.

"Special" damages are damages for loss or injury flowing from the tort which the law requires the plaintiff to specify in his pleadings and establish specifically.

The distinction between the two is therefore a matter of practice and procedure, rather than of substantive law and it is somewhat arbitrary, e.g. in claims which involve personal injuries damages for pain and suffering are "general" on the other hand damages in respect of earnings during a period of incapacity occasioned by the injury, or damages in respect of medical expenses incurred as a result of it are "special".

2. Nominal

These are awarded in cases to which the maxim "injure sine damnum" applies. Where the plaintiff's legal right has been technically infringed but he suffers no actual damage e.g. where a man merely walks across the land of another, thus committing a trespass.

3. Substantial

These damages are awarded for the real loss which, in most actions, the plaintiff has usually suffered. They are also called "ordinary" or compensatory damages and are awarded in a great majority of actions in tort.

4. Contemptuous or ignominious

They are awarded where technically a legal wrong is committed, but judge or jury consider that the plaintiff should be deprived of substantial damages because his claim is unmeritorious e.g. in a case of defamation, the plaintiffs conduct and charcter are such that he does not descrue to be compensated.

5. Exemplary or punitive or Vindictive or Deterrent

There are awarded in cases of great injury e.g. in cases of seduction of a man's daughter with deliberate fraud or of gross defamation. The object

of giving examplary damages is to make a public example of the defendant to deter all persons from the commission of a similar act.

6. Prospective and Continuing

Damages which have not actually accrued to a party on the date of the suit but which may arise subsequently as a result of defendants' action. As a general rule the injury resulting from one and and the same cause of action must be remedied once and for all. The damages awarded must therefore include compensation for any future or prespective damage which is likely to result from the defendants' tort, as well as compensation far accrued damage proved at the trial, for no more than one action will lie on the same cause of action

Except under four circumstances:

1. Where same act violates two rights e.g. where one below breaks B' arm and his watch.

2. Where cause of action is a continuing one e.g. continuing trespass, continuing nuisance.

3. Two distinct acts violating same right e.g. same libellous statement published to two or more persons at different times.

4. Where damage occurs at different times e.g. by reasons of a slander published by A, B lases employment with C and after obtaining employment with D, lases that too.

The Assessment of Damages

It is said that the purpose of awarding damages is to effect a "restitute in integrum," to put the plaintiff back in the same position that he would have been in if he had not been injured by the defendants wrong. This saying may be proved true as an ideal statement of principle, but actually in practice no one can really assess the value pf the loss of an eye or even of a tooth. That is why it would be better to say that the aim of an award of damages is, as far as money can do it, to compensate the plaintiff for his loss.

The assessment of damages is thus in the discretion of the court. The law has not laid down an arithmetical standards for this purpose, nor can it possibly do so. Thus the measure is vague and uncertain depending upon a variety of causes, facts and circumstances. Accordingly damages may rise to almost any amount, or they may dwindle down to being merely nominal e.g. in cases of seduction assault, defamation or malicious prosecution, the position, rank or feelings of the party injured as well as the wrong-doer must be considered as aggravating or mitigating factors.

The other rule is that the wrong-doer will be liable only far direct consequences of his act and in no case will 'remote' factors be considered in estimating damages.

The third rule is that if damage has resulted from two or three causes, as from an act of God as well as from a negligent act of a party, then the award of damages should be apportioned to compensate only the injury caused by the negligent act.

Thus is short the same principles which determine the existence of liability determines also the measure of damages to be awarded.

The above principles involved in the assessment of damages may be considered under two heads:-

1. in respect of cases concerning injuries to the person.

2. in respect of cases concerning injuries to property.

Damages for injuries to the person

As stated above there is no fixed rule by which damages in cases of injury to the person, reputation or feelings can be estimated because of certain difficulties.

1. The first difficulty is that the law of damages is pre-eminently a field of law in which circumstance alter cases e.g. an assault in public may aggravate damages than an assault privately.

2. The second difficulty is that damages are to be assessed upon the basis that they will so far as money can compensate give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act.

In the above rule, the problem of assessing the pain and suffering, mental anxiety, badily loss, loss of enjoyment of the pleasure in money term is very difficult, which can only be solved by forming conventional assessments appropriate to cases of similar kinds.

But recently it has been made clear that there is a double aspect to losses of this kind.

1. To some extent they may be measured objectively e.g. loss of a limb may be valued quite apart from any question of consciousness in the affliated person and an hypothetical value may be put upon them.

2. The subjective element is also to be considered which depends upon the actual awarness of the sufferer e.g., a man does suffer pain or he does not. If a person is rendered unconscious from the time of the injury, he has had no pain and so loss damages can be awarded. But the absence of the subjective element should not curtail the award of damages to a considerable extent.

In modern times the courts have also allowed a claim in respect of loss of expectation of life, this also has an objective aspect and is very difficult to asses in money like the assessment of the lass of a limb - a man injured in an accident may lose, say, seven years of his normal expectation.

But it also had a subjective element, to contemplate seven years less of life is distressing thing, that is why in awarding damages, subjective element may also be taken into account.

3. The thifd difficulty is of the economic realities which have to be faced, money values fluctuate, and the effects of inflation or deflation have to be taken into account. At the present time, for example, the actual amount awarded tends to be higher than it would have been in similar circumstances in former times.

4. Fourthly, the Courts cannot overlook the incidence of taxation. The amount of tax whhich a successful

plaintiff would have had to pay on future earnings must be taken into account by way of deduction from the damages he is to receive from the defendant whose tort has deprived him of the benefit of those earnings. Because where the damages as such are not taxable in the hands of the plaintiff, he would be making a financial gain from the tort if instead of receiving the amount of the taxed earnings, he were to receive an amount equivalant to gross earnings, before deduction of tax.

5. The last point is that in an action for damages resulting from defendants wrongful acts, sum received or receivable by the plaintiff on an accidental insurance policy should not be taken into account in reducing the amount of damages. The contract of insurance is with the plaintiff and it is a matter between the plaintiff and the insurance company and is not a matter with the defendant concerned. The amount of damages, should as such, be assessed as if the plaintiff was not insured.

Damages for injuries to property

In this area also, compensation is the basic principle. Thus the value of the property which the defendant has damaged or of which he has deprived the plaintiff has to be assessed, and, in addition, any necessary expenses incurred as a direct result of the tort have to be taken into account. The actual method of assessment or measurement of damages will be vary according to circumstances e.g. in case of injuries to real property, the cardinal rule in actions for trespass to real property is that the measure of damages is the loss the plaintiff has sustained, and not that benefit that may have accrued to the defendant from his tort.

On the other hand in case of injuries to personal property, where the tort concerned consists in depriving the plaintiff permanently of his personal property, the general rule is that the measure of damages is the full market value of the property at the time of the commission of the wrong, and where property is damaged he must pay such an amount as will make good the damage, but if at the time of the wrong the property is already damaged by the fault of some other person and has not been repaired then the defendant can not be made to pay for the cast of the repair for which the other person is liable.

But the assessment of the value of the property does not invariably relate to the time of the wrong. Thus though it does so in the case of a claim for conversion because conversion consists in a single wrongful act, it does not do so in the case of detinul, for here the claim is a claim in rem, and the wrong continues to the time of judgment at which time the assessment must be made.

In detinul, the plaintiff may claim the return of his chattel or recovery of its value, the assessment of the value must be made separately from the amount assessed by way of damages for its detention.

In the case of conversion also, if the value of the property converted has risen between the time of the act of conversion, or of the refusal to deliver, and the time of judgment, the plaintiff is as in the case of detinue entitled to have the damages assessed according to their value at the latter time.

Lastly when the plaintiff is deprived temporarily of the use of personal property he is entitled to recover not only by way of special damage all necessary expenses, such as the cost of repairs, or the cost hiring another article to take its place during the period of loss, but also to recover damages for loss of the use itself, even though it is difficult to place an economic value upon it, even though no such hiring has infact taken place. Such damages may usually be assessed by the probable cost of hiring a replacement for the damaged article for the period of loss.

Thus after analysing the principles governing the assessment of damages we come on conclusion that a person may be disentitled to recover compensation under four circumstances.

I Damnum Sine Injuria or

(because the defendants act was not wrongful at all.)

II. Damnum suffered by one person and injuria by another, or

(because the plaintiff is not the person to whom the defendant awed the duty which he has violated.)

III. Damnum of a kind not recognised by law

IV. Damnum too remote

While analysing the rule as to the assessment of damages I have toldyou that the plaintiff will be entitled only for the damages which are the natural and legal consequences of a wrongful act. In-jure non remote cause sed proxima Spectatur (in law the immediate and proximate, not the remote, cause must be considered).

The rule of law is, that 'the wrongful act, to render the defendant liable, must be the cause causans or the proximate cause of the injury, and not merely as cause Sine quo non.

The cause causans means the real cause or the cause of causes while the expression cause sine qua non means that cause without which the event or the consequence would not have happened e.g.

> A pushes B, who falls upon a stone which was left negligently by C, and is injured thereby. Here A' pushing B is the cause causans i.e. the real cause and the presence of the stone is the cause sine quo non or that cause without which the event would not have happened.

Remoteness of Damage

Here are two views regarding the remoteness of damage:-

1. According to the first view, consequences are to remote if a reasonable man would not have foreseen them as was stressed in the Wagon Mound Case (1961) A.C. This view is held by Pollock K.C.J. and has been approved in several cases.

2. The second view is that once the defendant is hold to be liable far a tort, he is liable far all direct consequence of it, whether a reasonable man would have foreseen them or not. This view was first upheld in Smith v. L & S.W. Railway (1870) L.R. 6 C.P. 14.

Facts

In a very dry summer the Railway Company's Servants cut the grass and trimmed the hedges bordering the Railway line. They left the trims and the cuttings in heaps between the line and the hedge for a fortnight. A fire caused by sparks from a railway engine ignited these heaps and spread over a neighbouring field. From these, a high wind carried the fire across a read to the plaintiff's cottage, situated 200 yards away. The cottage was burnt.

It was argued on behalf of the defendant, that no reasonable man could have foreseen the consequences, yet the court held that as the burning of the cottage was the direct consequence of the act of the defendants, the defendants were liable.

This view of Smith's case was adopted by the Court of appeal in Re. Polemis and Furness Withy & Co.Ltd.(1921) 3 K.B. 577.

A ship was hired under a charter which excepted both the ship owners and the charterers loaded a quantity of Benzine among other Cargo. During the voyage, the tins containing Benzine leaked and thus there was a good deal of petrol vapour in the hold. At a part of call the servants of the charterer negligently let a plank drop into the hold while they were shifting the Cargo. A rush of flame at once followed and the ship was totally destroyed.

The Court of Appeal adopted the direct consequence test and held the defendants liable for the loss of the ship.

But in 1933 the House of Lords came to cosider the decision in Re. Polemis while delivering their judgment in Lieshasch Dredger v. Edison(1933) A.C. 449

Facts

By a negligent navigation the Edison Sank the dredger Lieslasch. The owners of the dredger were under a contract with a third party to complete a piece of work within a given time. They were to poor to lag a substitute for the dredger. Consequently, they were put to a much greater expense.

in fulfilling the contract they had entered into with the third party. They sued the owners of the Edison, firstly for the market price of a dredger comparable to the Liesbasch, and also for extra expenses they had to incur in fulfilling their contractual obligation to the third party. The plea of the plaintiffs was, that they had to incur extra expenses as a direct consequence of the negligent acts of the defendants.

The House of Lords in this case distinguished Re Polemis on the ground that the inguries suffered were not the immediate physical consequences of the negligent act, and as in the instant case, the extra expenses had to be incurred by the plaintiffs not on account of the immediate physical consequences of the negligent act but on account of the intervening poverty of the plaintiffs, the plaintiffs could not claim for the extra expenses.

Therefore it appears that today the direct consequences test of Re Polemis is modified by the ruting of Lieslasch case.

But the above decision is also not free from difficulties.

1. In the first place 'immediate' as applied to 'consequences' is open to same objection.

2. Liesbasch decision is possibly to be limited to the tort of negligence, and certaintly to those torts in which physical damage is the only damage which is possible.

3. It cannot apply to libel where the damage is to a non-physical thing like the reputation.

4. The court regarded the loss of the dredger as not interfering with the plaintiffs' profit earning capacity. The court meant by 'profit earning capacity' <u>personal profit earning capacity</u> i.e. capacity independent of the loss of one's trade.

Thus if by injuring a person you diminished his personal profit earning capacity, you will have to pay more, if he is medical specials, less if he is a navy man not because of the irrelevant circumstance that he is probably a wealthy man in the one case and a poor man in the other, but because his capacity is high in monetary value in the one case and low in the other.

Consequence

The result of the Liesbasch case appears to be that in all torts in which physical damage results from the wrong, this damage, provided it is immediate, is not to remote.

Thus following the first view the judicial committee of the privy council in Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co;Ltd. (The Wagon Mound)(1961) A.C. 388 held that the decision in Re Palemis should no longer be regarded as good law and that the test of direct consequence was inappropriate.

Facts

While an oil burning vessel, of which the appellants acre the charterers, was taking in bunkering oil in Sydney Harbour a large quantity of the oil was, through the carelessness of the appellants servants, allowed to spill into the harbour. During that and the following day the escaped furnance oil was carried by wind and tide beneath a wharf owner by the respondents ship-builders and ship repairers at which was lying a vessel which they acre refitting and for which purpose their employees were using electric and oxy-acetylene welding equipment. Some Cotton Waste or rag on a piece of debris floating on the oil underneath the wharf was set on fire by molten metal falling from the wharf, and the flames from the cotton waste or rag set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil and thereafter a con-flagrated developed which seriously damaged the wharf and equipment on it.

In an action by the respondent to recover from the appellants compensation for the damage it was fund by the trial judge on the evidence that the appellants "did not know and could not reasonably be expected to have know that the furnace oil was capable of being set afire when spread on water, and that apart from the damage by fire the responde ants has suffered some damage in that oil had congealed upon and interfered with the use of their shipways, which was damaged, which beyond question was a direct result of the escape of the oil.

It was held, on the footing that the damage was the direct result of the escape of the oil, that, applying the test of foreseeability, the appellants who, as found by the trial judge, could not reasonably he expected to have known that the oil would catch fire, were not liable for the damage.

Thus it was established after this case that the liability does not depend solely on the damage being the "direct" or "natural" consequence of the precedent act, but of a man should not be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural" equally he should not escape liability, however "indirect" the damage, if he foresaw or could reasonably have foreseen the intervening events which led to its being done. Foreseeability is thus the effective test the "direct" consequence test leads nowhere but to neverending and insoluble problems of causation.

After seeing the conflicting views on the rule of remateness of damage, it may be pointed out that the rule with regard to the remoteness of damage is very vague, as Bramwell, B, has rightly remarked,

> "it is something like having to draw a line between right and day, there is great duration of twelight when it is neither night not day, but though you cannot draw the precise line you can say on which side of the line the case is."

Screetlon L.J., has observed in this connection, the question is one of first impression."

Lord Selborne has observed,

> "the act complained of must have some proper connection with the damage which followed its effect."

The principle as such is that in law the immediate, and not the remote cause of an injury is to be regarded. The remoteness may affect the action in tort in two different cases.

I. The right to recover or the existence of a tort itself, or

II. The quantum of damages recoverable.

CONCLUSION

For concluding this difficult topic it will be convenient to give certain points which seem to be indisputable.

1. An event may be the consequence of several causes. Nowadays in tort we do not search, as previously, for the effective or predominant cause of the damage. We recognise that there may be many causes of one damage.

2. The doctrine of remoteness of damage applied not merely to wrongs of negligence, but to wrongs of all kinds, whether wilful, negligent, or of absolute liability.

3. A consequence cannot be held too remote if it was actually intended by the wrongdoer.

4. The rule as to remoteness of damage has no application to those cases in which the defendant has wrongfully taken possession of or otherwise dealt with property in such a manner that it is now at his risk.

5. The question as to remoteness of damage must always be carefully distinguished from the preliminary question whether the defendant has been guilty of any wrongful act at all.

6. The question of remoteness may be said to be one of fact.

Thus again in conclusion I will say that the assessment of damages is in the discretion of the court and the actual assessment is based on a consideration of various factors. The law has not laid down what shall be the measure of damages in an action for tort. The expression "measure of damages" means the footing upon which the amount of damages to be awarded in a given case may be calculated. The law has not laid down any arithmetical standards for this purpose, nor can it possibly do so. Thus the measure is vague and uncertain depending upon a variety of causes, facts and circumstances. They may rise to almost any amount, or they may dwindle down to being merely nominal.