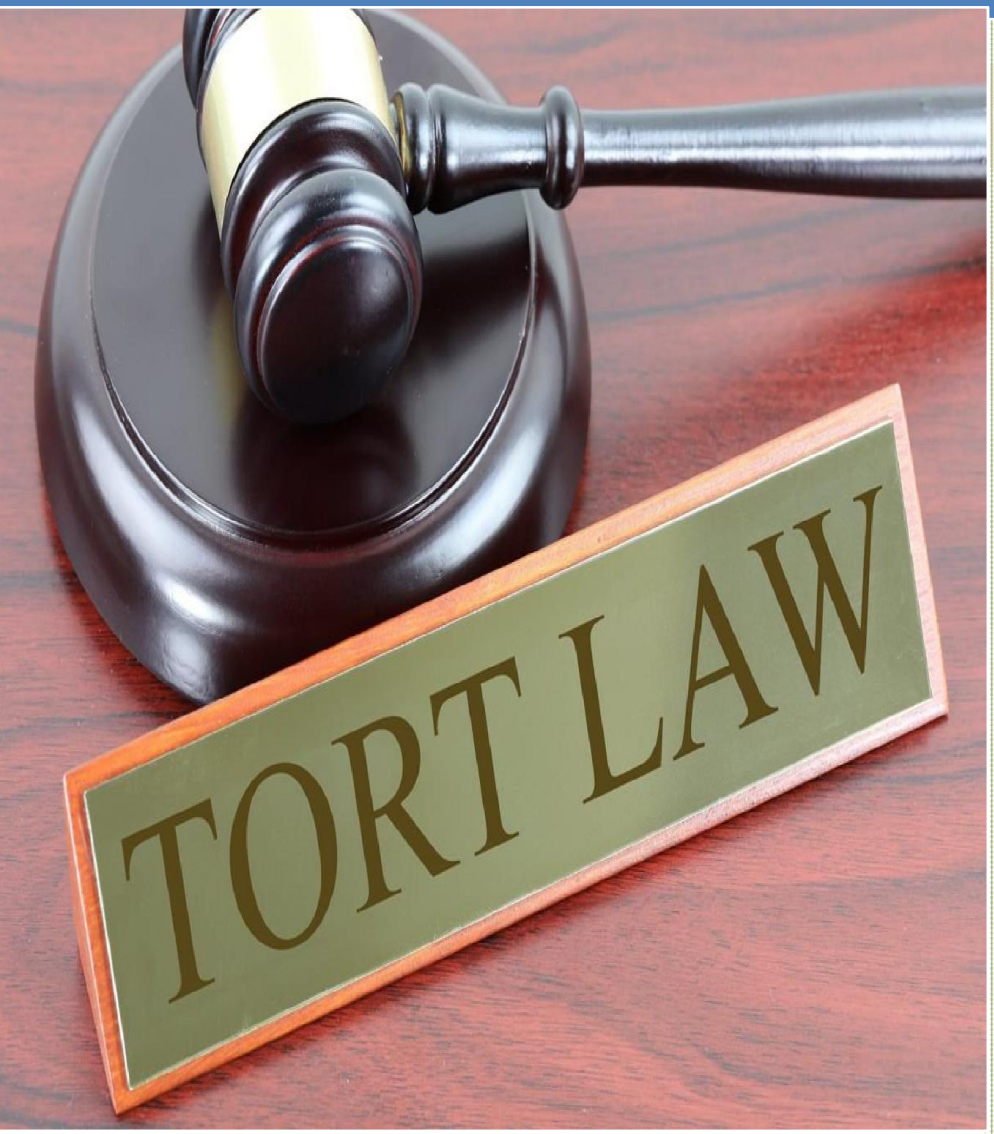
2020

LAW OF TORT



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SUBTOPIC NAME	Nuisance and its kinds
CONTENT TYPE	Text
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Unit – 3

Part – 3

Syllabus

Unit-III	**Justification of Tort:** • Volenti non fit injuria • Act of God • Inevitable accidents • Plaintiff's default Private Defense • Nuisance and its kinds

Nuisance and its kinds

Nuisance

The word “nuisance” is derived from the French word “nuire”, which means “to do hurt, or to annoy”. One in possession of a property is entitled as per law to undisturbed enjoyment of it. If someone else’s improper use in his property results into an unlawful interference with his use or enjoyment of that property or of some right over, or in connection with it, we may say that tort of nuisance occurred. In other words, Nuisance is an unlawful interference with a person’s use or enjoyment of land, or of some right over, or in connection with it. Nuisance is an injury to the right of a person in possession of a property to undisturbed enjoyment of it and result from an improper use by another person in his property.

Stephen defined nuisance to be “anything done to the hurt or annoyance of the lands, tenements of another, and not amounting to a trespass.”

According to Salmond, “the wrong of nuisance consists in causing or allowing without lawful justification the escape of any deleterious thing from his land or from elsewhere into land in possession of the plaintiff, e.g. water, smoke, fumes, gas, noise, heat, vibration, electricity, disease, germs, animals”.

DISTNCTION BETWEEN NUISANCE AND TRESSPASS

• Trespass is direct physical interference with the plaintiff’s possession of land through some material or tangible object while nuisance is an injury to some right accessory to possession but no possession itself.

E.g. a right of way or light is an incorporeal right over property not amounting to possession of it, and hence disturbance of it is a nuisance and not trespass.

• Trespass is actionable per se, while nuisance is actionable only on proof of actual damage. It means trespass and nuisance are mutually exclusive.

Simple entry on another's property without causing him any other injury would be trespass. In nuisance injury to the property of another or interference with his personal comfort or enjoyment of property is necessary.

They may overlap when the injury is to possessory as well as to some right necessary to possession. E.g. trespass of cattle discharge of noxious matter into a stream and ultimately on another's land.

• To cause a material and tangible loss to an object or to enter another person's land is trespass and not nuisance; but where the thing is not material and tangible or where though material and tangible, it is not direct act of the defendant but merely consequential on his act, the injury is not trespass but merely a nuisance actionable on proof of actual damage.

If interference is direct, the wrong is trespass, if it is consequential, it amounts to nuisance.

E.g. Planting a tree on another's land is trespass, whereas when one plants a tree over his own land and the roots or branches project into or over the land of another person, act is nuisance.

ESSENTIALS OF NUISANCE

In order that nuisance is actionable tort, it is essential that there should exist:

• **wrongful acts;**

• **damage** or loss or inconvenience or annoyance caused to another. Inconvenience or discomfort to be considered must be more than mere delicacy or fastidious and more than producing sensitive personal discomfort or annoyance. Such annoyance or discomfort or inconvenience must be such which the law considers as substantial or material.

In **Ushaben v. Bhagyalaxmi Chitra Mandir, AIR 1978 Guj 13,** the plaintiffs'-appellants sued the defendants-respondents for a permanent injunction to restrain them from exhibiting the film "Jai Santoshi Maa". It was contended that exhibition of the film was a nuisance because the plaintiff's religious feelings were hurt as Goddesses Saraswati, Laxmi and Parvati were defined as jealous and were ridiculed.

It was held that hurt to religious feelings was not an actionable wrong. Moreover the plaintiff's were free not to see the movie again.

In **Halsey v. Esso Petroleum Co. Ltd. (1961) 2 All ER 145:,**the defendant's depot dealt with fuel oil in its light from the chimneys projected from the boiler house, acid smuts containing sulphate were emitted and were visible falling outside the plaintiff's house. There was proof that the smuts had damaged clothes hung out to dry in the garden of the plaintiff's house and also paint work of the plaintiff's car which he kept on the highway outside the door of his house. The depot emanated a pungent and nauseating smell of oil which went beyond a background smell and was more than would affect a sensitive person but the plaintiff had not suffered any injury in health from the smell. During the night there was noise from the boilers which at its peak caused window and doors in the plaintiff's house to vibrate and prevented the plaintiff's sleeping. An action was brought by the plaintiff for nuisance by acid smuts, smell and noise.

The defendants were held liable to the plaintiff in respect of emission of acid smuts, noise or smell.

KINDS OF NUISANCE

Nuisance is of two kinds:

• Public Nuisance

Under Section 3 (48) of the General Clauses Act, 1897, the words mean a public nuisance defined by the Indian Penal Code.

Section 268 of the Indian Penal Code, defines it as "an act or illegal omission which causes any common injury, danger or annoyance, to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

Simply speaking, public nuisance is an act affecting the public at large, or some considerable portion of it; and it must interfere with rights which members of the community might otherwise enjoy.

Thus acts which seriously interfere with the health, safety, comfort or convenience of the public generally or which tend to degrade public morals have always been considered public nuisance.

Examples of public nuisance are Carrying on trade which cause offensive smells, **Malton Board of Health v. Malton Manure Co., (1879) 4 Ex D 302;** Carrying on trade which cause intolerable noises, Lambton v. Mellish, (1894) 3 Ch 163; Keeping an inflammable substance like gunpowder in large quantities, Lister's case, (1856) 1 D & B 118; Drawing water in a can from a filthy source, Attorney General v. Hornby, (1806) 7 East 195

Public nuisance can only be subject of one action, otherwise a party might be ruined by a million suits. Further, it would give rise to multiplicity of litigation resulting in burdening the judicial system. Generally speaking, Public Nuisance is not a tort and thus does not give rise to civil action.

In the following circumstances, an individual may have a private right of action in respect a public nuisance.

1. He must show a particular injury to himself beyond that which is suffered by the rest of public i.e. he must show that he has suffered some damage more than what the general body of the public had to suffer.

2. Such injury must be direct, not a mere consequential injury; as, where one is obstructed, but another is left open.

3. The injury must be shown to be of a substantial character, not fleeting or evanescent.

In **Solatu v. De Held (1851) 2 Sim NS 133,** the plaintiff resided in a house next to a Roman Catholic Chapel of which the defendant was the priest and the chapel bell was rung at all hours of the day and night. It was held that the ringing was a public nuisance and the plaintiff was held entitled to an injunction.

In **Leanse v. Egerton, (1943) 1 KB 323,** The plaintiff, while walking on the highway was injured on a Tuesday by glass falling from a window in an unoccupied house belonging to the defendant, the window having been broken in an air raid during the previous Friday night. Owing to the fact that the offices of the defendant's agents were shut on the Saturday and the Sunday and to the difficulty of getting labour during the week end, no steps to remedy the risk to passers by had been taken until the Monday. The owner had no actual knowledge of the state of the premises.

It was held that the defendant must be presumed to have knowledge of the existence of the nuisance, that he had failed to take reasonable steps to bring it to an end although he had ample time to do so, and that, therefore, he had "continued" it and was liable to the plaintiff.

In **Attorney General v. P.Y.A. Quarries, (1957)1 All ER 894:,** In an action at the instance of the Attorney General, it was held that the nuisance form vibration causing personal discomfort was sufficiently widespread to amount to a public nuisance and that injunction was rightly granted against the quarry owners restraining them from carrying on their operations.

Without Proving Special Damage

In India under Section 91 of the Civil Procedure Code, allows civil action without the proof of special damage. It reads as follows:

"S. 91.(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted-

by the Advocate General, or with the leave of the court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions."

Thus a suit in respect of a public nuisance may be instituted by any one of the followings:

By the Advocate-General acting ex officio; or

By him at the instance of two or more persons or

by two or more persons with the leave of the Court.

• Private Nuisance

Private nuisance is the using or authorising the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or affecting its enjoyment by interfering materially with his health, comfort or convenience.

In contrast to public nuisance, private nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. The remedy in an action for private nuisance is a civil action for damages or an injunction or both and not an indictment.

Elements of Private Nuisance

Private nuisance is an unlawful interference and/or annoyance which cause damages to an occupier or owner of land in respect of his enjoyment of the land.

Thus the elements of private nuisance are:

1. unreasonable or unlawful interference;
2. such interference is with the use or enjoyment of land, or some right over, or in connection with the land; and
3. damage.

Nuisance may be with respect to property or personal physical discomfort.

1. Injury to property

In the case of damage to property any sensible injury will be sufficient to support an action.

In St. Helen Smelting Co. v. Tipping, (1865) 77 HCL 642:, the fumes from the defendant's manufacturing work damaged plaintiff's trees and shrubs. The Court held that such damages being an injury to property gave rise to a cause of action.

In Ram Raj Singh v. Babulal, AIR 1982 All. 285:, the plaintiff, a doctor, complained that sufficient quantity of dust created by the defendant's brick powdering mill, enters the consultation room and causes discomfort and inconvenience to the plaintiff and his patients.

The Court held that when it is established that sufficient quantity of dust from brick powdering mill set up near a doctor's consulting room entered that room and a visible thin red coating on

clothes resulted and also that the dust is a public hazard bound to injure the health of persons, it is clear the doctor has proved damage particular to himself. That means he proved special damage.

In Hollywood Silver Fox Farm Ltd v Emmett, (1936) 2 KB 468:, A carried on the business of breeding silver foxes on his land. During the breeding season the vixens are very nervous and liable if disturbed, either to refuse to breed, or to miscarry or to kill their young. B, an adjoining landowner, maliciously caused his son to discharge guns on his own land as near as possible to the breeding pens for the purpose of disturbing A's vixens.

A filed a suit for injunction against B and was successful.

In **Dilaware Ltd. v. Westminister City Council, (2001) 4 All ER 737 (HL):,** the respondent was owner of a tree growing in the footpath of a highway. The roots of the tree caused cracks in the neighbouring building. The transferee of the building of the building, after the cracks were detected, was held entitled to recover reasonable remedial expenditure in respect of the entire damage from the continuing nuisance caused by the trees.

2. Physical discomfort

In case of physical discomfort there are two essential conditions to be fulfilled:

a. In excess of the natural and ordinary course of enjoyment of the property –

In order to be able to bring an action for nuisance to property the person injured must have either a proprietary or possessory interest in the premises affected by the nuisance.

b. Materially interfering with the ordinary comfort of human existence

The discomfort should be such as an ordinary or average person in the locality and environment would not put up with or tolerate.

Following factors are material in deciding whether the discomfort is substantial:

- its degree or intensity;
- its duration;
- its locality;
- the mode of user of the property.

In **Broadbent v. Imperial Gas Co. (1856) 7 De GM & G 436:,** an injunction was granted to prevent a gas company from manufacturing gas in such a close proximity to the premises of the plaintiff, a market gardener, and in such a manner as to injure his garden produce by the escape of noxious matter.

In **Shots Iron Co. v. Inglis, (1882) 7 App Cas 518:** An injunction was granted to prevent a company from carrying on calcining operations in any manner whereby noxious vapours would be discharged, on the pursuer's land, so as to do damage to his plantations or estate.

In **Sanders Clark v. Grosvenor mansions Co. (1900) 16 TLR 428:** An injunction was granted to prevent a person from turning a floor underneath a residential flat into a restaurant and thereby causing a nuisance by heat and smell to the occupier of the flat.

In **Datta Mal Chiranji Lal v. Lodh Prasad, AIR 1960 All 632:** The defendant established an electric flour mill adjacent to the plaintiff's house in a bazaar locality and the running of the mill produced such noise and vibrations that the plaintiff and his family, did not get peace and freedom from noise to follow their normal avocations during the day. They did not have a quiet rest at night also.

It was held that the running of the mill amounted to a private nuisance which should not be permitted.

In **Palmar v. Loder, (1962) CLY 2233:** In this case, perpetual injunction was granted to restrain defendant from interfering with plaintiff's enjoyment of her flat by shouting, banging, laughing, ringing doorbells or otherwise behaving so as to cause a nuisance by noise to her.

In **Radhey Shiam v. Gur Prasad Sharma, AIR 1978 All 86:** It was held by the Allahabad High Court held that a permanent injunction may be issued against the defendant if in a noisy locality there is substantial addition to the noise by introducing flour mill materially affecting the physical comfort of the plaintiff.

In **Sturges v. Bridgman (1879) 11 Ch D 852,** A confectioner had for upwards of twenty years used, for the purpose of his business, a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt to be a nuisance or complained of until 1873, when the physician erected a consulting room at the end of his garden, and then the noise and vibration, owing to the increased proximity, became a nuisance to him. The question for the consideration of the Court was whether the confectioner had obtained a prescriptive right to make the noise in question.

It was held that he had not, inasmuch as the user was not physically capable of prevention by the owner of the servient tenement, and was not actionable until the date when it became by reason of the increased proximity a nuisance in law, and under these conditions, as the latter had no power of prevention, there was no prescription by the consent or acquiescence of the owner of the servient tenement.

DEFENCES TO NUISANCE

Following are the valid defences to an action for nuisance

It is a valid defence to an action for nuisance that the said nuisance is under the terms of a grant.

• Prescription

A title acquired by use and time, and allowed by Law; as when a man claims any thing, because he, his ancestors, or they whose estate he hath, have had possession for the period prescribed by law. This is there in Section 26, Limitation Act & Section 15 Easements Act.

Three things are necessary to establish a right by prescription:

1. Use and occupation or enjoyment;

2. The identity of the thing enjoyed;

3. That it should be adverse to the rights of some other person.

A special defence available in the case of nuisance is prescription if it has been peaceable and openly enjoyed as an easement and as of right without interruption and for twenty years. After a nuisance has been continuously in existence for twenty years prescriptive right to continue it is acquired as an easement appurtenant to the land on which it exists. On the expiration of this period the nuisance becomes legalised ab initio, as if it had been authorised in its commencement by a grant from the owner of servient land. The time runs, not from the day when the cause of the nuisance began but from the day when the nuisance began.

The easement can be acquired only against specific property, not against the entire world.

In **Elliotson v. Feetham (1835) 2 Bing NC 134,** it was held that a prescriptive right to the exercise of a noisome trade on a particular spot may be established by showing twenty years' user by the defendant.

In **Goldsmid v. Turubridge Wells Improvement Commissioners (1865) LR 1 Eq 161,** it was held that no prescriptive right could be obtained to discharge sewage into a stream passing through plaintiff's land and feeding a lake therein perceptibly increasing quantity.

In **Mohini Mohan v. Kashinath Roy, (1909) 13 CWN 1002,** it was held that no right to hold kirtan upon another's land can be acquired as an easement. Such a right may be acquired by custom.

In **Sturges v. Bridgman (1879) 11 Ch.D. 852** A had used a certain heavy machinery for his business, for more than 20 years. B, a physician neighbour, constructed a consulting room

adjoining A's house only shortly before the present action and then found himself seriously inconvenienced by the noise of A's machinery.

B brought an action against A for abatement of the nuisance. It was held that B must succeed. A cannot plead prescription since time runs not from the date when the cause of the nuisance began but from the day when the nuisance began.

• Statutory Authority

Where a statute has authorised the doing of a particular act or the use of land in a particular way, all remedies whether by way of indictment or action, are taken away; provided that every reasonable precaution consistent with the exercise of the statutory powers has been taken. Statutory authority may be either absolute or conditional.

In case of absolute authority, the statute allows the act notwithstanding the fact that it must necessarily cause a nuisance or any other form of injury.

In case of conditional authority the State allows the act to be done only if it can be without causing nuisance or any other form of injury, and thus it calls for the exercise of due care and caution and due regard for private rights.

In **Vaughan v. Taff Vale Rly (1860) 5 H.N. 679,** The defendants who had authority by Statute to locomotive engines on their railway, were held not liable for a fire caused by the escape of sparks.

In a suit for nuisance it is no defence:

1. Plaintiff came to the nuisance: E.g. if a man knowingly purchases an estate in close proximity to a smelting works his remedy, for a nuisance created by fumes issuing therefrom is not affected. It is not valid defence to say that the plaintiff came to the nuisance.

2. In the case of continuing nuisance, it is no defence that all possible care and skill are being used to prevent the operation complained of from amounting to a nuisance. In an action for nuisance it is no answer to say that the defendant has done everything in his power to prevent its existence.

3. It is no defence that the defendant's operations would not alone mount to nuisance. E.g. the other factories contribute to the smoke complained of.

4. It is no defence that the defendant is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to other persons.

5. That the nuisance complained of although causes damages to the plaintiff as an individual, confers a benefit on the public at large. A nuisance may be the inevitable result of some or other operation that is of undoubted public benefit, but it is an actionable nuisance nonetheless. No consideration of public utility should deprive an individual of his legal rights without compensation.

6. That the place from which the nuisance proceeds is the only place suitable for carrying on the operation complained of. If no place can be found where such a business will not cause a nuisance, then it cannot be carried out at all, except with the consent or acquiescence of adjoining proprietors or under statutory sanction.

REMEDIES FOR NUISANCE

The remedies available for are as follows nuisance:

• **Injunction**- It maybe a temporary injunction which is granted on an interim basis and that maybe reversed or confirmed. If it's confirmed, it takes the form of a permanent injunction. However the granting of an injunction is again the discretion of the Court

• **Damages-** The damages offered to the aggrieved party could be nominal damages i.e. damages just to recognize that technically some harm has been caused to plaintiff or statutory damages i.e. where the amount of damages is as decided by the statute and not dependent on the harm suffered by the plaintiff or exemplary damages i.e. where the purpose of paying the damages is not compensating the plaintiff, but to deter the wrongdoer from repeating the wrong committed by him.

• **Abatement**- It means the summary remedy or removal of a nuisance by the party injured without having recourse to legal proceedings. It is not a remedy which the law favors and is not usually advisable. E.g. - The plaintiff himself cuts off the branch of tree of the defendant which hangs over his premises and causes nuisance to him.

CONCLUSION

The law of nuisance is almost an uncodified one. Yet it has grown and expanded through interpretation and through a plethora of judgments. The concept of nuisance is one that arises most commonly in a man's daily life and the decision regarding the same has to be delivered on a case to case base ensuring that neither the aggrieved plaintiff goes back uncompensated nor the defendant is punished unnecessarily. Indian Courts in the matters of nuisance have borrowed quite intensively from the English principles as well as from the decisions of the common law system along with creating their own precedents. This has resulted in a sound system of law being developed that ensures fairness and well being of all i.e. the parties and the society at large.

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