CHAPTER 3

Laws on Torts with Global Perspective

3.1- Introduction

Law of Tort is a subject which is not at all new in respect to its origin but has not been used much. It is a very powerful weapon in the hands of ordinary citizen to provide them with remedy in events of infringement of their rights by some individual or powerful corporation or even the State. But still the word 'tort' seems to be an alien word in the field of litigations where very few are aware of it. Now with globalization where concepts like transnational tort have taken birth it is high time that a second thought should be given to this unrevealed world of tort law so that it can be used properly to render justice. Perhaps this is the reason why a number of developed and so called modern nations are making endeavours to optimize the use of tort law and have made efforts in reviewing this subject and in doing so have drafted and adopted well comprehensive legislation and statutes.

This chapter of this research work aims to study and interpret the codified laws on tort of three countries namely United Kingdom, United States of America and China. The reason behind analyzing the law of torts of these three countries is that United Kingdom i.e. the English Law is the model law for almost all the Indian legislations, United States is one of the most developed and modern countries in the present era and lastly China was chosen because it is quite similar to India in terms of population and demography.

3.2- Tort Law in United Kingdom-

To understand and analyse the law of any country it becomes very essential to first understand the background of the legal system of that country. The laws of UK emanates from four main sources. They are the laws from the legislatures, Principles of Common Law of England, Laws from the European Union and the European Convention on Human Rights. Broadly analysing, the law system of UK can be divided into Public Law and Private Law. Further the Private law is classified into law related to property and law related to obligation i.e. duties. Law arising due to obligations is further classified into contract, tort and restitution. As this research is limited with the study of law of torts, the researcher has discussed below the law of torts of UK in details.

3.2.1- Journey of English Tort Law from Common Law to Codification-

3.2.1.1-Background of English Tort Law

Before analysing the present tort law in England, it becomes essential to discuss in short the background of English tort law. The substantive law of torts in England arose out of the forms of common law procedures. It had its origin in royal writs issued by the Chancery. Trespass was one of the first tortious actions which could be claimed by writs. At the beginning, the action of trespass was available for injuries which were direct, forcible and immediate, and did not cover indirect and consequential injuries, but later on, these injuries became actionable by the writ of trespass on the case or action on the case by virtue of statute called consimili cassu in 1285. Gradually, other tortious actions also started to be claimed by writs. . In the later part of the 19th century, prior to the Judicature Acts, the fields of tort was strewn with different forms of action having their own procedural variations which were finally unified by the Judicature Acts. Thereafter, cases of torts were dealt as civil suits and were decided on the basis of common law principles.

In the first stage of development of English tort law, fault theory was only accepted which mean that the defendant was held liable only if he was at fault. But with the increase in urbanisation and industrialisation, fault theory was gradually replaced by Strict liability Principle like in the famous case of Ryland v. Fletcher.

The foundation of the legal system of U.K is based on the common law which means that the system of precedent has a major influence in adjudicating matters. Accordingly the English tort law is also influenced by the judicial decisions of higher court. The law of tort is one of the pre-dominant choices preferred for seeking compensation in U.K. Under the various claims under tort law, to be more specific it is action for negligence which is the most claimed one. The reason behind this can be that all personal injuries are claimed in action for negligence.[67]

3.2.1.2-Reasons behind definite statutes for Tortious Liabilities-

The Tort law of United Kingdom like most of the other branches of law is based on Common law principles. It means that the base of tort law was based on certain

[67] Deakin, Johnston and Markesinis, *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003, pg 74.

principles mostly based on equity, good conscience and justice. This on turn gave a wider scope of interpreting cases by precedents and certain un-codified principles which gave room to uncertainties. Moreover as already discussed above in the background of English tort law, after the enactment of Federal Acts which are a series of Acts enacted by the Parliament to settle the dispute on procedures to be adopted, there still existed rooms for reforms in tort law. To be specific, issues like State liability, joint tort feasor liability, liabilities under common employment and fallacy of privity of contract for claims under product liabilities still suffered from ambiguities.

Old and outdated maxims and doctrines like 'King can do no wrong' and Doctrine of Common employment were needed to be abolished considering the sole objective behind tort law. Because of these doctrines have their origin in the era of Kings when immunities were granted to the King and their servants. Gradually with the involvement of States in many welfare functions the State started to extend its function beyond typical sovereign roles. So there was need of specific legislations to clearly establish the liabilities of the State for the tort committed by its servants.

Another burning issue which in existence of privity of contract loophole in establishing liabilities of the manufacturer for their products. With the leading case of Donogue v. Stevenson however the applicability of privity of contract doctrine was restricted and manufacturers were held liable for the product in event of damage caused to the consumers.

Scholars and lawyers have identified conflicting aims for the law of tort, to some extent reflected in the different types of damages awarded by the courts: compensatory, aggravated and punitive or exemplary.

Thus, it was high time that a step would have been taken to remove the ambiguities in the existing tort system in UK. Some of the major enactments made in this field are as follows:

1) State Liability for Tort after Crown Proceedings Act, 1947

2) Law Reform (Liability in Tort) Act, 1951

3) Torts (Interference with Goods) Act, 1977

4) Product Liability under The Consumer Protection Act 1987

The Researcher below while discussing the important provisions of the above enactments has also discussed their importance and need.

3.2.2- State Liability for Tort after Crown Proceedings Act, 1947-

In England, from very early times the King could not be sued in his own courts and the maxim that the "King can do no wrong" was invoked to negative the right of a subject to sue the King for redress of wrongs". The rigour of the immunity, however, was relaxed by making a petition of right available to a subject for redress only in respect of certain wrongs relating to contract or property. In the beginning even the procedure by way of Petition of Right was cumbersome until it was modified by the Petitions of Right Act, 1860. But this Act did not alter the law relating to torts. The injustice of applying the rule of immunity was, however, realised very soon by the Crown and compensation was paid in proper cases by settling the matter' with the injured person. But this was as a matter of grace and not as of right. When the officer or servant who committed the tort was known and was pleaded as defendant in an action, the Crown stood by him and met his liability. In very many cases, however, it was not possible to fix the liability upon a particular servant or officer of the Crown. The device, therefore, impleading as defendant any officer of the Crown and defending the action in his name was adopted. But this practice was condemned by the House of Lords in *Adams v. Naylov* which was followed later in *Royster v. Covey*. These decisions gave the immediate provocation to revive the Bill of 1927 relating to Crown Proceedings and finally led to the passing of the Crown Proceedings Act, 1947.

3.2.2.1- State Liability before the enactment

Prior to the Crown Proceedings Act, 1947, two ancient maxims consisting of two fundamental rules of the British Constitutional law governed the law of UK relating to the Crown's liability namely; a) the rule of substantive law that the King can do no wrong- *Rex non potest Peccare,* and b) the rule of procedural law, derived from feudal principle, that the Kind could not be sued in his own courts.[68]

The Principle that the King can do no wrong, led to the institution of the Petition of Right which was founded upon the theory that the King, of his own free will, graciously

[68] Gyan Prakash Verma , *State Liability in India: Retrospect and Prospects,* , Deep and Deep publication, pg no.23.

orders right to be done. The maxims, *qui facit per alium facit per se and respondent superior,* have no application where the servants of the Crown commit a tort. It was considered that what the sovereign does personally, the law presumes will not be wrong, what he does by his command to his servants cannot be wrong in him for if the command be unlawful, it is law no command and the servant is responsible for the unlawful act.

In context of the second maxim according to which the King could not be sued in his own court, it can be presumed that the maxim was based on the feudal principle that no lord could be sued in his own court. According to Street, "Just as no lord could be sued in the court which he held to try the cases of his tenants, so the King at the Apex of the feudal pyramid and subject to the jurisdiction of no other court was not suable". But it was admitted that the King was the fountain of justice and equity and as such he could not refuse to redress wrongs when petitioned to do so by his subjects. Subsequently, a standard procedure of presenting claims against the King by Petition of Right was introduced, which could enable the courts to give redress if acceded by the King.[69]

3.2.2.2- Actions allowed against state after the enactment

The Crown Proceedings Act altered the law relating to the civil liability of the Crown in many respects. The relevant provisions relating are sections 2, 3, 4, 5, 6, 9, 10, 38, 39 and 40.

These provisions may be classified under three heads:

(1) liability of the Crown under common law;

(2) liability for breach of statutory duties powers;

(3) exceptions under the Act exonerating the Crown from liability.

The doctrine that the "The King can do no wrong" which is a relic of the old feudal system and on which the immunity of the Crown was based, was not entirely abrogated by the Act. Under the Act the extent of the liability of the Crown in tort is the same as that of a private person of full age and capacity. The Bill of 1927 used the expression "act, neglect or default" while the word "tort" is used in section 2(1) of the Act. The

[69] Gyan Prakash Verma, *State Liability in India: Retrospect and Prospects*, Deep and Deep publication, pg no.25

alteration of the language is, no doubt, deliberate. Act, neglect or default would apply to tort as understood under common law and to breaches of statutory duties as well. Section 2(1) (a), (b) and (c) refer to the liability for tort under common law- Some of the principles of common law were modified by statutes. Whether the statutory modifications are also attracted by referring to common law in Section 2(1), of the Act, may be a question that would arise in the construction of the Act.

Section1 of the Crown Proceedings Act laid down that "that the Crown shall be subject to all those liabilities in tort to which if it were a private person of full age and capacity it would be subject", there may not be room for argument that the statutory modifications will not be attracted, the liability of the Crown being equated to that of a private person. For example, the Fatal Accidents Act, which gives a cause of action in case of death, does not bind the Crown but expressly modified the common law rule that an action dies with the person. Under that Act, a private person would be liable to the dependants of the deceased who was wronged and there is no reason to exclude the liability of the Crown in such an event.

The common law duties for the breach of which the Crown is liable under this Act may be considered under three heads:--

The first relating to the liability of the master for the torts committed by servants or agents or what is customarily treated as the vicarious liability of the master.

The second, relating to the liability of the master to his servants or agents in his capacity as an employer.

The third relating to the duties which arise at common law by reason of the ownership, occupation, possession or control of property.

The proviso to Sec. 2(1) adds a qualification to the vicarious liability of the Crown for the torts committed by its servants [clause (a)], namely, that the act or omission should give rise to a cause of action against the servant or agent or his estate apart from the provisions of this Act". In other words, if the servant himself could not be sued in respect of the tort committed by him, the Crown would not be liable. It was probably intended to exclude the liability when the servant has the defence of an "Act of State" open to him or in the extreme case which arises in England when the tortfeasor is the

husband of the person wronged, as the wife could not sue the husband under the English law for torts committed by him against her.

The principles governing the liability of the master for torts committed by servants also govern the Crown, as the Crown is placed 'in the position of a master. No distinction should, however, be made based on the nature of the functions whether sovereign or non-sovereign and whether they could be such as a private person could or could not exercise. The language of the Crown Proceedings Act is not quite clear on this point.

The liability of the Crown as master to its servants is, again, restricted to the common law liability. A master's duty to take reasonable care and to provide is discussed in *Wilson Clyde Coal Co. v. English*. These duties are:

(1) to employ competent servants;

(2) to provide and maintain adequate plant and appliances for the work to be carried out;

{3} to provide and maintain a safe place of work;

(4) to provide and enforce a safe system of work.

The provision in Sec. 2(1) (b) does not attract the duties imposed by statute on a private employer as it is restricted to common law liability. The State in the present day is, perhaps, the biggest employer of workmen in various industries. The State also provides public utility services, runs transport and in respect of such operations, the Factories Acts, and the Employers' Liability Acts, impose various- duties on persons carrying on such operations. This are- not included within the liability imposed on the State under clause (13) of Sec. 2(1). They are provided for separately. To what extent the Crown is liable for the statutory duties thus imposed by law will be considered presently.

Clause (c) provides for the breach of common law duties in respect of property. Liability may arise in different ways: Liability to invitees or licensees injured in dangerous premises and liability for nuisance for the escape of noxious things are some of the instances. Sec. 40 (4) provides that no liability shall rest upon the Crown until the Crown or some person acting for the Crown has in fact taken possession or control of any such property, or entered into occupation of such property. This is because the liability attaches by reason of the fact that the property is in the occupation or possession of the

Crown. Sec. 2[b} and (c) impose liability on the Crown only in respect of its breach of duty but no liability in respect of tort of a servant.

Sub-section 3 imposes liability upon the Crown in respect of functions conferred or duties imposed upon an officer of the Crown by any rule of common law or by statute as if the Crown itself had issued instructions law to the officer to discharge the duty or exercise the functions. The reason for this provision is the decision in *Stramhury V. Exeter Corporation* which held that a corporation was not liable for the negligence of a veterinary inspector appointed by them to exercise the functions imposed by the statute and the directions issued by the Board of Agriculture. Darling pointed out that the local authority which appointed the Inspector would be liable if he acted negligently purporting to exercise the corporate powers and not if he acted in the discharge of some obligation imposed upon him by a statute. The relationship between the local authority and the officer in respect of such a duty would not be that of master and servant as it had no control over the servant when he discharges the statutory obligations. On the analogy of that decision, it is possible to argue that where a statute or common law imposes a function upon an officer of the Crown rather than upon the Crown itself, the liability of the Crown would be limited to the appointment of a competent officer and the Crown would not be liable for torts committed by him in the discharge or purported discharge of a function. This principle was applied in *Enver v. The King*. The peace officer in that case was not the agent or servant of the appointing authority, for; in the preservation of peace his authority is original and is exercised in his own discretion by virtue of his office. It is to meet such a situation that the" provision in Sec. 2(3) is made.

In view of Sec. 11, it may be possible to argue by virtue of the function imposed by this sub clause that the Crown must be deemed to have issued instructions lawfully and since such instructions could only be issued by virtue of the prerogative of the Crown, the Crown may not be liable at all. But it is a matter for judicial interpretation and it is difficult to venture a definite opinion.

Sec. 3 of the Act makes the Crown liable for the infringement by a servant or agent of the Crown of a patent, a registered trade mark and a copyright including any copyright and design vested under the Patents & Designs Acts, 1907 to 1946. The infringement however must have been committed with the authority of the Crown. .

Under Sec. 4 the law as to indemnity, contribution between joint and several tortfeasors and contributory negligence is made applicable to the Crown. Part II of the Law Reform (Married Women and Tortfeasors) Act, 1935 which relates to proceedings for contribution between joint and several tortfeasors, and the Law Reform (Contributory Negligence) Act, 1945 which amends the law relating to contributory negligence, are made binding on the Crown under this section.

Sections 5, 6 and 7 deal with the liability in respect of the Crown's ships,' rules as to the apportionment of loss and the liability of the Crown in respect of docks and harbours.

Under Section 9, the liability of the Crown in respect of postal packets is restricted to loss of or damage to a registered inland postal packet not being a telegram so far as the loss or damage is due to any wrongful act done or neglect or default committed by a person employed as a servant or agent of the Crown while performing or 'purporting to perform ' his functions as such in relation to the receipt, carriage, delivery or other dealing. The proviso to sub-sec. 2 of the Act lays down limits of the liability in respect of registered postal packets and also lays down the wholesome presumption that until the contrary is shown on behalf of the Crown, the loss of or damage to the packet must be presumed to be due to a wrongful act or neglect or default of a servant or agent of the Crown. There are also other limitations imposed in respect of this liability by this section.

Section 10 relates to the armed forces. The liability of both the Crown and a member of the armed forces for causing death or personal injury to another member is excluded if at the time of the injury the person was on duty or though not on duty was on any land, premises, ' ship, aircraft or vehicle for the time being used for the purpose of the armed forces of the Crown, subject, how» ever, to the condition that the Minister of Pensions certifies that his suffering has been or will be treated as attributable to service for the purpose of entitlement to award of pension under the Royal Warrant, Order in Council, or Order of His Majesty relating to the disablement or death of members of the force of which he is a member. Sub- Sec. 2 of that section excludes the liability of the Crown for death or personal injury to anything suffered by a member of the armed forces of the Crown by reason of the nature and condition of any such land, premises, ship, aircraft or vehicle or negligence of the nature and condition of any equipment or buildings used for the purpose of those forces, provided the Minister of Pensions certifies that the suffering was attributable to service for the purpose of entitlement of pension as provided above. It

will be noticed that the section is restricted only to death or personal injury and does not extend to other wrongs. If the tort was such that it did not cause either personal in- jury or death it would seem that the Crown would be liable; for example, in the case of defamation a member of the armed forces as well as the Crown would be liable. The reason for excluding liability in the above cases seems to be that sufficient provision to repair the injury or the loss occasioned by death is made under the Pensions Act to be determined by the Minister of Pensions. Why the officer should also escape from liability in such cases is not clear but it may be that the compensation paid under the Pensions Act is treated as adequate.

3.2.2.3- Crown privilege and Public Interest Immunity

Common law provided two different rules affecting the production of documents by the Crown viz., (a) the Crown could not be subject to an order for discovery of documents[70] or interrogatories[71] by virtue of its prerogatives,[72] and (b) the Crown could refuse the production of documents if its production would be harmful to public interest.[73]Thus the Crowns enjoys 'Crown Privilege' in that it can refuse to disclose any document or to answer any question, where to do so, would be injurious to the public interest. It can suppress the fact of the existence of a document and even oral evidence cannot be given of these privileged documents. The claim for privilege is normally made by the appropriate minister in the form of an affidavit. Crown privilege can be claimed only by the Crown and not by local authorities or health authorities or by the corporation.[74]

By section 28 of the Act, the Court may order discovery against the Crown and may also require the Crown to answer interrogatories. But the Act specifically preserves the then existing rule of law that the Crown may refuse to disclose any document or may refuse to answer any interrogatories on ground that this would be injurious to public interest. Even disclosure of mere existence of a document may be denied on the same ground of public interest, under the Act.

Duncan v. Cammell Laird and Company Ltd was the leading case from 1942 to 1968 upon Crown Privilege. A new naval submarine, Thetis, while on trial sank with the loss

[70] '*Governmental Liability : A Comparative study',* H.Street, 1953, pg 29
[71] Gyan Prakash Verma, *State Liability in India: Retrospect and Prospects*, Deep and Deep publication, pg no.50

of ninety-nine lives including civilian workmen in 1939. Against the company, which had built the submarine under the contract with the Admiralty, many actions in negligence, were brought by the representatives of the dead persons. The company objected to the production of the documents relating to the design of the submarine as directed by the First Lord of Admiralty, on the ground of Crown privilege, since disclosure of it would be injurious to public interest in national defence. The House of Lords held that the documents should not be disclosed and laid down that Crown Privilege for a non-disclosure of document can be claimed on two alternative grounds, :

a) firstly, that the disclosure of the contents of a particular document would injure the public interest e.g. by endangering national security or prejudicing good diplomatic relations;

b) secondly, that the document falls within a class, which must as a class, be withheld from disclosure to ensure proper functioning of the administration. E.g. civil service memoranda and minutes to guarantee freedom and candour of communication on public matters, which might be suppressed if officials feared that the confidential nature of their reports might be destroyed by disclosure in litigation.

The first is known as 'content claim' and the second as 'class claim'. Crown's privilege under the second head, i.e., class-claim, was constantly under scrutiny. It was pointed out that the doctrine was accepted neither in the U.S.A nor in Canada or New Zealand. Moreover, there is a public interest not only in the proper functioning of the public services but also in doing of justice which is certainly hindered by withholding the documents.

3.2.3- Law Reform (Liability in Tort) Act, 1951

3.2.3.1- Object of the Act

The Law Reform (Liability in Tort) Act, 1951 was enacted and adopted on 29th May 1951. This was one of the most effective law reforms which were done with the objective to remove the uncertainties in important concepts like contributory negligence, common employment, joint and several tortfeasor and Crowns liability. It demarked the tortious liabilities and tried to remove the ambiguities by drafting the concept in the form of a statute.

The Act consists of seven sections and the main provisions comprises of interpretation clause, apportionment of liability where contributory negligence, defence of common employment, Joint and several tortfeasors and Application of Act to Crown.

A brief summary of the main provisions of The Law Reform (Liability in Tort) Act, 1951 is as follows:

3.2.3.2- Interpretation Clause

In this Act "court" means, in relation to any claim or action, the court or arbitrator by or before whom the claim falls to be determined or the action to be heard; "damage" includes loss of life and personal injury; "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort; "dependant" means any person for whose benefit an action could be brought under the Fatal Injuries (Actions for Damages) Act 1949 and "personal injury" includes any disease and any impairment of a person's physical or mental condition, and "injured" shall be construed accordingly.

3.2.3.3- Apportionment of liability where contributory negligence

Section 3 of the statute laid downs the provisions related to apportionment of liability when the plaintiff has contributed in the negligence. According to section 3 (1) of the Act, Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the amount of damage recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. The section further provides for exception such as any defence arising under a contract or where any contract or provision of law providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

Section 3 (2) states that where damages are recoverable by any person by virtue of subsection (1) subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault. Subsection 3 states that where any case to which subsection (1) applies is tried with a jury, then the jury shall determine the total damages which would have been

recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.

Section 3 further clarifies that the apportionment of liability will be considered in the same manner in cases involving joint and several tort feasors and in cases where any person dies as the result partly of his own fault and partly of the fault of any other person or persons. It further states that this provision will not be an exception to any law of limitation.

3.2.3.4- Defence of common employment abolished

Section 4 clearly states that It shall not be a defence to an employer who is sued in respect of personal injuries caused by the fault of a person employed by him, that that person was at the time the injuries were caused in common employment with the person injured. It further states that doctrine of common employment will not be a valid defence even if it was contained in a contract of service or apprenticeship or in agreement collateral thereto.

3.2.3.5- Joint and several tortfeasors

According to section 5 of the Act, in cases involving join and several tortfeasors, where damage is suffered by any person as a result of a tort the following shall be followed:

- judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
- if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of a dependant, of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;
- any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage,

whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

The section further states that the amount of the contribution recoverable from any person shall be such as the court, or, where the proceedings are by way of an action tried with a jury, then the jury, thinks just and equitable having regard to that person's share in the responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

3.2.3.6- Application of Act to Crown

One of the most important effects of this enactment is that under section 7 of the statute, the **Law Reform (Liability in Tort) Act 1951** becomes binding on the Crown as well. This means that the State is to be considered as an individual in cases where the provisions of this act would apply.

Thus, law reform (liability in tort) act 1951 is an important statute towards the path of codifying the law of torts to remove the ambiguities in the application of principles and in the interpretation of the same.

3.2.4- Torts (Interference with Goods) Act, 1977

The Torts (Interference with Goods) Act 1977 defines wrongful interference with goods as the following:

- Conversion of goods
- Trespass to goods
- Negligence so far as it relates to damage to goods
- Any other tort which results in damage to goods

Section 2(1) of the Act abolishes the old tort of detinue. This was where there was a wrongful refusal to deliver goods to the individual entitled or in having custody or possession of an individual’s goods and subsequently losing them.

Definition of Conversion

Conversion is defined as dealing with goods in a manner inconsistent with the rights of the individual who is the true owner, whereby the individual in possession of the goods intends to deny the owners right or to assert a right inconsistent with the owners.

The key elements thus to be established are as follows:

- Possession of goods to which you are not the owner
- Intent to deny the owners right or to asset an inconsistent right

Examples of conversion are purchasing goods from a thief, selling another individual's goods, destroying another's goods etc.

Definition of Trespass

Trespass is defined as the immediate and direct unauthorised interference with another individuals goods.

For trespass to be proven there must be intention on the part of the defendant to deliberately interfere with another's goods.

The definition of trespass includes using, removing, touching or destroying another's goods. Examples of this are slashing someone's tires with a knife or running a key alongside an individual's car scratching the paint work.

Remedies

If the defendant is found guilty of Section 1 wrongful interference with goods the following remedies are available to the claimant as specified in Section 3 of The Torts (Interference with Goods) Act 1977

Order for the delivery of the goods and consequential damages

Order for the delivery of the goods where the defendant has the option of paying damages for the value of the goods

Damages

The first two remedies are specifically concerned with conversion whereas the most likely or in fact only available remedy to an individual whom has suffered a trespass or a negligent act in relation to their goods would be damages.

In certain cases where the goods have been detained following the claim the court may order delivery up of the goods.

Double Liability

Section 7 of the Torts (Interference with Goods) Act 1977 deals with the situation of double liability. This is where there may be two rights of action for wrongful interference; this could be both conversion and trespass, or where there are two individuals who both have an interest in the goods.

In the case of double liability the Act specifies that one single claim shall be brought by one individual party meaning the single claimant will have to account to the other once the claim has been brought.

Defences

There are two defences which can be used against a claim of wrongful interference with goods. They are as follows:

1. Consent
2. Distress damage feasant

Consent

If for example the owner of a car has trespassed onto private land with his car and then has subsequently had his wheel clamped for the offence by the owner of the land then he cannot claim for wrongful interference with his vehicle. By trespassing on the land he is seen to consent to the interference – namely the clamping.

Distress damage feasant

Again in the case of a trespasser who trespasses onto another's land, the owner of the land is entitled to seize and detain any property which the trespasser brought onto the land with him until the trespasser leaves or if damage has been caused until the trespasser pays for the damage caused.

3.2.5- Product Liability under The Consumer Protection Act 1987

Product liability law is relatively new to England. Traditionally liability for defective products was dealt with either under contract law (if there happened to be a contract between the claimant and the defendant), or under the general law of tort, after ***Donoghue v Stevenson***[75] exploded the 'privity fallacy', a case which recognised that the ultimate consumer of a product could sue the manufacturer (or indeed anyone else in the supply chain whose fault has caused a defect) in tort.

The recent legislation in the area is The Consumer Protection Act 1987.

The Consumer Protection Act 1987

The CPA was enacted in order to transpose EC Directive 85/37445. Broadly, the Act renders the producer of a product, and certain others dealing with it, liable in damages for personal injury and some property damage caused by a defect in the product, without the necessity for the claimant to show fault, though certain defences may be raised by the producer[76].

Defect is defined in section 3 as being present where "the safety of the product is not such as persons are generally entitled to expect", with all circumstances being taken into account to determine whether this is the case. In *A v National Blood Authority*[77], it was held that the cost and practicability of eliminating the defect were not elements to be considered here. The standard therefore is what persons are generally entitled to expect, and this will be determined by the court. Section 3(2) provides that the safety of a product is to be judged by reference to standards prevailing when it was put into circulation.

There is a 'development risks' defence available to producers. Section 4(1)(e) states that if "the defendant can show that the state of scientific and technical knowledge [at the time of supply] was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control". The European Commission challenged the inclusion of this defence before the European Court of Justice, arguing that it was a

[75] *Donoghue v Stevenson*,[1932] AC 562
[76] WVH Rogers Winfield & Jolowicz on Tort Sweet & Maxwell 16th edition 2002
[77] [2001] 3 All ER 289

more lenient defence than the Directive allowed. However the ECJ ruled in favour of the UK, provided the CPA is interpreted in the light of the Directive[78]. According to the ECJ, the provision is directed at the state of knowledge in general, and not in the specific industrial sector. However the knowledge must be accessible. The defence applies if there is no knowledge of the risk of defect; and not if the risk is known but there is no available method of discovering the defect in individual products.

There are other defences available:

- The defect is attributable to compliance with any requirement imposed by law
- The defendant did not at any time supply the product to another
- Any supply by the defendant was non-commercial
- The defect did not exist in the product when he put it into circulation
- A defence for a component part producer where the defect is due to the fault of the producer of the product in which it is comprised

The Law Reform (Contributory Negligence) Act 1945 applies to actions under the CPA. Section 7 of the Act provides that any contract term, notice or other provision limiting or excluding liability is invalid. Liability is extinguished 10 years after the product has been put into circulation.

The Act provides for compensation for death and personal injury, and for property damage over £275. There is no liability in respect of loss of or damage to the product itself or the whole or any part of the product which has been supplied with the product in question comprised in it.

Hence, with the above discussion one can clearly see the shift in tort law from common law principles to proper enacted statutes. In case for State liability the maxim 'King can do no wrong' has been completely abrogated while establishing the State vicariously liable for the torts committed by its servants with the enactment of The Crown Proceedings Act. Product liability is specifically dealt under the Consumer Protection Act. But the area which still is redressed by common civil law action is Public Nuisance

[78] European Commission v UK [1997] All ER (EC) 481

apart from Criminal action in UK. Still the trend is towards adoption of enactments for eliminating the ambiguities and uncertainties while establishing the liabilities in tort law.

3.3- Tort Law in U.S.A-

The history of tort begins around 1870**,** when legal academics, inspired by a generally prevailing ideal of scientific endeavour, tried to sort private law into systems of general classification. What emerged from this process was the doctrinal field of torts, until then a heterogeneous jumble of miscellaneous rights of action. In their passion for generalization, legal scientists sought to reclassify as many of these actions as possible under a single theory of liability, whose organizing principle was fault. By the early years of the new century the scientists had popularized among the bar the now familiar organization of the field, into intentional torts, negligence, and strict liability.

3.3.1- Introduction to U.S.A's Tort Law

The United States of America is unique in that it is comprised of a federal district and fifty states. As a result, the legal system in the United States is divided into two separate courts: federal and state courts. The differences between federal and state courts are defined mainly by jurisdiction, which refers to the types of cases a court is allowed to decide.

The types of cases heard by courts in the United States can largely be divided into two areas of law: criminal and civil law. Criminal laws and the supporting judicial system recognize and enforce violations of laws that exist to protect all of society from conduct deemed wrongful. Such laws are typically enacted by the elected legislative branches of government. The purpose of the criminal law system in the United States is to punish violators and, by way of example, deter others from committing similar misconduct.

Unlike criminal law, the primary purpose of civil law in the United States is not to punish misdeeds but, rather, to compensate those individuals whose person or property has been wrongfully damaged by the conduct of another. In addition to compensatory damages, remedies available to civil litigants include equitable relief, such as an injunction, whereby a court orders a wrongdoer to cease its harmful conduct.

Civil law in the United States encompasses not only breaches of commercial duties and obligations arising from contracts, but also breaches of duties of care owed to one

another by virtue of being members of society. It is the latter category that comprises tort law in the United States: i.e., a body of law generally governing duties that arise by operation of law and not by mere agreement of the parties.[79]

U.S. tort law has its origin in the British common law system. Much of U.S. tort law was developed by judges through years of opinions written in specific cases. The body of law is fluid, literally changing on a daily basis as new cases cause judges to reconsider and affirm or revise prior opinions, as well as address issues that previously escaped adjudication.

Tort law in the United States exists to redress damages caused an individual by the conduct of another that falls below a standard of care defined by the civil courts.

TYPES OF TORTS

As noted above, the primary purpose of tort law is to compensate individuals or entities that suffer personal or property damage because of another's wrongful conduct and, when possible, enjoin continuing misconduct. The specific causes of actions comprising tort law in the United States are too numerous to list, but include liability arising out of: (1) intentional misconduct; (2) unreasonable conduct; (3) defects in the design, manufacturing, or marketing of products sold; and (4) one's relationship to the tortfeasor.

1. Intentional

"The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is intent to bring about a result which will invade the interests of another in a way that the law will not sanction."[80]

Determining whether liability exists for an intentional tort focuses on whether the actor intended his conduct. "The plaintiff need not prove, however, that the actor intended the harm that actually results."[81]

Perhaps the most common intentional tort to land is trespass. A trespass occurs when one intentionally enters or causes someone or something to enter upon the land of another.

[79] Civil law in United States, *available at:* http://www.fwlaw.com/news/186-tort-law-united-states (last visited on 15.07.2017)
[80] William L. Prosser, *Law Of Torts*, 31 (4th ed. 1971).
[81] *White v. Muniz*, 999 P.2d 814, 819 (Colo. 2000)

Torts similar to trespass exist to allow redress for intentional conduct damaging personal property. Frequently occurring intentional torts to persons include:

- Battery
- Assault
- False imprisonment
- Infliction of emotional distress

2. Negligence

Negligence is perhaps the most commonly asserted cause of action in the United States. Simply, it is conduct below that which society considers reasonable. When such unreasonable conduct is the proximate cause of injury to another person or his property, the actor may be liable in tort for negligence.

What constitutes unreasonable conduct typically is not defined by statute but, rather, is a question of fact to be determined by the finder(s) of fact. An exception may exist where instances of misconduct are frequent and so obviously unacceptable that the law imposes a rebuttable presumption of negligence. For example, the law may presume that a rear-end motor vehicle accident results from the negligence of the driver in the car hitting the vehicle in front of him.

In contrast to intentional torts, in negligence cases the actor need not intend the conduct causing damage. In fact, by definition the tortfeasor is not accused of acting with intent, but rather for failing to exercise the reasonable degree of care required by society as expressed through judges and juries. The care required is that of a fictional reasonable man in similar circumstances. Unreasonable conduct often is deemed to have occurred when motor vehicle accidents result from excessive speed or inattention to traffic control devices. Negligence may also be found in a commercial setting, such as where a designer, manufacturer or seller of a product does not exercise the reasonable care deemed necessary to prevent a dangerous product from reaching the consumer.

The essence of every negligence action is that a duty of care is owed to the plaintiff. Such duties may be found to exist irrespective of a pre-existing relationship between the parties. Common examples are the duties imposed on operators of motor vehicles. Other

duties exist by virtue of a pre-existing relationship, such as a doctor-patient relationship, attorney-client relationship, or clergy-parishioner relationship. Generally, negligence laws exist as a non-criminal regulator of conduct in society. Those individuals whose conduct falls below the required minimum standard of care may be liable for the resulting bodily injury, including death, and property damage.[82]

3. Product Liability

Product liability refers to "the legal liability of manufacturers and sellers to compensate buyers, users, and even bystanders, for damages or injuries suffered because of defects in goods purchased." **Model Uniform Product Liability Act, 102(2) (1979)** defines product liability to include "all claims or action brought for personal injury, death or property damage caused by the manufacture, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labelling of any product". Thus, this tort action makes a manufacturer liable if its product has a defective condition that makes it unreasonably dangerous to the user or consumer.

There is no comprehensive federal scheme governing the law of product liability. Rather, this area of law varies from state to state and is a creature of statute or has otherwise become a part of common law (i.e., it has been developed by judges over the years). Indeed, many states have enacted comprehensive product liability statutes, some of which are modelled after the Model Uniform Products Liability Act. The Model Uniform Product Liability Act, published by the United States Department of Commerce in 1979, was meant to set forth "uniform standards for state product liability tort law." Other states have adopted, in whole or in part, provisions of the Restatement of Law. However, provisions of the Restatement do not become rules of law until adopted as such by a court or legislature. Accordingly, it is imperative for anyone asserting a claim for product liability to understand the applicable law in the particular jurisdiction in which the claim is asserted.

Liability can occur at any point along the chain of production and distribution. Indeed, the manufacturer, wholesaler, and retailer can all be held accountable for injuries caused by a defective product. However, legislation has been enacted in several states that effectively immunizes non-manufacturing sellers or distributors from strict liability.

[82] Michael R. McCurdy and Jason B. Robinsonm, *Tort Law in the United States*, December 2010.

Thus, particular attention must be paid to the laws of the jurisdiction in which the product liability claim is asserted.

Generally speaking, product liability claims may be based on different theories of liability, including: strict liability, negligence, misrepresentation, or breach of warranty. Strict product liability has been described as a "term of art that reflects the judgment that products liability is a discrete area of tort law which borrows from both negligence and warranty" but "is not fully congruent with classical tort or contract law." Strict product liability focuses on the nature of the product rather than the conduct of either the manufacturer or the person injured and is premised on the concept of enterprise liability for casting a defective product into the stream of commerce.[83] Under the Second Restatement of Torts, strict liability could be found under all three theories of liability: i.e., manufacturing defects; marketing defects; and design defects. Under the Third Restatement of Torts, however, the only theory that allows for strict liability is one that is based on a manufacturing defect.[84] Unlike strict product liability, where a product liability action is brought on a negligence theory the focus is on the conduct of the defendant. To recover under a negligence theory, a plaintiff must show that the defendant breached a duty of care owed to the plaintiff and thereby caused the plaintiff's injuries. Unlike strict liability, in order to prevail on a negligence theory, the plaintiff must show that the defect resulted from the defendant's failure to exercise reasonable care. In some states, as in a negligence action, a plaintiff may rely on the doctrine of res ipsa loquitor.

A product liability claim may also be brought under a theory of breach of warranty, which may be based on either express or implied warranties, including the implied warranty of fitness for a particular purpose and the implied warranty of merchantability. These cases are substantially controlled by the Uniform Commercial Code, which governs commercial transactions and has been adopted in whole or substantially by all states. Although a product liability claim based on breach of warranty is a tort action, the theory is intertwined with contract law because warranty is based on a contractual relationship. These contractual issues can make it more difficult for a plaintiff to succeed

[83] *Boles v. Sun Ergoline*, Inc., 223 P.3d 724, 727 (Colo. 2010)
[84] Restatement (Third) Of Torts: Products Liability § 2 (1998).

on this theory, notwithstanding the fact that the plaintiff is not required to prove defendant was negligent under this theory. Plaintiff must also provide timely notice.

Finally, some states allow strict liability for manufacturers for misrepresentation

4. Vicarious Liability

The types of torts previously discussed have required some degree of misconduct by the actor. Tort law in the United States also imposes liability on individuals and entities simply by virtue of their relationship to the tortfeasor. Such liability is referred to as vicarious liability, meaning "indirect or imputed legal responsibility for acts of another." A frequent example of vicarious liability arises in the employer-employee relationship. If the employee negligently causes an accident while acting within the course and scope of his employment, the employer — although free of fault — may be liable for the losses flowing from its employee's misconduct.

Consistent with the purpose of tort law in the United States — i.e., to compensate persons for their injuries and damages — vicarious liability generally is imposed on an employer to provide another source from which to compensate victims. Proponents of vicarious liability theories reason that, because the employer was benefiting from its employee's actions when the accident occurs, the employer should also be responsible to those injured as a result of the employee's negligence when that negligence is within the scope of the employment relationship.[85]

The employer-employee relationship is but one example of vicarious liability. Other examples include the permissive use of a motor vehicle by a motor vehicle owner to another family member, as well as instances involving the parent-child relationship and joint ventures.

5. Other Types of Torts

The body of tort law in the United States is so broad and deep that it would be difficult, if not impossible, to discuss or even identify all torts. The types of torts addressed above are amongst those most commonly litigated. However, they are not exhaustive.

[85] Michael R. McCurdy and Jason B. Robinsonm, *Tort Law in the United States*, December 2010

Other recognized torts include causes of action for defamation (written or verbal misstatements of fact), premises liability (governing duties of an owner or possessor of land to occupants), malicious prosecution and abuse of legal process, false imprisonment, outrageous conduct, intentional interference with contractual obligations, bad faith breach of insurance contract, breach of fiduciary duty, civil conspiracy, invasion of privacy, and wrongful discharge from employment.[86]

3.3.2- Federal Tort Claims Act

The Federal Tort Claims Act is the statute by which the United States authorizes tort suits to be brought against it. With exceptions, it makes the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his employment, in accordance with the law of the state where the act or omission occurred. Three major exceptions, under which the United States may not be held liable, even in circumstances where a private person could be held liable under state law, are the *Feres* doctrine, which prohibits suits by military personnel for injuries sustained incident to service; the discretionary function exception, which immunizes the United States for acts or omissions of its employees that involve policy decisions; and the intentional tort exception, which precludes suits against the United States for assault and battery, among some other intentional torts, unless they are committed by federal law enforcement or investigative officials.

3.3.2.1- Historical background of FTCA

The Federal Tort Claims Act provides the exclusive vehicle for suits against the United States or its agencies sounding in tort. It is also the exclusive remedy for the common law torts of federal employees acting within the scope of their employment. It is a successful statute that has largely met Congress's reasons for enacting it. It creates an effective administrative procedure that efficiently resolves without litigation the vast majority of tort claims against the federal government. It grants the federal courts subject matter jurisdiction to decide those claims that cannot be settled, subject to specific limitations set forth by Congress. In doing so it effectively transferred responsibility for deciding disputed tort claims from Congress to the courts.

[86] Types of Torts, *available at:* http://www.fwlaw.com/news/186-tort-law-united-states (last visited on 04.10.2018)

The doctrine of sovereign immunity is a key foundation of the FTCA. This doctrine, as it is understood in American jurisprudence, provides that a sovereign state can be sued only to the extent that it has consented to be sued and that such consent can be given only by its legislative branch "Thus, except as Congress has consented to a cause of action against the United States, 'there is no jurisdiction ... in any ... court to entertain suits against the United States.'[87]

Before Congress enacted an applicable waiver of sovereign immunity, Americans injured by torts of the federal government could not sue it for damages. This did not leave them without a remedy because the First Amendment guaranteed their right to petition the government for redress of grievances. From the early days of the Republic, citizens asked Congress to enact special legislation granting a financial remedy for particular injuries caused by the government. The legislative process, however, proved ill-suited for resolving tort claims. John Quincy Adams complained about the inordinate time Congress spent on claims matters. Millard Fillmore urged that a tribunal be established to handle private claims. Abraham Lincoln called for such a change in his first annual message to Congress.

Over the years Congress enacted laws establishing remedies for a wide variety of claims, beginning with the 1855 Court of Claims Act that was interpreted to exclude torts. In 1886 it enacted the Tucker Act that explicitly excluded torts. In the following years it passed numerous statutes providing some form of tort remedy for various categories of claimants, including horse owners, oyster growers, and persons injured by operations of the Post Office. From the early 1920s pressure grew for enactment of a comprehensive law to more efficiently handle tort claims against the government. The number of claims continued to increase and the burden of serving on the claims committees became more onerous. Between 1920 and 1946 Congress considered more than thirty bills dealing with the subject. Finally, on August 2, 1946, the FTCA was enacted as part of the Legislative Reorganization Act of 1946.

3.3.2.2- Salient features of FTCA

Even in a republican country like the United States of America, the doctrine of immunity of the State from liability for torts has been imported for reasons which are diflerently

[87] Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor,* American University Washington College of Law, 2009.

explained, but, as in England, exceptions were sought to be introduced by permitting the State to be sued through the procedure of private bills. That procedure was, however, found. to be unsatisfactory and the Federal Tort Claims Act was enacted in 1946 to do away partially with the immunity. The Federal Tort Claims Act, however; is far more restricted in its scope than the English Act. The liability of the State under comnmon law is stated in the Act in these terms:

"District court shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money manly, accruing on and after January 1. 1945, 'on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred".[88]

It is also provided that:

"The United States shall be liable in the same manner and to the same extent as a private individual under like circumstances except that the United States shall not be liable for interest prior to judgment or for punitive damages".

So far as statutory duties and discretionary powers and duties are concerned, it is laid down in one of the exceptions that the "State" shall not be liable in respect of:

"any claim based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal Agency or an employee of the Government whether or not the discretion involved be abused". "Employee of the Government" and "Federal Agency" is defined in the Act.

It would be seen from the foregoing provisions that the liability of the State under common law is restricted to torts to property and injury to a person or death. Exception (h) excludes intentional torts, such as, assault, battery, false imprisonment, false arrest,

[88] *Catchment Board v. Kenn*, (I94r) 15.0 74.

malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. So far as statutory duties are concerned, the United States is not liable for any tort committed in the discharge of such duties so long as the duties are performed with due care. In respect of discretionary functions and duties conferred on a Federal Agency or an employee of the Government, the State is not liable even if the discretion is abused or even if there is negligence.

In the case of common law duties, the liability is restricted by adopting the formula that the "United States shall be liable in the same manner and to the same extent as a private individual under like circumstances".

This definition of liability is shrouded in uncertainty. It. is not clear whether by this formula it was intended to attract not only the common law principles by which a private individual's liability for tort is determined but also brings in the nature of the act or function (i.e.) whether it is governmental or nongovernmental. This vague expression has given rise to conflicting decisions of" the Supreme Court even within the short period that has elapsed from the date when the Act came into force. In *Feres v .United States,*" the Supreme Court expressed the view that the Act did not create new causes of action which were not recognised before. The case related to claims by members in the armed forces injured through the negligence of other military personnel. The decision, in that case was that as no private individual has power to conscript or mobilise private army, the State could not be made liable.

This interpretation was followed and applied in the later case *Dalehite v. United State.* The Court had ' to consider in that case the claims preferred under the Act. in connection with the disastrous explosion of ammonium. nitrate fertiliser in Texas city which resulted in damage unparalleled in history. The action was rested on the main ground that there was negligence on the part of the government and its servants. Reed J ., who delivered the opinion of the majority of the Court examined the scope of the Act and held that .under the provisions of the Act, the liability of the United States was restricted to ordinary common law torts and did not extend to the liability arising from governmental acts. In support of his view the learned Judge relied on the Committee reports which preceded the enactment of the law. The exception relating to statutory duties was intended, according to the Committee, to preclude any possibility that the bill might be construed to authorise a suit for damages against the government arising out of

an authorised activity such as flood control or irrigation project, where negligence on the part of the government agent was shown and the only ground for the suit was the contention that the same conduct by a private individual would be tortious.

It was also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon the alleged abuse of discretionary authority by an officer or employee whether or not negligence was alleged to have been involved. The learned Judge stressed on the language of the Act which imposed the liability on the United States to the "same extent as a private individual would be liable under like circumstances". This, he said, was a definite pointer negativing complete relinquishment of sovereign immunity. The exception relating to statutory duties, according to the learned Judge, was intended to protect the government from claims arising out of acts however negligently done which affect the governmental functions. The question of the liability of the State for negligence of the Coast Guards in the discharge of fire- fighting duties, which is a discretionary function, was also considered. It' was ruled by the majority that the Federal Tort Claims Act "did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. The Act, as was there stated, limited United States' liability to 'the same manner and to the same extent as a private individual under like- circumstances'.

The Federal Tort Claims Act (FTCA) is the statute by which the United States authorizes tort suits to be brought against itself. As a result of the common law doctrine of sovereign immunity, “the United States cannot be sued without its consent.” “Congress alone has the power to waive or qualify that immunity.” In 1946, by enacting the FTCA, Congress waived sovereign immunity for some tort suits. With exceptions, it made the United States liable: for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[89]

Thus, the FTCA makes the United States liable for the torts of its employees to the extent that private employers are liable under state law for the torts of their employees.

[89]Henry Cohen and Vanessa K. Burrows, *Federal Tort Claims Act,* December 2007.

3.3.2.3- Limitations of FTCA

The fact that state law would make a state or municipal entity — as opposed to a *private* person — liable under like circumstances is not sufficient to make the United States liable under the FTCA.

The FTCA, however, contains exceptions under which the United States may not be held liable even though a private employer could be held liable under state law. Three of these exceptions are: The *Feres* doctrine, which prohibits suits by military personnel for injuries sustained incident to service; the discretionary function exception; and the intentional tort exception.

Among the other exceptions, the United States may not be held liable in accordance with state law imposing strict liability; it may not be held liable for interest prior to judgment or for punitive damages for the act or omission of an employee exercising due care in the execution of an invalid statute or regulation; for claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter"; for claims arising in respect of the assessment or collection of any tax or customs duty; for claims caused by the fiscal operations of the Treasury or by the regulation of the monetary system; for claims arising out of combatant activities; or for claims arising in a foreign country.[90]

The *Feres* Doctrine and Medical Malpractice

In *Feres v. United States,*[91] the Supreme Court unanimously held that, although the FTCA contains no explicit exclusion for injuries sustained by military personnel incident to service, such an exclusion results from construing the act "to fit, so far as will comport with its words, into the entire statutory scheme of remedies against the Government to make a workable, consistent and equitable whole." One reason the Court found that to prohibit recovery for injuries sustained incident to service would fit the entire statutory scheme was that the act, makes the United States liable only "to the same extent as a private individual under like circumstances." This limitation could be construed to exclude service-connected injuries because, the Court found, that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States.

[90] *Smith v. United States,* 507 U.S. 197, 198 (1993)
[91] *Feres v. United States,* 340 U.S. 135 (1950),

In 1987, in *United States v. Johnson*, the Supreme Court, in a 5-to-4 decision, held that the *Feres* doctrine bars suits on behalf of military personnel injured incident to service even in cases of torts committed by employees of civilian agencies. The plaintiff in *Johnson* was the widow of a serviceman killed incident to service in a helicopter crash allegedly caused by the negligence of the Federal Aviation Administration. Re-examining the reasons for the *Feres* doctrine, the Court concluded that whether the tortfeasor was a civilian or a military employee was not significant.

Justice Scalia, joined by three other justices in dissent, noted that the *Fer es*doctrine is not in the FTCA as enacted by Congress, and found the reasons offered by the Court for adopting the doctrine to be unsatisfactory:

"Neither the three original *Feres* reasons nor the post hoc rationalization of "military discipline" justifies our failure to apply the FTCA as written. *Feres* was wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received.

Thus, the *Feres* doctrine stands and contains no exception for medical malpractice cases. As for the Supreme Court, it is not beyond the realm of possibility that it could completely overrule *Feres*. In *Johnson*, as noted, the four dissenting justices said that *Feres* had been wrongly decided, and even downplayed the significance of the fact that Congress since 1950 has not overturned *Feres.* As for Congress, some Members in the past have shown interest in amending the Feres doctrine to the extent of authorizing medical malpractice suits.

The Discretionary Function Exception

The discretionary function exception is the most significant exception to government liability that is explicitly provided for in the FTCA. This exception immunizes the United States from claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function."

It precludes liability even if a federal employee acted negligently in the performance or non-performance of his discretionary duty. In *Dalehite v. United States*, 346 U.S. 15 (1953), the Supreme Court said that the discretion protected by the exception: is the discretion of the executive or administrator to act according to one's judgment of the best course. It includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans,

specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.[92]

Suits by Victims of Atomic Testing

From 1946 to 1962, approximately 235 tests of atomic weapons were performed by federal government contractors. Many military and civilian personnel who participated in these tests claim to have suffered cancer and other long-term medical injuries as a result. Current federal law generally precludes either military or civilian personnel from recovering in tort against either the federal government or the contractors in these cases.

Military personnel are barred from recovering against the United States because of the *Feres* doctrine. "The doctrine of the *Feres* case does not apply to the spouse or child of a serviceman insofar as their own injuries or death are concerned . . . .

Conversely, the *Feres* doctrine clearly bars a suit by a serviceman's next of kin for damages resulting from the death or of injuries to the serviceman if his death or injuries are incident to service." The distinction is between a spouse's or child's injury that is caused directly by the military and a spouse's or child's injury that results from the soldier's service-connected injury: the former is recoverable but the latter is not. Thus, courts of appeals have held that the *Feres* doctrine bars spouses of soldiers from recovering for their own injuries where such injuries resulted from the soldiers' injuries that were caused by the soldiers' have been ordered into nuclear blast areas.

Similarly, courts of appeals have held that the *Feres* doctrine bars recovery by children born with birth defects that resulted from genetic changes in their fathers that occurred when they were exposed to radiation while on military duty.

However, "the *Feres* doctrine does not bar an action against the United States for a service-related injury suffered by a veteran as a result of independent post-service negligence," such as failure of the government to warn or monitor a veteran who had

[92]*Dalehite v. United States*, 346 U.S.15 (1953)

been exposed to radiation. A district court has held that the *Feres* doctrine does *not* bar suit by the daughter and grandson of a soldier who was the victim of such negligence.[93]

The Intentional Tort Exception

The intentional tort exception provides that the FTCA does not apply to claims:

Arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

However, the United States may be held liable for any of the first six torts in this list if committed by an "investigative or law enforcement officer of the United States Government." This exception to the intentional tort exception was enacted in 1974 and "grew out of widespread publicity given to several incidents in which federal narcotics agents engaged in what a Senate Committee described as 'abusive, illegal and unconstitutional "no-knock raids".

Thus, from the above discussion of various statutes namely Federal Tort Claims Act or Model Uniform Products Liability Act it can be concluded that like United Kingdom as discussed in the previous section of this chapter, the trend in United States of America is also towards establishing liability of State for torts committed by its servants not from common law principles but from specific statute. The liability of the manufacture for their product is also covered by statutes. As far as Public nuisance is concerned in United State Public nuisance was mostly dealt with common law but after the Second Restatement of Tort Law, public nuisance has been well defined in the draft which though is not a statute or law but is a treatise issued by the American Law Institute. It summarizes the general principles of common law United States tort law. In America there is a rise in averting public nuisances specially those affecting the climate by means of Public Nuisance litigation. It is a tool in the form of public interest tort litigations, which are Government sponsored lawsuits when mass tortious claims are made against a particular public nuisance affecting a large area or large number of public in general. Thus, to be brief, the present tort system of America is no longer based on certain common law principles or maxims but on certain well codified statutes, enactments and treatise.

[93] *Seveny v. United States Government, Department of Navy*, 550 F. Supp. 653 (D. R.I.1982).

3.4- Tort Law in China

During the "Reform and Opening-up" years, tort disputes have become one of the main types of cases litigated in Chinese courts, and tort law has been playing a significant role in carving out the incentives of businesses and individuals in China. Since the formal legal rules on torts came into being in 1986, a large number of changes have occurred in the law of torts.

3.4.1- Introduction to China's Tort Law

The formal legal rules governing tortuous behaviours in post-Mao China can be traced back to the General Principles of the Civil Law (*Minfa Tongze*, hereinafter as "General Principles") promulgated in 1986. Since then, tort disputes have become one of the main types of cases litigated in courts.

3.4.2- Three Sources of Tort Law

In China, at the national level, three categories of laws are applied in tort litigations, general statutes, special statutes and judicial interpretations. General statutes are comprehensive laws governing tortious behaviours. They set down the basic rules applicable to various types of torts. They are enacted either by the National People's Congress (NPC) or by its Standing Committee, and officially titled as "law", the highest rank of effect in China's formal sources of law. So far, there are two general statutes on torts, the General Principles and the Tort Liability Law. Chapter 6 of the General Principles, and Section 3 in particular, set forth the rules of torts covering intentional and negligent tortuous actions as well as several special types of torts often subject to strict liabilities. The Tort Liability Law, in some sense, is an extension of the rules established in the General Principles and inherited many of its substantive provisions.

Special statutes are laws related to specific types of torts that are usually referred to as "special torts" by Chinese lawyers. In most cases, these special statutes do not deal with tort liabilities in particular, but are regulatory rules for specific industries. Some of these special statutes are promulgated by the NPC Standing Committee, hence obtaining the status of "law", while others are adopted by the State Council, which are administrative regulations one rank lower than laws in terms of legal effect, or by the ministries of the State Council as departmental rules with an even lower rank as a source of law. There are more than 40 other laws, and probably even more administrative regulations and

departmental rules, involving tort liabilities. Most of these laws, regulations or rules belong to the special statutes described above. For instance, the Railway Law and the Civil Aviation Law set down the liability and compensation rules for accidents arising in, respectively, rail and air transportations. And the Regulation on the Handling of Medical Accidents (hereinafter as Medical Accident Regulation) includes a chapter devoted specifically to dealing with tort claims of medical malpractices.

Besides the rules provided by the legislative and administrative institutions, the Supreme People's Court (SPC) issues various judicial interpretations on adjudication of tort disputes. SPC interpretations either take the form of replies to lower courts' requests for instructions pertaining to particular cases or adjudicative problems, or stand alone as general directions on trials of certain types of tort litigations or on certain issues in tort law cases. Whereas the former is usually short and written in an essay style, the latter is closer to laws and regulations in terms of format and generality. Although, in principle, judicial interpretations are not a formal source of law, in practice, they are routinely cited in judgments, especially the legislation-style general directions. SPC derives its authority to issue interpretations in relation to the application of laws and regulations in adjudications from a resolution passed by the NPC Standing Committee in 1981 (NPC Standing Committee 1981, Art.2). No statistics show the exact number of SPC judicial interpretations related to tortious actions, but two judicial interpretations are of particular importance in this respect, the SPC Interpretation on the Determination of Damages for Pain and Suffering Arising from Torts (hereinafter as "Interpretation on Pain and Suffering") effective since 2001, and the SPC Interpretation on Application of Law in Adjudication of Cases of Personal Injuries (hereinafter as "Interpretation on Personal Injuries") effective since 2004. The former officially admits the award of damages for mental distress, which has been routinely claimed in tort actions involving personal injuries, whereas the latter not only details the calculation of damages for personal injuries but also lays down, for the first time, the rules in certain vital aspects of torts including employers' vicarious liability and concurrent torts. No wonder both of these SPC interpretations appear as frequently as, if not more frequently than, the laws and regulations in court decisions on tort liabilities. In addition to these general provisions applicable to a wide variety of torts, SPC also issues occasionally judicial interpretations on some specific types of torts, e.g. traffic accidents.

In a nutshell, the law of torts in China started from the General Principles, inviting a wave of special legislations in the 1990s, and was followed by a series of judicial interpretations in the 2000s, before they were consolidated in the Tort Liability Law taking effect in July 2010.

3.4.3- The Tort Liability Law of the People's Republic of China, 2010

The Tort Law of the People's Republic of China was adopted at the 12th session of the Standing Committee of the Eleventh National People's Congress on December 26, 2009 and came into force on 1st of July, 2010.

The statute comprises of twelve chapters, namely:

Chapter I General Provisions

Chapter II Constituting Liability and Methods of Assuming Liability

Chapter III Circumstances to Waive Liability and Mitigate Liability

Chapter IV Special Provisions on Tortfeasors

Chapter V Product Liability

Chapter VI Liability for Motor Vehicle Traffic Accident

Chapter VII Liability for Medical Malpractice

Chapter VIII Liability for Environmental Pollution

Chapter IX Liability for Ultra hazardous Activity

Chapter X Liability for Harm Caused by Domestic Animal

Chapter XI Liability for Harm Caused by Object

Chapter XII Supplementary Provision

The researcher makes an effort below to discuss the provisions of the statute below in nutshell.

Chapter 1 General Provisions:

Article 1 deal with the scope of the Act, which says that this law is formulated with the aim to give protection to the legitimate rights and interests of individuals arising out of relationships in civil law. It also aims to give clarification to tortuous liabilities, prevent and punish wrongs under tort law and thus aims to promote social harmony and stability.

Article 2 clearly states that individuals shall be tortuously liable according to this law on infringement of civil rights and interests. Further the article defines "Civil rights and interests" used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honour, right to self image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests.

Article 3 entitles the victim of a tort to assume the tortfeasor the tortuous liability. Further Article 4 specifies that in event of the tort feasor assuming liability under administrative or criminal law for the same act, his liability assumed under tort law will not be prejudiced. The Article further adds that where the assets of the tortfeasors are not sufficient for payments under tort, administrative or criminal liability, priority shall be given to the tort liability. Article 5 states that if any other law provides otherwise for any tort liability in particular, then this act will not have any overriding effect on the same.

Chapter II Constituting Liability and Methods of Assuming Liability

Article 6 and 7 specifies the grounds for constituting tort liability. Article 6 states that an individual who is at fault for the infringement of civil right or interest of another shall be liable under tort law. Further it states that an individual who is at fault as per a legal provision and fails to prove innocence will be liable under tort. Article 7 clearly adds that irrespective of if one is at fault or not, he is liable under tort if he infringes civil right or interest of another person.

Article 8 to 14 of the Act; deal with provisions covering all the aspects of joint tort feasors. Article 8 states that when tort is committed by two or more persons jointly there liability shall be joint and several. Article 9 states that an individual who assists or abets the commission of a tort is to be considered as joint tortfeasor. This class shall also include individuals who assist or abets a person who may not have the capacity to commit a civil wrong and also shall make the legal guardian jointly liable if the tort is

committed due to failure on their part to perform guardian duties. Article 10 further clarifies that if the specific tort feasor can be identified due to whose conduct harm was caused then he shall only be liable but if the specific tortfeasor cannot be determined then all the persons involved in the conduct shall become jointly and severally liable.

Article 11 states that when two or more persons commit torts respectively, causing the same harm, and each tort is sufficient to cause the entire harm, the tortfeasors shall be liable jointly and severally. To clarify it further Article 12 states that in above situation if the seriousness of liability of each tortfeasor can be determined, the tortfeasors shall assume corresponding liabilities respectively; but if it cannot be determined then the tortfeasors have to evenly share the compensatory liability.

Article 13 gives a choice to the victim to make all or some of the tortfeasors liable and according to Article 14 the amount of compensation required to be paid by each joint tortfeasor shall be according to the seriousness of liability of each of them if it can be determined and in case where it cannot be determined the compensatory liability shall be evenly divided among the tortfeasor. The Article further adds that in event of excess payment as per ones contribution to the harm caused, he shall be entitles to reimbursement from the other joint and several tortfeasor.

Article 15 lays down methods to assume tort liabilities which can be adopted either individually or jointly, they are as follows:

1. cessation of infringement;
2. removal of obstruction;
3. elimination of danger;
4. return of property;
5. restoration to the original status;
6. compensation for losses;
7. apology; and
8. elimination of consequences and restoration of reputation.

Article 16 to 18 deals with tort causing personal injury. Article 16 states that ‘Where a tort causes any personal injury to another person, the tortfeasor shall compensate the victim for the reasonable costs and expenses for treatment and rehabilitation, such as medical treatment expenses, nursing fees and travel expenses, as well as the lost wages. If the victim suffers any disability, the tortfeasor shall also pay the costs of disability

assistance equipment for the living of the victim and the disability indemnity. If it causes the death of the victim, the tortfeasor shall also pay the funeral service fees and the death compensation.

According to Article 17 a uniform amount of death compensation shall be determined where more than one person's death is caused by the same tort. In case of death of the victim the close relative and if the victim is an entity, the successor entity shall be entitled to require the tortfeasor to bear the liability as per Article 18. It further adds that the individuals who had paid the medical treatment expenses, funeral service fees and other reasonable costs and expenses for the victim shall be entitled to require the tortfeasor to compensate them for such costs and expenses, except that the tortfeasor has already paid such costs and expenses.

As per Article 19 in case of any harm caused to the property of the victim the loss is to be ascertained as per the market price at the time of occurrence or can also be calculated otherwise. Article 20 specifies that if any loss is caused to the victim's property due to infringement of his personal right or interest, he tortfeasor shall make compensation as per the loss sustained by the victim as the result of the tort. If the loss sustained by the victim is hard to be determined and the tortfeasor obtains any benefit from the tort, the tortfeasor shall make compensation as per the benefit obtained by it. If the benefit obtained by the tortfeasor from the tort is hard to be determined, the victim and the tortfeasor disagree to the amount of compensation after consultation, and an action is brought to a people's court, the people's court shall determine the amount of compensation based on the actual situations.

Article 21 states that when a tortuous act causes threat to the personal or property right of the victim then the remedies sought for are not limited to only cession of infringement, removal of obstruction and elimination of danger. Article 22 allows claim for compensation for any serious mental distress. Article 23 states that 'Where one sustains any harm as the result of preventing or stopping the infringement upon the civil right or interest of another person, the tortfeasor shall be liable for the harm. If the tortfeasor flees or is unable to assume the liability and the victim of the tort require compensation, the beneficiary shall properly make compensation.'

Another salient feature of this Act is Article 24 which makes both the victim and the tortfeasor liable and to share the damage if both of them were not at fault. Article 25 laid

down the procedure for payment of compensation. It states that 'After the occurrence of any harm, the parties may consult each other about the methods to pay for compensations. If the consultation fails, the compensations shall be paid in a lump sum. If it is hard to make the payment in a lump sum, the payment may be made in instalments but a corresponding security shall be provided.'

Chapter III Circumstances to Waive Liability and Mitigate Liability

Article 26 to 31 comprises this chapter, which briefly to state allows certain Principles of General Defences to avoid tortuous liability. The concept of contributory negligence is included under Article 26 and defences like volenti non fit injuria, Act of God, self-defense, intervention of third party, necessity are allowed under Article 27 to 31.

Chapter IV Special Provisions on Tortfeasors

According to Article 32 the guardian of a person without civil conduct capacity or with limited civil conduct capacity will be held liable for the tort committed in event of the failure of the guardian to perform his duties. If the duty of the guardian is fulfilled, then his liability may be mitigated. It further adds that the guardian will only pay the deficit if the person causing the harm has property the compensation will be paid out of it. Article 33 states that if the harm is caused by a person with full civil conduct capacity due to temporary loss of senses or control of his conduct and if he is at fault, he will be tortuously liable. When he is not at fault then the compensation will be paid to the victim as per the financial condition of the tortfeasor. The Article further mentions that the same principle will be used for persons who commits tort under the influence of intoxication or abuse of narcotic or psychoactive drug.

Article 34 envisages the principle of vicarious liability of the employer for the tort committed by his employees. Article 35 makes the labour service provider liable for the tort committed by the labour. It further adds that If the party providing labour services causes any harm to himself as the result of the labour services, both parties shall assume corresponding liabilities according to their respective faults.

Article 36 deals with the tortuous liability of a network user or network service provider. When a tort is committed by a network user which causes harm to a victim, it shall be the duty of the network service provider to take necessary measures like deletion, block or disconnection on being notified or having the knowledge of the same, and if the

network service provider fails to take necessary measures it shall be jointly and severally liable for the additional harm caused.

Article 37 states that it shall be the liability of the manager of a public venue or organiser of a public event if any harm is caused to another person due to failure on his part to duly provide safety and protection. The liability even arises even if the harm is caused by a third party and there was a failure to provide safety and protection.

Article 38 and 39 clearly makes the kindergarten, school or any other educational institution liable for the injury caused to the victim with or without capacity of civil conduct during the duration of studying or living there. Further Article 40 states that the kindergarten, school or any other educational institution shall be complementary liable if it fails to perform its duties and when the injury is caused by the act of third party.

Chapter V Product Liability

Article 41 to 47 of the Act deals with provisions related to product liability. Article 41 specifically makes the manufacturer liable for any injury caused to an individual for a defect in the product. Article 42 states that it shall be the liability of the seller if the harm is caused due to his fault and in cases where the seller cannot specify the manufacture or the supplier for the defective product it shall also be his liability. Article 43 states that the victim can claim for damages for the loss incurred by him due to defect in product either from the manufacture or from the seller. It further adds that if the defect is caused by the manufacture and seller had to pay the compensation, then he shall be entitled to get reimbursement from the manufacturer and vice-versa. Similarly Article 44 entitles the manufacturer or seller to be reimbursed if the defect was caused due to the fault from third party.

Article 45 states that if the defect in the product endangers the personal or property safety of another person, the victim can claim the manufacturer or seller to remove the obstruction or eliminate the danger. Article 46 makes it the duty of the manufacturer or seller to take remedial measures in event of circulation of defective products and issue warning and recall it within time. If they fail to do so and some harm is caused then it shall be their liability. Another important provision of this Act is Article 47 which provides for punitive compensation in cases where knowingly the manufacturers or

sellers continue to manufacture or sell defective product respectively and death or some serious harm is caused to victim.

Chapter VI Liability for Motor Vehicle Traffic Accident

Article 48 to 53 deals with the provisions relayed to motor traffic accidents. Article 48 specifies that where any harm is caused due to traffic accident by a motor vehicle, the compensation shall be paid according to the provisions of Road Traffic Safety Law. Article 49 shifts the liability of paying the compensation to the insurance company, where due to lease, borrows or any other reason the owner and user are not same. Only the deficit amount shall be paid by the user of the motor vehicle and the same applies to the owner if he is found to be at fault. Article 50 also makes the insurance company liable to make the compensation within the liability limit of the mandatory motor vehicle insurance in cases where there is transfer of ownership of the vehicle due to sale or any other transaction but the same is yet to be registered. Here also the deficit shall be paid by the transferee. In case of an illegally assembled motor vehicle or a motor vehicle reaching the standard of retirement, where there is transfer of ownership as per Article 51, both the transferor and transferee shall be jointly and severally liable. According to Article 52, where the accident is caused by a motor vehicle by the thief, robber or snatcher then the individual with illegal possession have to bear the tortuous liability and in event of the insurance company paying the limited liability compensation, they shall have the right to be reimbursed. According to Article 53, it shall be the liability of the insurance company to make the compensation within the limited liability where the driver hits and runs away. In cases where the motor vehicle cannot be identified or is covered under compulsory insurance, the advances for rescue or funeral expenses shall be paid out of the Social Assistance Fund for Road Traffic Accidents. After advances are made out of the Social Assistance Fund for Road Traffic Accidents, the governing body of the fund shall be entitled to be reimbursed by the person liable for the traffic accident.

Chapter VII Liability for Medical Malpractice

Article 54 to 64 deals with provisions which on one hand protect the interest of the patients and on another hand also give sufficient protection to the medical fraternity for proper rendering of their services.

Article 54 clearly states that the medical institution shall be liable for the loss caused to a patient due to fault on their part during diagnosis and treatment. Article 55 embodies the principle of free and informed consent of the patient or of the close relative of the patient. It states that during diagnosis and treatment, the medical staff should inform the patient about the line of treatment, diagnosis and in case of special examination or treatment the possible risks, alternatives or other relevant information. In case of failure on the part of the medical staff to perform the above stated duties, the medical institution shall be held liable for any harm caused to the patient.

Article 56 states that in case of emergency the consent of the person in charge of the medical institution or any other approved authority shall be sufficient for immediate medical measures to be taken. Article 57 makes the medical institution liable for the harm caused to the patient due failure on the part of its staff to maintain the standard during diagnosis and treatment.

Apart from these provisions establishing liabilities, Article 58 specifically provides certain circumstances when a medical institution shall be at fault constructively for any harm caused to a patient:

1. violating a law, administrative regulation or rule, or any other provision on the procedures and standards for diagnosis and treatment;

2. concealing or refusing to provide the medical history data related to a dispute; or

3. forging, tampering or destroying any medical history data.

According to Article 59 when a patient suffers from some injury due to defect in any medicine, disinfectant or instrument or by blood transfusion, the manufacturer or entity providing blood or the medical institution has to bear the liability and the medical institution latter can reimburse the amount paid as compensation from the manufacture or the institution providing blood.

Another important provision which provides certain circumstances when a medical institution shall not be held liable is Article 60. The circumstances are as follows:

i) when the patient or his associates do not cooperate with the diagnosis or treatment, but the medical institution will still be held liable if there was a fault on their part.

ii) when reasonable care and measures were taken in case of emergency such as revival of a patient from critical condition.

iii) due to the medical stage of the patient his diagnosis and treatment was difficult.

Article 61 makes it mandatory for medical institutions and medical staff to maintain proper records of all the tests, treatment related all records and expenses sheets and to provide the same to the patient when requested for. Article 62 includes the provision which makes it a duty of the medical institution and its staff to maintain the confidentiality of the privacy of the patient and not to make any information public without his consent. Article 63 prohibits any unnecessary examinations beyond the procedures and standards for diagnosis and treatment. Lastly, Article 64 protects the legitimate rights and interests of a medical institution and its staff by making persons liable if they cause interruption in the order of medical system or disturbs the work or life of medical staff.

Chapter VIII Liability for Environmental Pollution

Articles 65 to 68 are the relevant provisions dealing with environmental pollution. According to Article 65 makes the polluter tortuously liable for any harm caused due to environmental pollution and the burden of proof lies on the polluter to prove his innocence as per Article 66. Article 67 states that in cases where there is more than one polluter, the extent of liability of each of the polluter shall be decided according to the nature of pollutant, volume of emission and other relevant factors. According to Article 68 when the harm due to pollution is caused due to the fault of third party, the victim can sue either the polluter or the third party. The polluter has the right of reimbursement from the third party after the payment of compensation.

Chapter IX Liability for Ultra hazardous Activity

This chapter deals with the provisions establishing liability for ultra hazardous activities. Article 69 states that the individual engaged in ultra hazardous operation shall be tortuously liable to victim for the harm caused to him. Article 70 makes the operator of a civil nuclear facility liable for the injury caused due to any nuclear accident and if the same was not caused due to any war or by the intention of the victim. Similarly, as per Article 71 the operator of a civil aircraft shall be held liable for the harm caused by any civil aircraft and where there was no intention of the victim. Article 72 establishes the

possessor or the user of hazardous thing liable for the harm caused if he fails to prove that the harm was caused by the victim intentionally or by Act of God. His liability can also be mitigated if gross negligence of the victim is proved behind the injury. According to Article 73 the same principle as above applies to the operator of aerial, high pressure or underground excavation activity or high speed rail transport vehicle. Article 74 states that the owner of any lost or abandoned ultra hazardous material shall be held liable for any loss caused and in cases where the owner delivers the same to another person for management, the person so entrusted for management shall be held tortuously liable for the harm. Along with him the owner shall also be jointly and severally liable if his fault can be proved. Article 75 makes the illegal possessor of the ultra hazardous materials liable for the harm and the owner and the managing person shall also be jointly and severally liable unless they prove that they had performed their duty of high degree of care in preventing others from illegal possession. Article 76 provides for mitigation or exemption from liability if in spite of taking proper measures for safety and warning harm is caused due to entry into an area of ultra hazardous operation or its place of storage. The last provision of this chapter Article 77 allows any prescribe limit of compensation for liability for an ultra hazardous activity according to any other legal provision.

Chapter X Liability for Harm Caused by Domestic Animal

According to Article 78 and 79 the keeper or manager of the domestic animal shall be held liable for any harm caused to other in absence of the victim's intention or gross negligence and failure on the part of the keeper or manager to take proper safety measures respectively. According to Article 80 the keeper or manager of fierce animal prohibited from keeping shall be tortuously liable for any harm caused by it. Article 81 establishes the liability of the zoo for the loss if they fail to fulfil its duties of management. According to Article 82 the original keeper or owner of an abandoned or fleeing animal shall be held tortuously liable for the harm caused during the period of abandonment or fleeing. As per Article 83 where the harm is caused by the animal due to the fault of a third party, then the victim can claim compensation from the keeper or manger of the animal, or require compensation from the third party. After making compensation, the keeper or manager of the animal shall be entitled to be reimbursed by the third party. Article 84 makes it clear that the animals should be kept in accordance to

law, in the way where social morals are respected and without causing disturbances to the life of others.

Chapter XI Liability for Harm Caused by Object

According to Article 85 when any harm is caused to another person due to objects falling from building, structure etc or from anything suspended, the owner, manager or user shall be liable to pay the compensation if he fails to prove that he was not at fault, though later he can claim reimbursement from the actual offender, if any. Article 86 makes the construction employer and contractor jointly and severally liable for the harm caused due to the collapse of any building, structure or facility where there is absence of fault of another person. There also exists right of reimbursement for the construction employer and contractor if actual wrong doer is someone else. Another interesting provision is Article 87 which makes all the users of the building liable for any injury caused to other for anything thrown out or falling from a building. Exemption is provided for those who can prove their innocence. As per Article 88 person who makes a pile of objects which collapse and causes harm to another shall be tortuously liable until he proves that he was not at fault. Similarly according to Article 89, the entity or individual shall be liable for any harm caused due to piling, dumping or scattering of objects on public road. Article 90 makes the owner or manager of the tree liable to pay compensation due to harm caused to others due to its breaking down if he fails to prove that he was not at fault. Article 91 states that when an individual digs a pit, repairs or installs any underground facility, etc. at a public venue or on a public road and fails to take safety measures or put a warning sign and as a result harm is caused to another person, then the liability falls on him. Further, when any injury is caused to victim due to a manhole or any other underground facility and due to the failure of the manager to perform his duties, the tortuous liability shall be imposed on the manager.

Chapter XII Supplementary Provision

The last Article in this chapter makes the Act to come into force from July 1, 2010.

Hence, it can be inferred from the above discussion that **The Tort Liability Law of the People's Republic of China, 2010** is a well comprehensive law covering almost all the important aspects of tort law and removes the ambiguities in the interpretation of the concepts like product liability, nuisances, negligence and extend of liabilities. This

enactment has removed the room for deciding tortious liabilities entirely based on judicial interpretation and precedents. China has actually opted for a detail and well comprehensive legislation covering almost all aspects of tort law instead of multiple statutes adopting certain common law principles related to tort law and henceforth providing scattered remedies.

From the above discussions it becomes quite evident that the legal frameworks of developed countries like United Kingdom, United States of America and China have certain definite statutes or enactments dealing with concepts like State liability, Public Nuisance and Product Liability. All these countries have made an attempt to remove the ambiguities and uncertainties faced in interpretation of the common law principles which were the foundation of tort law by adopting well codified comprehensive legislations for the same. After discussing the various statutes and provisions on State liability, Product Liability and Public Nuisance available in developed Countries in this chapter, the researcher in the next chapter shall discuss and analyse the present Indian laws on State liability, Product Liability and Public Nuisance.