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THEORIES AND TECHNIQUES OF ASSESSMENT OF DAMAGES

By

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It has been said that no part of English law is so uncertain and so confused as that relating to damages. This is due partly to the inherent difficulty of doing justice to both parties. Sentiment leads us to compensate the plaintiff for all loss, impartiality to remember that, especially where there is no fault, too great a burden should not be placed on the defendant. Partly the confusion is due to our lack of basic theories in tort, partly because the law of damages is surprisingly modern and has not yet been thoroughly worked out.

Measures of Damage meaning of:

It is not possible to lay down any invariable and fixed rule which can be followed in the determination of measure of damages and as to what amount of compensation the injured party is entitled to. The whole difficulty is due to the endeavour to reduce every injury and the resulting damage in terms of money. It is almost impossible to fix a money value upon the injury suffered by a person. for who and how can one measure in terms of money the injury suffered by the loss of a limb or by wounded feelings.

Lord Halsbury has rightly pointed out as follows in this connection:-

"The whole region of inquiry in damages is one of extreme difficulty. You very often cannot even

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lay down any principle upon which you can give damages, nevertheless it is remitted to the Jury, or those who stand in the place of Jury, to consider what compensation in money shall be given for what is wrongful act. Take the most familiar and ordinary case; how is anybody to measure pain and suffering in money's count? Nobody can suggest that you can by any arthmetical calculation establish what is the exact amount of money which would represent such a thing as pain and suffering which a person has undergone by any accident. I think, it would be very agreeable to to say that a person would be entitled to no damages for such things. That mainly mind cares about pain and suffering that is past. But nevertheless the law recognises that as a topic upon which damages may be given". Baron Wilede has observed as follows in this connection;[3]

"The question of the measure of damages has produced more difficulty than, perhaps, any branch of the Law."

It is the nature of non-pecuniary loss that it cannot be translated directly into money,[4] but nevertheless the only form of compensation available is an award of monetary damages, and an assessment of damage has to be made. It is no doubt true that ultimately the exact sum which the plaintiff isawarded in any case is dependent upon all the detailed circumstances of the case, but this does not mean that the topic is devoid of principle. On the contrary, atleast where so called pecuniary damage is concerned, some quite firm rules have developed, and even in the case of non-pecuniary damage, such as pain and suffering and what is called" loss of amenities" where precise valuation in money terms is obviously impossible, the eminent Judges have laid down rules, and standards in accordance with which courts are guided in awarding compensation for a given injury and these rules have become know as "Measure of Damages" by which the quantum of damages payable to an injured party are determined.

In this paper, we shall consider some of the theories and techniques of assessment of damages in cases of personal injury with special reference to social and economic condition of India.

The first formidable difficulty that we face here is the great paucity of reported Indian cases on this topic. During British rule courts in India were enjoined by Acts of Parliament in the U.K. and by Indian enactments to act according to justice, equity and good conscience if there was no specific rule of enacted law applicable to the dispute in a suit. In regard to suits for damages for torts courts followed the English common law in so far as it was consonant with justice, equity and good conscience.[5] They departed from it when any of its rules appeared unreasonable and unsuitable to Indian conditions. Some instances are the rules requiring proof of special damage for an action for slander[6] and the doctrine of common employment.[7] It is, however, well to recognise that this branch of law is still premature in India and the reason is that there is very little tort litigation in our courts and there have not been sufficient opportunities for applying principles evolved elsewhere or evolving principles appropriate to Indian conditions. At present it is a singular circumstance that very few cases of torts go before the Indian courts. The Indian Law Reports furnish in this respect a striking contract to the English and American.

Fundamental principles in determining the quantum of damages:

1. Restitution in integrum.
2. Remoteness of damages.
3. Mitigation of damages.

1. The basic principle for the measure of damages in tort as well as in contract is that there should be restitution in integrum. In other words the injured party is entitled to be put as far as practicable, into the same condition as if the injury had not been suffered, i.e. where any injury is to compensate by damages, in settling the sum of money to be given for reparation of damages one should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[8] Lord Wright described[9] the principle of restitution in integrum as "the dominant rule of law." "Subsidiary rules can only be justified if they give effect to that rule" (Lord Dunedian).[10]

In a case of personal injury this criterion can and should be applied to the pecuniary elements of the plaintiff's loss such as his loss of earnings, but if is difficult to see that it can be applied to the non-pecuniary elements such as pain and suffering, and there the plaintiff receives compensation not restitution." It is the nature of non-pecuniary loss that it cannot be translated directly into money, but nevertheless the only form of compensation available is an award of monetary damages, and an assessment of damages has to be made. A measure of uniformity in the amounts awarded is also important, Justice will neither be seen to be done nor will it in fact be done if widely divergent awards are made in essentially similar cases. Recently, therefore, the courts have permitted the citation of previous awards as guides to the assessment of damages[12] and this should help to encourage consistency. But as a technique the comparison of awards has one serious draw back. Comparison of one case with another is only useful if like case can really be compared with like, but the circumstances of each case are so variable that it is hard to find a basis for the comparison. If, for example, £ 5000, to take a figure at random is appropriate for the loss of a leg, what guidance does that give to the damages appropriate for the loss of an eye.

This problem becomes more acute in India because of the inequitable social and economic conditions of its prople. These facotrs vary so largely from one case to another that a particular sum proper in one case may be proved too meagre and injustifiable. In one case[13] a sum of Rs.500/- was held not to be excessive for reduction of the wife of the plaintiff. Damages, in such case, aspecially in India, cannot be confined to loss of service of the wife, but may be awarded by way of solatium for injured feelings. It is very difficult to assess the intensity of the injured feelings in an individual case. The same difficulty is realised in assessing the damages in other kinds of personal injuries. The principle on which damages are awarded in tort is to compensate the person wronged, so far as money could compensate for the wrongful act of the defendant and for all its direct and natural consequences. If the tort is in relation to property, assessment of damage is comparatively easy because the damages then are measured by the actual pecuniary loss suffered but when injury was to a person or his reputation damages

were difficult to assess because it is not possible to assess in money value the pain and suffering of a person or the effect of damages to reputation. Indeed compensation in the literal sense is no more possible than restitution, and what is given has been described as "notional or theoretical compensation to take the place of that which is not possible, namely, actual compensation.

2. Remoteness of damages.

Even if the plaintiff proves every other element in tortious liability, he will lose his action or, in the case of torts actionable perse, fail to recover more than nominal damages, if the harm which he has suffered is too remote a consequence of the defendant's conduct, or, as it is somewhat losely said, if the damage is too remote Remoteness of damage is thus concerned with the question whether damages may be recovered for particular items of the plaintiff's loss. To ask whether a given item of damage is too remote a consequence of a given breach of duty. Theoretically the consequences of any conduct may be endless, but no defendant is responsibile aid infinitum for all the consequences of his wrongful conduct, however remote in time and however indirect the process of causation for otherwise human activity would be unreasonably hampered. The law must draw a line somewhere, it cannot take account of every thing that follows a wrongful act, some consequences must be abstracted as relevant not on grounds of pure logic, but simply for practical reasons.[14] Bacon's rendering of the maxim in jure non remote cause sed proxima spectatur has often been cited." It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by/without looking to any further degree."[15] Of course /that this does not tell us that an "immediate" cause, and the common law as has probed the matter more deeply than the maxim does. But any one who expects a scientific analysis of causation will be grievously disappointed. Courts have for a long time attempted - really sttuggled - to invent a working test to solve the problems of causal relation which arise before them. But the circumstances in which those problems arise are so varied and infinite that no single test or formula will suffice. This is not surprising. The problem of causation is nothing more than the problem of liability

or responsibility.[16] How can we have a single yeardstick by which we can measure the responsibility of parties to pay damages in the numerous variations of facts that may arise?

The only way of solving the problem is to answer the question on the facts of each case, is it or is it not just on the facts in the case to hold the defendant the negligent actor by reason of his conduct responsible for the harm suffered by the plaintiff? This perhaps is an easier task to discover a principle of general application which does not exist the latter however is the course that has been pursued by the Judges for nearly a century and more in England. The method adopted has been first, to describe - or misdescribe the problem of responsibility as one of causation or "cause and effect" in other words to evande the real issue, and having done that, to search for light and guidance in the meaning of these words. Indeed they sought the aid of quite a number of Latin and English words and pharases; e.g. direct, proximate, efficient, effective, immediate intervening, remote cause natural, probable, direct, remote consequence, cause causes, and cause sine qua non, move cause interveniens; and also the aid of metaphors about causation such as chains, rivers, transmission, gears, conduit pipes, nets, insulators. The result has been confusion and conflict in the case law, to which another circumstance has also contributed. Courts have split.. up the issue of responsibility of negligence into three different issues, duty, breach and causal relation and have tried to propound tests and rules for each issue. But they are parts of a single issue and not easily separable. Therefore, the attempt to evolve separate rules for these issues has been far from successful. The result is very confused State of the law which judges and text writers[17] have deplored.

3. Mitigation of damages:

The damage is considered too remote, if despite the wrongful act of the defendant, the plaintiff by failing to use reasonable care to avoid the damage allows himself to suffer the damage by his own negligence or indifference to the consequences. This rule is illustrated by the Maxim in jura non remote eausa sed proxime spectater. Sundara Iyer J. observed as follows in this connection in a case:[18]

"It is frequently said that it is the duty of the plaintiff to reduce the damages as far as possible. It is more correct to say that by consequences which the plaintiff, acting as prudent men do, can avoid, he is not legally damaged" i.e. it is the duty of the injured party to minimise damage. In case he wilfully allows himself to suffer even though the wrongdoer may be primarily guilty the responsibility will be entirely with the injured party. The duty cast upon the injured party is thus two fold in character. It is a duty to himself, for it is not in his own interest that he should suffer any damage. It is at the same time the duty to the society in as much as a wrongful act though aimed at one individual may directly cause injury to many others who may have no remedy for the wrong. The law as such enjoins upon every individual who complains of the wrong, the duty of avoiding as far as it lies in his in his power the mischievous consequences which the wrongful act of the defendant may produce.

This rule is also not free from the vice. The term, 'reasonable care, 'prudent man' within his powr' are so wide in heir connotation that any rule based on them may not be of much help in bringing consistency and uniformity in the amount of damages to be awarded. Facts of each case are variable that it is not always possible to determine by taking guidance from the earlier decision that reasonable effort was made to avoide the injurious effects of the wrongful act in a particular case. The value of the principle can, however, be bot denied.

FOOTNOTES

1. Alkin L.J. (as he then was) in The Susquehanna, (1925) P.196 at 210.
2. The Mediana (1900) A.C. 113.
3. (1860) H. & N. 211.
4. Winfield P.779 No.45.
5. (1926) I.L.R. 49 Mad. 728,736;1955 All.594.
6. (1926) I.L.R. 51 Bom. 167;(1946) I.L.R. I. Cal.157.
7. (1938) I.L.R. Nag.54.
8. (1880) 5 A.C. 25,39.
9. (1933) A.C. 449, 463.
10. (1922) 2 A.C. 242, 248.
11. (1956) A.C. 185.
12. (1951) 2 M.L.R. 1260(1961)I W.R.L.R. 1494.
13. (1961) M.P.L.J. (Notes) 137.
14. (1933) A.C. 449, 460.
15. Maxims of the Law (1630) Reg.I.
16. Prof. Goodhart (1953) 69 L.Q.R. 433-35; Prof. G. Williams, (1954) 17 M.L.R. 66-72.
17. Winfield, Tort p.84.
18. I.L.R. 36 Mad.580.