Course Name- B.A.LL.B 6th sem
Subject- Jurisprudence
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Concept – Liability and Obligation

Concept of Liability In The Light of Jurisprudence

In civilized societies, most of the relations between the individual and the state are governed by rules made or recognised by the state, that is, law. Law lays down the rights and duties of the individuals. In other words, it prescribes what one is to do and what one is not to do and what one is entitled to get it done. A breach of these rules is called wrong. When a person has committed a wrong, he is said to be liable.

Thus, liability is the condition of the person who has committed a wrong. Salmond defines liability as, 'the bond of necessity that exists between the wrongdoer and the remedy of the wrong'. The task of law is not finished only by laying down rights and duties; it ensures their protection, enforcement and redress also. Therefore, liability is a very important part of the study of law. The kinds of liability, when one becomes liable or in other words, when liability comes into existence and the measure of liability are the things that must be known in this connection.

Kinds of Liability
Liability is of two kinds:

1. **Civil.**
2. **Criminal.**

Distinction between civil and criminal liability

About the distinction between the two, different jurists have given different views.

Austin says:
An offence which is pursued at the discretion of injured party or his representatives is a civil injury. Offences which are pursued by the sovereign or by the subordinates of the sovereign are a crime. All absolute obligations are enforced criminally.

Salmond's view is that the distinction between criminal and civil wrong is based not on any difference in the nature of the right infringed, but on a difference in the nature of the remedy applied.

One view is that the main difference between the two lies in the procedure. In other words, their procedures are different.

Generally, four points of distinction between the two have been put forward:
Crime is a wrong against the society but a civil wrong is a wrong against a private individual or individuals.

The remedy against a crime is punishment but the remedy against the civil wrongs is damages.

A third difference between the two is that of the procedure. The proceedings in case of crime are criminal proceedings, but the proceedings in case of a civil wrong are called civil proceedings and criminal and civil proceedings take place in two different sets of courts.

The liability in a crime is measured by the intention of the wrongdoer, but in a civil wrong the liability is measured by the wrongful act and the liability depends upon the act and not upon the intention.

Points of distinction not well founded. It is submitted that most of these points of distinction between the two are not well founded. To take the first point, there are wrongs which are against the state or society, but they are not considered as crime, for example, a breach of a contract by an individual made with the state is not a crime.

In the same way, there are wrongs which are only against a private individual but they are considered as crimes. Secondly, a criminal proceeding does not always result in punishment and on the contrary sometimes civil proceedings result in punishment.

For example, in the case of disobedience of an injunction granted by a court, punishment is awarded although it is a civil proceeding. Thirdly, to say that the measure of criminal liability is intention and of civil liability is the wrongful act. In modern times, mens rea (intention) has gone under an eclipse and the question of intention has become more a matter of form than of a substance. The distinction on the basis of proceedings is sounder and contains substantial truth. Though in some cases civil and criminal both the proceedings can be instituted for the same act, they are always different and are regulated by two different sets or rules.

Remedial and Penal liability

The liability can again be classified as penal and remedial. This distinction has been made on the basis of the legal consequences of the action against the wrong, if after a successful proceeding the defendant is ordered to pay damages or to pay a debt, or to make a specific performance etc., the liability is called remedial liability.

When after a successful proceeding the wrongdoer is awarded punishment which may be the fine, imprisonment, etc., it is called penal liability. The civil liability is generally remedial and the criminal liability is penal. But this is not always true. As pointed out earlier, the civil liability in some cases is penal. Therefore, civil liability is remedial and penal both. So far as criminal liability is concerned, with the very few exceptions, it is always penal.

Remedial liability

This liability is based on the maxim ubi jus ibi remedium (where there is a right, there must be some remedy). When law creates a duty, it ensures its fulfillment also. For the breach of a duty, there is some remedy prescribed by law and it is enforced by law. With very few exceptions this is the rule.

The exceptions are the following:

The duties of imperfect obligation. This is the first exception of the rule that a duty is enforceable by law. A time-barred debt is an example of it. Though the debt exists in law, it is not enforceable. Therefore, there can be no proceedings to compel its payment.

There are some duties which are of such a nature that if once broken cannot be specifically enforced (in respect of the act done). For example, in a completed assault (that is actionable as

a tort), the defendant cannot be made to refrain from it (as it is already done and the original state of things cannot be brought).

Cases where, though the specific performance of the duty is possible, the law, on other considerations, does not enforce the specific performance, but instead awards damages to the plaintiff.
For example, if A contracts to render personal service to B, B cannot enforce performance of this contract, (Specific Relief Act of 1877, section 21).

Penal Liability
The Maxim actus non facit reum, nisi mens sit rea (the act alone does not amount to guilt, it must be accompanied by a guilty mind) is considered to be the condition of penal liability.

Thus, there are two conditions of penal liability:

- Act.
- Guilty mind or mens rea.

Austin defines act as a ‘movement of the will'. It is bodily movement caused by volition, a volition being a desire for a bodily movement which is immediately followed by such movement provided the bodily member is in a normal condition. The view of Holmes is that an act is always a voluntary muscular contraction and nothing else. Thus, according to both the jurists an act is a willed movement of the body.

Salmond takes act in a wider sense. He says: ‘We mean by it (act) any event which is subject to the control of human will'. Salmond's use of the word ‘event' is of great significance. Even is not an act in the strict sense nor is movement, but Salmond by act means those events which are subject to the control of human will.

An act consists of three stages:

1. Its origin in some mental or bodily activity or passivity of the doer.
2. Its circumstances
3. Its consequences.

For example, if we take theft, it has five ingredients:

1. Dishonest intention to take property.
2. The property must be movable property.
3. It should be taken out of the possession of another person.
4. It should be taken without the consent of the person.
5. There must be some moving of the property in order to accomplish the taking of it.

If we examine the ingredients, in the light of the above definition, we can say that it is an act according to the definition. Leaving the first ingredient which is the second condition mens rea, if we arrange the other ingredients in the light of the definition, intention to take the property is a mental activity where the act originates. The circumstances are the property must be movable (ingredient 2);

it should be taken without the consent of that person (ingredient 4); there must be some moving of the property in order to accomplish the taking of it (ingredient 5).

The consequence is that the property is taken out of the possession of another person (ingredient 3).

A theft would take place when all the ingredients are complete. When we use the word ‘act' as condition of penal liability, it is used in its wider sense, and not in its limited sense as the movement of the body only. Therefore, the definition given by Salmond is more accurate than the definition of Austin and Holland.

The law prescribes as to under what circumstances and consequences an act shall be punishable or, in other words, a person committing the act shall be under penal liability. The circumstances so prescribed are relevant in determining whether a particular act (wrong) has taken place or not. A person is liable only for his own acts and not for the acts done by others, or the events which are independent of human activity.

Kinds of Acts

Acts are of various kinds:

Positive and negative acts: when the wrongdoer does an act which he should not do or in other words, he is prohibited by law not to do, it is a positive act. When the wrongdoer does not do an act which he should do, in other words, which he is directed by law to do, it is a negative act. Act includes positive as well as negative act. The Indian Penal Code section 32 says In every part of this code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

Voluntary and involuntary acts: If the act is a willed act, it is called a voluntary act, but if the act is not a willed act, it is an involuntary act. The penal liability is only for voluntary acts.

Internal and external acts: Internal act means the act of mind and external act means the act of body. An external act generally implies an internal act also but an internal act is not always translated into an external act. The term ‘act' is commonly used for external act, but it should not be taken to be restricted to it alone. Internal act is a very important condition in determining the penal liability.

Intentional and unintentional acts: Intentional act means an act which is foreseen and is desired by the doer of the act. Unintentional act is that act which is not so foreseen or desired, or in other words, it is not a result of any determination. Generally, by act we mean intentional act, but intention is not always necessary condition of penal liability, and therefore, it is not an essential element in those acts where it is not a condition of liability. These divisions of act are not exclusive, and sometimes an act may fall into various classes. For example, an act may be positive, external and intentional at the same time without any conflict.

The wrongful acts are divided into two classes:
Acts which causes some harm, and it is only on this ground that they are considered wrong.
Acts which are considered as wrong due to their mischievous tendencies. In these acts, proof of actual harm is not necessary for liability.

Damage and liability
In the first class of the wrongful acts, no cause of action arises without some actual damage but in the second class of acts, the proof of the damage is not necessary, the act alone makes the

doer liable. Generally, though not necessarily, the civil liability arises on the actual damage. But as crime is a wrong against the society in general, so not only the act but the mischievous tendencies also are considered wrongful and they are punishable.

Therefore, in criminal law attempt and in some cases, preparation also subjects a person to criminal liability. In the first class of cases, actual damage does not include every kind of damage. A damage though caused by an act of a man, is not always wrongful. Damnum sine injuria (a damage without injury or wrongful act) does not make a person liable.

It means that though damage has been caused, it does not amount to a wrongful act. Such cases are of two kinds:

The cases where though some damage is caused to an individual nevertheless it is a gain to the society at large, for example, a competition in trade causes damage to some of the traders, but as it is a gain to the society, therefore, the trader whose competition causes damage is not liable.

The cases where though some harm is caused, it is so trivial that it is the policy of the law not to take action against the doer.

Mens Rea
Salmond's view: Mens rea means guilty mind. It is the second condition of penal liability. Mens rea is defined as 'the mental element necessary to constitute criminal liability'. In making a person criminally liable, an enquiry 'into his mental attitude is made Criminal intention, malice, negligence, heedlessness, and rashness, etc. all are included in mens rea.

Salmond says that mens rea included only two distinct mental attitudes of the doer towards the deed:
Intention
Recklessness.

It means that a man is liable only for those wrongful acts which he does either willfully or recklessly. Sometimes, inadvertent negligence is also punishable. Therefore, unless an act is done with any of these three mental attitudes, the doer is not liable.

External conduct as the basis of the liability
Different legal systems have recognised, in different ways, this mens rea as the condition of penal liability. There are degrees of mens rea and in some cases, the punishment is determined on the basis of the degree of mens rea. In German law, theoretically, various forms of mens rea are recognised and they are distinguished from each other. Historically, mens rea has its origin in the idea of blameworthiness of the wrongdoer for the wrongful act.

But as the aim of the law is to serve more an external purpose than to enquire into the blameworthiness, the mens rea is determined, more or less, on the basis of external conduct. Therefore, the act is judged not from the mind of the wrongdoer but the mind of the wrongdoer is judged from the act. The law presumes that every man is of the average understanding and judges his act from that standard.

What is an average or reasonable man, more or less, depends upon the idea of the judge of an average man. If the accused is below the average, the burden to prove it lies on him. Therefore, in modern times, mens rea does not mean enquiry into the mental attitude of the wrongdoer

from a subjective point of view, but it simply means that the mens rea is judged from the conduct by applying an objective standard.

Holmes makes out the same point when he says
It is not intended to deny that criminal liability, as well as civil is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it in another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear. It is only intended to point out that, when we are dealing with the part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere, to find that the tests of the liability are external, and independent of the degree of evil in the particular person's motives or intentions. The conclusion follows directly from the nature of the standards to which conformity is required.

These are not only external, but they are of general application. They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into well known exceptions such as infancy or madness. They assume that every man is as able as every other to behave as they command. If they fall on any one class harder than on another, it is on the weakest. For it is precisely to those who are most likely to err by temperament, ignorance, or folly, that the threats of the law are the most dangerous.

Mens rea under eclipse
The mens rea has no longer remained the condition of penal liability in its original sense and it has been replaced by standards which the law has established. Apart from this change, there are other factors also which have contributed in relegating the importance of mens rea as a condition of a penal liability. Mens rea or the degree of subjective guild varies in different classes of offences.

For example, against a charge of kidnapping a girl under the age of 18, an honest and reasonable belief of the accused that the girl was over 18 is no defence. In modern times, the law has tended to establish absolute liability. A number of new offences have been created, and are being created every year by the law in every society to ensure the smooth running of the community life under the growing complicated social organization. The rules governing and regulating traffic, electricity and water supply, etc., are the rules of this kind. In the offences of these kinds for holding a person liable, no mens rea is required. But for these offences, there is slight fine and they involve no moral stigma.

Mens rea in Indian Penal law
In Indian criminal law, the scope of general application of the conditions of mens rea is very limited. It is due to many reasons. Here the criminal law is all codified and the offences are carefully defined. If mens rea is a necessary condition for a particular offence, it is included in the very definition of the offence and it is a part of it. There are certain offences which have been defined without any references to mens rea or intention. In these offences, mens rea is not a condition for a penal liability.

These offences are of a grave nature and the act itself is very dangerous, therefore, the law does not go to make an inquiry into the mental attitude of the wrongdoer. Such offences are the offences against the State, counterfeiting coins, etc.

Lastly, there is a chapter in the Indian Penal Code, ‘General Exceptions'. It prescribes all those circumstances in which mens rea is negative and hence there is no liability. Thus mens rea in India, is a condition of penal liability only to the extent it is codified. However, it works as a general principle of criminal law and is applied in matters of interpretation.

From the point of view of the mens rea, wrongs maybe divided in three classes:
Where mens rea amounts to intention or knowledge. The wrongs in which the mens rea is of this degree are intentional wrongs, or wrongs committed recklessly, or there is culpable negligence.

Negligence: In these wrongs carelessness amounts to mens rea.
Absolute or strict liability: In cases of absolute or strict liability mens rea is not a necessary condition of liability.

Intention
Intention is defined as the purpose or design with which an act is done. It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, in as much as they fulfill themselves through the operation of the will. An act is intentional if, and so far as it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied.

Holmes says that there are two elements of intention:
Foresight that certain consequences will follow from an act.
The wish for those consequences working as a motive which includes the act.
A criminal intention means an intent to do an act whose natural and probable ultimate consequences are criminal. Thus, when we speak that a wrong is intentional, it means that the intention is extended to all the three elements of the wrong (origin, circumstances and consequences). Intention must be distinguished from the other similar terms.

Intention and Expectation
Intention and expectation are two different things, and the one does not necessarily involve the other, one may intend a result though he may not expect it. Intention is the foresight of a desired issue, howsoever improbable, not the foresight of an undesired issue, howsoever probable. For example, if I am firing in a direction in which there is a man, a mile away from me, I may intend to hit him although I do not expect so. Similarly, I may expect thing without intending it. A surgeon who is going to perform a dangerous operation might expect the death of the patient, although he never intends it.

Mens rea, or the intention is inferred from the act. It is on the principle that every man knows the consequences of his conduct or act. Therefore, the law will not go to enquire as to whether the particular consequence was intended by the doer of the act or not. If the consequence is foreseen as the certain result of the doer's conduct, it shall be taken (by law) as intended. Thus, intention has a two-fold meaning.

Meaning of intention:
It means either desire of the consequence of one's conduct, or foresight of the certainty of such consequence. But the intention does not extend to cover the knowledge of probable events. A manufacturer, who employs workmen, has the knowledge that some accident might take place

which might kill a workman, but this knowledge would not be taken as an intention of the employer if any workman is a victim of an accident.

Sometimes, the intention is imputed from the act or the consequence. If a particular act has been done, the law will presume that the person doing it had the intention to do it without the enquiry as to whether actually he had the intention or not. This is called constructive intention.

In English as well as in Indian law, intention does not mean only the specific intent, but it includes the generic intent also.
For example, in culpable homicide (section 299 IPC) it is not necessary that the offender should intend to kill any particular person, or he has killed the same person whom he intended to kill. It is enough (for making him liable) if he causes the death of anyone by doing an act with the intention of causing death....

Anyone clearly indicates that the person actually killed may be somebody else then the person .whose death was intended. If A digs a pit in the way through which B passes and conceals it with grass etc. with the intention of killing B, and C passes through that way and falls in the pit and is killed, A is liable for killing him although he never intended it. But a person shall be liable in such cases only when the harm intended and the harm caused are of the same kind.

Intention and motive
Though intention and motive are very close to each other, they are not the same. Motive is called the ‘ulterior intent'. It is seldom that a man commits a wrongful act for its own sake. The wrongdoer has some end in his mind, which he tries to achieve through his wrongful act.

For example, if A fires upon B, his intention is to kill B. A intended to kill him due to reason that B was contestant against A in an election, and he is likely to win it. A intended to kill him for ensuring his success by removing B from the election field. This idea of removing B from the election field is motive of A for doing the wrongful act.

Thus, generally in committing a wrong, the intent of the wrongdoer is two folds:

- one is the wrongful act itself.
- the other is that on which the wrongful act proceeds and it is beyond the wrongful act.

If we take the ‘intent' in a comprehensive sense, it may be divided into immediate and ulterior. The immediate intent is coincident with the wrongful act itself. This is intention. The ‘ulterior intent' is beyond the wrongful act.

It is motive. Intention is related to the immediate and motive to the distant object of the act. Motive is the feeling which prompts the operation of the will. Intention is the result of deliberation upon the motive. It is an operation of the will directing an over act. An act may have more than one motive behind it. For example, if A kills B, his one motive may be to remove him from election field where he had a stronger support than A and second motive may be to take away his (B's) property also.

Malice
Sometimes, malice is also used in law to indicate a similar meaning. It denotes various things. Sometimes, it is used to indicate a wrongful intention, and sometimes, it means ‘motive'. Paton says that malice is a most unfortunate term and it has many different meanings in English law:

In murder, it merely means that there is present one of the various forms of mens rea necessary to constitute the crime.

In certain statutory offences, it means that there must be either an intention to cause results of the particular kind prohibited by the statute, or at least a recklessness which cares not whether the prohibited consequence occurs or not.

Sometimes, the word is otiose, a pleading relic, as in the allegation that the defendant maliciously defamed the plaintiff, since even the proof that there was no malice is not a defence.

Sometimes, the word means spite or actual ill will or other improper motive, for example, malice in this sense may be proved to rebut a defence or qualified privilege in defamation.

Sometimes, as in the phrase malitia supplet aetatem, it means that the act was done with the knowledge of its nature.

Relevancy of Motive
Most of the wrongful acts are done with a motive. It is not very relevant in determining the liability. It is the immediate intent (intention or negligence) that is material in the determination of the liability. With some exceptions, man's motives are irrelevant in determining his liability. An act which is not unlawful otherwise will not become so because it was done with a bad motive. In the same way, an act which is unlawful would remain the same although it might have been done with a good and laudable motive.

If a person has stolen single paise from the pocket of a man, the law will not exonerate him from the liability although he stole it to purchase milk for his new born baby whose mother is dead and who is dying in the house for want of food.

Motive is relevant only in the following cases:
Where it (motive) is the evidence of the evil intent: Though the proof of the exercise of the motive is not necessary for a conviction, where it is proved it is an evidence of the evil intent, and it is relevant in the showing that the person, who had a motive to commit the offence, actually committed it. Thus any fact is relevant which shows or constitutes a motive or preparation for any facts in issue or relevant fact...

In the criminal attempts: Motive is relevant in cases of the criminal attempts also. Attempt is an act done with the intent to commit the offence so attempted? A person is liable for his criminal attempts, as they show the existence and the nature of motive or ulterior intent and thus motive becomes relevant.

Cases where the intent is a part of or ingredient of the offence: In most of the offences, a particular intent forms part of the definition of the offence. For example, theft (section 378 IPC 1860) consists in Intending to take dishonestly any movable property out of the possession of any person without the person's consent and moving that property in order to such taking. In such cases ‘the ulterior intent' is the source, in whole or in part, of the mischievous tendency of the act, and is, therefore, material in law.

In cases of jus necessitates: (Act in necessity or in other words, necessity knows no law). Where an act has been done under necessity, the motive is the all material consideration, and it

operates as the ground of excuse. Where one is to make an option between two acts, both of them causing harm, the act which is to cause lesser harm should be opted without minding the letter of the law. It would be lawful in an emergency to imperil one or two lives in order to save a score of lives. In India, nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person and property under IPC, 1860, Section 81.

Motive is taken into consideration in determining the punishment: Though a good motive is no defence against conviction, it is considered in determining the sentence, and if a good motive is there, a lighter punishment is awarded.

The ulterior intent or motive is seldom relevant in determining the civil liability. The law looks to the act alone and not to the motives from which it proceeds. But there are certain exceptions to this principle. These are cases where it is though expedient in the public interest to allow certain specified kinds of harm to be done to individuals, so long as they are done for some good and sufficient reason, but the ground of this privilege falls away as soon as it is abused for bad ends. Therefore, in such cases, motive or malice is a very essential element in the cause of the action. Defamation and malicious prosecution are the wrong of this nature.

Strict Liability

Apart from the negligence and wrongful acts, there is another class of wrongful acts for which a person is liable irrespective of mens rea. This liability is called the strict or absolute liability. The strict liability is an exception to the general rule about the conditions that constitute liability. It is said that in civil wrongs, strict liability should be the rule. The aim of civil law is to redress the person who has suffered harm and there is no question of punishment.

Therefore, the person who suffered should be redressed without the consideration as to whether the wrongdoer did it intentionally or negligently. This view has no wide recognition in modern times because cases where redress is a penal redress are considered as punishment. In such cases, the damage awarded to the plaintiff amount to a penalty inflicted upon the defendant for which he is liable.

Therefore, it is argued that there should be no strict liability in civil law also. This view is supported by many English jurists, and to some extent, it is applied in the English law. In modern times, there is a tendency of expanding the field of strict liability. In cases where the redress is penal, it is intended more for mending the conduct of the wrongdoer in future than it is a penalty for subjective guilt.

Difficulty of knowing the intention: A very strong argument that is given in favour of strict liability is that it is very difficult to procure the evidence of intention or negligence in every case and it would make the administration of the justice very difficult. Therefore, in some kinds of cases the law makes a conclusive presumption of mens rea on the basis of the external conduct. It is clear that this liability would fall very heavily upon the innocent persons.

But the supporters of strict liability say that it is not so serious and hard as it appears to be. In cases of civil wrongs, a man does a thing at his own peril; therefore he should be liable for it in every case. In criminal law, the rule of strict liability is applied only to a comparatively minor and trivial kinds of offences which in many cases do not imply any moral stigma on the

part of the wrongdoer and in majority of the offences mens rea is a necessary condition for liability. Thus, in criminal law, rule of strict liability is almost an exception.

The strict liability may be divided into the following three headings:

- Mistake of law.
- Mistake of fact.
- Accident.

1. Mistake of Law:

The principle that ignorantia juris non excusat (ignorance of law is no excuse) is followed in almost all the legal systems. A person who has committed a wrongful act will not be heard to say that he did not know that it was forbidden by law, or, in other words, he did not know the law. This is an irrebuttable presumption that every person knows the law of the land. This is an instance of strict liability. The law will not go to make an inquiry as to whether the person taking the defence of the ignorance of law actually knew it or not. This irrebuttable presumption or, in other words, the strict liability is on the following grounds.

First, that law is definite and knowable and it is the duty of every person to know the law concerning his rights and duties.

Second, law in most of the cases is based on common sense, or in other words, it is based on the principle of natural right and wrong which generally every person knows. A person might not be acquainted with the Indian Penal Code, but he knows that to kill a man intentionally or to steal is a wrong.

Third, there shall be evidential difficulties in accepting the defence of the ignorance of the law. In most of the cases, the wrongdoers in the first instance will take this defence and the court will have to enquire as to whether the wrongdoer knew the law or not before going into the merits of the case. This will create great difficulties before the courts and it will hamper the course of the administration of justice.

Arguments in support of the rule not convincing

It is submitted that grounds given in support of strict liability are not very convincing in modern times. In a country like ours, where every citizen is governed by the law made by the two legislatures and the rules made by the local bodies which undergo frequent amendment also, to say that every person knows the law is nothing but a fiction. The second argument that law is based on common sense also does not hold much water.

In modern times, the law has grown very complex and in many cases it has nothing to do with the common sense. Some general rules and principles of the law are undoubtedly based on common sense, but now most of them are based on the expediency or other things. Thus, the strict liability that everyone knows the law is very hard and severe. However, there are certain exceptions to this general rule.For example, one is not presumed to know a by law until it has been duly published.

2. Mistake of fact:

The principle about it is that ignorantia facit excusat (ignorance of the fact is excuse). It means that a person is not liable for a wrongful act if he has done it under a mistake of fact. In other words, mistake is a valid defence against a wrongful act. But this principle applies only in case of a criminal wrong and not a civil wrong. In civil wrongs, except in few cases, the mistake of fact is not a valid ground for discharging a person from liability.

But in criminal law, the strict liability for a mistake of fact is only in exceptional cases (IPC Act 1860, section 76 to 79). An example of such exception or strict liability is that if a person kidnaps a girl below 16, he is always liable, although he honestly believed that she was above 16.

3. Accident:
A person is not liable for an act taking place accidentally. Accident differs from a mistake of fact. Every unintentional act is done by mistake when the consequences of the act are intentional, the mistake is only about the circumstances and in that respect it is unintentional.

For example, For example, if I arrest A taking him to be B, it is a mistake of fact. In this case the consequence that is arrest is intentional but there is a mistake about the circumstances and I was to arrest B and not A. So the arrest of A is unintentional. An act is said to be done accidentally when it is unintentional in respect of its consequences also.

For example, if I am cutting wood with an axe, and the axe slips away from my hand and falls upon the head of a man and causes his death, it is accident because the consequence was never desired. Accident is culpable or inevitable. It is considered to be culpable in those cases where it could not have taken place at all had the doer of it observed the proper care. For example, if one drives a car above the fixed speed limit in a crowded place, and harm or injury is caused to any person, the person so driving is liable, although it is unintentional.

The accident is called inevitable when it could not have been avoided by the wrongdoer and it takes place without any fault on his part. Culpable accident is no defence, save in those exceptional cases in which wrongful intent is the exclusive and necessary ground of the liability. Inevitable accident is commonly a good defence in the criminal law (IPC Act, 1860 Section 80). It exonerates the wrongdoer from the liability.

The rule in (Rylands v. Fletcher, (1868) L.R 3 H.L. 330) and in some other cases of that nature is that if a person accumulates or keeps a thing which may cause danger if it escapes, he does it at his own peril and he is strictly liable for any harm or damage that the thing causes, although it is caused accidentally.

Vicarious Liability
The general principle of law is that a person is liable for his own acts and not for the acts of others. But in certain kinds of cases a person is made liable for the act of another on account of his standing in a particular relationship with that person. This liability is called vicarious liability. This kind of liability existed in ancient times also but the grounds of liability were entirely different from what it is in modern times.

The principles of vicarious liability in ancient times were that a person must be made answerable for the acts of the person who are akin to him. With the onward march of time, this principle of liability underwent a great change, and in modern times, this liability exists in limited kind of cases. Now a person is made liable on the grounds of expediency and policy, and not on any other ground. The scope and the field of application of the vicarious liability shall now be described here.

Criminal law:

In criminal law, the general principle is that a person is not liable for the act of another. A master is not criminally liable for the unauthorized acts of his servant. However, there are certain exceptions to this rule. The legislature may prohibit an act or enforce a duty in such terms as to make the prohibition or the duty absolute; in that case the principal is liable if the act is in fact done by his servant. Thus, a statute may impose criminal liability upon the master as regards the acts or the omissions of his servants.

A master or owner is liable in case of public nuisance clone by his agent. Similarly, if a principal neglects the performance of an act, which is likely to cause danger to others, and entrusts it to the unskillful hands, he will be in certain cases criminally liable (IPC Act 1860, Section 154 and 155).

Civil law: Vicarious liability exists mainly in civil law. It is recognised in civil law generally in two kinds of cases:
A master is liable for all tortious acts of his servants done in the course of his employment.
The representatives of the dead person are, in certain cases, liable for the acts of the deceased.
1. Master's liability for the acts of his servant:
Most of the jurists are of the view that the origin of the liability of the master of his servant is in the old institution of slavery Holmes tracing the development of the liability says that in the beginning, it was the revenge that was the motive of the punishment. It was vengeance on the immediate offender. If a slave committed a wrong, the master of the slave had to surrender him to the person who had suffered the wrong.

Even the inanimate things were surrendered or forfeited if any injury to a person took place on account of them. Later on instead of surrendering the slave, some compensation was paid to the person suffering the injury by the master of the slave or the thing. Thus, the master paid for the blood feud for taking back the slave or the thing, in other words, the surrender was substituted by compensation.

Gradually, a practice developed that the master was also made a party when an action was brought against his servant for his wrongful act. It was only as a matter of convenience to establish the liability of the master and to realize the money from him. Though in course of time the institution of slavery was abolished and the nature of the liability also changed, a master continued to remain liable for the wrongful acts of his servants on the same analogy.

The modern jurists are of the view that the liability of the master in modern times is not linked with the old principle of liability. The liability of the master for the acts of his servants in modern times is of recent origin and growth. The liability of the master for acts of his servants is based on a legal presumption which, later on, became conclusive that the acts done by a servant in and about his master's business are under the express or implied authority from the master. Therefore, these acts are the acts of the master. It is this presumption which has appeared in the shape of the employer's liability. It has been embodied in various statutes.

The reasons of making the master liable are mainly two:
It has evidential importance: To prove in every case of this nature that the servant acted under the actual authority of his master would involve a lot of difficulties and in most cases the master will escape the liability on the ground that there was no formal authority given to the servant. Secondly, to make masters liable for the acts of their servants makes them to remain vigilant and cautious in respect of the acts of their employees.

The second reason for making the master liable is his pecuniary position: The masters are in a financial position to redress the injury caused by the acts of their servants. It is a principle of justice that one, who is in a position to make good the loss caused by him, or on his behalf, should not escape the liability of paying it by delegating the exercise of it to the agents from whom no redress can be obtained.
If a master keeps a servant at a place where he can cause mischief, the master must be answerable for that.

2.Representatives of a dead man are in certain cases liable for the acts of the deceased:
This is a second form of vicarious liability, there is no vicarious liability in criminal law, so the representatives of a dead man are not liable for the criminal acts done by him before his death. So far as the civil liabilities of the deceased are concerned, most of them are transferred upon his representatives.

For example, a debt or damages for which a deceased was liable will have to be paid by his representatives. Whether the representatives of a deceased should be liable or not in cases of the penal redress which was to be made by the deceased is a question on which there has been a difference of opinion. The penal redress partakes the nature of punishment and compensation both. According to the principle, the former liability should extinguish with the death of the wrongdoer, but the latter liability survives him. The main problem was how to transfer this liability on the representative.

The older view was that the action for the penal redress dies with the wrongdoer and his representatives cannot be held liable for it. This view is no longer accepted. In modern times, the representatives of a deceased are liable in case of penal redress also and in many legal systems it has been embodied in a statute. It is considered that although liability to afford redress ought to depend in the point of origin upon the requirements of punishment, it should depend in point of the continuance upon those of compensation.

Representatives are held liable on the ground that when a valuable right of a person (against whom a wrong has been committed) has come into existence, he should not be disappointed.

A person who has succeeded to the estate of the deceased must pay, and he is liable to pay it on the same ground on which he is liable to pay a debt of the deceased. Secondly, holding representatives liable will work as a deterrent. The person who commits a wrong shall be made to think that in any case he shall have to redress the wrong and after his death his representatives shall be liable. It will deter a person from doing a wrong of this kind.

The measure of liability
Depends upon the theory of punishment and on the concept of the State, the measure of the criminal liability is different in different legal systems. The measure of the liability is determined on various considerations.

First, the measure of liability in a particular society depends on the theory, or in other words, the aim of the punishment recognised in the society. If the punishment is for the purpose of the retribution, the law will look into the motive of the wrongdoer and would take it as the chief measure of the liability. If the purpose of the punishment is to reform the wrongdoer, the measure of the liability would be the character of the wrongdoer and soon.

Second, the measure of the liability depends upon the concept of the State and the kind of the government in a particular society. In Nazi Germany, to be a Jew was the gravest offence and, similarly to speak and to act against the wishes of the dictator was a very serious crime. In a socialist State, the grave offences are those that undermine the interest of the society.

Third, the measures of the liability also depend on the values which are recognised in a particular society. In India, where sex morality is considered to be a great virtue, the punishment for sexual offences has been very severe since very early times but in England, where the sex morality is not the same as it is in India, adultery is not an offence and in some cases seduction is a civil wrong and the wrongdoer is liable only for compensation. Thus in modern times, the principle is that all the offences do not involve equal guilt on the part of the wrongdoer and all the offenders are not equally guilty for the same offence.

This being so, the punishment for all kinds of offences and for all wrongdoers having committed the same offence cannot be uniform. The aim of the law is to bring the maximum good at the cost of the maximum sacrifice, therefore, in awarding the punishment it proceeds on the same line. If the punishment is same for assault and murder, a person who intends to cause injury to his enemy would prefer to cause the latter kind of injury. Thus the uniform punishment for every offence would bring more evil than good.

Similarly, the punishment is very severe such as hanging for petty thefts; it may bring down the crimes, but the evil so prevented would be far outweighed by that which the law would be called on to inflict in the cases in which its threats proved unavailing.

Therefore, the different offences have different punishments and secondly, the judge is left with ample discretion in awarding punishments. The law has generally fixed the maximum punishment that can be awarded in a particular offence and the judge awards the punishment within this limit taking into consideration the nature of the guilt, and the character of the offender, etc.

In modern times, though there is a great theoretical support for the reformative theory of punishment, in practice, the punishment to some extent, serves the retributive purpose and in the most part the deterrent purpose.

Therefore, the factors which are taken into consideration in determining the liability are the following:

Motive: The motive of the offence is a very important factor in determining the liability. If the motive to commit the offence is very strong, the punishment must be severe, because the punishment aims at counteracting the motives which made the offender to commit the crime.

The magnitude of the offence: The other things being equal, if an offence brings greater evil consequence or has greater evil tendencies, the punishment should be severe. Some criticize this view and say that the liability should not be determined on the basis of the evil caused to a person, but it should be determined on the basis of the benefit derived by the offender by his wrongful act. It is submitted that the punishment on the basis of the magnitude of the offence greatly helps in preventing offences and where the offender is to choose one wrongful act out of many of the same nature, he would prefer to commit one for which there is lesser punishment. Thus, the severe punishment for grave offence deters the wrongdoer from committing it.

The character of the offender: The character of the offender is also a factor in the measure of liability, in other words, it is a consideration in determining the punishment. The offenders who have become habitual and have undergone punishment, to them punishment loses much of its rigour and light punishment does not deter them. Therefore, they are given severe punishments.
There are some other factors also which are taken into consideration in determining the punishment. One such factor is the nature of the offence. The offences which are inhuman and heinous deserve severe punishment. The sensibility of the offender is also taken into consideration. A simple censor or rebuke might hurt the sensibility of a wrongdoer who did a wrong casually in the heat of a passion or anger and he may not commit the offence again, but to a habitual offender the censor or rebuke will have no effect, therefore, he should be given a severe punishment for the same offence.

OBLIGATION

The concept of obligation

The conceptual foundation of obligation traces as far back to ancient Roman law which defines obligation as a means of an undertaking or legally binding relationships where one party promises the other party to perform some acts or to do something. Ancient well-known Roman lawyers defined obligations based on their personal opinion, which as a result has developed the concept of obligation.

Year Gay, a Roman jurist, defines obligation as ‘a means of personal claim brought against another in order to force him before us to give us so as to we are able to enforce our rights. Gay also classifies obligation in terms of contract, quasi-contract, delict, and quasi-delcit

Pavel year also understood obligation as an undertaking not by Roman citizens to perform some acts or to do or to give or to render rights to non-roman citizens regarding to give, to do, or to render some rights to roman citizens.

The concept of obligation by both classical legal scholars was unilateral in character and discriminatory in nature since it imposes obligation to do, to give or to render rights only on non-roman citizens not the Romans.

However, the institute of Justinian defines obligation as a legally binding relations when Roman citizens undertake to perform certain acts or to do something in accordance with the Roman law.

Obligation defined in the institute of Justinian, differed from the obligations defined in the classical Roman jurists in that the institute defines obligation in the aspect that Roman citizens to carry out.

In general the concept of obligation can clearly be expressed as;

a) Obligation to give or not to give

b) Obligation to do or not to do

c) Obligation to render rights to others to do something.

Definition of Obligations

Black's law dictionary defines obligation as 'a legal duty or moral duty to do or not to do something'. Common-law scholars such as Fredrick Pollock defines obligation in its popular sense as merely synonym for 'duty'. In its legal sense derived from roman laws 'an obligation is the bond of legal necessity or vinculum juris which binds together two or more determinate individuals'.

John Salmond (year) defined obligation in its more general acceptation as 'something the law or morals command a person to do a command that is made effective by the imposition of sanction if a person failed to comply such a command'

In the modern legal systems and currently existing legal materials, there is no exact or single whole definition of obligation. However, some scholars define it based on their own legal system For instance French judges define the term obligation as a legally binding relations to another party is obliged to give or to do or not to do something.

Likewise the Ethiopian civil code, in the book IV of the code uses the term obligations without defining what it means. However, like French judges who define obligations indirectly from article 1101 of the French civil code of the term contract as an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of proprietary nature.

Sources of obligations

According to Gay, Roman jurist, the fundamental source of obligation can be classified into two:

a) Contract

b) Beyond the contract

Those obligations, which arises beyond the contract, are divided into unjust enrichment (quasi-contract), unlawful acts (delict) and causing physical injure to the person or causing damage to property of person (quasi-delict).

In modern time, the laws of different countries clearly express the sources of obligation. For instance, French civil code classifies the source of obligation as;

i) Obligation that arises from contract

ii) Obligations that arise beyond the contract

iii) Obligation that arises from the unlawful acts

iv) Obligations that arises from the causing of physical injure or causing material damage

vi) Obligations arising from law

In Ethiopian legal system, there are no clearly stated classifications of sources of obligations. But Art.1675 of Ethiopian civil code generally expresses obligations as arising from contractual agreements.

However, the close readings of the provisions of the civil code show that there are other sources of obligations-like those arising from non-contractual relationships (from Art.2027-2178), obligations arising from unlawful acts or obligation that arises from the causing of physical injure or obligation arising from the causing of material damage (fromArt.2027-2161) and finally, obligations arising from unjust enrichment (from Art.2162-2178).

In so far as an obligation arising from the law is concerned, it happens in situations when law imposes obligations on persons to give or not to give, to do or not to do some acts recognized in almost all-legal systems.

Obligation arising from the law is a unilateral obligation imposed on citizens or contracting parties without their consent.

It includes among other things

- Obligation to pay income taxes
- Obligation to render military services
- Obligations of creditors
- Obligation of debtors
- Obligations of families to their children, etc.

Types of Obligations

Obligations can be classified based on the nature of activities, and the number of parties legally bound by the obligation. Accordingly, they can be classified into:

1) Divisible obligation

This is one whereby a party undertakes to perform its obligations by dividing into parties. For instance, if A and B owed C 1,000 BIRR such parties to the obligation perform or discharge the obligations by paying half (part) of the debt to C, which is 500 each.

2) Indivisible obligations

In this type of obligation, the performance of the obligation undertaken cannot be divided into parts. Hence, in this type of obligation partial performance is impossible given the conditions and circumstances of its formation, which does not allow the performance of obligation by dividing into parts.

3) Positive obligation

This is a situation where a person’s obligation is to do or to give some thing to another. It requires an action from the debtor.

4) Negative obligation.

This is a situation where a person's obligation does not to do some thing or it refrains from doing some thing. Such obligations are also called obligations not to do.

Example, company A may agree with company B in which company A under takes an bligation not to produce or sell certain goods in the same market.

Based on the number of parties legally bound, obligations can be classified into unilateral, bilateral, and multilateral obligations.

a) Unilateral obligation arises from contract in which two parties are participate. However, only one of the parties is legally bound by the contract for the benefit of the other contracting party. Example, donations

b) Bilateral obligation arises from a contract entered into by two parties in which these contracting parties are bound legally to each other on equal terms. Accordingly, there are two promisors and two promises.

c) Multilateral obligation. This is a case where more than two persons undertake to perform an obligation. Such obligations can be classified into three:

1) Simple joint obligation

2) Joint obligations

3) Several and joint obligations

1)Simple joint obligation

In this type's obligation, parties who are bound by such obligation are not jointly liable for the total debts, but each debtor is liable for its own share with the exception of Art.1917 of the Ethiopian civil code

2) Joint obligations

It arises from the contractual obligation in which more than two parties participate and debtors are jointly liable for the debt secured as a result of the obligation entered into with the creditor or creditors.

3) Several and joint obligations

In this kinds obligations the co-debtors shall be jointly and severally liable unlike joint obligation where the debtors are jointly obliged to undertake a given obligation, in the several and joint obligation, the creditor may require all the debtors or one of them to discharge the obligation in whole or in part.