Extra-Contractual Liability

Teaching Material

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PART I

GENERAL BACK GROUND

CHAPTER I

DEFINITION AND PRINCIPLES OF NON-CONTRACTUAL LIABILITY LAW

1.1. Definition

There are rights and interests, which are rendered protection by the FDRE Constitution. Some of these interests and rights are the right to life (article 15), the right to the security of person (article 16), the right to liberty (article 17), the right to honor and reputation (article 24), the right to privacy (article 26), etc. Where these rights or interests are infringed there are remedies made available by different laws, one of which is criminal law. The remedy rendered by criminal law. However, is different from that rendered by Non- Contractual Liability Law, for the latter gives remedy by forcing the tortfeasor to make that damage good.

Therefore, Non-Contractual Liability Law is a law that gives remedy by awarding compensation to the victim or ordering restitution or injunction. When those interests, which are protected by the Constitution and other laws, are violated, courts will award a sum of money, known as damages (compensation) for infringement of protected interest[1]. Alternatively, the court may issue injunction.[2] Injunction is a court order given to the defendant to refrain from doing something". [3] Restitution is the third form of remedy. The victim seeks a remedy by bringing her

[1] John Cooke, Law of Tort; Pearson Longman 2007.p3.[Hereafter Cooke] see also the Civil Code of Ethiopia, article 2090 proclamation No 165/1960 (hereafter CCE)
[2] Ibid, article 2121.
[3] Cooke p3

case to a court[4] or by settling it amicably with defendant directly or through a third party.[5]

Exercise 1.1.

1. Is there a circumstance where a victim could avail herself of self-help? Please cite proper provisions from the CCE.
2. So what is Non – Contractual Liability Law?

1.2 Principles

We have seen some of the rights, which are protected by the FDRE Constitution, and other laws and some of the mechanisms utilized by courts to that effect. Now in this part, we will try to discuss the principles of Non – Contractual Liability Law. To make a person liable under this law, four requirements which are called principles of Non-contractual Liability Law are essential. The first one is act or omission. The second concerns damage. The existence of casual relationship between the act or omission and the damage suffered by the victim[6] is the third principle. Finally, this damage should be a kind of harm recognized as attracting legal liability.

Illustrations

Let us assume Mohammed is running a merchandise business in X Street. Zeberga Starts similar business adjacent to Mohammed. If Zeberga sells the merchandize with lesser price than Mohammed and Mohammed is made out of business, Mohammed is said to have suffered damage and the cause is Zeberga. Since the damage is, however, not a kind of harm recognized as attracting legal

[4] Article 37 of the FDRE Constitution, Federal Negarit Gazeta 1st Year, No1 Addis Ababa August, 1995. Here after the FDRE Constitution.
[5] CCE article 2148
[6] Ibid article 2141

liability Zeberga may not be obliged to make that damage good. This is referred to as *damnum sine injura* in Latin. On the other hand, there is a circumstance where a person could be ordered to pay compensation without her act or omission causing damage.

Illustration

Let us assume Tahir crosses a piece of land without having the permission of Okan Okech, the landholder. Tahir will be obliged to pay compensation though Okan Okech suffers no damage. This is referred to as ***injura sin damno*** in Latin. The conduct is actionable without proof of damage. It is said to be actionable per se.

Exrcise 1.2.

1. Identify one article in the Non – Contractual Liability Law provisions to illustrate *damnum sine injura.*
2. Identify one article in the Non – Contractual Liability Law provisions to illustrate *injura sin damno*.

CHAPTER II
CONSTITUTIONAL RIGHTS

2.1. Personal Security

These are torts involving a tress pass to the person[7]. As per article 16 of the FDRE Constitution, everyone has the right to protection against bodily harm. This right is protected in a number of ways. For instance, if one makes a contact with another intentionally against the other person's will, the victim could bring action as per article 2038(1) of the CCE under assault. Assault is a condition where "one person puts another in fear of being hit. If (however) the blow is struck, then the person hit may have an action under bodily harm[8].

Moreover as per article 17 of the FDRE Constitution any, Ethiopian or foreign national lawfully in Ethiopia has the right to liberty of movement. This freedom could be restricted unlawfully. A person whose freedom is restricted could sue that person who interfered with her liberty for interference with the liberty of another as it is stated under article 2040 of the CCE or for false imprisonment.

This suffices for immediate purpose. Let us now raise one issue, and discuss other rights protected by the law. Assume Chala, a pedestrian, is hit by Chaltu, who is driving her car negligently. Chala dies immediately. Sifen, Chala's sister is witness to this traumatic event and due to this, she sustains a serious mental suffering or psychiatric damage. Under what Extra – Contractual Liability provision can Sifen sue Chaltu for the psychiatric damage she suffers.

[7] Nicholas J. Mebirde and Roderick Bagshawi Tort Law, Longman, 2006 0 p.17 (Hereafter Nicholas]
[8] Cooke, p. 5. Bracket is added

2.2. Interest in property

As per article 40(1) of the FDRE Constitution, every Ethiopian citizen has the right to the ownership of private property. This right includes the right to acquire, use and dispose of such property by sale or bequest or to transfer it otherwise. No one, therefore, has the right to interfere with this constitutional right other than as it is provided by law.

Under the FDRE Constitution, private property is either classified into tangible and intangible or movable or immovable.[9] On the other hand, land as well as natural resources are owned by the state and the peoples of Ethiopia as per Article 40(3) of the FDRE Constitution. Therefore, every Ethiopian has possessory or holding right over the land. The conclusion is, therefore, no one will interfere with possessory right of the land. If someone, for instance, forces his way into the land under the possession of another, house of another, or takes possession of another's movable property, the tortfeasor shall be sued under trespass.[10]Trespass to land is constituted as any unlawful incursion on to land or building in possession of another"[11] "Trespass to movable is a direct and unlawful injury to or interference with goods in the possession of another" [12]

Moreover, an interest in property can be affected by the negligent act of another. This as well is protected under Extra Contractual Liability Law. For instance, "where clothing or a car is damaged in a negligently caused accident, then a person may have an action for damage in negligence"[13].

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[9] FDRE Constitution article 40(1) and (2)
[10] Alan J. pannett, Law of Torts Pitman publishing, 1995 P.179 [Hereafter Alan] see also articles 2053 and 2054 of the CCE.
[11] Alan p .202
[12] Cooke p.5
[13] Cook p.6 see also article 2055 – 2059 of the CCE

2.3 Economic Interest

As per article 41(1) of the FDRE Constitution, evey Ethiopian has the right to engage freely in an economic activity and pursue a livelihood of his choice anywhere within the national territory. Any conduct which jeopardizes the exercise or enjoyment of this right is violation of the economic interests of a person, which is guaranteed protection by the FDRE constitution. Therefore, the Extra – Contractual Liability Law gives protection to this interest "… [w]here the defendant has acted unlawfully and has caused economic loss to the claimant"[14]

2.4 Reputation and privacy

The FDRE Constitution recognizes every one's reputation and privacy under articles 24 and 26 respectively. Accordingly, under article 29(6) of the same, limitation on the right of thought, opinion and expression are put where these rights go against honors and reputation of individuals. Therefore, as it is provided under article 29(7) of the FDRE Constitution, any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law. One of these laws is Extra – Contractual Liability Law. Hence, "where a person's reputation is damaged by untrue speech or writing then they may have an action in the tort of *defamation*[15]

[14] Cooke p.6 see also article 2055 – 2059 of the C.C.
[15] Cooke p.6 see also article 2044 ff and article 2109 ff. of the C.C.

CHAPTER III

CONDUCT THAT GIVES RISE TO LIABILITY

Conduct is a person's behavior in a particular place or in a particular situation. In legal sense, conduct is classified into two: Act and omission. Act is defined as an external manifestation of the actor's will[16].

Illustration 1

Mohammed drives his car carelessly with the result that it mounts the pavement and hits Chala, a pedestrian, causing Chala personal injury. Here the act is Mohammed's driving the vehicle. In legal terms this is known as ***Misfeasance*** and it is a positive act[17]. Omission on the other hand is failure to act where the law requires you to act in a certain way. This is known in legal terms as ***nonfeasance[18].***

Illustration 2

As per article 219 of the Revised Family Code [RFC] [19]the father and the mother are, during their marriage, jointly guardians and tutors of their minor children. As a guardian, they fix the place where the minor is to reside[20]. And watch over the health of the minor.[21] They also take the necessary disciplinary measures for ensuring her upbringing.[22] The guardians shall ensure that the minor be given general education or professional training commensurate with

[16] Harry Shalman and others; Law of Torts Cases And materials; Foundation Press, 2003 p.27 [hereafter Harry]
[17] Cook, p. 24. see also Article 2029(2) of the CCE
[18] Cook P.24 see also article 2029(2) of the Civil Code.
[19] Negarit Gazette, Extra-Ordinary Issue No. 1/2000.[Hereafter RFC]
[20] RFC Article 258
[21] RFC. Article 260
[22] RFC. Article 260

her age and abilities[23]Generally the guardians are under obligation to discipline their children and see that the minor children receive proper education. Failure to do that is committing an offense as you can read from the following:

> *A person commits an offence where he fails to take in respect of persons entrusted to his charge or supervision by law or in conformity with the law the measure of education and supervision which may reasonably be expected of him, having regard to the circumstance and custom* [24]

We have already said that conduct is a person's behavior in a particular place or in a particular situation. Conduct is classified into act and omission.[25] Now work out the following cases.

Questions

1. Abebe is a blind person. He is seen by Kebede while walking a cliff and failling. Would Kebede be liable for the damage sustained by Abebe? If yes, why? If no why not?

2. Mulat enters Beti's Bar and becomes drunk and a nuisance. Beti ejects Mulat from the bar. Beti knows that Mulat will be walking home. Nevertheless, on the way home Mulat is run over by a car. Is Beti liable to Mulat for failing to call a taxi or the police? If yes, why? If no, why not?

3. Assume that when Mulat is run by a car, Siraj, a doctor, locates him and gives him First Aid. Will Siraj be liable if he gives his assistance negligently? If yes, why? If no why not?

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[23] CCE. article 2051(1)
[24] CCE article 2051 (1)
[25] Harry p.27
Harry]

3.1 Intention and Negligence

These concepts are complex. Hence, I will try, as much as possible to simplify them. Intention is related with behavior that is intended to be wrong. Intentional wrongs are, therefore, those wrongs in which the person charged must have acted in such a manner that she either wanted to harm someone or knew that what she did would result in harm.

Hence, "Intention refers to the defendant's knowledge that the consequences of her conduct are bound to occur, where the consequences are desired or, if not desired, are foreseen as a certain result"[26]

Hence, Intention exists where:

a) The defendant knows that the consequences of her conduct are bound to occur; or
b) Where the defendant desires the consequences or
c) Where the defendant may not desire but foreseen the result of her action or omission. For example:

If Gemachis intentionally shoots Belay. or, if Gemachis makes a lot of noise around his house simply in order to annoy his neighbor Chaltu, we say Gemachis Commits intentional fault.

On the other hand, if a person failed to act in a reasonable manner, we say that person acted negligently. For instance, if a child walking across the street in a designate cross was hit by an automobile because the driver was drunk or the car's brakes were faulty, society says that the driver breached a duty to drive the

[26] Michael A. Jones, Text book on Torts, Oxford University Press ,2002 P.9 (Hereafter, Michael) see also article 2029(1)

car in a reasonable manner and will have to pay for damages suffered by the child. Thus to say negligence exists, four conditions are supposed to exist:

1. The defendant must have owed the plaintiff a duty;
2. The defendant must have breached that duty;
3. The breach of that duty must be the actual as well as the "legal" cause of the plaintiff's injury.
4. That injury must be one that the law recognizes and for which money damages may be recovered [27]

There, it is worth discussing duty and reasonable person. We all have a duty to protect other persons from harm. The question is what degree of duty exists and under what specific circumstances. To determine the degree of duty, the reasonable and prudent person has been introduced. So we all have a "reasonable duty to avoid liability causing behavior". Reasonable ***duty is a standard of ordinary skill and care, based upon the specific facts of each individual case.***[28]

Illustration

While Abebe is quietly fishing on the shore of Lake Tana, he sees Kebede one hundred meters away fall out of his boat and begin to drown. The law does not place any duty upon Abebe to help Kebede. But suppose Abebe owns a boat yard on the lake and Kebede rents Abebe's boat and that boat springs a leak because it is defective when Kebede rents, thereby causing Kebede to drawn. Then Abebe will have breached his duty to rent safe boat, and he has a duty to help Kebede.

3.2 REASONABLE AND PRUDENT PERSON

Since the degree of duty is related with reasonable and prudent person we now briefly discuses three requirements which help us to define what a reasonable

[27] Michael p 191.
[28] Simons Deakin, Angus Johnston and Basil Markesan's, tort Law Clarendn Press – Oxford pp 223 – 239. Hereafter Simons.

and prudent person is. These are knowledge, investigation and judgment. Before that, however, let us discuss the objective standard, which will help us to ensure objectivity and uniformity. [29]

As members of a community, a certain standard of care is expected from us when we act. The standard of care expected from us is that of the reasonable man. It is objective. To that effect, it does not take into account the particular way of behaving, thinking, etc or weaknesses of the defendant.

Illustration 1

Let us assume Chala is a learner – driver. While on training, he crashes into a wall and causes injury to his trainer who seats on the front seat. Chala is not to be judged as a learner driver. He is to be judged by the same standard as that required of any other driver, namely that of a reasonably competent and experienced driver[30]. This reasonable man standard is embodied in our Non – Contractual Liability Law as well.[31]

This reasonable and prudent man standard is not without exception. One of the exceptions is ***unforeseen harm.*** Hence, "If a particular danger could not reasonably have been anticipated, the defendant has not acted in breach of her duty of care, because a reasonable man would not take precaution against unforeseeable consequences. [32]

Illustration 2

This illustration is directly taken from a case decided in 1947. The case is referred to as *Roe v Minister of health*. An operation was undertaken in which the plaintiff was paralyzed by anesthetic, which had become contaminated by disinfectant. The anesthetic had been kept in glass ampoules, which were stored in

[29] Alan P. 62
[30] Ibid.
[31] Article 2030 of the CCE
[32] Alan p.63

the disinfectant and became contaminated through invisible cracked in the glass. At the time of the accident in 1947, this risk was not known. Had it been now it would have been known and brought about liability. Hence, as the amount of knowledge existing in the world increases, so does the amount of knowledge that reasonable and prudent person is expected to possess. That seems the reason why our Civil Code makes a professional liable, "[W] here, due regard is given to scientific facts or the accepted rules of the practice of her profession, she is guilty of imprudence or of negligence consisting definite ignorance of her duties". [33]

To understand this reasonable and prudent man let us consider the other two areas, which we mentioned earlier investigation and judgment. Before anybody drives a car, the law presumes that she will have investigated or checked in good order the car, among other things, the brakes are working properly, and the wheels are Similarly, if you are a drug manufacturer, the law presumes that you will have ascertained that your drug does not cause any harmful side effects. If it does, you will have violated the standard of care of a reasonable and prudent person[34].

The other simple way of determining the reasonable and prudent man standard is how we judge our activity. Hence, before we start any activity, the law expects us to ask ourselves the following questions: What is the likelyhood that our particular activity will harm someone else? If harm might occur, what is the likely hood of the extent of the harm? What must I give up in order to avoid the risk to others?

Illustration

Let us assume you live in a village and you get a new rifle, which you want to try. While trying your shot it starts to attract crowds from the village. The more the shot is the bigger the crowd. At what point would you decide to stop shooting in order to avoid injury to an innocent villager? The decision to stop involves the

[33] Article 2031 (2) of the CCE
[34] See article 2085 of CCE

exercise of reason. The exercise of that faculty or reason is judgment to be made by a reasonable and prudent man.

3.3 Statutory Standard

The objective standard is not free from subjectivity for …"[t]here is a subjective element in that it is left to the individual judge to decide what a reasonable or what could have been foreseen" [35] Hence the law introduces statutory standard.

Thus in some cases the law solves the problem of subjectivity by providing a standard contained in a statute. For example, when it begins to get dark, all drivers are required to turn on their headlights. If, while traveling, any driver without her lights on, hits and injures a pedestrian, the law will conclude that she breaches a standard of reasonableness, no matter what she gives as an excuse. The majority rule is that breaching the statutory standard is negligence *per se*. Negligence *per se* is inherent negligence, i.e. negligence without a need for further proof.[36]

[35] Michael P.192
[36] Ibid P.460

CHAPTER IV

CAUSATION AND REMOTENESS OF DAMAGE

Now we will discuss the concepts of Causation and Remoteness of Damage, which are separate but interconnected.

4.1 CAUSATION

It is not difficult to determine the cause for a damage where there is only one cause and that is established. "A causation problem, therefore, usually occurs when we look at the damage and see that it was actually caused by a number of different factors, or to put it another way, that a number of factors combining together brought about the damage."[37]

Illustrations

To illustrate this concept we consider a popular case, i.e. *Barnett V Chelsea and Kensington Hospital*

There were three night watchmen at the Chelsea College of Science and Technology. William Barnett was one. At 5:00 AM on the morning of 1966's new-year day, all three shared same tea. After 20 minutes, they began vomiting. At 8:00 AM, they went to Karsignton Hospital and were seen by a nurse who telephoned the doctor on duty who replied, "Well, I am vomiting myself and I have not been drinking. Tell them to go home and go to bed and call their own doctor." The three men returned to the College but continued to feel ill, and by 2:00 P.M, the claimant had died. It was shown that he had been poisoned with arsenic. His widow said the hospital failed to treat her husband. The defendants have said the deceased must have died in any event.

Therefore, the issue was whether the deceased's death was caused by that negligence or whether the deceased must have died in any event.

[37] Richard Kinder, Case Book on Torts, Oxford University Press, 2002.P 106[hereafter Richard]

To determine this, the court called in an expert witness who testified based on a timetable as follows: the deceased attended at the causality department at 5 or 10 minutes past eight in the morning. If the doctor had got up, dressed and came to see the three men and examined them and decided to a admit them, the deceased could not have been in bed in a ward before 11 a.m.

After the admission they would have been treated which would have shown arsenic poisoning. This poisoning is brought about by two considerations: on the one hand dehydration and on the other disturbance of the enzyme process. The judge learnt it was the second case from the expert and concluded that the only method of treatment, which is likely to succeed, was the use of specific antidote which is commonly called B.A.L. Concerning this, the expert witness testified as follows:

The only way to deal with this is to use the specific B.A.L. ***I see no reasonable prospect of the deceased being given B.A.L before the time at which he died.*** [Emphasis added] and a later point in his evidence – I feel that even if fluid loss had been discovered death would have been caused by the enzyme disturbances. Death might have occurred later. From this, the judge decided as follows:

I regard that evidence as very moderate, and it might be ***a true assessment of the situation to say that there was no chance of B.A.L. being administered before the death of the deceased,*** [emphasis added]. So the only medication that would have saved the deceased was to administer B.A.L. According to the medical procedure, however, the B.A.L would not have been administered before the death time. Therefore, death preceded the B.A.L

For those reasons, the judge decided that the plaintiff (the widow) has failed to establish, on the balance of probabilities, that the defendant's {the doctor and the Hospital} negligence caused the death of the deceased.

We may conclude the following from the above case: The hospital and the doctor owed the deceased a duty of care, which they had breached by failing to examine him. They were held not liable, however, as the evidence established that, even if he had been examined he would have died before diagnosis and treatment could have been carried out. Therefore, as the deceased would have died regardless of the breach of duty the breach was not a cause for his death.

4.2 THE 'BUT FOR' TEST

To determine the cause for the damage [death] the judge may, among the many tests, uses "but for" tests. "According to this principle the plaintiff will have to show that she would not have been injured in the way she was but for the defendant's conduct"[38]. In the case at hand the wife was supposed to show that her husband would not have died but for the defendant's negligence.

In the case at hand the judge utilized technology as assistance to determine "but for" test. Judges could face, however, a condition where technology has not reached a level to resolve the issue, under such circumstances the judges resort to ***a balance of probabilities test.***

Illustration

This hypothetical case is taken from Nicholas on p.534 with change in names.

Suppose that Chala committed a tort in relation to Chaltu and Chaltu subsequently developed cancer. Suppose further that it is claimed that Chala's tort caused Chaltu to develop cancer. Suppose finally that it is hard to tell whether Chaltu would have developed cancer in the way she did had Chala not committed his tort. In this sort of case, the courts, have to determine whether the "but for" test is satisfied by using a balance of probabilities test. They ask: Is it more likely than not that Chaltu would not have developed cancer in the way she did had Chala not committed his

[38] Nicholas p.530

tort? If the answer is yes then the courts will find that Chaltu would not have developed her cancer but for Chala's tort and Chala will usually be held to compensate Chaltu for the fact that she has developed cancer. If the answer is "no" then the courts will find that Chaltu would have developed her cancer in the way she did even if Chala had not committed his tort, with the result that Chala will usually not be held liable to compensate Chaltu for her cancer.

Question

Is it proper to use a 'but for' test for the following Case?

Suppose Gari and Mohammed are two professional footballers and that when they are playing football together Mohammed negligently injures Gari with the result that Gari becomes permanently disable. Suppose that, at the time of the accident, a big club is interested in signing Gari. The transfer will earn Gari USD 11,000,000. Of course, after Gari's accident the big club in question loses interest in signing him.

In this case, can we say Gari would have earned USD 11,000.000 but for Mohammad's negligence? Discuss.

4.3 Remoteness of Damage

In the previous unit, we have seen that causation is a link between the defendant's conduct and the plaintiff's damage. To that end we have seen the law uses the "but for" test to determine whether that connection is established or not. Now we will discuss remoteness of damage, which is "used to set the limit of legal accountability of the defendant"[39]

[39] Alan P.72

As a matter of principle once the conduct of the tortfeasor causes the damage, the tortfeasor will be obliged to make that damage good. There are, however, conditions where "even if the defendant's act caused the damage liability can still be excluded." [40] That is, if the kind of damage was an unforeseeable consequence of the act, the damage is said to be too remote.

Illustration

The defendant drove negligently on the motorway and his car severed and left the road. The car landed on a railway line. A mainline railway train was derailed by the car. The train struck a dam, which burst, flooding a small town.

Here the defendant had set in motion a chain of events. The court has to terminate the defendant's liability at a particular point. The point could be after the damage to the train. Any damage beyond that point is too remote.[41] Let us take another illustration to make clear foresees by a reasonable man.

A ship is loaded with benzene. It is not only loaded with benzene but the benzene is leaking. As a result, the ship's hold is filled with benzene vapor. A Stevedore [a person whose job is moving goods in and off ship] negligently drops a wooden plank into the hold of the ship and causes a spark. The spark ignites the vapor, causing an explosion which destroys the ship.

The court which decided that case, held the employer of the stevedore vicariously liable for the stevedore's negligence stating that the damage was not too remote. Here to determine whether the damage was too remote or not the court stated the fact that damage was the direct result of the tortfeasor's act. The court further stated: Since the damage was a direct consequence of the negligent act, the

[40] Richard p.68

[41] Cooke. Law of Torts. Pitman publishing, 1997 p.96. This one is the first book as far as I know. So to differentiate it from 8th edition (this one is 3rd edition) I will refer this one as Cooke, Pitman.

damage is not too remote. Therefore, we may use this direct consequence of the act test to say that the damage is not too remote or we may use this direct consequence of the act test to determine the remoteness of damage.

We may conclude the following from the two cases given above. It is beyond reasonable man's limitation to foresee that a train derailed by a car hits a dam and consequently floods a village. It is not, however, beyond a reasonable man's limit to foresee for a spark to start fire in a ship hold full of benzene vapor.

4.4 Exception to the Foreseeability Test

Previously we have seen how we use foresee ability test to determine the remoteness of damage, and we said that the judge put a reasonable man standard and determine whether the damage is foreseeable by a reasonable man or not. In addition, if the consequence of an act is foreseeable by a reasonable man, that damage may not be referred too remote a damage and the defendant shall make the damage good. There are, however, exceptions to the foresee ability test. The following are the exceptions:

4.4.1 The egg -shell -skull rule

This rule applies "Where the plaintiff is suffering from a latent physical or psychological predisposition to a particular form of illness, which the harm inflicted by the defendant triggers off, that his negligence has produced."[42] Here the issue is whether a certain act causes a physical injury, which is different and much worse than the ordinary injury that would have been caused in the course of events.

<u>Illustration</u>

[42] Alan p.83

Abebe is struck on his lip by a piece of molten metal that comes from a certain metal factory. The burn turnes the tissues in Abebe's lip into cancerous and Abebe died eventually from cancer. The factory owners are liable for the death of Abebe. "For the test is not whether those [defendants] could reasonably have foreseen that a burn would cause cancer and that [Abebe] would die. The question is whether these [defendants] could reasonably foresee the type of injury he suffered, namely the burn"[43]. This rule also applies for an eggshell personality. This is a condition "where the injury to the plaintiff merely aggravated a pre – existing nervous condition"[44]

4.4.2. Economic loss consequent on physical injury

This is a condition where one single conduct causes two injuries, and the one is not foreseeable by the tortfeasor.

Illustration

Mohammed by his act causes physical injury to Chalto. Due to this physical injury Chalto suffers economic loss. Chalto can recover compensation for the physical injury that she suffers and she will be able to sue Mohammed for compensation in respect of the economic losses that she suffers as a result of sustaining that injury without having to prove that it is reasonably foreseeable at the time Mohammed commits the act that she will suffer those economic losses as a result.

Nicholas illustrates this by using a simple example as follows: In the cases of claims in tort, damages are constantly given for consequences of which the defendant had no notice. You negligently run down a shabby looking man in the street, and the shabby looking man turns out to be a millionaire who engages in a

[43] Ibid
[44] Ibid

very profitable business which the accident disables him from carrying on. You will be held liable for the economic loss so caused." [45]

As per the Ethiopian Non – Contractual Liability Law a victim who suffers both physical and economic loss should sue the defendant for both at the same time. Otherwise as per article 2151 of the Civil Code of Ethiopia the victim may not bring a fresh action for compensation for other damage she has suffered unless such damage was caused independently of that for which she has already claimed compensation. Therefore, as per Ethiopian law simply bringing an action for physical injury does not mean that it follows with compensation for economic loss. The claimant has to bring action for both simultaneously.

Exercise 1

Identify any article in the Non – Contractual Liability Law provisions that regulate the above idea.

4.4.3. Psychiatric Illness

In the case we discussed under number 2 herein above, we have seen that due to physical injury a victim could incur economic loss. Under such circumstance, we also said that the defendant would be liable even if that loss is unforeseeable. Similarly, if a physical injury brings about the victims psychiatric illness, even though the defendant will not foresee that, she will be liable for the psychiatric illness.

Illustration

Ukan Okech negligently causes a traffic accident in which Sara is involved. Sara is injured in the accident and developed a psychiatric illness as well. Therefore,

[45] Nicholas P.561

Okan Okech is liable for the psychiatric illness Sara suffers. Does our law have an article, which regulates psychiatric illness due to physical injury?

Let us assume that a girl is raped. This girl does not simply suffer from physical injury. She also for sure will suffer from psychiatric illness which will stay with her for a long time or forever. In spite of this, rape victims are only awarded 'fair' compensation by way of compensation as per article 2114(1) of the CCE.

The offender who commits rape, therefore, should not only be sentenced or pay nominal compensation. The offender has to cover the medical cost that is required to heal the psychiatric illness.

4.4.4 Intentional torts

"The foresee ability test to determine whether the loss suffered by the victim of a tort was a remote consequence of that tort does not seem to apply to cases where someone commits an intentional tort"[46]

Nicholas classifies intentional tort into two: The first one is the one which is committed by an actor who knows what she is doing. Examples of this are battery, false imprisonment, defamation and private nuisance. These are referred to as non-intentional torts[47]. They are referred to as non – intentional torts because they can be committed unintentionally or inadvertently.

Others are those which are committed intentionally. Examples for this are ***malicious falsehood***. If someone makes maliciously false statement about someone to a third party, which results in that someone suffering loss, we say that act is an international act. "Other examples of intentional torts are the

[46] Nicholas P.564
[47] Ibid

intentional infliction of harm using unlawful means, deceit and malicious prosecution"[48] So the tortfeasor may be held liable to compensate the victim for the loss she suffers even if the damage is not reasonably foreseeable at the time the tortfeasor commits the act intentionally.

Exercise 2

1. Can you state the reason why the law treats defendants who commit non-intentional torts more favorably than those defendants who commit international tort? In other words, where the act is international, even if the result is reasonably unforeseen the offender will be liable for the remote damage. If, however, the act is non – intentional but resulted in reasonably unforeseen consequences, the offender will not be answerable for the remote damage.
2. Is there a possibility of classifying faults in our law as non-intentional and intentional torts? If yes, please identify the articles.

4.4.5. Statutory Torts

There are certain human relations which are delicate and given special attention in statutes or laws. Among them are discrimination based on race, religion, or sex. To that effect, USA has issued the Race Relations Act, 1976. In accordance with this Act, if someone racially abuses another and as a result the latter develops psychiatric illness, the foresee ability test will be applicable. Hence, the tortfeasor will be liable under the Act.

Individual and group rights are recognized in the FDRE Constitution. Rights of Women, Rights of Children and Rights of Nations, Nationalities and Peoples are some of the group rights.[49] Accordingly, as per articles 25 of the FDRE Constitution discrimination based on grounds of sex, nation and nationality is forbidden. Hence as per article 35(8) of the FDRE Constitution, women shall have a

[48] Ibid p.562; see also articles 2045(1) and 2048(2) of C.C.
[49] FDRE Constitution Articles 35,36 and 39

right to equality in employment, promotion, pay and the transfer of pension entitlement. Similarly, as per article (3)(1) of the Federal Civil Servants Proclamation[50] no discrimination among job seekers or civil servants shall be made in filling vacancies because of their ***ethnic origin, sex, religion, political outlook or any other ground [emphasis added]***

In a similar manner, article 14(1)(f)of Labor Proclamation[51] declares making discrimination between workers on the basis of nationality, sex, religion, political or any other conditions is forbidden. Now the issue is what will be the liability where one violates those provisions? The Labor proclamation gives remedy under its article 184, which reads:

> An employer who violates the provisions of article 14(1) shall be liable to fine not exceeding Br, 1200 if the Criminal Code does not provide more severe penalties.

This liability is criminal liability. What about civil liability? Assume Chaltu is an accountant in ABC Share Company. A notice is displayed on a board for a vacancy in the senior accountant position. Chaltu, who applies, satisfies every requirement for that position. She is, however, disqualified for that position on sex ground. As a consequence the employer will be penalized Br, 1200.00 as per article 184(2) (d) of the Labor Proclamation.

What about if Chaltu, due to that discrimination made against her, suffers psychiatric illness? Would the employer be liable for that? One possible solution is, by reading article 2035 of the CCE with article 184(2) (d) of the Labor Proclamation to make the employer liable. Otherwise, our law does not have any provision that governs such kind of situation. So at this point, we have to think of

[50] Proclamation No 262/2002
[51] proclamation No 377/2003

inclusion of express provision to regulate the psychiatric illness, which will not exempt the defendant by unforeseeable test.[52]

[52] Obligation could arise from certain kind of relations, for instance obligation to supply maintenance. See Article 807ff of CCE.

CHAPTER V

Boundaries of Non– Contractual Liability Law

In the previous units, we have discussed what Non – Contractual Liability is, those interests protected by the FDRE Constitution and tort law, its principles and the tests it uses. In this part, we will discuss the boundaries of this law. To that effect, we will try to see the relationship between Non – Contractual Liability Law and Contractual Law on the one hand and Criminal Law on the other.

5.1 Non-contractual liability law v Contractual law

To start with, under the Ethiopian Law both Non – Contractual Liability Law and Contractual Law are classified under Book 4 as Obligations. However, the sources of obligations are different. In case of contracts, the obligations emanate from the agreement made between the parties,[53] while the obligation of Non – Contractual Liability Law emanates from the law.[54]

From this, we may say that consent of the parties is necessary in case of Law of Contracts while this is not in Non-Contractual Liability Law.[55] This is not, however, clear in the real world as we can see from the following discussion. Consent is a concurrence of wills, manifested by signs, actions, or facts or by inaction or silence, which raises a presumption that agreement has given.[56] Now let us go back to Gari and Mohammed, the football players discussed on page 16. In that case, while they were playing football Mohammed negligently injured Gari. Therefore, Gari became permanently disabled. Can we say Gari is consented to the

[53] CCE article 1675
[54] Ibid article 2027 ff.
[55] Ibid article 1678 and 1679
[56] Ibid articles 1681, and 1683 – 1686. Read articles 2147 and 2148.

injury? If so, is he going to sue Mohammed under Contract Law? Please read article 2068. What if someone is injured by a cricket ball while they are watching?

The other difference between the two laws is the fact that in case of Contract Law there are certain people who are exempted from performing their part of obligations, for instance, a minor. No exception is, however, made in Non – Contractual Liability Law.[57]

Furthermore, breach in contract is established by simply showing that the performance promised has not been materialized without showing the promisor's fault. Exception is article 1795. In Non – Contractual Liability Law, however, Liability is established by demonstrating the defendant's fault within the meaning described to that term by articles 2021, 2030 or the specific case provisions. We have to make clear that labiality without fault, however, under Non – Contractual Liability is an exception applying only where the law specifically so provides.[58]

The relevance of discussing this is to determine the amount of compensation, which is the other difference. In case of contract where it is established that the breach is intentional or due to "grave" fault, [59] the compensation shall be increased to cover the damage, which is greater than the normal damage. However, in the absence of intentional fault non – contractual compensation for wrongful harm may sometimes be decreased.[60]

Let us now discuss very briefly two specific differences and wind up this part. Where a person borrows money the damage for delay in payment is the amount of

[57] Ibid articles 2030(3) and article 317. But Consult article 2099 (1)
[58] Ibid article 2027(2) cum section 2.
[59] Ibid article 1801(2)
[60] Ibid article 2101, see also article 2091.

interest. [61] In case of Non - Contractual Liability the amount of compensation is assessed at the time of judgment. [62]

Finally, yet importantly, difference is related with the period of limitation and court jurisdiction. If someone has to bring action, she has to bring it within a certain period. Otherwise, it is going to be barred by limitation of action. Limitation of action in contract is 10 years while in case of Non – Contractual Liability it is 2 years.[63] Finallym, a court that has jurisdiction in a case of contract is a court at the place where the contract is made or to be performed[64] while in the case of Non – Contractual Liability the court at a place where the wrong was done has jurisdiction[65]

5.2 Non- Contractual Liability Law v Criminal Law

From the discussion we had so far, civil wrongs are classified into contractual and non - contractual wrongs. We can also classify wrongs into civil and criminal wrongs and compare criminal wrongs with non – contractual wrongs. To start with, liability from both wrongs emanates from the law, unlike that of contractual wrongs, which emanates from agreement. Moreover criminal wrong gives rise to Non – Contractual Liability [66] On the contrary in deciding whether a [civil] offence has been committed, the court shall not be bound by an acquittals or discharge by a criminal court. [67]

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[61] Ibid article 1803
[62] Ibid article 2091 and 2150
[63] Ibid article 1845, 1846 and 2143
[64] Civil Procedure Code of the Empire of Ethiopia, 1965.Negarit Gazit, Extraordinary Issue No.31965.A.A art.24 (1).Here after CPC.
[65] Ibid Art.27(1)
[66] See articles 407,543,559,580,585,602 etc of the Criminal Code of the FDRE with their corresponding Non – Contractual Liability articles.
[67] CCE article 2149.

The consequence, however, varies. The criminal wrong doer may end up in jail or be punished with fine or both. In case of non – contractual wrong, the wrong doer may not go to jail. Rather she will be obliged to pay compensation to the victim or be ordered to restitute the thing she has taken away from the victim or be ordered to refrain from perpetuating the wrong. This is because the primary function of the criminal law is to protect the interests of the public [while] the primary function of the law tort is to provide of redress for individuals who have suffered a loss."[68]

The parties are different. In the criminal case, the parties are the offender and the state, the latter, representing the public through the public prosecutor. In Non – Contractual Liability case, the parties are the victim and the offender who are civilians.

Finally, the purposes of the two laws vary. The object of a criminal prosecution is to punish a person who has been duly tried and convicted of a criminal offence. While 'The purpose of an action in the civil courts is to obtain compensation for the loss sustained by the plaintiff."[69]

[68] Alan P.4
[69] Ibid.

PART II

Ethiopian Non – Contractual Liability LAW

In the common Law system, this law is referred to as Tort Law. In our case it is either referred to Non- Contractual or Extra – Contractual Liability Law. Here I am not going to discuss the naming. I have been utilizing Non – Contractual Liability as opposed to contractual and civil liability against criminal liability. The same naming will be followed while discussing each provision in the following units.

CHAPTER VI

SOURCES AND TYPES OF LIABILITIES

The sources of Non – Contractual Liability Law are three:

1. Fault (offence)
2. Activities one engages in or things possessed by a person
3. Where a third party for whom a person is responsible incurs liability.

The first one is regulated by those provisions from article 2028 – 2065 and the liability is referred to as fault liability. In addition, it is further classified into paragraph 1-General rules and paragraph 2-Special cases. General rules contains articles 2028 – 2037 and Special cases is from article 2038 – 2065. The second source of liability is referred to as Liability in the absence of an offence or strict liability. It is regulated from article 2066 – 2089.It consists of Dangerous activities (article 2069 and 2070), liability for animals (2071 – 2076), liability related with building (2077 – 2079), machines and motor vehicles (2081 – 2084) and one article for manufactured goods (2085).

The third source is the act of a third party and the liability is vicarious liability. We may classify it into liability of families and others for a minor child (2124 – 2125), liability of State (2126 – 2128), liability of Bodies Corporate and Employers for their Employees (2129 – 2132).

6.1 Liability for Fault

6.1.1 General Rules

This type of liability is an ordinary one while the other two, i.e. Strict and Vicarious Liabilities are exceptions, for they arise when the law says so. Article 2030 (1) may help us to understand a circumstance when to say an act or omission is a fault. Hence when an act or forbearance of an individual is in a manner or in a

condition. which offends morality or the usual standard of good conduct, we say that person is at fault. As per article 2029 the types are:

1. Intentional positive act
2. Intentional forbearance
3. Negligent positive act and
4. Negligent forbearance.

To say these acts or forbearances are faults they have to fulfill what is given under article 2030. What is more, sub article (2) of 2030 brings in what is referred to as the objective standard under the guise of a *reasonable man.* That seems the reason why the subjective standard is expressly rejected under sub article (3) of the same article in assessing fault stating expressly" fault shall be assessed without regard to the age or mental condition of the person concerned" The law here seems more concerned about the victim.

Thus in assessing the fault the law is very strict. However, when assessing the damages or the consequence the law takes into consideration the mental and the age of the defendant. Hence though in principle it is stated under article 2091 that the amount of compensation is equal to the damage suffered by the victim, the court shall take into consideration those elements mentioned under article 2099(3). Furthermore, article 2099 is applied when the wrong doer is not aware of the consequence of her act for … a person who was not in a state to appreciate the wrongful nature of her conduct committed the fault. After this brief introduction on fault, we will discuss each fault article at a time.

6.1.2 Professional Fault (2031)

To know what a professional fault is, it is vital to know what a profession is. A profession is an activity for the proper exercise of which a special training, skill and knowledge is required. A professional is, therefore, some one who

practices profession. Examples are lawyers, physicians, accountants etc. Therefore, to practice any of these professions, that person has to have certain training, skill and knowledge. Thus, you may not need, special training, skill and knowledge to load and unload merchandize on or from a truck using bare hand. You may, however, need training; skill and knowledge to load- unload the merchandize operating a forklift. Hence, a person practicing a profession shall observe the rules governing that practice.[70] Therefore, if she fails to observe the rules of the said profession fault is committed.

Illustration

Doctor Ali is a gynecologist. One morning Fatima comes to his hospital. He carries out a gynecological operation on Fatima who is pregnant. Doctor Ali has not verified that Fatima is pregnant. After a while, Fatima gives birth to Khadija with abnormalities including deformed limbs and inability to conceive and is greatly embarrassed by her appearance, which she considers will impair her relationships with men and her earning capacity. Khadija can sue Doctor Ali under article 2031 for professional fault for he fails to observe the rules and norms of his profession, i.e. he fails to identify whether Fatima is pregnant or not and whether the gynecological operation will have negative effect on the embryo or not before he carries out that operation. Let us raise one question. Would it make any difference, had the victim been the mother, Fatima? Why or why not?

The rules for the profession could be written or it may not be written but is simply recognized by the professionals. For instance, in driving there are written rules and every driver should observe them. Therefore, to find out whether a driver has committed a professional fault we look into those written rules.[71] If the professional rules are not written, we should call in an expert witness.

[70] Article 2031 (1) CCE
[71] Transport Proclamation No.468/2005. Article 19.

The last point, which deserves mentioning, is the reasonable man issue. The reasonable man that is stated under article 2030 should be, for article 2031, the reasonable professional person in the eyes of article 2031.

6.1.3 Intent to Injure (2032)

This is an area where the right of an individual is restricted or controlled. Individual rights are protected as long as they are used primarily for the advantage of the individual herself. When they are used mainly not for personal gains, but primarily "with intent to injure another" a fault is committed.

Illustration

Sarah is in a business of selling mousetraps. Dawit invents and markets better mousetraps. And with the result, Sarah goes out of business. Dawit will not have intentionally caused Sarah to suffer harm. However, some competition in the market place may take the form of one trader intentionally causing another trader to suffer harm. This is where Sarah and Dawit are in the same business of mousetraps and Dawit, deliberately cuts the price to uneconomic level to drive Sarah out of business. And we say Dawit will have intentionally caused harm where, after driving Sarah out of business, he raises the price to the economic level. Under sub article (1) of 2032, the objective of the offender is not to secure personal gain. Rather it is intent to injure. As it is stated under sub article (2) of the same article, however, the purpose of the act is personal gain. Therefore, where the defendant by using his right makes a personal gain, but such gain is disproportionate [disproportionately small] in relation to the heavy damage she consciously causes to the plaintiff], then we say the defendant will have committed fault, for a given "disproportion" really denotes a primarily mischievous intention.[72]

[72] See article 2063

So we may conclude as follows: Where a person either injures another intentionally without personal gain or intentionally causes damage in seeking personal gain, which is less proportional to that of the damage, we say she abuses her rights and she is at fault. On the other hand, a person does not abuse her rights where she injures another incidentally to a lawfully gainful activity as in e.g., fair business competition. Thus, she does abuse them where her main purpose is not gain to herself but harm to another.

Questions

Assume the possessor of each property mentioned in the following articles causes' damage. As per which article would she be liable? Article 2032 or 2035? Why?

1. An owner who makes excavations or works below the surface of the land she possesses shakes neighbor's land, exposing the land to damage or endanger the sociality of the works there on.
2. A helicopter suffers damage while it flows over a certain land for it crushes to a wire that is extended above the surface of the land by the land possessor. (Article 1211).
3. A possessor or holder of land refuses, against full payment in advance of compensation, the installation on the land of water, gas or electrical lines or similar work to the benefit of other lands [1220(1)].

4. A holder of a certain land denies a holder of another land, which is enclosed, access to public ways even though the latter will have paid compensation (1221)

6.1.4 Diversion of power [2033]

There are two types of power. The first is the one, given in the interest of a private individual, and the second is that given to an individual in the interest of

the public.[73]In any case, if such person who is conferred with such power uses the power in his interest or to the benefit of a third party we say there is a diversion of power. That power could emanate from a law or the decision of a court. Power that is entrusted to the guardian of a minor is one that emanates from the law.[74] The power of a liquidator assigned by a court to liquidate an asset of a business that goes bankrupt is power that emanates from decision of a court.

Therefore, if the guardian or the liquidator uses the power entrusted to her in her own interest then we say there is diversion or abuse of power and it is a fault. The former one is abused by the individual upon whom the power is conferred to benefit herself while in the latter case the public power is abused to benefit the individual upon whom the power is conferred or some third party. One of the differences between the private power diversion and the public one is the purpose for which the powers are diverted. Therefore, we say there is private diversion (abuses) of power where the powers are directed from their basic purposes by being exercised with a view to personal gain. In case of the public one the diversion is done not only to benefit the individual who diverted the power but also a third part.

6.1.5 Purpose of Rights (2034)

If one exercises her rights under article 2032 and 2033, though they are within the economic or social purpose of the thing, one could be at fault. We referred to those two articles for the phrase "Subject to the foregoing provisions" under article 2034 seems is referring to those two articles.

[73] Article 2033
[74] Article 219 of RFC see articles 222 and 227 of RFC.

ILLUSTRATION

Let us assume there is a shortage of house to be leased. A lesser locked her house and made it idle. Even though this act is against the economic and social purpose of the house, no one can question the owner of the house on the way she handled her house. However, if we can prove that she was doing that with the intention to harm, then she is at fault as per article 2034.

6.1.6 Infringement of Laws (2035)

Concerning this article there are points which need some elaborations. The first one is the use of the word law, decree or administrative regulations. In contemporary Ethiopia, we have laws issued as Proclamation by the House of Peoples Representatives, Regulations enacted by the Council of Ministers and Directives to be issued by respective Ministries.[75] These are Federal laws. We also have state legislations enacted by State Councils.[76] So article 2035 should be read in this context. The laws we mentioned should be specific. The means they should not be general and subject to interpretation.

Illustrations

Articles 1758 and 2323 of the CCE both regulate "Risks" as one can see from their title. Under article 1758 the risk is related with debtor and this debtor could be a seller or a buyer. Alternatively, for that matter the debtor could be a lessee or lesser. Nevertheless, under article 2323 the risk is related with the buyer specifically. Therefore, when we compare the two articles in the context of article

[75] FDRE Constitution. Articles 55(2) &77(13). See also article 4(1) of Proclamation No. 470/2005. Federal Negarit Gazeta 11th.Year No.60. Addis Ababa

[76] The FDRE Constitution article 52(2)(b).

2035, article 2323 is specific and article 1758 is general. Hence, article 1758 is subject to interpretation.

Related with this, the law should not be implicit. It should be explicit. We do not have to use analogy or other methods to understand the meaning of the legislation. The other question we have to address is a situation under which we utilize or not this article. We do not use this article where the fault is regulated by any of the Non – Contractual Liability law provisions. For instance, abuse of power is infringement of law as per article 407 of the Criminal Code of the FDRE. Since this infringement is governed under article 2033, we do not utilize article 2035.

Finally, yet importantly, a violation of contractual agreement is infringement of a law as well. We, however, do not apply article 2035. As per article 2037, we should apply the appropriate contract provisions. Therefore, the application of article 2035 is very narrow. For one thing, the infringed law should not be exposed to various interpretations. It should be explicit. The fault should not be regulated by other Non – Contractual Liability Law or Contractual provisions.

6.1.7 Chain of Command (2036)

There are three approaches concerning the relationship in hierarchical order. The first approach is always obeying the law. This is what the rule of law says and it is true where it is assumed everybody knows the law. This approach is that of Britain. The approach, however, is not free from criticism, for it invites discussion, which makes the administration to face problems. This is especially true in the military.

The second approach is obeying the order and forgetting the law. It is a blind obedience approach. According to this approach, it is up to the superior to give order as per the law. The presumption is that the superior knows the law. This approach is good especially in military operation. It has never been, however, free

from criticisms and it was rejected after the Second World War. The theory caused so many sufferings to human beings and damage to materials, and those who carried on those atrocities invoked superior order as a defense.

The third approach is obeying both the law and the order. Article 2036 seems to have adapted this approach. It is, therefore, the intermediate approach. After this brief introduction let us now discus the article. To apply article 2036 there has to be superior subordinate relationship and in that relationship the superior should give an order to the subordinate and the act of the latter should give rise to harm. To that effect, a chain of command relation should exist between persons of whom one has the right to command and the other the duty to obey.

Second, superiority should be in authority not in rank. For instance, a foreign Minister is superior in rank to a police officer but not in authority. Third, the authority should emanate from the public law. In addition, the subordinate should have the obligation to accept the order, which emanates from that public law. Hence, if the subordinate acts on an order given by a superior in rank but not by superior in authority she is at fault. Moreover, even if a superior in authority gives the order but the executants exceed the order or causes additional harm by improper execution, e.g., where a soldier is wrongfully ordered to confiscate one head of cattle, intentionally or negligently slaughters the whole heads of cattle, the subordinate commits fault.

Moreover, where the subordinate is aware of the criminal nature of the order and carries out the order she is at fault. To illustrate this we may use article 74(1) of the Criminal Code of FDRE, which reads as follows:

> The subordinate shall be liable to punishment if he was aware of the illegal nature of the order, in particular, if he knew that the order was given without

> authority or knew the criminal nature of the act ordered, such as in case of homicide, arson, or any other grave crime against persons, or national security or property, essential public interests or international Law.

Thus, the subordinate is liable:

1. If she is aware of the illegal nature of the order;
2. If she knew the order was given without authority
3. If she knew the criminal nature of the act ordered.

Is there a possibility for the subordinate not to be at fault under the circumstances we have discussed so far? The author of the act, i.e. the subordinate may know the illicit and criminal nature of the act. But as it is stated under article 2036(3) if in the circumstances of the case and particularly under disciplinary compulsion it was practically impossible for the subordinate to discuss the order or disobey, i.e. act otherwise than she did, she is not at fault.

To that effect, circumstances of the case must indicate that the subordinate was in such fear of imminent harm as to make it "practically" impossible for her to disobey to execute arson at the gunpoint. The following, depending on the circumstances, could be drastic impossibility forms to disobey:

a. Ffear of arrest
b. Ddismissal from a civil office

So it dependence on the circumstances and the order to be obeyed. For instance for a government employee who wins bread for a large family, fear of imminent dismissal or no promotion or transfer or disciplinary fine could be a potent imminent harm.

So the conclusion is that where the subordinate was in such fear of imminent harm as to make it "practically" impossible for her to disobey she would not be a fault as per article 2036(3) of CCE. This, however, does not mean she is not liable, for she will be liable under article 2066. However, it makes no sense to say that a person is not at fault while at the same time making that person liable. The law is taking this course, possibly, to compensate the victim. Therefore, the solution seems to make the superior answerable as per article 2035 of the CCE cum specific provision she has infringed.

6.1.8 Non – Performance of a contract (2037)

Both Contractual and Non – Contractual Liabilities arise, as a rule, from the breach of duty. The mere fact that a person does not perform an obligation (duty) in a contract, however, does not amount to non – contractual fault as it is given under article 2037(1). Under such circumstance, the plaintiff should apply the appropriate contracted provisions.

There are cases, however, where it is difficult to determine which provisions are pertinent. For instance, article 2533 deals with the secret that is to be kept even after the employee abandoned the job. What if the employee discloses the information? What is the remedy? This provision does not give any solution. The obligation not to disclose the information after the contract is terminated seems to persist. On the other hand, article 2035 may not be invoked for article 2037 prohibits us from doing that.

The following two possibilities could be solutions. Even though the contract has been already terminated, the law imposes an obligation not to disclose the secret. So if the employee discloses this we may take that as an infringement of a specific law and invoke article 2035.On the other hand, it is to say that though the

contract is terminated generally the obligation not to disclose, however, persists under an obligation "not to do". So the proper articles of contract could be invoked.

6.2 Special Cases

Up to now, we have been discussing fault in general and its classifications. The relevance of a reasonable man was also discussed. Abuse of power, infringement of a law and chain of command were some among others, which we have discussed. In this part, we are going to discuss special cases. To that effect, we may not adhere to the sequence of the articles as they are laid down in the code. Rather we will classify them under different headings. Thus, we will discuss physical assault, interference with the liberty of another and defamation under trespass to person. The other category will be fault against property. Under this, we will have trespass to both immovable and movable properties. The third category will be fault against economic interests. Article 2055 – 2063 falls in this category. Finally, we will discuss injury to the right of spouses and duty to educate and supervise.

6.2.1 Trespass To Person

Trespass to person consists of

1. Physical Assault [Battery]
2. Interference with the liberty of another [false imprisonment]
3. Defamation

6.2.1.1. Physical Assault (2038)

In the common law context, this is referred to as battery. Battery is doing something which induces in another reasonable fear and apprehension of

immediate violence. Therefore, if B wants to sue A for committing the tort of battery in relation to B,B will have to show that A directly applied force to her person, that A did so intentionally or carelessly; and that A had no lawful justification or excuse for acting that way.

Some of the elements in this article need illustration are also in article 2038. Thus to say a person has committed a physical assault, first, there has to be contact to the person of the victim. This contact could be made by having direct personal contact or by utilizing other objects, which could be a living thing or a non – living thing.

Illustrations

(1) Touch

Abebe commits physical assault if he touches Fatima's body intentionally. For instance, he touches her hair. This is personal contact.

1.1 Living or Non – Living thing

Oken Okech pours water on Chaltu's face intentionally. Or Oken Okech wipes shoe polish on a towel and then rubes the towel in Chaltu's face.

1.2 Gari's dog leaks Abebech's leg as it is trained and ordered.

Questions

1. Abebech is about to sit on a chair when Abebe pulls it out from under her, causing her to fall to the ground. Would Abebe be at fault under Physical Assault? Why or why not?
2. Mohammed wipes shoe polish on towel and leaves the towel in Khedija's bathroom. Khedija uses it thus getting shoe polish all over her face. Would Mohammed be at fault under physical Assault? Why or Why not?

3. Chaltu is trying to enter a classroom. Chala stands in the doorway to the room blocking Chaltu's way. Would Chala be at fault under physical assault? Why or Why not?

The contact should, however, be done intentionally. [See the above definition]. In other words if the contact is made negligently or it is careless contact there is no physical assault.

Illustrations.

1. Assume Sarah is a passenger in Anbassa City Bus in Addis Ababa. She is standing when the Bus is traveling. Suddenly the bus comes to a halt with the result that Sarah falls over and Crushes into Ali, a fellow passenger. We cannot say Sarah has intentional contact with Ali because she does not do that voluntarily. So Physical Assault is not applicable here.
2. Assume Kedir is out shooting birds in the woods. Assume also Lemma is hidden in the same wood to catch birds. Kedir shoots Lemma accidentally. There is no Physical Assault for Kedir's shot that causes damage to Lemma as it is not intentional.

Let us discuss one issue and proceed to the justification. One difference we can observe from the reading of sub articles (1) and (2) of article 2038 is while a mere contact suffices to bring action under sub article (1), bodily harm is envisaged under sub article (2). So we may say physical assault is invoked whether the contact has caused bodily harm or not. So in case of sub article 1 causing damage is not a prerequisite to be liable. This is what has been referred to as *injure sine damno* in Latin.

Finally, sub article (3) deserves some explanation. The mere threat of physical assault on someone shall not constitute an offence as a matter of rule. If, however, the law says so, it shall constitute an offence.[77]Nevertheless, a person who has been allegedly regarded as having committed an offence with the meaning of article 2038 can find a complete defense when certain conditions exist. These are:

6.2.1.2 Defenses

1) <u>Unforeseen objection (2039)(1)</u>

This is where the defendant could not reasonably have foreseen the plaintiff's objection beforehand to the physical assault.

<u>Illustrations.</u>

Let us assume that Gamachis taps Mohammed's shoulder to attract his attention. Mohammed brings action under physical assault against Gamachis. The latter can invoke 2039 (1) as a defense for "It has been said that there is no liability in assault for the jostler, the back – slipper and the hand shaker."[78] And the defendant could not reasonably have foreseen that the plaintiff would object to her act, i.e. the patting, the shaking.

<u>(2) Self defense (2039) (2)</u>

Self defense exists where the act was done in "a reasonable manner in legitimate defense of one's person or of another in the safeguard of property of which the defendant is the lawful owner or possessor" as per article 2039.To start with, the purpose of the self – defense is to protect one's person or of another or it could be in the safeguard of property of which the defendant is the lawful owner or possessor. Here the law does not discriminate between defending oneself and

[77] Read article 580 of the Criminal Code of the FDRE.
[78] Alan P.192

someone else. For instance if a young boy is using force against a girl, a passerby could interfere and use force against the boy to save the girl.

The law, however, does not allow the use of force to protect someone else's property.[79] Hence the use of force is allowed only to safe – guard of property of which the defendant is the lawful owner or possessor. A good example is article 1148 of CCE though that article does not discriminate between legal possessor and simply possessor. In addition, that article does not expressly include owner. Let us raise one issue. When do we say the defense is legitimate defense? A case narrated by Nicholas on page 250 – 251 would help to illustrate this concept. Hence, the case is copied as follows with slight adaptation made in names.

Chala is a farmer who allows the local hunt to ride over his land while hunting foxes. Gari is a hunt saboteur. While the local hunt is riding over Chala's land, Gari walks onto Chala's land in an attempt to disrupt the hunt. Chala attempts to remove Gari from his land with the result that Gari attacks Chal, jabbing him in the chest and throat with stick and eventually hitting Chala twice on the arm with the stick. Chala manages to grab the stick from Gari and hit Gari. Gari sustains a fracture of the skull because of the blow and sues Chala who claims that he acts reasonably in self – defense in hitting Gari and has therefore done no wrong in hitting Gari.

The first instance judge who considered scientific evidence as to how heavy Chala's blow has been, found the blow has been a "heavy" one and held that Chala has used excessive force in striking Gari. Chala appealed and the court of appeal judge found that Chala has acted reasonably in self – defense. The Court of appeal judge thought that the correct test to apply for the purpose of determining whether Chala acted reasonably in self defense was to ask"[is Chala] in a moment of

[79] Read article 78 of the criminal code of FDRE

unexpected anguish and only [does] what he honestly and instinctively thinks is necessary?"

As Chala has only hit Gari in order to bring the attack on him to an end, the answer is "yes". All the court of appeal judges emphasized that the first instance judge is wrong to find that Chala has used excessive force in hitting Gari because his blow is estimated to be 10 percent harder than a blow delivered with average force. The Judge of the court of appeal remarks, "the judge [in reaching such a finding] fell into error [of] using jeweler's scales to measure reasonable force". The judge remarks that the victim of violence cannot be expected, when acting in self defense" *to measure [the force used by him in self – defense] with mathematical precision" (emphasis added).*

3. Corporeal Punishment [2039(3)]

This act consists in a reasonable corporeal punishment inflicted by the defendant on his child, wards, pupil or servant. This is what is called lawful chastisement which is an act used to punish someone for misbehaving. So, as per article 2039(3) if a child misbehaves, parents or a guardian may use reasonable force to discipline their child .School teacher acting in *lue of parents was* allowed to use reasonable force to punish the children in her care if they misbehaved[80]. The same is true for a ward and servant.

The Constitutionality of this sub article is questionable for the FDRE Constitution states under article 36 (1) (e) that children are free of corporal punishment or cruel and inhuman treatment in school and other institutions responsible for the care of children. Even the Revised Family Code does not allow corporal punishment expressly. What parents can do, when their children misbehave, is to take disciplinary measures. Some argue these disciplinary

[80] Nicholas P 253

measures include corporal punishment. The ground they invoke for their argument is that the FDRE Constitution does not expressly include parents among those who are forbidden from administering corporal punishment. Nevertheless, article 576 of the Criminal Code prohibits beating a child by making this act a crime. Moreover, it uses the word *whoever* not to make any kind of discrimination on the actors.

Concerning the servant and others, it is as well unconstitutional to administer corporal punishment in its whatever form, for the FDRE Constitution declares that everyone has the right to protection against cruel, inhuman or degrading treatment or punishment.[81] Therefore, this sub article should be revised and redrafted alongside the FDRE Constitution and other laws.

4. A dangerous Lunatic (2039[4])

The second to the last justification is where the plaintiff is a dangerous lunatic whom it was necessary to prevent from doing harm and the act was done in reasonable manner. If a notoriously insane person is categorized as dangerous lunatic those people with whom he lives or his family would restrict his liberty of moving. This is usually done, especially in rural areas, by tying that person's arms and legs with rope so that, that person may not injure people or himself or cause damage to property. Applying reasonable force to tie that person could be necessary and it is justifiable.

5. Any other justification (2039[5])

This is where the act of the defendant is justified in the eyes of a reasonable person.

[81] Article 18 FDRE Constitution

Illustrations

1. Ali is in danger of being hit by some moving object. G/Tsadik drags Ali out of way to save him from being hit by that moving object.
2. Kebede brushed past Sarah in the Street. The Contact is justifiable." The reason is that in walking the street Sarah will have voluntarily taken the risk that she will be touched by people brushing past her"[82]This is a good example for direct justification, i.e. consent.

6.2.2. Interference with the Liberty of another (2040)and Defenses

This is referred to as false imprisonment in the common law legal system. It is a detention of one person by another against the will of the former and without just cause. Article 2040 consists of elements, which may need elaboration Hence: -

1. The first one is the "… without due legal authority…." It is where one who restricts the free moving of another has done that without due legal authority, i.e. lawful justification or excuse. For instance, as per article 49 of the Criminal Procedure Code of The Empire of Ethiopia of 1961[83]a person is arrested if arrest warrant is issued by a competent court. Therefore, if a police officer arrests a person without arrest warrant, the arrest is said to be without due legal authority.[84] It is not only the police that may interfere with the liberty of another. A citizen may interfere with the liberty of another citizen as well.

Illustration

[82] Nicholas P. 249
[83] Negarit Gazeta, Extra ordinary Issue No. 1 of 1961, Addis Ababa (Hereafter CPC]
[84] But read articles 50 and 51 of CPC

Abebe is a passenger in Addis Ababa City Bus. The Bus has specific places or stops to let passengers get down or/ and others get in. If Abebe demands the driver to stop the bus at a place different from those specific stops and the driver refuses to do so, Abebe may not claim false imprisonment. If the driver, however, refuses to stop at the Bus Stop we can say Abebe's freedom of moving is constrained without due legal authority.

2. The other point is that the detention should not necessarily be for a long period to say there is interference The detention should be as well absolute. In other words, the deprivation must be complete, for "It is not false imprisonment if the plaintiff had any *reasonable* means of leaving, e.g. if his path was barred in one direction, but not in another."[85]

Moreover, the prevention from moving need not necessarily require the physical restrain. For instance a person could be physically free to leave, but had been deprived of his clothes, or the only means of escape was dangerous or in convenient, e.g. by having to jump from a height or into water.[86]Thus, it shall be sufficient for the plaintiff to have been compelled to behave in a certain manner by the threat of a danger of which he could not be unaware as per article 2040(3).

3. There is a phrase … as he is entitled to… This entitlement emanates from the Constitution.[87]
4. Finally, one point deserves brief discussion. That is material injury is not a pre – request to say there is fault under this article for an offence shall be deemed to have been committed not withstanding that no injury is done to

[85] Alan P. 193
[86] Ibid. Read also article 2040 (3) of CCE
[87] the FDRE Constitution article 32

the plaintiff's person. This is *injuria sin damno* and it is actionable without proof of damage and so it is actionable *per se*

DEFENSES

6.2.2.1. Lawful authority (2041).

A. The first justification to restrain another person and prevent him from moving is where the constraint has been imposed on a person in the legal custody of the defendant and for enforcing the authority conferred up on the latter by law. Three elements deserve discussion. These are:-

1) The constraint should be exercised in a reasonable manner.
2) The one who interferes with the liberty of another should have a legal custody of the plaintiff.
3) The law should confer that authority upon the defendant.

Illustration

1) People suffering from mental disorders may in certain circumstance be arrested or confined in a hospital for the hospital has a legal custody that is conferred upon it by a law. [88] Some of the inmates may move freely in the hospital compound while some could be confined in a room. So the reasonableness dependence upon the seriousness of the mental illness and the means used for confinement.
2) The other example is where "a prisoner whether sentenced to imprisonment or committed to prison on remand or pending trial or otherwise, maybe

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lawfully confined in prison" [89] The prison administration has a legal custody which is conferred up on it by law. [90]

3.) Further as per article 219 of the RFC the father and the mother are, during their marriage, jointly guardians and tutors of their minor child. Hence, as long as they are together in marriage both the father and the mother have the custody of their minor child. Therefore, as guardian they shall fix the place where the minor is to reside.[91]

6.2.2.2 Criminal offence (2042)

This is done in prevention of a crime. As per article 2042 (1) the person who interfered with the liberty of another has to show that she has a good reason to believe that the plaintiff had committed a criminal offence.

Illustration

Beletu always suspects her husband Kebede of visiting a woman. One day he left home saying he is going to express his condolence to his friend whose mother had died recently. Belatu being suspicious pursued him without being noticed by her husband. Kebede rather than going to his friend, went to that woman and closed the door behind. Belatu knocked at the door and requested Kebede to open the door. Kebede did not respond in any way. At this time, Beleatu locked the door behind using a locker, headed to the police station to report, and call the police.

[89] Michael PP 533 – 537
[90] Article 2(4) of proclamation N. 39/2004, proclamation issued to establish Harari Regional State Prison Administration
[91] RFC article 256. Read also article 113 of the RFC.

We cannot say Belatu has done an offence though she has interfered with the liberty of Kebede when she locked the door behind, for she had a good reason to believe that her husband had been committing adultery which is a criminal offence as per article 652 of the Criminal Code of the FDRE. We say she had good reason to believe that her husband had committed a crime because it suffices to show circumstantial evidence i.e. locking the door behind with a woman who is not his wife to say adultery had been committed.. It will be up to Kebede to prove that he has not actually had sexual intercourse by different means, such as by showing that he is impotent.

The offence has to be a criminal offence. In other words, for civil offences we cannot restrain the liberty of another. Moreover, once we have constrained the liberty of another, we have to immediately hand over the person in our custody to the police. Otherwise, we are going to be liable as per article 2042 (2)

Question

1. As per article 19(1) of the FDRE Constitution, persons arrested have the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them. Assume a police officer while arresting a person fails to act in accordance with the above article. Would the arrest be lawful? Why or why not?

2. As per article 19(3) of the FDRE Constitution persons arrested have the right to be brought before a court within 48 hours of their arrest. Assume a police officer fails to do this. Is the police officer liable under article 2040 if she keeps the arrested person in custody after 48 hours? Why or why not?

6.2.2.3 Bail (2043)

There are two points to be discussed here. One is the fact that the defendant was standing surety for a person who is to abscond. The other point is the defendant has given her assurance to the officials as to the whereabouts of the residence of the person whose liberty is obscured.

If the person who stood surety for a person has a good reason to believe that person is about to abscond and prohibits that person from leaving his residence, the one who interfered with the liberty may not be said has committed an offence. Some of the indications to believe a person is to leave her place is if she starts packing her staff or booking to travel in a plane.

6.2.3 Defamation (2044)and Defenses

Article 2044 defines defamation and the means used to that end. Therefore, the means utilized for the purposes of defamation could be words, writings or any other means. If for instance Chala states in public or to someone that Chaltu commits adultery and that is not true he defamed Chaltu by using words. Or Chala writes this in a news paper or he uses "….Carvings, paintings or gestures" [92] which are referred to "as other means" by article 2044. Then Chala commits fault as per that article.

The consequences of defamation are to make a living person detestable, contemptible or ridiculous and jeopardize his credit, his reputation or his future. So defamation is related to living person. not to a deceased one.[93] Some examples of defamation are stated under article 2109. So as per that article there is defamation or insult where;

a) The injurious or defamatory charges are that the plaintiff has committed a crime or an offence punishable under criminal law she has not committed the crime

[92] Alan P. 212
[93] See article 46(2) of CCE

b) It is alleged that the plaintiff is incompetent or dishonest in the exercise of her profession while she is honest or competent in the exercise of her profession.
c) It is alleged that the plaintiff, a businessperson, is insolvent while she is a successful businessperson.
d) It is alleged that the plaintiff is suffering from a contagious disease or
e) It is alleged that the plaintiff is of low moral while she is not.

Nevertheless, it seems that our law makes differences between defamation and insult. Defamation exists when the defamatory words or statements are communicated to a third party. If the words or statements are limited to the victim herself, they are said to be insults not defamation. Their consequences, however, as you can see from article 2109 are all the same, i.e. awarding of fair compensation to the plaintiff or to a charity named by the plaintiff.

There is no group defamation as per article 2045(2). The other name for group defamation is defamation of a class.[94] For example, to refer to all lawyers as crooks is too vague to be defamatory of specific people. Let us assume that this statement is made by Kebede and one of the lawyers, says Ali, sues Kebede. Ali may not be successful. The reason is, no court will find an ordinary reasonable person who heard or read Kebede's statement and would have thought that it referred to Ali and would have tended as a result to think less of Ali.

However, the outcome would be different if Ali is one of the employees for ABC Share Company and Kebede wrote down "All the lawyers employed by ABC Share Company are corrupt." The reason is" an ordinary reasonable person who… reads Kebede's statement would be entitled to think that Kebede in writing that statement, was not making a sweeping generalization but was instead making a specific allegation against each and every lawyer employed by ABC Share Company

[94] Nicholas P. 273

So an ordinary reasonable person who reads Kebede's statement would be entitled to think that Kebede's writing indicated that Ali was corrupt and would tend to think less well of Ali as a result. [95]

Defenses

A person may use defamatory words or statements against another. She may not, however, be liable, for she has justification for her act. Under the Ethiopian Non – Contractual Liability Law these defenses are laid down under article 2046 – 2049 which we will discuss one at a time here below.

6.2.3.1 Public Concern [2046]

As per article 2046, expressing an idea of public concern is not defamation. Now the issue is when is an expression said to be a public concern or interest? Public concern or interest is related with fair comment. To say a certain statement is fair comment the following three conditions should exist.

a) The statement should be, on its face, statement of opinion, not a statement of fact.
b) The expression should be an opinion on matters of public interest, rather than private interests.
c) The holder of that opinion should hold that opinion honestly and should not act maliciously in expressing that opinion.[96]

Illustrations

A. Opinion and Fact

[95] Nicholas P.274.
[96] Nicholas P.284

Let us assume Helen made the following statement concerning a Mayer of a certain city. "*He is a habitual liar and not fit to hold office."* This statement is, on its face, not an opinion rather it is a statement of fact. However, if Helen says, "*Everything he has said and done in office tends to indicate that he is a habitual liar and is unfit to hold office.*" Her statement is on its face a statement of opinion. For "in saying what she said, Helen was obviously expressing an opinion about what could be concluded from the conduct of the politician in question in office".[97]

It is worthy to quote fully Nicholas on page 286 to know what counts public interest.

> … [W]henever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned, at what is going on, or what may happen to them or to other; then it is a matter of public interest on which everybody is entitled to make fair comment.

Therefore, if a journalist comments on the quality of certain football teams, it will count as a matter of public interest, for people may be legitimately interested in how good this play will be, so as to know whether or not to buy tickets for it.

C. Honest and not malicious

This requires good faith and the non – existence of malicious distortion. Therefore, "The defendant must have made the comment in good faith believing in its truth and without malicious distortion".[98]

Illustration

97.Nicholas p.284
[98] See article 2032

Rowda is running a restaurant. She has a boy friend called Ali. When they break, Ali makes a comment on the food saying the food at Rowda's Restaurant is terrible. If Ali exposes the food and service at Rowda's Restaurant to get revenge on Rowda for breaking up with him, he cannot invoke honesty as a defense for he acted in bad faith and maliciously.[99]

6.2.3.2 Truth of the Alleged Fact (2047)

In principle if what someone states is true, there is no defamation provided this is not done with intent to injure. Alan says this defense is a dangerous defense for if it fails heavier damages will probably be awarded.[100]The burden of proof is that of the defendant. When the defendant proves she is not expected, however, to prove every word of what she said is correct. It suffices if she proves substantial amount of it.

Illustration

Let us assume that Belay beats his wife three times every week. Chaltu says that Belay beats his wife four times every week. If Belay sues Chaltu for defamation, Chaltu can invoke the truth as a defense. Her saying is substantially true even though she gets it wrong as to how many times Belay beats his wife a week.

6.2.3.3 Immunity (2048)

As per article 2048(1) no liability shall be incurred in respect of utterance made in parliamentary debates or in the course of legal proceedings. From this reading, we can see this immunity or privilege is given to certain persons. These are Members of Parliament [MP] and those who engage in the judicial proceedings. This immunity seems is extended to

[99] Alan P. 244
[100] Ibid P.221

members of the constitutionally established executive as per article 611 of the Criminal Code of the FDRE. The question is whether the immunity stated in the Criminal Code is immunity either from civil and criminal liability or only from criminal liability. In addition, remember that the outcome of the criminal proceedings may not affect the civil one.

MPs have constitutional guarantee for article 54(5) of the FDRE Constitution states that no member of the House may be prosecuted because of any…opinion he expresses in the House, nor shall any administrative action be taken against any member on such grounds. The rationale could be if "… Members of Parliament being [are] allowed to say what they say in parliament without fear of being sued that assures MPs that what they say in parliament will always be privileged".[101]

Other people who are immune are those who are involved in the course of judicial proceeding. The question is which proceeding is referred to as judicial proceedings. As per article 79(1) of the FDRE Constitution judicial powers, both at Federal and state levels are vested in the courts. As per article 80 of the same at both Federal and State level, the courts are Supreme, High and First Instance Courts and it is to tell the obvious that those who involve in those courts proceedings are immune.

QUESTIONS

1. Regulation No.3/2006, The House of Peoples' Representatives of The Federal Democratic Republic of Ethiopia Rules of Procedures and Members' Code of Conduct Regulation states under article 29(2)(c) the [MP] shall make a speech based on good faith or truth. Further, his speech shall respect the prestige and dignity of the House, its members, other persons and institutions. Discuss this in light of the immunity that is granted to the MPs in the FDRE Constitution and the CCE.

[101] Nicholas P.289

2. The FDRE Constitution recognizes religious and customary courts to adjudicate personal and family matters. Moreover, as per the Revised Family code courts could instruct family matters to be adjudicated by family arbitrators. There are also proceedings held by administrative tribunals. The question is: are those involved in those proceedings entitled to immunity? What about statements made to Ethical and Anti Corruption Commission?[102] What about statements made by a witness to his testimony for courts? What about statements made in the course of being questioned by someone investigating a crime?

Not only MPs and those who involve in judicial proceedings are immune. Those who reproduce the debate or the proceedings in the parliament or judicial proceedings respectively are also immune provided they reproduce it without intent to injure.[103] Is the immunity rendered under article 2048 absolute? Why or why not?

Questions

Which of the following is defamation? Why or why not?

1. A husband told his wife Ato Kebede is a thief.
2. Ali dictated his secretary mentioning Abebe as an immoral individual.
3. Gari sends to Chaltu a post card which contains defamatory statement about Chaltu herself but which Chaltu does not understand.

4. In the FDRE Constitution Freedom of press is guaranteed as per article 29(3). If limitation is made it is only to protect the well – being of the youth, and the honor and reputation of individuals. This is where defamation is committed by

[102] Read Anti Corruption Special procedure and rules of Evidence proclamation No. 23/2001 Federal Negarit Gazeta, 7th year No.24.
[103] CCE article 2048(2)

press against individuals. Press proclamation No 341 1992.[104] expands defamation to include defamation against nation nationality, people and organization.[105]Is this different from group or class defamation? If not who will sue the defendant? May be the public prosecutor?

6.2.4 PUBLICATION (2049)

Defamation could be committed by way of publication. In whatever form the defamation is carried out, the responsibility of press arising from criminal offences and civil damages shall be laid down in the Criminal Code and the Civil Code.[106]Nonetheless, as per article 2049 of the CCE the defendant may not be liable provided that:

i. She has acted without intent to injure and without negligence.
ii. At the request of the plaintiff, she publishes immediately a withdrawal and an apology.

If she, however, acts with intent to do harm or with gross negligence she is liable. Moreover, when she is requested to withdraw and make an apology, she fails to do so immediately (forth with) she will be liable.

Concerning compensation as per article 2109 of the CCE fair compensation may be awarded to the plaintiff. While as per article 14(2) of the press law the award, in case of a non – profit making press, is reasonable compensation and incase of a profit – making press, compensation could be up to double the capital of the press registered under the commercial code. So which one prevails? Read articles 2090 ff and the notes ahead.

Sub article (2) and (3) are the methods how the withdrawal and apology is made. Hence, where the defamation is committed by way of a periodical, which

[104] Press Law Negarit Gazeta 52nd year No.8
[105] Ibid article 10(2) (b)
[106] Ibid article 14(1)

appears at intervals of more than one week, the plaintiff may require the withdrawal and apology to be published immediately in a periodical of his choice. Let us assume a newspaper; Daily Time publishes a defamatory statement in its July issue. Let us further assume the newspaper is a monthly one. The plaintiff may demand the withdrawal and apology to be published in other newspapers which the defendant should comply with. If the periodical on which the defamatory statement is published at intervals of less than a week or weekly base, the withdrawal and apology shall be published in the periodical in which the defamatory matter was published.

6.2.5 Trespass to Goods

All goods are movable or immovable[107]. Lands and buildings shall be deemed immovable[108]. Others, which are moved by man or move themselves without losing their individual character, are referred to as movable goods[109]. There could be interference with these goods. Our Civil Code uses trespass to indicate trespass to land or a house[110] while trespass to movables is referred to as assault to property. Now we will discuss each at a time.

6.2.5.1Trespass [2053]

There is trespass as per article 2053 where without due legal authority, someone forces her way on the land or into the house of another against the clearly expressed will of the lawful owner or possessor of the land or house. The elements of this article, which deserve brief discussion, are:

[107] CCE article 1121
[108] Ibid article 1130
[109] Ibid article 1127
[110] Ibid article 2053

1. "…without due legal authority…."

This exists when a person enters a land or a house without having any justification.

Illustration

1. Fatima checks in at Ras Hotel in Harar for one holiday. For that one day, she has a legal authority to stay at Ras Hotel. When the holiday is over, she has to check out. If she stays in the room without extending the rent, her staying will be without due legal authority.

2. The same is true for football spectator. The spectator should leave the stadium when the game is over. If the spectator stays after the game is over his stay there is without due legal authority. This kind of trespass is referred to as trespass by remaining on the house or building[111].
3. As per article 1309, a person has a usufructory right of using and enjoying things subject to the duty of preserving their substance. This right is applicable to land and other chattels. This right ends as per article 1322 upon the expiry of the period for which it was created. If the person who was enjoying this right continued to stay on the land or in the house after the expiry her stay is without due legal authority.

2. .... he forces his way on the land or into the house of another...

This could be done directly by personal entry or by procuring the entry of another person, object or animal.[112]

[111] Alan P.182.
[112] Ibid P.177

Illustration

1. Oken Okech puts his hand or head through an open window of Fetima's house. It is a trespass by personal entry.
2. Mohammed sits on a boundary fence of Chaltu. It is a trespass if he throws a ball, which enters Chaltu's land only momentarily before returning.
3. Gari pushes Chaltu into the land or house of Chala. Now the trespasser is not Chaltu. It is Gari [procuring the entry of another person].
4. Or Gari lets his cattle enter in the farm land of Chala [procuring the entry of animal].

3. .... against the clearly expressed will of....

The expression could be oral, written or by conduct. If you are a guest in a hotel, the room manager could tell you to leave the room if you misbehave. If you stay in the hotel after that, you are a trespasser for you stay against the clearly expressed will of the hotel room manager, given orally.

A notice could be put on a door or fences of some ones holding which reads "Stay away. This is private property" or you may have a notice saying "Dangerous water. No swimming" [113] which are written expressions.

If someone fences a piece of land under his possession, he is expressing his will by conduct. If you force your way into the land by passing that fence or lean a ladder against the wall you are a trespasser.

4. ... a lawful owner or possessor of the land or a house.

[113] Richard P.2

The expression should be given not by wrongful owner or possessor. Now the issue is who is the lawful owner or possessor of the land or the house. As per article 40 of the FDRE Constitution since land cannot be owned privately, what we have on both rural and urban land is possessory or holding right. Thus, those who secured possessory right as per the relevant law shall have the possessory right over the land.[114] Therefore, they are lawful possessors of the land.

A house can be owned privately and that can be proved by producing a title deed.[115] A person could have also the possessory right over the house as lessee, as usufructory or a keeper, etc. Therefore, these are lawful possessors of a house.

Questions

A. Chaltu leaves for a seven day vacation. In her absence, she assigned Chala to look after her house. If Chala enters the house for stealing and not looking after, will he be a trespasser? Why or why not?

B. Garbage, which was collected and hoard at a certain place by Abebe is carried by wind to Ali's compound. Is Abebe a trespasser? Why or why not?

C. Kedija and Isa are neighbors. Kedija plants a tree. Its branches pass a party wall of Kedija to Issa's compound. Is Kedija a trespasser? Why or why not? What if smoke from Kedeja's chimneys crosses to Issa's house? Is she a trespasser? Why? Or why not?

4. Kebede steals Gari's cycle and keeps it in his compound. Gari enters Kebed's compound and takes the cycle. Is Gari a trespasser? Why or why not?

[114] 119
[115] CCE article 1195

5. Chala enters Chaltu's compound to repair his house from the side of Chaltu's. Is Chala a trespasser? Why or why not?

5. You are a hotel room. After lunch, you have a habit of taking a nap for a few minutes. To do so you put on your hotel room door "Do not disturb." In spite of that, the room cleaner knocked at your door. Is she a trespasser? Why or why not?

6.2.5.2 Assault on property [2054]

This is a trespass to movable property. Therefore, as per article 2054 a person commits an offence where, without due legal authority, she takes possession of property against the clearly expressed will of the lawful owner or possessor of the property. The elements of this article are:

1. Without due legal authority...

It could mean without having lawful justification.

Illustrations

A. According to article 2076 of CCE in order to secure compensation, which may be due to her, the owner or possessor of a farmland, may seize and charge animals belonging to another person provided they have caused damage to property. Therefore, a person who seized the animals, which caused damage, has a due legal authority to take possession of the animals. If she, however, continues seizing the animals after the owner pays compensation her possession is without due legal authority.

B. Criminal Procedure Law grants the police with powers of entry, search and seizure as per 32.[116] If the police officer acts in accordance with the search warrant, she is with legal authority. If the police officer, however, acts not in accordance with article 32 or exceeds the limits set in the search warrant her act is without due legal authority and it is a trespass.

For instance, Abebech is a police officer who secures a search warrant to search Hanna's house to seize a stolen TV-set. If she dismantles a vacuum cleaner in search of the stolen TV, her act constitutes a trespass for it exceeds the limits. If she, however, dismantles the vacuum cleaner to look for drugs her act may not constitute a trespass for drug could be concealed in the vacuum cleaner.

3. ...she takes possession of property...

This conduct includes actual damage of goods, use of goods or moving of goods from one place to another.[117]

Questions

Are the following acts trespasses to goods? Why or why not?

A. To show private documents to unauthorized person
B. A trained dog steals and brings a ball to a master
C. A dog is beaten
D. Erasing a CD or a cassette

3. ... against clearly expressed will of....

[116] CCP
[117] Alan P.201

Using force to repel any act of usurpation as indicated under article 1148(1) is clear expression of will. So if a person takes away the thing while the possessor or owner is using force to repel the usurpation we say he is a trespasser to goods for she takes possession of goods against clearly expressed will of the lawful possessor or owner.

In our previous example, we said that a possessor of land might seize and take charge of animals belonging to another person, which have caused damage to her property as per article 2076(1) of the CCE. Where the owner of the animals makes good the damage by paying compensation but the possessor of the land continues to keep the animals we say she is a trespasser for she possess the animals against clearly expressed will of the owner of the animal.

4. ...the lawful owner or possessor of property.

Possession, as per article 1140 of CCE, consists of the actual control, which a person exercises over a thing. This possession, however, could be lawful or unlawful. Possessor in good faith is a lawful possessor. If she steals a thing, she is not a lawful possessor. Hence, the one who takes possession of a thing by stealing cannot invoke article 2054, for she is not a lawful possessor

Similarly, if she is not a lawful owner she cannot invoke article 2054. Proving of ownership of movables is different from proving ownership of immovable. As per article 1193, whosoever is in possession of a corporeal chattel shall be deemed to possess it on her own behalf and be the owner thereof. Therefore, the law presumes that one who possesses a movable property owns that property. Therefore, if someone interferes with the possession of this person he is a trespasser.

Illustration

A boy found a jewel, which he gave to a goldsmith to be valued. The goldsmith refused to return the jewel and the boy sued him. It was held that the boy, as possessor of title to the goods, could maintain the action[118]

[118] Alan P.203

CHAPTER VII

Interference Against Economic Interest

Some of the items we are going to discuss in this part are pre-contractual negotiations, inducement to breach of contract, unfair competitions, simulation and others. They are governed from article 2055 to 2064, each of which are discussed below.

7.1 Pre contractual Negotiations [2055]

Before they conclude a contract, parties make negotiations. This is done by expressing their intentions to enter into a contract. When one declares her intention, she may induce others to incur expenses and then decline from entering into the contract. This is an offence as per article 2055

Illustration

ABC Share Company in Dire Dawa puts a notice in a newspaper inviting others to take part in a bid for purchase of stationer. People from Addis came to Dire Dawa to take part in that bid. To that end, they incurred expenses. If the ABC Share Company arbitrarily abandons its intention then those people who incurred expenses with the intention to conclude contract with the ABE Share Company should have action against the company.

Question

Haramaya University announces its intention to purchase 'teff' to feed its students for the year 2001 by posting a bid notice in Addis Zemen. At the end of the bid announcement the following remark is made;

Haramaya University retains the right to cancel the bid partly or wholly.

Would Haramaya University be liable under article 2055 if it wholly cancels the bid? Why or why not?

7.2 Inducement to breach of contracts [2056]

As per article 2056, whosoever is aware of the existence of a contract between two other persons commits offence where she enters into a contract with one of those persons thereby rendering impossible the performance of the first contract.

The elements are:-

1/ Being aware of the existence of contracts between other persons.
2/ Entering into a contract with one of those persons
3/ Rendering impossible the performance of the first contract.

1/ .....Being aware of the existence of a contract between other persons...

Here it is necessary to establish that a defendant acted with knowledge of a contract existence between other persons.

Illustration

Chaltu is a singer. She has a contract with Gari to sing at Gari's nightclub every night from 9:00 Pm up to 2:00 Am. Abebe who is an owner of another nightclub induces Chaltu to sing in his nightclub from 9:00 Pm up to2:00 Am even though he knows she sings at a similar time at Gari's nightclub.

2/ ...entering with one of them...

This act has to be done with intent to induce one of the parties to breach the contract she has with the other party.

<u>Illustration</u>

For Chala to be found to have committed fault of inducing a breach in the case at hand, it suffices if he knew that his acting in a way that would or was likely to have the effect of causing Chaltu to breach her contract with Gari

3/ ... rendering impossible the performance of the first contract

It is not enough that the entering into a contract with one of the other persons makes the already existing contract performance difficult. For instance, in the case at hand Chala may induce Chaltu to sing at his club from 6: Pm to 8:30 Pm, which will make Chaltu's next performance difficult for she will be tired.

Therefore, the second contract should render the previous contract impossible to be performed. In the case at hand, both contracts obliged Chaltu to sing at the same at two different places, i.e. from 9:00 Pm up to 2:00 Am, which is humanly impossible.To summarize, before we conclude that Chala had committed the fault of inducing a breach of contract in inducing Chaltu to breach her contract with Gari, it will have to be established that

1/ He was aware that there was a contract between Chaltu and Gari

2/ He knew that his actions were very likely to result in Chaltu breaching that contract and he did not care whether his actions had that effect[119]

If the one who complains the breach of a contract, nevertheless, failed to take the necessary measure, which would have ensured the effective performance of that

[119] 124. Nicholas P 392

contract the one that made the latter contract would not be liable.[120] What measure would be taken by Gari to ensure that Chaltu performed only in his club?

7.3 Unfair competition [2057]

Competition in trade is necessary to bring growth in that sector. The competition, however, should be fair. Hence, the effort of two or more parties to secure profit out of their identical business by offering the most favorable terms to their customers is what we mean by fair competition. Examples are reducing the prices of commodities and services up to economic level, producing quality goods and providing efficient services.

On the contrary, publishing inaccurate information about other competitors[121]or any false statement in the course of business with a view to discredit a competitor; misleading customers by using the same trademark, same commercial name, or same container is unfair competition, which is generally a dishonest practice used by the defendant[122] Hence a person commits an offence where, through unfair competition, he compromises the reputation of a product or the credit of a commercial establishment [123]

7.4 Simulation (2058)

Simulation is a deliberate making of certain conditions that could exist in reality. Article 2058 deals with simulation. which is the equivalent of 'Kutch yebelu' in Amharic.

Illustration

[120] 125. Article 2056(2). please read this article with article 2155(3)
[121] . 126 Commercial Code of Ethiopia, article...
[122] . 127Article 2127 of CCE
[123] . 128 Ibid article 2057. Please read article 2127.

Abebe is a street boy in Addis Ababa. He sometimes does light work and other times he deceives people, 'specially those who come from the rural area'. Abebe and his friends agreed to cheat people who would come to Addis Ababa to purchase food items at governmental enterprise with less price. To elevate problems related with price raising in food items the government authorized Merchandise Whole Sale and Import Trade Enterprise (MWSETI) to distribute the items with less prices to those people with low income. Following that every morning long queues are made in front of MWSETI gate. One morning Abebe and his friends joined the queues. Before Abebe went into the MWSETI he started to collect money from his friends who were just behind him. The poor farmer asked the reason why they were giving their money to Abebe. Abebe's friends told the farmer that Abebe is a friend of the manager so that he would immediately purchase whatever they need without corrupting the manager. Otherwise, they said, half of the money had to be paid to the manager to corrupt him and only half of the money would be used to purchase the food items. Believing that, the farmer handed over the whole money to Abebe. Abebe proceeded through the gate of WSTDA but never returned with either the money or the food items. This is what we call Kutch yibelu' or simulation

7.5 False Information (2059)

In the common law, this is referred to as the tort of deceit[124]. Hence as per article 2059 a person who intentionally or by negligence, supplies false information to another commits an offence where:

a) He knows that the person to whom the information is supplied or another given person will act upon the information and thereby suffers damage. Similarly Cooke says there is "the tort of deceit... when the defendant makes a false statement to the

[124] Cooke p. 452

claimant, knowing it is false, or reckless as to its truth, with intention that the claimant acts on it, the claimant does act and suffers damage as a result[125]

Illustration

Chala is an auditor. Assume he audited ABC Share Company. Chala finds out that the company is not doing well. He nevertheless, reports the company is doing well. Thus he commits an offence though no one has acted based on the information and suffered damage.

However, where the information supplier is not bound by the rules of her profession to give correct information, she will be at fault if she knows that the persons to whom the information is supplied or another given person will act upon the information and thereby suffers damage.

Illustration

An individual shouted "Fire! Fire! "in a cinema hall. The author of this word should have known that the audience would react upon this information and suffer damage.

7.6 Exception 2060

A person may provide false information and someone may act upon that and suffers damage. The provider of that information may not be liable where the false information is supplied orally with the intention of helping others. Thus the person supplying incorrect information shall not be liable where, the statement made by him relates to the qualification, conduct, solvency, competence, or under taking of

[125] Ibid

another person and was made with the object of securing credit, money, or goods to that person i.e. with the intent of helping.

Illustration

Abebech is from one of the villages out of Addis Ababa. Since Abebech is without mother and father, she came to Addis to look for a job. Her aunt helped her in search of the job. At the end Abebech is employed as a cookhouse by Ato Abebe who was told by Abebech's aunt that Abebech is an excellent cook while she is not.

Here Abebech's aunt supplied Abebe with incorrect information not with the intent to injure Abebe. Rather to help Abebech. Therefore, though the aunt had committed fault she shall not be liable.[126] If she puts this information in writing and signed it, however, she shall be liable[127], for it will be injurious falsehood.[128]

7.6 .1 Witnesses [2061]

Witnesses could testify the occurrence or the non-occurrence of certain events or they may testify the existence or the non-existence of certain facts. For instance, they may be present at a marriage ceremony (event) and later testify the occurrence of that event.[129] The existence of a marriage is a fact. So the existence of marriage is either established by a marriage record or in default of the certificate by other reliable evidence or witnesses.[130]

[126] CCE. article 2060(1)
[127] Ibid article 2060(2)
[128] Alan P.133
[129] RFC article 95
[130] Ibid article 94 and 95

Thus witnesses who testify to the occurrence or the non-occurrence of a given event or to the existence or the non-existence of a given fact shall guarantee the accuracy (exact or without error) of their statements.[131] If they could not do that they would be liable to those who acted on the faith of such statements.

Criminally, as well, a witness who knowingly gives the authorities inaccurate information in relation to criminal proceedings or investigations is punishable with simple imprisonment.[132]It is acceptable to make people guarantee the accuracy of their statements. At the same time witnesses should be protected by witness immunity. "Witness immunity is the right of not being sued and not being liable for what one has said as a witness in judicial proceedings".[133] As to my knowledge there is no express article, which governs witness immunity though we have immunity for members of government, MPs and judges[134]. Moreover, we have the protection of those who provide information or evidence to justice authorities or testifying in criminal cases against assaults, suppresses or harms[135]. Nevertheless, they may not have witness immunity. Finally there is a possibility for witnesses to be misled by others. In such cases the witness has the right to bring recourse against whosoever led them into error provided that they acted in good faith.[136]

7.6.2 Advice or recommendations (2062)

Where a person comes to seek advice and one renders only that advice or makes recommendations the one who gives the advice or makes the recommendation may not be liable. For instance if Fatima is sick and approaches Ali to seek advice and accordingly Ali advises her to go to a witch doctor Ali may not

[131] CCE article 2061(1)
[132] Criminal code of FDRE article 446
[133] Nicholas P.498
[134] CCE article 2138
[135] Criminal Code of FDRE article 444.
[136] CCE article 2061(3)

be liable if Fatima suffers damage. This is so where Ali only confines himself to giving advice. If, however, Ali leads Fatima to the witch doctor's place and Fatima, as a result, suffers damage Ali will be liable, for Ali's conduct goes beyond giving advice or making recommendations.

7.6.3 Seizer of another's property or Distrait (2063)

Here we have a creditor-debtor relationship. The creditor, in order to force the debtor, to pay her debt, holds the property of the debtor. If the property that is held by the creditor is disproportionate to the value of the debt this act is a fault. The question that we may raise is whether the debt is owed extra contractually or contractually. If it is extra contractual, the amount first has to be determined by a court. Otherwise, the victim cannot determine the amount by herself. If it is contractual, the creditor has recourse to judicial proceedings. Thus, she does not have to take the law into her hand. Then what kind of situation is envisaged by this article? The situations are those governed by article 2076 though that article deals solely with animals.

7.6.4 Execution of a court order (2064)

A court gives order for sale of judgment-debtor's property to execute its judgment by giving a valid execution order.[137] An execution officer or a bailiff carries out the execution order. To be a valid order it should bear:

1. The day on which it is issued;
2. The signature of a judge
3. The seal of the court and

[137] CPC article 394 ff

4. Obviously it has to be in a written form [138]

Thus, the execution officer who seizes the property of judgment-debtor to execute the court order shall not be at fault provided she carries it out in accordance with the order.

The execution officer, however, shall be liable where:

1. She executes the court order that is not made in a prescribed form, i.e. either where it does not have the signature of a judge, the seal of the court, or
2. the execution officer exceeds the instruction in the order, for instance while the order is to seize specific movable property the execution officer seizes another [139]
3. The execution officer carries them out without due regard for the provision of the law. For instance, if she seizes those properties which are not subject to the attachment[140]

7.6.5 Prescription 2065

There is a prescription in which one is supposed to bring an action. For instance in a contract case it is 10 years.[141] Thus, the creditor has to bring her action within this period. If she does not, she is barred from bringing her action by prescription.

[138] Ibid. article 392 and CCE article 2064(1)
[139] Ibid article 392
[140] Ibid article 404
[141] CCE article 1845

By virtue of article 2030 the debtor's action of not paying the debt within this period, however, is a fault. Nevertheless, article 2065 is an exception. Thus, if the creditor invokes article 2030 (for not settling one's debt is a fault) the debtor can invoke article 2065 not to be liable. Let us make one remark and proceed to the next part. As a rule, by virtue of article 2164 one can demand restitution. Let us assume the restitution is carried out after the prescription period. The one who effects the restitution or who pays after the prescription, i.e. after the period has ran out cannot claim the restitution. because the law says she paid what she owed.

CHAPTER VII

Other Interests

Here we will discuss two points. The first one is where someone induces either of the spouses and the second one is where one fails her responsibility of educating or supervising others. Thus, first we will discuss the interference of third parties in marriage life and then proceed to the duty to educate and supervise.

8.1 Injury to the Right of Spouses (2050)

This is a condition where someone induces one of the spouses to leave the other against the will of the other spouse. Here we have elements worth discussion.

1… knowing her/him to be married…
The one who induces the spouse knows that the one (s) he is inducing is married. This knowledge could be direct or indirect. It is direct where, for instance, she has witnessed the marriage event. It is indirect where, for instance, she learnt that from someone who has been at the marriage event or from documents to that effect. Having a wedding ring on the ring finger or any other sign is another indication for marriage. No matter how she knows, knowledge of the fact that the person whom she has induced was a married person is a requirement.

2…he or she induces one of the spouses…This is where the actor persuades one of the spouses to leave the other

Illustration

Chala and Chaltu have just concluded their marriage irrespective of opposition from Chaltu's family who invoked Chala's poor income. To make Chaltu leave Chala, Chaltu's family offered Chaltu visa to the USA. As a result, Chaltu left Chala and went to the USA. In this case, Chaltu's family had committed an offence for they induced Chaltu to leave Chala against Chala's opposition.

3…against one of the spouses' opposition.

In other words, even if you induce one of the spouses to leave the other where there is no opposition from the spouse there is no commission of offence for spouses can agree to live separatly.[142]Under article 2050(1) and (2) the one who induces one of the spouses is playing the active role and she is pro-active. The spouse is reacting to the situation. Under sub article 3 however, the third party is a recipient. Moreover, the one who she receives, harbors or detains is a married woman. It is not a married man. Thus, this is done against the will of the husband. The act of receiving, harboring or detaining in full knowledge of the husband's opposition shall be a fault.

It is worth making two points clear here. The recipient should have the knowledge of the un willingness and opposition of the husband. If this knowledge does not exist there is no fault. Thus if there is an agreement to live separately and one receives the wife, there is no offence, for the husband is willing to accept that act by conduct. Moreover, the recipient can receive the wife if the husband is guilty of cruelty. Under such circumstances, the recipient is not at fault. Now the

[142] RFC article 55(1)

question is who is to determine the guilt of the husband.[143] Moreover, if the recipient (defendant) had good reason to think so, she is not at fault.

Illustration

Abebe and Abebech are husband and wife. One night Abebech knocks at Sara's door. When Sara openes the door she find Abebech with blood on her swollen face. Sarah less in Abebech in and asked her who did that to her. Abebech tells Sarah that her husband Abebe did that? Sara is not at fault for receiving Abebech because she has good reason (swollen face with blood) to believe that Abebe is cruel and Sara could not let Abebech stay outside. Hence, Sara received Abebech out of humanness.

Question

1. Chala and Chaltu are husband and wife. Chala left their home and started to stay at his friends' home. If Chaltu is against that, will Chala's friend be at fault for receiving Chala against Chaltu's opposition? Why or why not?
2. Sarah left her home and started living with her father and mother, accusing her husband for failure to supply maintenance. The husband is against this and he made complain his in-laws, who replied that they could not force her to leave, for she is their daughter. Have they committed fault? Why? or Why not?

[143] Read the FDRE Constitution article 20 (3) and the Criminal Procedure Code article 148.

8.2 Duty to Educate and Supervise (2052)

When we discussed fault or offence, we said that it could be by commission or omission. Article 2052 is a good example to a fault by omission. Thus, where a person has responsibility to educate and supervise an individual who is under her control or entrusted to her fails to carry on this responsibility in "I –do- not- care style" it is said she has committed fault.

As per article 2052 a person could be entrusted to the charge or supervision of another by law or in conformity with the law. Thus, parents' custody of their children emanates from the law.[144]. This obliges them to educate and supervise their children. If the parents or legal guardians fail to educate and supervise their children, they are at fault. Similarly, schools have the custody of children for the time the children are at school. During this time, the schools have responsibility to educate and supervise the children at school.

In determining whether the custodian has carried out her responsibility, the custom as well as the financial position of that person should be taken in to account. Thus, if the one who is entrusted fails to take the necessary measures as her financial capacity or custom allows, she will be at fault because of her failure. To make her liable, however, the damage should be suffered either by the person in her charge or by a third party as per article 2052(2) and (3).

Illustration

1. It is the duty of the parents and schools to educate their children how to cross roads used by vehicles. Not to do it is a fault. If the children are hit by a vehicle

[144] RFC articles 256 ff.

while crossing roads wrongly and suffer damage, the parents and schools are liable in addition to the owner of the vehicle.[145]

2. If a child throws a stone and breaks a window glass the parents are liable. What about if the child damages a vehicle that is parked in a school compound? Who is liable? Why?

3. Under question no 2 above, how would you advise the owner of the vehicle in bringing action against the parents? Under article 2052 or 2124? Why?

4. Under question number 1, if the parents were liable, how would they be liable?

[145] CCE articles 2081 and 2086

CHAPTER IX

Liability Irrespective of Fault

Strict Liability (2066-2089)

For the purpose of simplicity, we classify this chapter into three headings.

1. Liability for the types of activities which the defendant peruses (2066-2089)
2. Liability for bodily harm or injury (2067)
3. Liability for the types of instruments that cause damages (2071_2085). These are further classified into:

A. Liability for animals(2071-2076)
B. Liability for buildings (277-2080)
C. Liability for motor vehicles or machines (2081-2084)
D. Liability for manufactured goods (2085)

9.1 Necessity (2066)

When there is imminent danger against property, oneself or another person, one may cause harm to another person to avoid that danger. However, where a person acts of necessity as per article 75 of the Criminal Code of FDRE she may not be criminally liable she is, however, civilly liable as per article 2066 of the CCE. The reason to make a person who acts of necessity civilly liable and criminally free could be to strike a balance between the interest of the victim and the doer of the action.

To that effect the interest that one saved should be greater than that which was damaged, for "The courts seem to take the view that where personal injury

is threatened then any necessary damage to property will be justified. [For instance] ff a ship is threatened with sinking in a storm, the decision to throw goods over board to try and save the ship's crew could be defended by necessity".[146] The doer of the action may incur liability where she saved not only herself or property but also a third party from the imminent danger. This may beg the question why the acts should be answerable for the action in which someone benefited? The reason could be the fact that the victim only knows the actor whom she can go against. Nonetheless, the savior can go against the other whose interest is saved by virtue of article 2162 of the CCE. Lastly, the damage is assessed not in accordance with article 2091.It is rather estimated equitably as per article 2103.

9.2 Bodily Harm and Defenses (2067)

In the common law legal system bodily harm is referred to as battery. Thus, "a battery is the actual infliction of unlawful force on another person" Direct personal contacts may not be needed to cause bodily harm. For instance, you can cause bodily harm to a person by pulling a chair from under her, or by striking a horse that the victim was riding causing her to be overthrown. All these and similar indirect acts which inflict bodily harm are envisaged by article 2067.

DEFENSES

The defenses are stated under sub-article 2 of article 2067. These are:

1. Where the act causing the harm was ordered by law
2. Where it was done in legitimate self-defense.
3. Where the harm is due solely to the victim's fault.

[146] Michael P.509. Bracket added.

A. Where the act causing the harm was ordered by law

Article 56 of the Criminal Procedure Code governs how arrests are made. As per that article if the person against whom a warrant is issued for arrest submits herself to the custody of the police officer she may not be touched. If, however, she resists the endeavors to arrest such officer may use all means proportionate to the circumstances to effect the arrest. That may cause bodily harm to the one who resists the arrest. Nevertheless, the police officer may not be liable for the act that causes that harm ordered by law[147]

B. Self Defense

Self-defense is a defense where reasonable force is used to repulse an attack on a person, property or another person.[148] Though what amounts to self-defense will be a question of fact in each case the basic principle is the force used must be reasonable in proportion to the attack. That seems the reason why self-defense is qualified by the word *legitimate* under article 2067 (2). For illustration, please refer back to the case of Gari and Chala on page 37.

9.2.1 Where the harm is solely due to the fault of the victim.

No contribution is made by the offender to cause that injury. In other words, the injury would not have been caused had the victim not committed fault. That seems the reason why the law uses the word *solely*.

Illustration

[147] Criminal Procedure Code articles 18 and 19
[148] Cooke P.385

Abebech enters Shoa supermarket and runs out of the supermarket with some goods for which she has not paid . Gari-one of the supermarket's security guards- will commit no fault if he Chases Abebech and wrestles her to the ground in an attempt to apprehend her and Abebech sufferers bodily harm.[149]

9.3 Sport Activities [2068]

In sporting activities, one may injure another who is taking part in the same activity or a spectator. Where the one who causes the damage observes the rules of the game she may not be liable. The rationale behind this is what is called voluntary assumption of the risk.[150] If there is, however, a deceit or gross infringement of the rules of the sport the person who causes the injury shall be liable.

Illustration

If Chala plays football with G/Hiwot, Chala will commit no fault if he injures G/Hiwot in tackling him so long as the tackle is within the rules of the game. "The reason for this is that, in agreeing to play football with Chala, G/Hiwot will have voluntarily taken the risk that Chala would subject him to tackles which are within the rules of the game."[151] What about if Chala's tackle was a fault tackle? "In such a case, the courts draw a distinction between the case where Chala's tackle amounted to a mere 'error of judgment' or 'Lapse' and cases where Chala's tackle showed a 'wanton' or 'reckless' disregard of G/Hiwot's safety"[152]

[149] FDRE Criminal Code articles 665 and CCE article 2035
[150] Nicholas P.249
[151] I bid
[152] I bid

Question

While playing cricket Sara hits Hanna, one of the spectators, with a ball. Is Sara liable? Why or why not? What if the ball passes the cricket compound and hits Ali who is a passerby?

9.4 Dangerous Activities [2069]

Creation of abnormal risks

The activities are enumerated as follows under article 2069.

1. **Storing or using explosives or poisonous substances.**
2. **Establishing high-tension electric transmission lines.**
3. **Modifying the natural lie of the land.**
4. **Engaging in exceptionally dangerous industrial activities.**

Question

Is the enumeration exhaustive or indicative? Why?
In other words, is the extension of these items by analogy possible?

These activities are economic activities and they have advantages to the community. Thus we cannot prohibit them. At the same time we have to protect the public and individuals from hazardous activities that cause damage. Thus the owners are liable without the victim establishing fault for it would be"…

[U]nreasonable to expect the victim to establish fault,[153] which is very difficult.

The law rather requires those who engage in those activities to establish fault from the side of the victim thereby shifting the burden of proof to those who engage in those kinds of activities. They do that by proving the victim is at fault fully or partly. [154] The reason why the law takes this position seems that the giant corporations engaged in those activities are powerful in every aspect when compared with the victim. Moreover, they are the beneficiaries of the activities. Finally, yet importantly, they are in a position to distribute the loss among the community by adding the compensation they paid to the victim by adding it on the value of the products they produce.

The law also devices a mechanism to protect those who engaged in those activities by stating that engaging in those activities by itself does not make those who engage in those activities liable. They …(S) hall be liable where the danger they have created materializes thereby causing damage to another," [155]

I. A person could store or use explosives or poisonous substances. For instance, a farmer could use pesticide, which could be washed in to a river where people and animals use that river for drink. If people drink from that water and consequently became sick the farmer shall be liable. What about for the animals

[153] Richard P.312
[154] CCE article 2086 (2)
[155] I bid article 2069 (1)

II.Ethiopian Electric and Power Corporation (EEPC) erects high tensioned electric transmission lines to supply powers to different parts of the country. EEPC does not allow people to build houses beneath or around those high tensioned lines for either in the end people could develop skin cancer or if those lines fall the danger they create is disastrous. Thus if that materializes EEPC shall be liable.

III. Constructing canals, dams, highways, etc. are important. At the same time, these activities could expose people to damages. For instance, if dams burst and flooded a village killing people those who run the dams are liable.

Question

ABC Share Company builds a dam and canals to irrigate the vast land to plant sugar cane. The dam and the canals turned into a suitable area for mosquito to spread malaria. If people, in a small town near the dam and the canals are infected by the malaria, would the ABC Share Company be liable? Why or why not?

IV. Some of the industrial activities listed as dangerous by Ministry of Labor and Social Affairs are Chemical Industries, Cement and Asbestosis, Coal mining, etc.[156] So where these dangerous industrial activities cause damage to people the owners shall be liable. Two points deserve brief mentioning. Sub article (1) of article 2069 regulates a condition where these activities cause damage to persons, i.e. human beings. The damage could be injury

[156] Occupational Health and Safety Training package, Ministry of Labor and Social affairs, Addis Ababa, May 1997

or death. Whatever is the consequence liability follows provided the activities are causes for the damage.

When the damage is related to property, however, as a matter of principle the property has to be completely destroyed to make the owner of the industries liable. The reduction in value may not be reason to make the one who engage in those activities liable provided she or a person whom she is responsible for has not committed fault as sub article 2 of article 2069.

Illustration

Chaltu belongs to the Diaspora and has invested in Ethiopia. She owns a large house, gardens and marshland, which are adjacent to the Atomic Energy Establishment owned by the government. One night storm caused ponds on the land to overflow and Chaltu's marshland became contaminated with plutonium above the regulatory limits. This reduced the sales price of the marshland. If Chaltu brings action against the government, she may not win, for as per article 2070… (N) o liability shall be incurred by the government where the value of neighboring property was decreased unless the marshland was completely destroyed or the reduction in price is brought about due to the fault committed by government employees.

9.5 Types of Instruments

In this part, we will discuss liability for animals, buildings, motor vehicles or machines and manufactured goods.

9.5.1 Liability for Animals (2071_2076)

Under the common law legal system, animals are classified into *ferae naturae* [fierce by nature] and *mansuetae naturae* [tame by nature].[157]The purpose of this classification is to determine the circumstances under which the keeper of the animal would be liable. Thus, the keeper of the *ferae naturae* is strictly liable for the damage caused by the animal, for knowledge of its dangerous propensity is being presumed. This is not true for *mansuetae naturae.* for the keeper is liable for the damage caused by the animal if science or knowledge of its dangerous propensity could be proved ,e.g. proving it had previously manifested behavior of the type complained obut or has displayed a general vicious propensity. Thus, in the first case, the law presumes and the owner has to disprove that. In the second case, the victim is supposed to prove.

Basically, our law does not classify animals for purposes of determining whether the liability is strict or not. per article 2071,the owner of an animal shall be liable for any damage caused by the animal not withstanding t*hat it has eluded his control accidentally or the damage caused was unforeseeable.*[emphasis added].Three elements need discussion. The first one is … any damage caused by the animal.' This could mean damage to property or person. A dog could give a physical bite to a boy or a horse. It makes no difference.

The second one is… 'it has eluded his (its!!) control accidentally'… We said under common law legal systems animals are classified

[157] Alan P.160

into *ferae nafural* and *mansuetae naturae*. Examples of the former are lions, tigers and gorillas while dogs, cats and camels are *mansuetae naturae.* The first type of animals could cause harm by eluding their control accidentally for the keeper may not let free these types of animals. For instance, if a person wakes up in the middle of the night and finds an escaping tiger on top of his bed, and suffered a heart attack the keeper cannot defend himself by stating the tiger eluded its control accidentally for the law says *not withstanding*…

The third point is … 'the damage caused was unforeseeable'. This point could be related with the second type of animals. For instant, most of the time dogs are trained to bark and simply scare intruders and frighten them away. If, however, such kind of dogs bite people we may say the damage was unforeseeable. Nonetheless, it cannot be a defense for the keeper of the dog.

1. Custodian (holder)(2072)

The holder is a person who uses the animal for her personal benefits. She is liable for any damage caused by that animal while it is under her holding. A farmer could borrow a donkey from another farmer to transport 'teff' to a market. At market place the donkey may kick a boy and cause damage to the boy. The farmer is liable for that damage.

This holds true where a person hired the animal as well, for instance, where a farmer hired an animal to plough a field. A person could be in charge of the animal for any other reason. For

instance, a dog could be trained by a trainer. If that dog harms someone while it is with the trainer the trainer could be liable as per article 2072(2).The case of an employee is different. The employee attending the animal is not liable unless the damage is caused due to fault committed by her. The same is true for a person making use of the animal for the owner's account or for the account of another person[158]

2. Transfer of Liability (2075)

A person who suffers damage by an animal may bring action against the owner though the damage was caused while it has been in charge of someone else. The reason could be the fact that the victim may only know the owner or the victim may think that the owner has the capacity to pay damage. Similarly, the courts may order the owner to make the damage good. The owner who paid the victim may recover the amount from the person in whose charge the animal was when it caused the harm.

Question

Chaltu is an owner of a donkey. The donkey entered Abebe's farmland and destroyed crops. The value of the crops destroyed by the donkey was estimated at Br. 400. While the donkey was in custody of Abebe it kicked Sultan, a boy of 7, and injured him.

[158] CCE article 2072 (3)

Sultan had been taken to hospital and the overall cost was Br. 450. Sultan sued Chaltu and recovered Br. 450 from her. Can Chaltu recover any amount from Abebe? How?

The owner of the animal, after paying the compensation to the injured person may claim indemnification from a person under whose charge the animal was when it causes damage. And the claim to be indemnified is full, unless the damage is due to the fault of the owner of the animal or a person for whom he is liable.

Illustration

Kebede is an owner of a donkey that has a habit of kicking people when it is touched on its tail. Ato Abebe borrowed the donkey to take teff to a market. Kebede failed to tell Ato Abebe the habit of the donkey. The donkey kicked a boy who touched the tail at the market place. If the boy brought action against kebede under article 2071 and Kebede pays the boy he could not recover from Ato Abebe what he paid the boy for he committed fault, i.e. he failed to tell Ato Abebe the habit of the donkey, which would have probably avoided the damage.

9.4.4 Transferring the ownership (2074)

Ethiopian Non- Contractual Liability Law classifies animals into domestic animals and animals other than domestic, unlike the common law classification into tame by nature and fierce by

nature. Domestic animals are those animals, which it is customary to keep for purposes of pleasure or gain[159].

The purpose of the classification is to determine whether the owner and the person in whose charge the animal is could relieve themselves of their liability by simply transferring the ownership of the animal in case of the owner and paying the value of the animal in case of the person who was in charge of the animal when it caused damage[160]. Thus in case of the owner, she can relieve herself of her liability by surrendering the ownership of the animal to the person who suffered the damage provided that the damage is not the consequence of an offence (fault) committed by the owner or by a person for whom he is liable (child or employee) or where the animal is domestic animal[161]In case of a person in whose charge the animal is he can relieve himself by paying the value of the animal at the time when the damage was caused provided the animal is a domestic animal.

Before we discuss how the person will relieve himself where the animal is non-domestic we will discuss briefly classification of damage. Thus according to Michael A. Jones the types of damages are:

1. Nominal and Contemptuous damages
2. General and special damages
3. Aggravated and exemplary damages.[162]

[159] Ibid article 2074 (3)
[160] Ibid article 2074 and 2075
[161] Ibid articles 2074 and 2075 (2)
[162] Michael P.659-560

The nominal damages are those which are paid when the claimant proves the defendant has committed a tort but the claimant has suffered no loss. E.g., trespass to land.[163] The contemptuous damages are those which are paid where the court considers that the claimant's action, although technically successful, was without merit and should not have been brought. E.g. damages paid for libel action[164].

Losses that are capable of being calculated with reasonable accuracy are pleaded as special damage while inexact or unliquidated losses… are compensation by an award of general damages[165]. Examples for the former are medical expenses for personal injury and compensation for pain is an example for the latter ones.

"Exemplary damages [sometimes called indicative or punitive damages] represent an addition to what is awarded as real damages, to compensate the plaintiff for what the court considers deplorable or outrageous conduct of the defendant and (in effect) by way of punishment for it" [Bracket added]. [166]

As per article 2074(2) the owner may not relieve himself of liability by simply transferring the ownership of the animal where the damage is the consequence of an offence committed either by herself or by a person for whom she is liable. Similarly, where the damage is the consequence of an offence committed by a person who is in charge of the animal , that person's liability may not be limited only to the value of the animal. Hence, on top of transferring the ownership or paying the value of the animal, those persons would be forced to pay additional compensation to the victim. It seems, therefore, that when the law does not limit the liability to the level stated above, the law is utilizing exemplary damages against the owner and the

[163] I bid P.659
[164] I bid
[165] I bid P.660
[166] Alan P.254

person who was in charge of the animal where the cause for the damage is the fault they committed.

4 Victim's guarantee (2076)

Animals may cause damage to crops or grasses. The owner or holder of these interests may seize the animals as a guarantee until compensation for the damage is paid for her. Such kind of situation is envisaged by sub article (1) of 2076. Sub article (2) governs a situation where the animals brought damage disproportionate to their value. Such animals could be dogs or cats, which the holder of the interest could kill and notify the owner.

9.6 Liability For Buildings (2077 – 2080)

Buildings could create risk if they collapsed. A building could collapse and the reason could be man made or natural. Where a building collapses due to lack of maintenance we say the cause is man made. whereas if it collapses due to earth quack or other natural reason, we say the reason is natural. For whatever reason the building is collapses or is demolished and brought damages, the owner is liable as per article 2077(1).

Where the reason for the damage is the fault committed by the person who built the building or occupier, the owner, after paying the compensation to the victim, may claim compensation from those persons as per article 2077 (2).Similar to the owner of an animal, the owner of a building may relieve himself of liability by surrendering the ownership of the building to the person who has suffered the damage as per article 2078 (1). The question is what about if the building is totally demolished or destroyed and nothing is left to transfer?

On the other hand, the owner may not relieve himself simply by transferring ownership of the building where the damage is due to the fault committed by the owner or a person for whom he is liable. The compensation is therefore greater than the value of the building where the damage comes because of fault as per article 2078 (2).

Illustration

According to article 2079, a person endangered by another's building may require the owner thereof to take the necessary measures to avert the danger. Maintaining the building could be one of the necessary measures to avert that danger. Nevertheless, let us assume the owner failed to maintain the building and as a result, the building collapsed and caused damage. The owner cannot simply relieve himself from liability by transferring ownership of the building for she committed fault by violating article 2079.

Under article 2077, the occupier is one among those who are liable for the damage due to the building. Her liability, however, is for any damage caused by the objects failing from the building as per article 2080. The question is what are these objects? Are those objects things, which are part of the building or household utilities?

Question

1. Abebe entered Kebede's house to steal money. While he is in the house the house collapsed and injured him. Will Kebede be liable? Why or why not?

2. Would it make any difference if Abebe entered the house to take shelter from a heavy rain? Why? Or why not?

9.7 *Machines and motor vehicles*

What are machines and motor vehicles? Most of the time machines are used in industrial complex. They are fixed in certain places. Persons who operate them are referred to as operators. Nevertheless, there are certain machines which are not fixed, such are water pumps, bulldozers, caterpillars etc.

Motor vehicles are not fixed. They are mobile. Those who move them are referred to as drivers. So usually, the machines cause harm to employees who are connected with the machines through a contract. Hence, if the victim is connected with the dangerous industrial activity…which has caused the damage the consequence of the damage shall be settled in accordance with the rules governing the agreement reached. [167]

Thus, the owner of machines and motor vehicles are liable for the employees in accordance with the labor proclamation 377/2000 while for others the owners of a machine or vehicle shall be liable for any damage caused by the machine or vehicle in accordance with extra contractual liability. They are liable even if the damage was caused by a person who was not authorized to operate, or handle the machine or drive the vehicle.[168] In other words, the fact that the machine is operated or the vehicles driven by a person who is not authorized cannot be a defense. The only defense to relieve the owner from being liable is where the damage is due solely or partly to the fault of the victim.[169] Moreover, the owner shall not be liable where she proves that, at the time when the damage was carried, the machine or vehicle had been stolen from her[170].

[167] CCE article 2088
[168] Ibid article 2081
[169] Ibid article 2086[2]
[170] Ibid article 2081[2]

Machines could be operated by someone else other than the owner or someone else could drive the vehicle. Thus, a person who has taken possession of the machine or vehicles for purposes of personal gain shall be liable for any damage caused by the machine or vehicles while the machine or the vehicle is in her possession. An agent who has charge of the machine or vehicle for the owners account or for the account of another person shall be liable if the machines or vehicles caused damage due to her fault.[171]

The victim may not know the keeper or the agent who caused the damage. Thus, they may go against the owner. In addition, the court may order the owner to make the damage good in accordance with article 2081(2). Nonetheless, the owner who paid compensation to the victim may recover fully from the person in whose keeping the machine or vehicle was, provided she has not committed an offence or a person for whom she is liable has not committed a fault.[172]

Finally, two motors could collide in a road accident. When it is not proved the accident was due, entirely or chiefly, to the fault of one of the drivers, it shall be deemed each driver has contribute equally to the accident. Consequently, the owner of each vehicle, or person responsible for it, shall bear half the total amount of the damage resulting from the accident.[173]

9.8 *Liability for manufactured goods(2085)*

A person who manufactures goods and sells to the public for profit shall be liable for any damage to another person resulting from the normal use of goods. There are elements worth discussing. These are:

1. A person …This person could be either physical or natural person.

[171] Ibid article 2082
[172] Ibid article 2083
[173] Ibid article 2081

2…who manufactures goods…

When do we say goods are manufactured goods?

Under common legal system manufacture goods are referred to as "Manufactured products"[174]

Examples for "manufactured products are, cars, radios and computers."[175] From these examples we can understand that manufactured products do not simply refer to food and drinks as some think. "It has been held to cover motor vehicles, lifts, clothes, cleaning fluids and building"[176]Under our law, however a building may not be classified as manufactured products.[177]

3. …Sells to the public for profit… To start with if someone gives a manufactured product for donation and the donee is injured this article may not be applicable. Furthermore, if two individuals exchange different manufactured products, since barter is not sales under Ethiopian law, and if one of the individuals is injured due to the manufactured goods this article is not applicable. The sale should be to the public and for profit. An enterprise could, for instance, distribute food items free for the public. And if someone is injured due to that food, the victim may not be successful under this article.
4. …shall be liable for any damage…

   Here any damage could mean damage to person or damage to property. For instance, you may eat food and you could be ill. This damage is to person and the manufacturer shall be liable as per article 2085(1). It is similar if you buy a certain spare part and assemble it in your car and your car is damaged due to that spare part.
5. …resulting from the normal use of the goods. Each good has normal use. The normal use of a chair is to sit on it. The normal use of edible oil is to cook food items not to drink like water. The chair or the all could be defective. Nonetheless, if someone suffers is while using the defective chair like a

[174] Nicholas P.764
[175] Ibid P.762
[176] Cooke P.251
[177] CCE articles 2077 ff

ladder the manufacturer shall not be liable. Neither the oil manufacturer is liable for the damage suffered by a victim who drank the oil. Nor is the manufacturer liable where the the defect caused the damage could have been discovered by a customary examination of the goods.[178] Cooke illustrates this as follows:

Where it is reasonable to expect someone to inspect the goods before they are used, the manufacturer may not be regarded as the cause of the damage. If the goods were examined and the defect was negligently not identified, this makes the examiner a cause of the damage. It is not sufficient that someone had an opportunity to examine the goods; it must be shown that the manufacturer could reasonably expect that person to make an examination. For example, it would not be reasonable for a manufacturer to expect that a person would wash an underwear before using it.[179]

QUESTIONS

1.Who is a manufacturer.

In conventional sense the word manufacturers applies to retailers, whole salers,

repairers of products (Such as garages)[180]Do you agree? Why or why not?

2.Who is consumer?

A consumer is a any one whom the manufacturer should foresee would be affected by the product. This will include purchasers, donnees, and borrowers, employees of purchasers and bystanders who happen to be injured.[181]

Do you agree? Why or why not?

[178] Ibid article 2088[2]
[179] Cooke P.253
[180] Ibid P.251
[181] Ibid

9.9 Defenses or justifications for strict liability

Before discussing article 2086, it is better to summarize other defenses stated under articles. Thus, regarding articles 2066 and 2067 the defenses are given under each sub article (2) as victims fault. They are uniform defenses. Moreover, sub article (2) of 2067 presents order by the law and legitimate self-defenses as justifications. As regards article 2081, if the vehicle or the machine is stolen and that can be proven by the owner, that can serve as a defense. Article 2088 states that if the harm is occurred to a person who connected with instruments due to the contractual relations there will not be liability based on tort. The consequences of the damage shall in this case be settled in accordance with the rules governing the agreement reached.[182] Even in the absence of contractual relations without the owner deriving any profit from this operation, the owner is not liable, if the damage is sustained, unless the owner has committed a fault[183]

Now we can discuss article 2088, which is applicable under all situations as a defense. To start with, there seems to be a difference between the English and Amharic versions of sub article (1)of 2088. While the English version reads… "May relieve themselves…" The Amharic version reads…The Amharic version seems correct for two reasons. The simple reason is where there is inconsistency between the English version and the Amharic version the latter one prevails, for the Amharic language is a working language of the FDRE government[184]. Second, in light of sub article (2) of the article 2086 the Amharic version gives more sense than the English version. For as per article 2086(2) those persons declared legally liable shall be relieved of their liability, entirely or in part, only where the damage is due solely or partly to the fault of the victim

[182] CCE article 2088(2)
[183] Ibid article 2089
[184] FDRE Constitution article 5(2)

\Thus, the only justification to relieve those persons declared legally liable is the claimants fault which is referred to "as the claimants lack of care."[185]Here the idea is the claimant's negligence contributes to her injury. Thus, the standard applied to the claimant in contributory negligence is the same as that of the reasonable person in fault liability. Here the test, however, is not whether the damage or the accident was foreseeable but whether the claimant acted reasonably, that is to say, with the amount of self-care that a normal person would have exercised in the circumstances[186].

Illustration

1. Wearing a seat- belt is a sensible practice for all journeys no matter how short the journeys are or whatever the conditions are.
2. If someone, while visiting a construction site, is told to wear a crash helmet but fails to do so and sustains injury.

Thus, those grounds enumerated under sub article (l) of article 2086 may not be invoked by those persons who are legally declared liable to relieve themselves from liability. The grounds are the following:

1. Those persons cannot say we have not committed fault, for as we have already said strict liability is a liability without fault. And the persons,i.e. owners, custodians of animals; owners, those who build the buildings and occupy, them; users or those who store explosives or poisonous substances; owners or keepers of motor vehicles and finally manufacturers of goods are liable not because they committed fault. Rather, among others, they are either owners or the beneficiaries.
2. They cannot relieve themselves by stating that it was impossible to establish the cause of the damage. For instance in a car accident, in which a pedestrian is injured, the cause could be the negligence of the owner while driving the car (high speed)or the cause could be defect in a break though the

[185] Simon Deakin, Angus Johnston and Basil Markesinis, Tort Law, Oxford Press, 2007, P.897(Here after Simon)
[186] Ibid

driver was prudent driver. The victim is not obliged to establish this nor the owner can excuse herself by saying the cause is not known.

3. They cannot exempt themselves from liability by establishing that it was not within their power to prevent the damage. This is what is known as force majeure or acts of God. Thus, acts of God may not be a ground to relieve those persons from liability. For instance, if a building collapses due to earth quake and injures a passerby, the owner may not invoke force majeure to relieve herself from liability.

4. Finally, the fact that the damage was due to the fault of a third party as well cannot be a justification to relieve oneself from liability. These third parties, however, do not include an employee attending to an animal (2072(3)), thieves and agents (2081(2)) and 2082(2) respectively for if the damage was caused due to the fault of those third parties, the actors themselves will be liable and the fault could be invoked by the owner.

It is only under such circumstances fault they a committed by third parties can be invoked as a ground to relieve oneself from liability; otherwise it cannot be a ground.

Questions

Would you please write down those third parties envisaged by article 2086(1)

One final point. The amount of liability depends on how much is contributed by the victim for the damage to occur. Thus, if the damage is due solely to the fault of the victim the defendant will be relieved from liability entirely. If, however, the contribution of the victim is partly, the defendant will be relived in part. The issue is a question of apportionment, i.e. dividing the liability between the victim and the defendant. Thus, "In principle, the damage to which apportionment applies is only that part of the claimant's over all loss which is jointly attributable both to his own fault and that of the defendant.

If the claimant suffers the loss entirely through his own fault, apportionment should be irrelevant[187]

What about if the damage is caused by the objects other than those stated in the preceding articles? For instance, a tree falls and crushes a vehicle. As per article 2087, the owner of the tree shall be liable where the cause for the damage is her fault or an offence committed by a person for whom she is liable. Thus, she is not liable for the mere fact that she is the owner of the tree for article 2087 states "…the owner or the keeper of an object shall be liable for any damage caused by the object *only* where she has committed an offence. Thus, the victim is obliged to establish fault from the side of the owner or the keeper to claim damage. Otherwise, the owner or keeper may not be liable.

Questions

1. A boy, while crossing a highway without using a zebra line, is hit by a vehicle. Can the owner of the vehicle invoke the act of the boy as fault to relive herself from liability? Why or why not?

2. A girl is walking on the right side of the road, which does not have a side road for pedestrian. The girl is hit by a car which is driven in the same direction .Can the driver relieve herself from liability by invoking the act of the girl as fault? Why or why not?

3. Write down examples for objects in article 2087.

[187] Ibid P.902

CHAPTER X

VICARIOUS LIABILITY

Vicarious liability is "…liability imposed on one person for the wrong doing of another."[188] Similar definition is given by John Cooke, which reads "Vicarious liability is where one person is made liable for the tort of another person.[189] Thus, under the Ethiopian tort law parents and others listed under article 2125 are liable for the wrongs done by a minor child. The state is liable for its civil servants and employees acts.[190] Similarly, bodies corporate are liable for their representatives, agents or paid workers act.[191] The employers are held liable for the acts of their employees.[192] Finally, the managing editor of the newspaper, the printer of the pamphlet or publisher of a book is liable for defamation committed by the author of the printed text.[193] The issue, which we will try to discuss, is why someone is held liable for the wrong committed by another?

10.1 The Rationale why one is held liable for the wrong *committed by another*

Some authors refer to vicarious liability as another instance of strict liability[194]in the sense that one person is made liable for another without herself committing any fault. Therefore, it is worth asking why one is liable for the wrong done by another. The possible rationales are:

[188] Simon p. 677

[189] Cooke p. 461
[190] CCE article 2126
[191] Ibid article 2129
[192] Ibid article 2130
[193] Ibid article 2135
[194] Simon p. 664. Cooke p. 461

10.1.1The control test: This theory attributes to those who are made liable the ability to control the behavior and precise manner of the wrong doers. For instance, the employer has the ability to control the behavior and precise manner of his employees.[195] This is expressed under article 4(1) of Labor Proclamation No 377\2003 which reads "A contract of employment shall be deemed formed where a person agrees directly or indirectly to perform work for and *under the authority of the employer.* Furthermore, one of the obligations of the workers is to *follow instructions given by the employer* as per article 13(1) of the same proclamation. Thus, the fact that the employee is working under the authority of the employer and follows instructions given by the same tells us the employer has the ability to control the behavior and precise manner of his employees.

The same is true for parents, for they have the ability to control the behavior and precise manner of their minor children by doing the following:

1. Direct the upbringing of the minor.
2. Take the necessary disciplinary measures for ensuring her upbringing.
3. Direct and supervise the social contacts of the minor.
4. Ensure the minor is given general education or professional training commensurate with her age and abilities.[196]

Thus, when the law makes the employers or the parents liable for their employees or children's wrong doing respectively it is implying you have committed wrong for you failed to control the behavior and precise manner of your employees or children. This test is not free from criticism, especially concerning employees "…as many employees perform skilled tasks, which the employer is incapable of understanding. For instance, to say that a health

[195] Ibid p. 665
[196] RFC articles 258, 259 and 260

authority chief executive controls the work of a constant is stretching the meaning of the word."[197]

10.1.2. *Analogy with causation*

The state, the employers or the bodies corporate are those who…set the whole thing in motion and that, therefore, they should bear the consequences of a third party who suffers through their employees wrongful conduct.[198]Setting in motion by the employer is expressed in the Labor Proclamation under article 12 as follows:

1. The employer provides work to the worker.
2. The employer provides the worker with implements and materials necessary for the performance of the work.
3. The employer pays the worker wages and other emoluments.

10.1.3 *Deep pockets*

As per this theory, the father, the state, bodies corporate and the employers are richer. Hence they should pay. "So making A vicariously liable in respect of B's tort will help to ensure that those who have suffered loss. because of B s tort will be able to sue someone of substantial means for compensations for their losses.[199]

The weakness of this theory is that it "…justifies the employers being liable for all the torts committed by his employees, whether they were committed within or without the course of their employment.[200]

10.1.4 *Economic and moral consideration*

This theory is based on the fact that "…the person who drives a benefit from the activity of another should also bear the risk of the damage inflicted by those

[197] Cooke p. 462
[198] Ibid
[199] Nicholas P.638
[200]Ibid

acts."[201] Nicolas refers to this as elementary fairness. It …dictates that if you seek to make money from engaging in some activity and other people suffer losses as a result of your engaging in that activity, you should compensate them for that loss."[202]In simple language, if you want to obtain the gains resulting from engaging in that activity, then you should bear the losses as well.

10.1.5*Loss spreading*

This is another economic variant, which enables the employer to spread the loss through insurance or the price of the products. The employer does this "Either by charging his customers slightly higher prices or by making a claim on his liability insurance.[203]After this brief background, let us now discuss Ethiopian vicarious liability provisions.

10.2 Liability of parents and others

As per article 2124, the father shall be liable under the law where his minor child incurs liability. Thus according to this article the father is a primary person to be liable for his minor child is wrong doing. The mother is only liable where she exercises the paternal authority over the child as per article 2125(a). This needs some further explanation.

As per article 635 of the Civil Code of Ethiopia, the husband is the *head of the family*. Hence, the spouses shall co-operate under the *guidance of the husband*, to bring up the children and to prepare for their establishment. Thus, the father who is the head of the family in upbringing the children, has to take the blame for the wrongdoing of the children.

This is no truer in contemporary Ethiopian. To start with, as per article 34(1) of the FDRE Constitution men and women have equal rights while entering into, during marriage and at the time of divorce. Consequently, the spouses shall have equal rights and obligations in the management of the family. Concerning

[201] Simon P.665
[202] Nicolas p. 639
[203] Ibid p. 640

their children, they shall cooperate to bring up and ensure the good behavior and education of their children in order to make themresponsible citizens.[204] Thus, both spouses should take responsibility for the wrongdoing of their children.

Moreover, as per article 204 of the CCE or article 219 of the RFC, the father and the mother are, during their marriage, jointly guardians and tutors of their minor children. It is in case of death, disability, unworthiness or removal of one of the parents, the one who remains shall alone exercise such functions.[205] Thus, the one who exercises that function shall be answerable for the wrongful act of the children. Furthermore, where the marriage is dissolved by divorce and children are in the custody of one of the parents, the one who has the custody shall be liable for the wrong done by the children. In other words, if it is the father alone who exercises that function, he bears the consequences for the wrong done by his minor child. On the other hand, if it is the mother who exercises the same, she shall be liable for the minor child. Article 2125(a) is, therefore, applicable where the father of the child is unknown.

To summarize, the father and the mother, as parents, are jointly liable for the wrong done by their minor child. One of them is liable where she\he exercises the guardian authority alone for this or that reason. Finally, the mother shall be liable where she exercises that authority alone where the father is unknown, for the child shall have a judicial bond only with her mother.[206] The words in lieu of article 2125, therefore, do not apply for the mother. Parents are either jointly liable where both exercise parental authority or separately liable in case one alone exercises the authority.

[204] RFC article 50
[205] CCE article 205 or RFC article 220
[206] RFC article 107(2)

This is true where the child lives inside the family home. Where the child lives outside the family home, however, the person in whose charge the child is placed shall be liable.[207]

The child could be said is living outside the family home when she lives, for instance, in governmental or private orphanages.[208] Thus where that child commits wrong while she is in governmental or private orphanages these institutions shall be liable. Apart from family home, governmental, or private orphanages, children are in school when they learn at school. If children commit wrong while they are at school the head master of the school shall be liable.[209]

As per article 89(2) of Labor Proclamation, it is prohibited to employ persons less than 14 years of age. In other words a person can be employed where she is 14 and above.

Moreover as per article 263(1) of the RFC a minor can be employed as of 14 and receive income from her employment. On the other hand, a minor before actually engaging in working she may be provided with a particular training for a particular job. This undertaking is called an apprenticeship and the one who engages in the same is referred to as apprentice. An apprentice is a young person who works for an employer for a fixed period in order to learn the particular skills. During the apprentices, the minor may commit wrong and injure someone. For that wrongdoing, the employer shall be liable as it is stated under article 2125(c).

After the completion of apprenticeship, if the child proves competent, she may be employed under contract of employment as any other employee. Thus, the employer shall be liable for an act committed by a child as per articles 2130 and 2131, which we will discuss in detail when we discuss the employers liability.

[207] CCE article 2125(b)
[208] RFC article 192
[209] CCE article 2125(c)

10.3 Liability of the state 2126

The FDRE Constitution established a Federal Democratic State. Accordingly, the Ethiopian state shall be known as the Federal Democratic Republic of of Ethiopia.[210]

It consists Federal Government and State Members.[211] Thus, state refers both to government at Federal and Regional levels. Accordingly, civil servant means a person employed permanently by either Federal or Regional Governmental offices.

The state, as any other person, employs civil servants to provide services to the public. While giving these services the civil servant or government employee may commit fault. This fault could be personal or professional fault. Where the fault is personal, the state shall not be liable.[212] Where the fault is professional, however, the victim may claim compensation from the state. Nevertheless, the state may subsequently claim it from the servant or the employee at fault.[213] The difference between personal and profession fault is given under article 2127. Nonetheless, that article does not set objective criteria to differentiate the two types of faults. Thus, if the civil servant or employee believes in good faith that she acted within the scope of her duties and in the interest of the state, then the fault shall be deemed professional fault. In addition, the good faith is presumed. Thus, one who challenges that has to prove the contrary. The law utilizes elimination mechanism to tell what personal fault is by stating a fault is personal fault in other cases, i.e. where it is not professional fault.[214]

[210] FDRE constitution article 1
[211] Ibid article 50 (1)
[212] CCE article 2126 (3)
[213] Ibid 2126 (2)
[214] Ibid article 2127

10.4 *Liability of bodies corporate and employers [2129-2133]*

Before discussing the liabilities it is worth knowing what bodies corporate are and who employers are. As per article 31 of the FDRE Constitution, every person has the right to freedom of association for any cause or purpose. The cause or the purpose of such association, nonetheless, cannot be to illegally subvert the constitutional order or to promote such activities.

Association, therefore, could be established to secure or share profits as it is stated under article 404 of CCE. These types of associations are subject to the provisions of the Commercial Code of Ethiopia relating to partnership.[215] The same shall apply to cooperative and other grouping, which tend to satisfy the financial interests of their members by placing them in a position to save money.[216] The Civil Code does not govern these types of associations. Rather their specific laws govern them.[217]They are as well bodies corporate. Trade unions and groupings of a religious character are bodies corporate. The former one is governed by Labor Proclamation 377\2003 while the later shall be subject to the special laws concerning them.[218]The state and the church are also bodies corporate as per article------?

Thus bodies corporate are those associations established in accordance with Memorandum of Associations and Statutes with a view to obtaining a result other than the securing or sharing of profits. These associations shall have directors appointed by the general meetings as per article 437 of CCE. They also shall have servants as we can read from article 457(1) of the CCE. Other bodies corporate we mentioned are established as per the proper special laws governing them. Thus bodies corporate shall be liable for the acts and omissions of its

[215] Commercial code , Negarit Gazette No. 3 extra ordinary issue 1960, Addis Ababa article 210 ff
[216] CCE article 405
[217]
[218] CCE article 407

directors and servants as well as their employees, whenever such acts and omissions have taken place in the execution of the functions which entail liability.[219] These bodies corporate are liable for their directors, servants or employees where the directors, servants, or employees are at fault while executing their functions, which is referred to as discharge of duties.[220] If the damage is caused at the place where she is normally employed or if the damage is caused during the time when she is normally employed,[221] it is presumed the fault is done while she is discharging her duties. This presumption is rebuttable for proof to the contrary is admissible to rebut such presumption as per article 2132(2). In addition, the wrongful act or the abstention should be committed for carrying out the duties.[222]

Carrying out the duties is referred to in the common law legal system as "In the course of his employment."[223] The great tort lawyer Sir John Salmond in the first edition of his *Law of Torts* stated that the employee committed the wrong in the course of her employment if either:

A) A wrongful act was authorized by the employee's employer or

B) The employee's employer authorized a wrongful and authorized mode of doing some act.[224]

In explaining Salmond, Cooke said "To put the test another way, under the Salmond test, an employee's tort will have been committed in the course of his employment *if employee did something he was employed to by committing that tort*." [225]

[219] Ibid article 457 (1)
[220] Ibid article 2129
[221] Ibid article 2132
[222] Ibid 2131
[223] Nicolas p. 637; Cooke p. 462
[224] Quoted from Nicolas p. 646
[225] Ibid

Illustration

1. Chala is employed by XYZ Co. to drive a car from Dire Dawa to Harar. Chala drove the car at 100-k.m. /hour, thereby breaking the speed limit and injuring Chaltu. Under Salmond test, XYZ Co. would be vicariously liable in respect of Chala's negligence for Chala injured Chaltu while he was discharging his duties or while he was in the course of employment for he was employed to drive the car from Dire Dawa to Harar.
2. Assume Chaltu is an owner of a bar. She hired Chala to work in the bar and was charged with the general responsibility of keeping order in the bar. If Gary was making a nuisance of himself in the bar and Chala hit him to shut him up, then Chala would have done something he was employed to do by hitting Gary and Chaltu would be vicariously liable in respect of Chala's tort under Salmond test.

In the first case even if Chala had been told to limit his speed to 90 k.m/h. the XYZ Co. may not escape from being liable for the fact that the wrongful act was ultra vires,or that its author was strictly forbidden to commit. This may not release the person who is legall from her liability.[226]

Let us assume that Chala, in the second case, in hitting Gary, was merely taking revenge on Gary for some slight, which Chala suffered at Gary's hands in the past. Then, under Salmond test, Chaltu would not have been vicariously liable in respect of the wrong committed by Chala hitting Gary, for the liability shall not be deemed to have been incurred in the discharge of the duties where such duties have merely provided their author with an opportunity of committing the wrongful act or abstention which caused the damage.[227]

What we have been discussing about bodies corporate and their agents, paid workers and representative is applicable to employee – employer relationship. Nevertheless, we have to define employee and employer. To

[226] CCE article 2131(2)
[227] CCE article 2133

answer this question we resort to Labor Proclamation No.377/2003. As per that proclamation employer means a person or an undertaking who employs one or more persons who agree directly or indirectly to perform work for and under the authority of an employer for definite or indefinite period or a piece of work in return for wage. A worker or employee is a person who has an employment relationship with an employer in accordance with an employment contract.[228]

In the introductory part of vicarious liability, we have discussed in detail why employers are liable for the wrongful act of their employees. Among those rationales, one was the fact that the employee is under the control and authority of the employer. In other words, if a person is an independent worker or contractor, though she is working for the employer, the latter is not liable for the faults or offences by an independent worker or contractor,[229] for an independent worker or contractor undertakes to produce a given result, under her own responsibility.[230]

10.5 DEFAMATION

Under article 2049 a person is liable for defamatory matter because of positive act, i.e. where she communicates words, pictures, or written materials to at least one person other than the person defamed [Cooke p. 407]. Here the author has a primary responsibility. Nevertheless "(E)xceptionally one may also be liable for not taking positive steps to prevent the publication by someone else".[231] or, "because she approved it" [232] Thus the managing editors of the newspaper, the printer of the pamphlet or

[228] Labor proclamation article 2(1)&(3) and article 4(1)
[229] CCE article 2134
[230] CCE article 2610
[231] Simon P.772
[232] Cooke p. 407

publisher of the book shall be liable for defamation committed by the author of a printed text.

Hence, the authors are liable for positive acts under article 2049 for they have primary responsibility for the defamatory matter. And the managing editor, the printer and the publisher may be liable for either approving the defamatory matter or as accomplices.

Our law, however, does not seem to make any discrimination in making liable both the author of a defamatory matter and the publisher, the managing editor or the printer. for under article 2136(2) it is stated that the person who caused the damage and the person whom the law declared to be liable for such damage shall be jointly liable to repair the damage.

Even if we take, the managing editor, the printer or the author as accomplices that may [i]not save them from being liable for no distinction is made between instigator, principal and accomplice[233]. It seems there is, however, one outlet for the printer, i.e. a person whose name is defamed may bring action against the managing editor, or printer or the publisher for it is easier to identify and locate them rather than the author. Under such circumstances the managing editor, printer or the publisher may demand that the author of the damage be made a party to the proceedings brought by the victim for compensation.[234]The reason seems that the person who caused damage (the author) shall repair it notwithstanding that another person (printer, managing editor or publisher) is declared by law to be liable for such damage.[235]

[233] Article 2155(2)
[234] Article 2136
[235] Ibid. Bracket added

PART III: REMEDIES TO EXTRA CONTRACTUAL WRONG

Chapter XI Introduction to the Basic Notions of Damage

11.1Conceptual Analysis of Damage

As was discussed in the earlier part of this material, proving the existence and the extent of liability are cumulative mandatory requirements in an action for compensation in extra-contractual liability law. This means, if an action for compensation is based on the provisions of extra contractual liability law, the plaintiff has the responsibility to prove that he has incurred damage because of acts or circumstances for which the defendant is liable under the law. As a rule, without proving the existence of damage caused to his interest by the activities of the defendant or by certain things controlled by the defendant, the plaintiff is not entitled to compensation. So, important issues in this part of the discussion are *the* determination of the type and extent of the liability. Thus, a discussion of the notional classification of damage and the standards of its assessment would be of great help.

The word "damage" is derived from a Latin word "*damnum*" meaning loss or species of loss. It is a harm or injury caused to a person's legitimate interest. The interest harmed may be related to the person's material (pecuniary) interest or to moral (non pecuniary) interest. Therefore, based on the nature of the interest harmed, damage can be classified into two: material damage and moral damage. Material damage is a damage which affects the person's pocket, whereas harm to his moral interests affects his feelings or emotions. However, the classification of damage into material and moral is not similar in all jurisdictions. For instance, the Italian law distinguishes damages as Patrimonial to denote material damage and non-patrimonial to denote moral damage. Categorizing damage as material and moral is

not known in the common law legal system. They sometimes divide material damage into intangible material interest and tangible material interest. But the usual classification of damage in common law systems is pecuniary and non-pecuniary, which is equivalent to material and moral damage respectively.

Be it material or emotional, proving the existence of damage and its extent is a prerequisite for compensation. Many countries provide damage as a primary criterion to order awards for damage. For insistence, the German tort law states different requirements by which a plaintiff can claim compensation. Among these the primary point which courts underline is that, whether there is violation of enumerated rights or interests, i.e. life, body, health, property and other rights that the law covers. The French law also states three requirements for compensation to victim, causation, fault (in case of fault based liability) and damage. Damage is among the mandatory requirements. In Ethiopia, too, proving damage is a prerequisite for compensation. The cross reading of Articles 2092 and 2102(2) of the civil code clearly shows that proof of the existence of damage is a mandatory requirement for the plaintiff to claim compensation.

11.2 Classifications of Damage

11.2.1 Material Damage

As stated above, damage or injury caused to a person's protected interest can be broadly classified into material and moral damage. Material damage, as discussed above is an injury caused to a person's economic or financial interest. This damage affects the victim's credit worthiness or economic status in one or another way. The common example of material damage is loss of earnings with all other expenses attributable to the tort such as medical care, expense of traveling, cost of equipment, loss of pension rights and other losses, which have pecuniary nature. It also includes harm, which makes a thing deteriorate or destroys it and injury to property that has pecuniary nature. Material damage affects a person's credit

worthiness. Material damage may have two important components. These are present (actual) material damage and future material damage.

Present Material Damage

Present material damage refers to the material or pecuniary loss sustained by the victim of the tort that covers the loss occurred from the date of the commencement of the injury up to the date of final assessment by the court. It can be measured by the difference between the plaintiff's present estate and what would be now his estate had the harmful fact for which redress is sought not occurred. Present material damage can be further classified into two: a *damnum emergens*, a Latin term, which denotes the occurrence of a loss (diminution of estate), or a lucrum cessans, the Latin term, which denotes the prevention of a gain (non-increase of estate). [Krzeczunowicz: p.13]. *Damnum emergens* includes two different aspects. Firstly, it refers to the type of damage caused to a person's tangible or intangible asset due to the depreciation, destruction or loss caused to such asset. In this case the value of the plaintiff's assets is diminished due to the injury-causing agent that makes the defendant liable. The other aspect of *damnum emergens* refers to the increment or creation of a liability to the plaintiff. This does not refer to the direct injury caused to the person's material interest. Rather it refers to the circumstances where a person becomes civilly liable to a third party because of the wrongful damage caused by the defendant.

Illustration: Assume that while Mr. A is driving Mr. B's car without authorization from the latter, he was involved in a severe collision with another car which belong to Mr. C. Assume also that both the cars involved in the collision are damaged and the cause for the collision is proved to be the fault committed by Mr. A who drove the car contrary to traffic regulations. In this hypothetical case, it is possible to discern the *damnum emergens* caused to Mr. B's property right. Firstly, the value of the car is reduced due to the damage caused during the collision. This diminishes

the value of Mr. B's asset. In order to repair the car, Mr. B has to pay some amount of money. Secondly, by virtue of Article 2081 of the civil code, Mr. B is liable to compensate Mr. C for the damage caused to the latter's car. This fact also decreased Mr. B's estate, i.e. his credit balance is affected. So, both the damage caused to Mr. B's car that reduced the value of his asset and the liability Mr. B owed to Mr. C due to Mr. A are components of the *damnum emergens*.

Lucrum cessans in the context of present material damage refers to the damage incurred by the plaintiff due to the prevention of gainful opportunities or loss of earnings resulting from the tortuous act of the defendant. In the hypothetical case provided above, the owner of the car, Mr. B, in addition to the money he paid out of his pocket to repair his damaged car and the money he has paid in the form of compensation to Mr. C, he lost the daily income he would have normally derived by hiring his car for some period of time until the car is repaired and made ready for its normal function. So, *lucrum cessans* refers to the damage incurred by the plaintiff where the injurious event blocks the victim from increasing his estate or wealth. In other words it refers to the prevention of gain that could have been materialized had the injurious event not occurred.

Future Material Damage

Future material damage is the other main component of material damage. It is a damage that is going to occur in the future. The dividing line between present damage and future damage is drawn in terms of time. The dividing date is that of the judgment assessing the damage. Where the judgment as to the amount of compensation is appealed and varied, it is the date of the new assessment on appeal that separates present from future harm.

In short, future damage includes the damage that will occur certainly or with a higher probability after the date of judgment. Although future damage was not

present at the time of a judgment, it is compensable without waiting for it to materialize provided that it is certain to occur.

As compared to present damage, assessment of future damage is very problematic. As was mentioned earlier, the overall present damage resulting from a past fact may be measured by the difference between the plaintiff's present estate and what would now be his estate had the fact not occurred. This test cannot apply by analogy to future damage. For present damage, the "difference" test operates between a given and "hypothetical" present estate. But for future damage, both items of comparison would have to be hypothetical, the date for comparison arbitrary, and the number of conjectural factors unmanageable Id: 18. Assessment of future damage becomes very difficult because it is not related to the actual occurrence of loss at the time of assessment but only to the non-occurrence of expected future earnings or gainful opportunities. It is sometimes more than difficulty. It may be temporarily impossible, for instance, the medical prognosis for a bodily injury may still be reserved at judgment time. The ultimate result may be death, or full recovery, or disability of an unknown degree. Now in view of the short limitation period (article 2142) and the immediate need of the victim for funds to cover his present expenses, the victim often cannot postpone his action until the final medical prognosis, but has to bring it earlier. And under the *res judicata* prohibition of article 2151, he may be unable to bring a fresh action after the final prognosis for the plaintiff is technically prohibited to split his claim for present damage and future damage.

The terms "present" and "future" denote no difference in the nature of the harm. In particular, *damnum emergens and lucrum cessans* may affect both the past and the future, although *lucrum cessans* is more frequent and pervading in the "future" harm category. Consider the following examples to understand future material damage well.

Where a person's motorcar or body is tortuously injured, he normally sustains, first a *damnum emergens*, his car is normally worthless. But instead of demanding a sum for his loss of value, or a reparation in kind at the defendant's expense (article 2119), he himself undertook the repatriation, then the judgment date may divide his total repair expenses into present (incurred) and future (impeding) damnum emergens. As to his body, it has no market value and it is not a thing that can be replaced or repaired by application of Article 2119, the *damnum emergens* consists primarily in his expenses for repairing it (for hospitalization, medical care drugs…). These expenses may be protracted until after judgment *date and, thus, constitute "future" damnum emergens. As* mentioned before*, lucrum* cessan results from impediments to gainful use of a person's working capacity or property. These impediments may extend beyond judgment date. In the above example, the motorcar will not be rented until repairs are completed. As to his working capacity, it will not be used to produce earnings while he is in the hospital and it will remain impaired wholly or in part, if his total or partial disability is permanent. Thus, in bodily harm cases, *lucrum cessans* may extend indefinitely into the future. [Id]

11.2.2 Moral Damage

The term moral damage refers to the harm or injury inflicted to a person's feeling or non-pecuniary interest. It is an injury caused to a person's honor, reputation or personal feelings of the victim. In many bodily injury cases, both moral damage and material damage are inflicted to the victim. While the loss of earnings which resulted from the temporary or permanent total or partial incapacity affects the victim's pocket, that is, material interest, the pain, mental anguish and frustration which resulted from pain and disability or disfigurement of his body parts affects the victim's feeling, hence referred to as moral damage. There are situations where

the same tortuous act can inflict both material damage and moral damage to a person. This is usually what happens in many bodily injury cases.

Review Questions

1. Discuss the following terminologies:

- Damage v Damages
- Material damage
- Moral damage
- Present damage
- Future damage
- Damnum emergens v Lucrum Cessans

2. Discuss the point of demarcation between present material damage and future material damage.

Chapter XII Modes of Compensation

12.1. Modes of Compensation for Material Damage

12.1.1. The Rule of Pecuniary Compensation

The material damage sustained by a person due to the tortuous act of another person can be compensated or made good in different ways. Broadly speaking, the modes of compensation for material harm, as stipulated in Article 2090 of the civil code, can be categorized into **pecuniary or non-pecuniary** compensation**.** This section is exclusively devoted to pecuniary compensation and the other mode of compensation will be thoroughly appreciated under the subsequent section.

To begin with the definition of the term "pecuniary" compensation, it means compensation by means of money. That means that the damage inflicted to the pecuniary interest of the victim has to be quantified and valued in terms of monetary equivalence so that the harm will be made good by the award of compensation expressed in terms of money. *Article 2090 of the civil code that deals with "Modes of Compensation" for material damage laid under sub-article one is as follows: "As a rule, the damage is made good by compensating the victim by means of an equivalent sum of money". This provision set the governing rule that the normal and usual mode of compensation for material damage is monetary. So, in the absence of any strong reason to deviate from the rule, the material damage suffered by the victim has to be compensated by monetary equivalence. The exceptions to the rule of monetary or pecuniary compensation will be discussed subsequently. Suffice it to say, pecuniary (monetary) compensation is the rule, whereas non-pecuniary compensation is the exceptional mode of compensation for material damage.*

12.1.2. Non-Pecuniary Compensation

Although our law sets pecuniary compensation as an ordinary or usual mode of compensation, there are also other non-monetary or non-pecuniary forms of compensation or remedy that may be awarded by the court in exceptional circumstances. The exception to the rule of pecuniary compensation is laid down under Sub-Article two of Article 2090 of the civil code, which reads: "The court may, subject to the liberty of persons and to the right of third parties, order in lieu or in addition to money damages other appropriate measures to make good or limit the damage". The provisions of the civil code Article 2118 through Article 2123 provides a partial enumeration of the "other modes of compensation" other than payment of monetary compensation to the victim. Restitution, reparation in kind, retraction of defamatory publications, enjoining cases of unfair competition and injunction are prominent among such non-pecuniary modes of compensation that can be granted in addition to or as alternative to monetary compensation in appropriate cases envisioned in Article 2090(2) of the civil code. It is important to note that this enumeration is not exhaustive but illustrative. Because Article 2090 (2) can be broadly interpreted to include any other modes of non-pecuniary compensation within the limits provided therein other than those remedies enumerated in Article 2118 through Article 2123. These limits are "liberty of persons" and "rights of third parties".

The phrase "*subject to the liberty of persons" incorporated under sub-Article two of Article 2090 articulates that deviation from the rule of pecuniary compensation is possible where* non-pecuniary civil compensation does not contradict with the liberties of the defendant recognized under the various laws including the constitution. For example, where an order of reparation in kind or injunction as a remedy threats the liberty of the defendant, it shall not be granted, as the liberty of the defendant prevails over the material interest of the plaintiff. For instance, the defendant shall not be forced to work for the plaintiff as it contradicts the latter's

right not to be subjected to a forced labour. In other words, insofar as the awards of monetary compensation can reasonably rectify the mischief caused to the victim, the other modes of non-pecuniary compensation shall not be granted where the persona liberty of the defendant is at stake.

The other phrase *subject to the "rights of third parties" incorporated in Article 2090(2) also* illustrates the *in personam* aspect of the remedies of the law of obligation. The remedies enumerated in Articles 2118 through Article 2123 of the civil code apply against only the party in breach of the tortuous obligation and not against third party right-bearers. For instance, the remedy stated in Article 2118 (1) of the civil code, restitution can not be granted as a remedy in disregard of the property law Articles 1161 and 1164, which enable the person who possesses a thing in good faith as qualified therein to resist restitution. Therefore, the other modes of compensation should take into consideration the rights of third parties as stated in the provisions of the law. That is, where the rights of a third party are at issue, restitution of the thing may not be granted as a remedy to the mischief caused to the plaintiff. Thus, the liberty of the person (defendant) and the rights of third parties are the restrictions that qualify the appropriateness of the grant of non-pecuniary compensation for material damage. These phrases set limitations on the broad discretionary power of the court to deviate from the rule of monetary compensation for material damage.

12.2. Modes of Compensation for Moral Damage

12.2.1. The Rule of Non-Pecuniary Compensation

We have already explained that moral damage is a harm inflicted to a person's feeling or emotion. It is an injury caused to the honor, reputation or personal feelings of the victim. Therefore, moral damage refers to the injury caused to a person's feeling that cannot be assessed in monetary terms. It is difficult to set

monetary equivalence for an injury caused to a person's feeling. Thus, as a rule, the mode of compensation for moral damage is non-pecuniary. This is because injury to a person's feeling cannot be measured in terms of money. In addition to the difficulty to measure an injury caused to a person's feeling in terms of money, the other strong reason may be that moral damage may be better made good by non-pecuniary forms of compensation than by monetary awards. For example, an injury caused to a person's reputation through defamatory publications can be made good through an order of retraction of the defamatory publication.

In Article 2105 of the civil code, the principle related to the mode of compensation for moral damage is clearly stated. Sub-Article one of this provision stated that the author of a wrong shall make good the moral harm resulting from the wrong wherever adequate procedure exists for such redress. Sub-Article two further stipulated that pecuniary compensation for moral harm may be awarded only in cases expressly provided by law. The phrase "only in cases expressly provided by law" indicates the exceptional nature of awarding pecuniary compensation for moral damage. And the word "may" incorporated under Sub-Article two of Article 2105 gives the court a broad discretion, that is, even in such cases expressly provided by law, awarding monetary compensation for moral harm is no mandatory. The court is required to order other appropriate non-pecuniary redresses where the law provides adequate procedure for redressing moral damage. Hence, non-pecuniary compensation is the ordinary rule for redressing moral harm under the Ethiopian Extra- Contractual liability law.

12.2.2. Pecuniary Compensation as an Exception

Regarding the issue whether or not compensation for moral damage shall be as of rule pecuniary or non-pecuniary, there is no unanimity between countries. Some countries like France accept that moral damage can be compensated in terms of

monetary equivalence in the same manner as material damage, while others such as Bulgaria accept equitable pecuniary compensation for moral damage in principle as contrasted to the fictitious concept of monetary equivalence adopted in French. There are also some countries that completely deny awarding pecuniary compensation for moral damage. The former Soviet Union may be cited as a typical example. Monetary indemnification for non-pecuniary (moral) harm was viewed as an expression of the bourgeois philosophy that everything has its price. The high regard, which Soviet society has for human personality, is said to forbid this type of indemnification. Indeed, the Soviet Union allowed no monetary indemnification for non-pecuniary harm. [Id: pp. 270-271].

Coming back to the position under the Ethiopian civil code, as discussed above, the rule set under Article 2105(1) states that the "author of a wrong shall make good the moral harm resulting from the wrong wherever adequate procedure exists for such redress." That means where there is a procedure set under the law that is adequate and appropriate to redress the specific moral harm inflicted a person, the court is obliged to order the wrong doer to make the damage good. As to the meaning of the phrase "adequate procedure" and the type of redress that may be ordered by the court the law lacks clarity. But, when Sub-Article one is read in conjunction with Sub-Article two which states that pecuniary compensation can be awarded to redress moral damage only in cases expressly provided by law, one can safely conclude that the type of redress envisioned under sub-one must be non-monetary (non-pecuniary) in its nature. Sub-Article two of Article 2105 is applicable only to such nominated cases of moral injury enumerated in Article 2106 through 2115 of the civil code. It may also apply to other moral harms expressly stated to such effect in other pertinent provisions. In a nutshell, the Ethiopian extra contractual liability law allows monetary compensation as a redress only for exceptionally nominated types of moral harms.

In assessment of moral damage, based on equity, the law does not provide general guideline to be followed by the court. So, in the assessment of moral damage, Ethiopian courts have discretionary power in two respects: in awarding the compensation and in fixing the amount of compensation. That is, even in those nominated cases of moral harms enumerated as pecuniary compensable as provided in Article 2105 through Article 2115 of the civil code, it is not obligatory for the court to award monetary compensation to the victim. Only when it deems appropriate having regards to the circumstances of the case, the court can exercise its discretion in awarding equitable compensation to the victim of a moral harm. The question of what equitable compensation for moral injury is also left to the discretion of the court. Of course, the court is required to consider the type and the nature of the harm caused to the victim's moral interest.

Review Questions

1. Discuss the various modes of compensation and the circumstances that make them relevant
2. What makes pecuniary compensation appropriate for material damage but not for moral damage?
3. What makes non-pecuniary compensation appropriate for moral damage?
4. Discuss the circumstances where pecuniary compensation can be awarded for moral damage.

Chapter XIII Quantum/ Extent of Compensation

13.1Quantum of Compensation for Material Damage

13.1.1. The Rule of Equivalence

The principle of equivalence between material damage and compensation is incidentally mentioned in Article 2090 and explicitly laid down in Article 2091 of the civil code. While dealing with modes of compensation for material damage, Article 2090 incidentally states that: "as a rule, the *damage is made good by compensating the victim by means of an equivalent sum of money."(*Emphasis added.*)* Article 2091 of the code, which deals with the extent of compensation, also explicitly states that: "The compensation due by the person legally liable is equal to the damage caused to the victim by the fact giving rise to the liability." The principle of equivalence between compensation and damage goes in line with the overriding purpose of extra contractual liability law. As discussed previously in this course material, the primary goal of extra contractual liability law is compensating the victims of civil wrongs. Although some foreign jurisdictions observed using the award of damages for punitive purposes by imposing exemplary or punitive damages upon the tortfeasor in special aggravating circumstances, compensation in Ethiopia can in no circumstance exceed the damage sustained by the victim of the tort. So, our law under no circumstance allows an award of compensation that exceeds the damage incurred by the victim due to the tortuous act for which the defendant is called to account. However, there are situations where compensation that is less than the damage incurred by the victim may be awarded. This is possible where any of the mitigating circumstances specified under the law (as will be discussed later) come into operation.

In order to match the amount of compensation to the extent of the damage, or reduce it equitably from that extent, the latter must be measured reasonably to the

possible degree. Determining the extent of the harm or damage sustained by the victim is a prerequisite for determining the quantum of compensation to be awarded to him. As clearly stated under Article 2141 of the civil code, the burden is on the victim to establish the amount of the harm sustained and to prove the circumstances which render the defendant liable to make it good.

Despite this fact, there are no rules and standards set under the law to regulate the methodology of assessment of damage. The judge seems to have been left with broad discretion to choose the rational assessment methods having regard to the nature of the case in hand. Since the circumstances of each case may vary infinitely, a harm-evaluation device used in one case may be unsuitable in another. Consequently, neither statutes (in continental systems) nor precedents (in common law systems) normally impose specific harm-assessment methods; nor, it seems, will they always be successful if they attempted to do so. It could be out of similar reasons that the Ethiopian law too, simply put the general principle of equivalency between compensation and material damage as a requirement and left the detail regarding the assessment of the extent of damage to the discretion of the judge. But while the judge assesses the damage, he is expected to critically consider all constituting elements or components of the damage; both the material and the moral aspect of the harm need to be considered, the internal classifications of material damage between *damnum emergens* and *lucrum cessans* as well as between present damage and future damage has to be properly addressed and weighed.

While assessing the damage sustained by the victim, both the material and the moral aspect of the damage must be quantified and valued in terms of money provided that such moral harm(s) is made compensable under the law. At the time of assessment, the judge is required not only to calculate the actual material damage suffered by the victim up to the date of judgment but also future damage that certainly or mass probable will occur after the date of judgment. The important components of the material damage, namely *damnun emergens* and lucrum cessans

should be critically evaluated within the context of both actual/ present damage and future damage.

Thus, while calculating the material damage caused to a person's pecuniary interest due to the injurious act of another person, the court is required to calculate not only the out of pocket payments made by the victim to repair the property damaged or the medical and other related expenses he incurred to heal the physical injury caused to his body but also the *lucrum cessans* (gainful opportunity prevented, frustration or interruption) because of the injury causing event for which the defendant is liable. Even where the property is completely destroyed, the person liable should pay the plaintiff not only the monetary value of the property destroyed at the time of but also the gain prevented due to the destruction of the property up to the date of assessment. The principle of equivalence between damage and compensation should be construed in that so far as money can make the injury caused to a person good, the victim of tort should be put in a position he would have now had not the injury causing event been occurred. The purpose is not to restore the victim to his pre-injury creditworthiness, it is rather to put him in a position he would have been now had not been for the injury.

But there are arguments against the above line of interpretation. In an appeal lodged to the Federal Supreme Court (Civil Appeal file no. 4265/92 E.C.), the appellant stated that his minibus was rendered completely useless because of a collision caused by another person's insured car and requested the court in his memorandum of appeal to award him Birr 70,000 (seventy thousand) as the estimated monetary value of the destroyed minibus at the time of injury and Birr 84,150 (eighty four thousand one hundred and fifty) for the gainful opportunity he alleged to suffer due to the prevention of the 250 birr daily income of the minibus from the date of collision up to the date of filing the appeal. The defendant in this case opposed the plaintiff's claim for compensation of the prevented gain (income) stating that there is no legal basis to claim compensation under the guise of

prevented income in addition to claiming the full value of the minibus at the time of collision. Since the minibus was destroyed completely, according to the defendant, it could not have the capacity to generate income. The Supreme Court accepted the appellant's claim 250 for Birr 70,000 (seventy thousand) compensation as a value of the minibus destroyed but rejected the other claim based on the so called prevented gain. Mehari Redae, The coup's reasoning was cited in a paper titled 'Assessment of Compensation for Injury under the Ethiopian Civil Law' by mehari Redae,presented in a workshop organized by Action Professional Association for the People (APAP) in2006:

… prevailing at the time of collision, which is Birr 70,000 to be paid by the respondents, he has no any legal or factual ground to claim compensation for the income he alleged to be prevented from the date of collision up to the filing of the action….

…in so far as the plaintiff claimed the value of the property destroyed, there is no compensation to be claimed for the so called prevented income. The court, however, stated that if the payment of the value of the car was delayed and the plaintiff proves that, because of the delay of payment he had lost some economic gain or interest he would derive by using the money in commercial activities or by depositing same in saving banks respectively, he may claim compensation for such losses. (Translation mine)

In support of the court's reasoning in this case, Mehari stated that if it is proved that a person's property is completely destroyed, that person's claim for compensation should be limited to the full market value of the property prevailing some seconds before the destruction of same. But this argument may be valid where the court made the assessment of the damage immediately after the occurrence of the injury and award the victim an equivalent compensation forthwith. In actual practice, however, the litigation process of the court is too elaborate and time taking. The court may take some months or a year or more to pass its final decision on the subject of a dispute. As per Article 2150(1) of the civil code, the assessment

of the damage has to be made on the day on which the court renders its final judgment. The date of assessment, the court is required to determine what the estate of the plaintiff would be but for the destruction of the property. Thus, on the date of assessment the court should not consider only the market value of the property that was prevailing some seconds before the event of destruction occurred but also the net economic gain that would have been derived by the plaintiff from the use of the property until the date of judgment.

13.1.2. Departures from the Rule of Equivalence

For various policy reasons, the rule of equivalence between damage and compensation discussed above may be qualified by several exceptions. This topic shall discuss the most radical departures that may be made by the court from the principle of equivalence stated in Article 2091. These exceptions will be discussed under separate headings in the following sequence:

- Compulsory Mitigation
- Discretionary Mitigation
- Optional Mitigation
- Nominal Damages

A. **Compulsory Mitigation**

As exceptions to the rule of equivalence between damage and compensation, there are situations where the quantum of damages (compensation) may be reduced or should be reduced to a certain amount, which is less than the material damage sustained by the victim. The term departures in this context is used to denote the circumstances that justify the mitigation of the liability of the defendant to a reasonable amount which is less than the damage caused to the plaintiff. Such mitigating circumstances may take one of three forms: compulsory, discretionary or

optional. In this section, cases of compulsory mitigation are presented and the rest will be discussed in the subsequent sections in turn.

Cases of compulsory mitigations, which are prescribed in the civil code, are binding on the court. They are stipulated to the benefit of the defendant, that is, the defendant as of right can invoke them. The concept of compulsory mitigation is incorporated in Article 2098 of the civil code. According to this provision, where the damage is caused to the victim due to his own partial (contributory) fault, then he is entitled to partial compensation. In this case, the liability of the defendant could be fault-based liability, strict liability or vicarious liability. Regardless of the nature of the type of liability of the defendant, if the victim by his own intentional or negligent fault contributed to the occurrence or aggravation of the damage to his interest, then his claim for compensation shall be reduced in proportion to his relative contribution. For instance, if the victim by his fault contributed 40% to the occurrence of the damage or aggravated the damage by 40%, the liability of the defendant shall be reduced to 60% of the overall damage. Where the damage is caused solely due to the victim's fault, there shall be a complete denial of compensation as compensation may no be claimed contrary to good faith against an innocent person (Article 2097 civil code) In this case, the victim shall bear fully the consequences of his fault. Hence, mandatory mitigation of compensation is relevant in situations where the victim's own fault is partly contributed to the damage sustained by him. The governing provision, Article 2098 that deals with the fault of the victim reads:

"(1) Where the damage is due partly to the fault of the victim, the latter shall receive partial compensation only.

(2) In fixing the extent to which the damage shall be made good, all the circumstances of the case are taken into account, in particular the extent to which the respective faults have contributed to causing the damage and gravity of each fault."

Sub-Article 2 of Article 2098 provides a clue to the judge in fixing the damage to consider all the circumstances of the case, particularly the respective gravity of the fault of the defendant and the plaintiff. But weighing the relative contributory fault of the parties seems relevant where the liability of the defendant is fault based. In circumstances where the liability of the defendant does not depend on fault, that is, in strict liability cases, the judge should consider only the contribution of the victim's faulty behavior in materializing or aggravating the damage. Otherwise the defendant may escape liability for each and every contributory fault of the victim, which would be contrary to the purpose of the goals of the law of torts.

B. **Discretionary Mitigation**

In the previous sub-section we have discussed the provision that prescribe awards of compensation less than the overall damage sued for on a compulsory basis. In this sub topic we will consider provisions that permit such awards without prescribing them, i.e., on discretionary basis. These provisions depend for their application on the court's largely free (discretionary) decision. The defendant can invoke them where relevant, but he is not as of right entitled to the mitigation. This can be inferred from the wordings of Articles 2099-2103 and 2157, which use "powers of equity" as a parameter for exercising such discretion and the word "may" in Articles 2099-2101 that indicates the discretionary nature of mitigation. These provisions shall be discussed in turn.

Article 2099 talks about a case where the court may reduce the amount of compensation regardless of the principle of equivalence provided in Article 2091, where the fault giving rise to the liability is committed by a person who was not in a state to appreciate the wrongful nature of his conduct. In reducing the award based on this article, the court must first ascertain whether or not the defendant is liable for fault, that means strict liability and vicarious liabilities cannot be mitigated

under Article 2099. And the defendant must establish that he was not conscious of his fault and was not in a state to appreciate the wrongful nature of his act. This may be due to age, mental condition or other circumstances.

Article 2100 states another instance where the court may reduce the amount of compensation for damage caused under the "chain of command". To reduce the award based on this article the court must first ascertain whether the defendant committed the fault envisaged in Article 2036 (2). And the defendant, to get the reduction, must establish that he was moved to commit the fault by his sense of duty deriving from discipline or obedience. This may be inferred from his past conduct and apparent absence of improper motives. The extent of mitigation shall be roughly apportioned to the degree of the imperativeness of the duty. Indecently, where this degree is so high as to lead to practical impossibility to disobey, the court shall fully exculpate the defendant pursuant to Article 2036 (3). However, this does not mean the victim shall be left helpless. There could be claim for compensation against the superior order giver where the order is unlawful or against the state as the case may be.

Unforeseeability of the damage as stated in Article 2101 is another ground for reduction of the amount of damage. This article allows the possibility of reducing the liability of the defendant to a reasonable amount where in consequence of unforeseeable circumstances the damage expanded beyond what could reasonably be expected. Consider the following illustration:
Where B, slightly injured by C's act, dies in a hospital where his injury is treated, due to the aggravation of his injury by an abnormally incompetent medical treatment, C is liable, but may invoke Article 2101 in mitigation as the damage is aggravated by circumstances unforeseeable to him. The damage in this case is too remote that cannot be normally foreseen. So the judge has discretionary power to mitigate C's liability where it is in the interest of justice, having considered all the circumstances of the case.

Another mitigating circumstance is provided under Article 2103 of the civil code. That is, when a person causes injury to the property of another because of acts of "necessity" in the sense stated in Article 2066, he is liable to compensate the victim. But he can invoke Article 2066 to mitigate the extent of his liability. But whether or not mitigation in this case is compulsory or discretionary, the wording of the provision is not clear. The other most important thing that we need to bear in mind is that article 2103 speaks only of damage to the property, not to the body of another. For example, B damages C's boat to save swimmer D (or himself) from drowning; in this case article 2103 can be applicable, but if B hurts swimmer C to prevent D's (or his own) boat from crashing against a rock, mitigation based on Article 2103 is not possible.

C. Optional Mitigation

The mitigation of liability for compensation in optional cases differs from the mitigations discussed in the above three limitations in that its application does not depend on the discretion of the court but on the discretion of the defendant himself. In optional mitigation cases there are alternatives other than paying money, therefore, the defendant can opt for an alternative to that of paying the damages otherwise due by him. Cases of optionally mitigating circumstances are covered in Articles 2074, 2075 & 2078. As stated in these Articles, the defendant may surrender the animal or building that caused the damage to another or pays an equivalent sum of money due. The defendant may choose to surrender the animal or building instead of paying an equivalent some of money where the value of the animal or building is less than the monetary value of the overall damage sustained by the defendant. But it has to be noted that in order to exercise such option the person shall be the owner of the animal or the building that caused the damage to the victim's legitimate interest. The defendant cannot exercise this options where the damage was caused by his fault or that of a person for whom he is answerable. (Article 2074(2) cum Article 2078(2))

D. Nominal Damages

The other instance where departure from the rule of equivalence between compensation and damage comes into operation is related to the award of nominal damages. As a rule, a claimant in extra contractual liability law has the burden to prove the nature and the extent of the harm he sustained and the circumstances that render the defendant liable to make it good. But this is not the case in an action for nominal damages. Without the need to proving any real or actual damage, a very small fraction of money can be awarded to the victim simply as a recognition or declaration of his rights violated or infracted by the defendant. The term "nominal" connotes the symbolic (unreal) and insignificant nature of the award that does not correspond to any real damage sustained by the claimant. Its purpose is to bolster the court's declaration that a certain right of the plaintiff is infringed or that the defendant is liable for the infringement of such right. Nominal damages are awarded when the claimant has established his case, particularly in relation to torts actionable per se, such as trespass, but has not shown there is any actual loss. The award marks his success.

Article 2104 of the civil code that deals with Nominal Compensation states that: "Damages of a purely nominal amount may be awarded where the action has been brought solely with a view to establishing that a right of the plaintiff has been infringed, or that a liability has been incurred by the defendant." Regarding this point of discussion Professor Krzeczunowicz made the following point:

The Ethiopian Civil Code's "nominal compensation" concept is borrowed from the common law of England, where certain rights grew from tort remedies: the reactions imply the existence of the rights in question. Violation of the latter (i.e. of the tort rules protecting the interest involved) was actionable per se and was, in the absence of harm (*injuria sine damno*), sanctioned by, at least, "nominal damages". This latter device seems unnecessary in Ethiopia, where rights are based on

legislations and statutory remedies for their … infringements abound. This devise seems unnecessary in Ethiopian case. In the Ethiopian system, the spectrum of non-nominal redress available in tort cases is so wide as to make nominal damages, as a rule, pointless. For instance, absence of pecuniary harm does not prevent a plaintiff from claiming compensation for moral damage, or in all cases where compensation claimed is other than pecuniary (e.g. under Articles 2119-2123). Even in the absence of both material and moral damages, the plaintiff may be granted an injunction against the continuation of a tortuous infringement of his rights. In all these cases, the relief granted necessarily establishes a violation of the plaintiff's rights (legitimate interest), thus making the "nominal compensation" remedy superfluous. [Id. Pp.132-133]

13.2 Quantum of Compensation for Moral Damage

The principle of equivalence between damage and compensation envisaged in Article 2090(1) cum 2091 is practically impossible in the case of moral damage. Admitting the difficulty or impossibility of the rule of equivalence, our civil code uses the word "equitable" rather than equivalent as a standard for fixing the quantum of compensation for moral damage. This is evidenced by the wordings of Article 2106 through Article 2126 of the civil code that deals with instances of moral damage that may be subject to monetary compensation in appropriate cases.

Determining the amount of compensation equitable for a given moral harm is not an easy task. The absence of a concrete standard for measuring non-pecuniary (moral) loss in terms of money creates the danger that the courts arbitrarily award different amounts for non-pecuniary harm in comparable cases. [Id. P. 273] Acknowledging this danger of arbitrariness in assessment of moral damage and the concomitant discrepancy in the quantum of the awards that may result from such arbitrariness in assessment, our civil code puts a ceiling amount, which is one thousand Ethiopian Birr (Article 2116(3)). So, the discrepancy in the Ethiopian case

may fall between the smallest positive number and one thousand Ethiopian birr and possibly between denial of monetary compensation and awarding the highest figure, one thousand in comparable cases. This is also the case in many countries.

As was discussed earlier, different countries take different positions concerning the issue whether non-pecuniary (moral) injury to a person's interest shall be compensated monetarily or not. While some countries like the former Soviet Union deny compensation for moral damage in absolute terms, others like France allow the compensability of moral damage in monetary equivalence in the same footing as compensation for material damage. Still some other countries take the middle position. They allow compensation for moral damage in exceptional cases specified under the law. A typical example of these countries is Ethiopia which allows equitable compensation for moral damage in specific cases expressly stated under the law.

Under the principle of equivalence the idea is that the amount of compensation must be equal with the amount of damage. The main purpose of compensation here is that putting the plaintiff in a position he would have been in the absence of the injurious event as much as possible. Hence, this principle particularly applies to material damage. As already discussed, moral damage is an injury caused to a person's feeling. It is not as such easy to award a monetary compensation for a victim in case of moral damage because of the immeasurability of one's feeling in money terms. So the principle of equivalence does not apply to moral damage. Hence the solution adopted is compensating the victim based on equity. The word equity in this context refers to standards of fairness and justness, which results from a conscientious judge's appreciation of what is fair in the circumstances of a case.

However, even between those countries that allow equitable pecuniary compensation for moral damage, there are discrepancies concerning the extent of

the award. As already indicated, the Ethiopian civil code does not allow monetary compensation for moral damage beyond the ceiling figure - one thousand Ethiopia Birr. But in some common law jurisdictions, it is commonplace to see hundreds of thousands and sometimes six digit compensations awarded to the victims of moral injury. In Ethiopia, too, there seems a general consensus among the general public, the legislature and the judiciary concerning the inadequacy of the one thousand birr which is set as a ceiling amount for compensating moral damage under the 1960 civil code of Ethiopia. Under Article 34(4) of the Copy Rights and Neighbouring Rights Proclamation (proclamation no. 410/2004), the House of Peoples' Representatives fixed a minimum of one hundred thousand Ethiopian Birr compensation for moral injury caused due to the infringement of the copy rights laws. The Cassation Bench of the Federal Supreme Court in one case (civil cassation file no. 11042) awarded Birr ten thousand in the form of moral compensation to a woman whose marriage is terminated due to an act of adultery committed by here husband during marriage.

13.3 Compensation for personal Injuries

13.3.1. General Damages vs. Pecuniary Loss

General Damages: As discussed in the preceding sub-sections, for the purpose of determining the mode and extent of compensation awards, authorities usually categorize the generic term damage into pecuniary (material) damage and non-pecuniary (moral) damage. Physical injuries caused to a person's body often times bear these two components of damage. For the purpose of convenience, let us discuss them in turn.

The term "general damages" which may be taken as synonymous with moral damages refers to the monetary award granted to a person who suffered loss of amenity, pain and suffering due to the tortuous acts of another person. Loss of

amenity is in essence the reduction in the capacity to enjoy life. It will depend in part on the nature of the injury, so that it will be greater where there is permanent loss of mobility, or of an organ or limb. It will also depend in part on the characteristics of the claimant, so that there will be a higher award if the injury prevents or curtails continued enjoyment of sport or hobbies: *Moeliker v Reyrolle & Co. Ltd [1977] 1 All ER 9 (cases and materials (12.1.2.1)).* The level of awards granted for amenity has to be 'conventional' as money is not a direct recompense for suffering. [Hadgson & Lewthwait: p. 374]

One vexed area has been the level of award appropriate to a claimant so seriously injured as to be largely or wholly unaware of the reduction in quality of life. Logically it can be argued that the unconscious patient has not lost any amenity, in the sense of subjective enjoyment of the quality of life, but the practice is to award a reduced figure on the basis that there is an objective diminution in the quality of life actually enjoyed. Pain and suffering is essentially subjective, and so no award will be made to a claimant who is wholly unconscious. It may include distress due to life expectancy. For these authorities, if the victim of a serious bodily injury is turned down to a permanent absolute unconsciousness because of the injury, an award of compensation for loss of amenity, pain and suffering including distress due to life expectancy cannot be granted as the victim is not in a position to sense these losses. But if the level of unconsciousness is not absolute but large in magnitude, the general damages to be awarded to the victim for the loss of amenity, pain and suffering, authorities recommend reduction to a certain level.

It is often said that it is scandalous that it should be cheaper to kill a man than to maim him and that it would be monstrous if the defendant had to pay less because in addition to inflicting physical injuries he had made the plaintiff unconscious. I think that such criticism is misconceived. Damages are awarded not to punish the wrongdoer but to compensate the person injured, and a dead man cannot be compensated: *H. West & Son v Shephard [1964] A. C. 326.*

A point worth discussing here is that does the Ethiopian extra contractual liability law adopt a similar position concerning the compensability or otherwise of personal injuries resulting in the unconsciousness of the victim? Our civil code lacks clarity on this issue. However, it is possible to make inference from some pertinent provisions of the code. Giving important to the protection of bodily integrity, the law in Article 2067 of the code introduc the concept of strict liability for causing bodily injury regardless of the magnitude of the injury. Article 2113 of the code also recognized the compensability of bodily injury resulting in loss of amenity, pain and suffering. Having regard to the nature and gravity of the harm and the general principles of justice and fairness, the court is invested with a discretionary power to grant (including to deny) equitable monetary compensation to the victim of a bodily injury. It is logical to say that the quantum of the compensation should depend, among other things, on the nature and gravity of the injury for equity to be meaningful in the objective sense. They mean there should be a positive correlation between the gravity of the bodily injury and the moral damages to be awarded for that injury. To deny moral damages for a person who was reduced to absolute unconsciousness because of serious bodily injury would be against the very principle of equity underscored in Article 2113 of the code. It would be unjust to deny a person rendered unconscious due to a serious injury by analogizing him with a dead person. It deems also immoral to equate a person rendered unconscious with a dead person and deny him general damages.

Pecuniary Loss: Personal injuries, in addition to causing loss of amenity, pain and suffering, usually result in pecuniary loss (loss of earnings, medical expenses and other outlays) to date and future pecuniary losses to the victim.

Loss of earnings is recoverable, and usually causes little conceptual difficulty. There may be, however, problems in establishing the exact net loss, particularly where the employment pattern was irregular, or overall earnings depended on overtime or

piecework. The cost of care, including the cost of private medical treatment, is also recoverable. The defendant cannot argue against the claim for the recovery of cost of private medical treatment by invoking the fact that National Health Service facilities were available free of charge. Problems have arisen in relation to nursing care. If this is provided by a professional, it is clearly recoverable. Where it is provided by a relative out of a sense of moral obligation, it is strictly the case that the claimant has not suffered a loss, in the sense of paying for the care. The law takes the common sense view that there is a need which is being met and the claimant should be in a position to reward the provider, even though it may, in these family cases, actually amount to compensation to a third party rather than to the accident victim: *Cunningham v Harrison [1973] QB 942.* [Id. pp. 374 – 375] This is the logic behind the refusal to allow the claim where the tortfeasor himself provided the care: *Hunt v Severs [1994] 2 All ER 385* (Cases and Materials (12.1.2.2)). [Id. p. 375]

It is clearly relatively easy to assess pecuniary loss to date (present material damage), although in practice, especially in cases of average or below average complexity, a settlement figure is taken is reached which can take a broad approach rather than analyzing each item of the claim in fine detail.

On the other hand, it is extremely difficult to assess future loss. While assessing future pecuniary loss, the following three key variables need to be considered:

(a) the future progress of the injury;
(b) the impact of all the other vagaries of life, such as unrelated illness, on the claimant;
(c) the claimant's future employment prospects. [Id.]

Until recently it was necessary to assess all these in every case, as the court was obliged to award a final lump sum to cover all heads of claim. In all cases assumptions were made. In the case of the development of the injury, the main

problem in practice is the uncertainty surrounding such complications as late onset post-traumatic epilepsy following head injuries or osteo-arthritis following limb and joint injuries. In these cases, the impact of the complication if it occurred, is assessed and then discounted by the likelihood of it occurring. If osteo-arthritis has a 'value' in the particular case of $30,000, and there is a 10 per cent chance of it occurring, the damages are increased by $3,000. [Id.]

Having taken this scholarly accounts of foreign experience related to the assessment of pecuniary loss resulting from personal injury, let us turn to appreciate the way our law tries to handle such complications. In Ethiopia, material damage (pecuniary loss) that will be "certain to occur" in the future is compensable without waiting for it to materialize (Article 2092 civil code). Acknowledging the complications and difficulties in assessing future harms (harms that have not yet materialized) in advance, especially most bodily harm cases, Article 2102 of the civil code devised a solution as follows:

" (1) Where the exact amount of the damage cannot be ascertained, the court fixes it equitably, taking into account the ordinary course of events and the measures taken by the injured party.

(2) Nevertheless, no indemnity shall be awarded in respect of a damage of which the very existence, and not only the amount, is uncertain."

Here, while assessing future pecuniary losses, in difficult situations, the court is required to take two things into consideration. Firstly, it has to critically appraise the usual future consequences of an injury of the type under consideration. Secondly, it has to consider the measures taken by the victim in aggravating or otherwise of the consequences of the harm. And then the court is required to fix the amount of compensation equitably where it is difficult to determine the extent of the damage exactly. But where the very existence of the damage is uncertain and questionable, no compensation is required to be awarded on mere speculation.

Article 2150(2) of the civil code could also be relied on to address the complication and uncertainty related to the assessment of future pecuniary loss. Where it is impossible to finally assess the damage sustained by the victim on the date of judgment, the court has the discretion to grant a provisional judgment that may be reconsidered within a period of two years upon the application of the parties. Within this period of two yours, the medical prognosis concerning the nature and the gravity of the injury may be completed.

While calculating future damages (compensation), that is, compensation to be awarded in advance in a lump sum form for pecuniary losses to be suffered by the claimant in the future, some foreign jurisdictions consider other additional factors such as inflation and interest. In fixing future compensation, inflationary tendencies that diminish the real value of the money are required to be considered. That means, the compensations, needs adjustment, having regard to the rate of inflation. And since the claimant receives a lump sum now rather than a stream of income over a period of time, and can invest that lump sum to produce further income, a discount to such effect has to be made in the compensation.

Having appreciated the assessment of personal injuries and the corresponding compensatory remedies in a general perspective, let us turn to further appreciate within the context of a more specific situation by classifying the victims into three categories based on the nature of their engagement.

13.3.2. Injury of an employee

Like any person, the general losses discussed above such as loss of amenity, pain and suffering as well as pecuniary losses, may be suffered by an employee, too. Despite the complications involved in their assessments, general damages are awarded for injuries caused to a person's non-economic (moral) interest. The discussion made in the previous sub-section concerning general damages is

operative for non-pecuniary damage suffered by any person regardless of the difference in the nature of his occupation. Thus, further discussion concerning this issue in this sub-section is unnecessary. This section focuses mainly on the economic losses that may be suffered by an employee due to bodily injuries caused to him by tortuous acts.

In order to determine the quantum of compensation for the pecuniary loss sustained by an employee, it is a prerequisite to calculate the economic loss suffered by the employee due to the bodily injury. Based on the classifications made under Article 99 of the "Labour proclamation No. 377/2003", bodily injuries that decrease or impair the capacity of the person injured to work have the following effects:

(a) Temporary disablement
(b) Permanent partial disablement
(c) Permanent total disablement and
(d) Death.

The last injury, death, is not the concern of this sub-section. It will be appreciated in the subsequent sub-sections. Although theoretically it is possible to categorize disability as done above, practically determining the exact degree of disablement even in each category is not an easy task. As Mehari Redae stated in the paper he presented in the workshop mentioned earlier, different medical experts have been shown producing different degrees of disablement for the same kind of bodily injury at different times. In order to show the magnitude of the problem, Mahari cited the following cases: at one time in medical evidence produced by a medical board concerning a person whose left leg was cut off because of injury estimated the degree of disability of that person at 60% (Cassation Bench, Civil case file no. 1/1980 E.C). At another time for a similar injury a medical evidence estimated the degree of disability to be 45% (Civil Appeal file no. 26/74 E.C) In different case for a person whose right leg was cut off due to injury, the medical evidence estimated the disability to be 50% (Cassation Bench, civil case, file no. 320/1981 E.C), and at another time a medical evidence produced concerning a person one of whose legs

rendered useless because of injury, estimated the extent of disability at 20% (Civil case file no. 1563/75). These are good examples that illustrate the magnitude of the discrepancy of the medical evidence produced by medical boards concerning the degree/percentage of disability a certain kind of bodily injury entails to the victim on his future earning capacity. This discrepancy may be caused mainly due to the absence of objective bodily injury assessment criteria.

Temporary disablement (incapacity) impairs the working capacity of the worker partially or totally for a limited period of time. The pecuniary loss that may be suffered by this worker includes loss of net wage (if any), loss of interest that would accrue from saving part of the wage, if any, increased outgoings such as medical expenses and nursing expenses, if proved any, and any other pecuniary loss occasioned by the temporary cessation of capacity to work for the duration of such period. But what if the employee receives his full wage during such period? Can the tortfeasor ask for setoff? See Articles 2093 and 2094 if they would be of some help to answer this question.

The second type of bodily injury is that of resulting in permanent partial disablement (incapacity). It refers to incurable bodily injuries that decrease, but not absolutely impair the victim's future working (earning) capacity. While assessing the material damage suffered by the victim in this case, in addition to calculating the loss of earning (net income) and the increased outgoings suffered by the victim up to the date of assessment (judgment), the magnitude of the decrease in the working capacity of the employed victim and the future earnings that will be frustrated because of the injury has to also be measured as permanent partial incapacity decreases the future earning capacity of the victim permanently. For example, where the working capacity of an employee is permanently decreased by 30%, it is possible to say that his earning capacity during the rest of his working life is reduced by 30%. So, if the annual salary of the injured worker prior to the injury was Birr 10,000, and the worker would have been worked for additional 20 years in

the same capacity had it not been for the occurrence of the injury, then, his future loss may be crudely calculated as follows: (10,000 Birr x 30% x 20) plus/minus inflation minus interest. This calculation is made based on the formula adopted by some foreign jurisdictions that made adjustment to lump sum award of compensation for future damage to inflation, and discount interest.

The last type of bodily injury worth discussing is related to the category of injuries that impairs the working capacity of the victim worker permanently and totally. To use the wording of the labour proclamation cited above, "permanent total disablement" means incurable employment injury, which prevents the injured worker from engaging in any kind of remunerated work. This type of injury not only results in total frustration of the net income and increases the outgoings of the injured worker up to the date of judgment, but also frustrates all future gainful opportunities of the injured worker. Thus, the economic loss caused to the injured worker in this instance is absolute in its nature. For instance, if you take the annual salary of the injured worker to be Birr 12,000, and the assumption that this worker could have continued to work for additional 10 years had it not been for the occurrence of the injury-causing event, then the pecuniary loss of this worker can be roughly calculated as follows:

- Present material loss, which includes losses of earnings (at minimum Birr 1000 a month from the date of injury up to date of assessment plus interest from saving that would have been made, if any), increased outgoings, e.g. medical and nursing expenses and other consequential outlays, if proved any.
- Future material losses (losses to be materialized after the date of assessment or judgment due to the lasting nature of the injury. If the assessment in this example is made at the end of one year, the future loss of the worker when calculated in terms of such salary is = [(Birr1000 - tax) x 9 years] plus/or minus inflation minus Interest. Since awards of damages are free from tax, the argument is that the net loss should be

> taken into consideration. In some foreign jurisdictions, although our law is not clear in this regard, lump sum awards of future damages are adjusted to inflation, and interest accruals expected from such payment are discounted from the figure. In addition to the loss related to the loss in the net salary of the worker per year, future damages may also fairly include other additional gainful opportunities frustrated due to the injury.

But an important question that would be relevant to all pecuniary losses occasioned by bodily injury is: How is material loss calculated where the employee receives full or part of his wages or other benefits during the period of his incapacitation? Can the tortfeasor ask for setoff? Before trying to address this question in Ethiopian context, let us see some relevant foreign experiences.

Awards of damages are tax free, so the calculations, e.g. of loss of earnings, must all be of net of tax: *BTCv Gourley [1956] AC 185.* Where the claimant has himself taken out insurance, or is entitled to a pension or other allowance as part of his terms of employment (whether the scheme is contributory or not), benefits received are regarded as independent of the defendant, and will not thus be set against damages. The principle was first established in relation to insurance, being justified on the basis that the claimant had paid for and earned those benefits: *Bradburn vGWR (1874) LR 10 Exch 1*. It was extended by analogy to the pension situation by *Parry v Cleaver [1970] AC 1*, and applies even where the pension provider is also the tortfeasor: *Smoker v London Fire & Civil Defence Authority [1991] 2 Ac 502.* The defendant is taken to be wearing two separate hats in this situation. *Parry v Cleaver* is also authority for stating that voluntary payments from charitable or other benevolent sources will be treated as independent and thus not set off. [Hodgson and Lewthwaite: p. 376]

Sick pay received from an employer, or under a scheme administered by the employer will be deducted from the claim. The principle was established in Hussain

v New Taplow Paper Mills [1988] AC 514, where the employer was also the tortfeasor, and the sick pay could be seen as in effect a payment on account of damages. The rule also applies to sick pay where the employer is not the tortfeasor unless the contract of employment contains, as it normally will, an obligation to refund sick pay if it is paid in consequence of a tortiously inflicted injury. Now, it is time to appreciate the case in Ethiopian context.

Whether the damage incurred by the person shall be calculated based on the gross or net income of the victim after deducting the tax that would have been paid to the government from the frustrated gross income had the injury causing event not occurred, our law lacks clarity. Some Ethiopian authorities argue that the gross income of the victim should be taken into account. For example, Mehari Redae (2006) argues that the injury sustained by the victim should be calculated based on the gross income of same, that is without deducting taxes. In support of his argument, he cited, among other things, Article 13(f) (1) of the Income Tax Proclamation (proc. No. 386/2002) that exempts compensation to personal injuries from taxation. However, it does not seem plausible to infer from the very exemptions of compensation earnings from taxation that the law intends to award compensation to the victim based on the frustrated gross earning. As it has been already discussed, the purpose of extra contractual liability is to restore the victim to a state he would have been had the injury causing event not occurred. Thus, since the loss incurred by the victim is the net earning, the assessment of pecuniary damage should be computed based on the monthly or annual net earning of the victim. In this the principles of equivalence between damage and compensation envision under Articles 2091 and 2092 of the civil code is contemplated.

In relation to insurance and pension recipients, our law takes similar position with the cases cited above. As can be inferred from Articles 2093 and 2094 of the civil code, insurance and pension benefits received by the victim on the occasion of a bodily injury caused to him cannot be raised by the tortfeasor as a ground to setoff

the victim's claim for compensation. The tortfeasor cannot escape full liability for the pecuniary loss he caused to another by inflicting bodily injury. Insurance and disability pension benefits are independent claims of the victim that cannot be invoked by the tortfeasor to setoff the victim's claim for compensation. But whether or not this position can be sweepingly extended to other independent benefits received by the victim on the occasion of the injury is a moot issue for both the practitioner and the academics.

13.3.3. Injury of self-employed Persons

As contrasted to employees, self-employed persons do not work for wages pursuant to Article 2512 ff. but for remuneration or income as an independent entrepreneur pursuant to Article 2610 one doing intellectual work pursuant to Article 2632 ff., one in the medical profession pursuant to Article 2639 ff. ,an innkeeper (Article 2653 ff.), publisher (Article 2672 ff.), or any kind of independent businessman, craftsman, etc [Krzeczunowicz: p. 62] The phrase includes all classes of persons who pursue their livelihood in any independent activity other than employment. Assessment of material damage incurred by self-employed persons resulting from bodily injuries is much more difficult than loss of wages from an employee. The earnings of self-employed persons usually fluctuate from time to time because of uncertain external market and non–market related variables and factors personal to each person.

However, depending on the nature of the bodily injury, the victim's pecuniary injury can be roughly assessed having regard to his pre-injury earnings. But, even here, there are difficulties: the plaintiff may have kept no accounts, his other evidence may be shaky, or he may keep accounts which (for fiscal reasons) conceal some earnings. Once such hurdles are passed, the self-employed person's pre-injury year's earnings could – as in the case of wage-earners, be presumed to represent what would have been his subsequent yearly earnings as well, subject to counter-

evidence by plaintiff and, exceptionally, counter-evidence by defendant. Of course, this may not be a perfect assessment. In addition to the practical difficulty to determine the victim's pre-injury earnings as stated above, such determination itself is full of problems. That is, a person's pre-injury annual earnings may not perfectly represent that person's life long annual earnings. The conditions of that person would have been improved or worsened had the injury-causing event not occurred. Unless the possibility for any of these two extremes are proved to the contrary, the assessment of post-injury present and future losses of self-employed persons can be made on the basis of their pre-injury yearly earnings. Even where pre-injury pecuniary earning cannot be determined exactly, it can be fixed equitably having regard to surrounding circumstances as discussed elsewhere. The peculiar problem related to the assessment of the material damage incurred by a self-employed person is bound in the determination of that person's pre-injury earning. Once this problem is solved, the quantum of compensation can be fixed based on the frustrated present and future net earnings of the victim, having regard to inflation and interest adjustment as discussed above.

13.3.4. Injury of Non-Employed Persons

The term "non-employed persons" in this context refers to persons who are neither employees nor self-employed individuals in the sense discussed under the preceding sub-sections. The reasons for their unemployment could be, among other things, lack of incentive, opportunity, or ability to work. Krzeczunowcz in his book under the title "THE ETHIOPIAN LAW OF COMPENSATION FOR DAMAGE" (1977), pp. 64 – 66, discussed the problems related to the assessment of pecuniary losses suffered by unemployed individuals because of another person's tortuous acts in a comparative perspective as follows:

(a) Lack of incentive to work professionally may be due to the possession of wealth, which allows a person choice of leisure or work. Suppose that a medical graduate

does not practice because of having inherited enough assets to live on. In case of an injury disabling him from such practice, it seems that most American courts would compensate him for loss of professional earning "capacity", while English courts would refuse to compensate him for loss of "earnings" which he will not lose. The latter approach seems imperative for us. Indeed the American practice of placing of a pecuniary value on a person's earning capacity whether or not used and/or intended to be used is incompatible, in Tort law, with Article 2091of the Ethiopian civil Code and, in Contract Law, with Article 1800. [Id.]

But an important question that may be raised here is: Can't a person have choice between leisure and work at different times? If he can, does not the injury in the medical graduate example impair that person's post-injury (present and future) occupational choice? More probably, the answer is, it does impair. Such an absolute or partial impairment of a person's choice for work not only results in a moral shock to that person but may also frustrate his gainful opportunity in the future due to the choice foregone by the injury. So, is not the American approach that recompense impaired professional earning "capacity" logical than the opposite followed by English courts? Is it possible to conclude that the Ethiopian tort law, regarding the case in hand, fits the English approach?

(b) Lack of opportunity for permanent work is often connected with the existence of a largely unused *residuum* of unskilled workers. When one of them suffers a disabling injury, the amount of his prospective loss of earnings is very uncertain. In this country such men, commonly named "coolies", are, from time to time, called to do some sporadic work.

(c) Where an injury does not increase a person's pre-existing physical and/mental inability to work, there is no loss of earnings. Where, however, the pre-existing inability to work for profit is transitional because it is due merely to tender age (child) or learning process (student), loss of future earnings, even though uncertain

in amount, can be claimed. It will be easier to predict in the case of a student or apprentice than in that of a young infant, whose future is a guess. [Id.] But the issue here also is whether or not we should bound only by these exceptions. In another words, should childhood and student hood only be accepted as grounds for awarding compensation on the basis of equity for material loss presumed to be suffered some time after? Perhaps, recourse to the preceding discussion under (a) would suffice to appreciate the problems that may result from accepting this restrictive classification of pre-existing inability as transitional. Indeed, it would be rational to deny pecuniary damages for the victim of a bodily injury if his capacity to work had already been frustrated by fortuitous or other tortuous acts and nothing was aggravated or added by the subsequent alleged tort.

13.3.5 Compensation for Fatal Accidents

For the purpose of assessment of bodily injuries suffered by employees, we have already classified disabilities into those that cause physical/mental injury of various degrees, and injuries resulting in death. Where a person suffers personal injuries other than death, the nature and extent of the harm can be assessed having regard to surrounding circumstances of the case and the interest frustrated by the injury. As will be discussed in the subsequent chapters, in bodily injury cases, it is only the direct victim of that injury who is entitled to claim compensation for moral and material injuries suffered by him due to tortuous acts committed by another. No matter how serious the bodily injury may be, dependants of the victim are not entitled to independent claim. This is because an award to an injured claimant is intended to replace his total income, out of which he is expected to maintain his dependents as he would have done out of his earnings.

As a principle, no action for compensation lay for the death of another except by dependants nominated under the law. The way compensation awards for fatal cases are treated and the purpose it serves is different. Regarding this issue, interesting remark is given by an authority, named Lord Diplock: "… the purpose of an award of damages under the Fatal Accidents Act is to provide the widow and other dependants of the deceased with a capital sum which with prudent management will be sufficient to supply them with material benefits of the same standard and duration as would have been provided for them out of the earnings of the deceased had he not been killed by the tortuous of the respondent…" (A Case Book on Tort: pp. 648- 649)

In line with this overriding purpose, the Ethiopian Civil Code under Article 2095 entitled specified dependants of the victim of a mortal accident with the right to institute a civil action for compensation for the loss of the economic support they suffered by the death of the person providing such support. Postponing the discussion related to the prerequisites that the claimants nominated under this article shall fulfill in order to exercise this right to the subsequent chapters, what follows is a discussion on the assessment of pecuniary loss occasioned by fatal accidents.

According to Lord Diplock, the usual method, both England and Northern Ireland, follow in computing total award for losses sustained by dependents is 'multiplying a figure assessed as the amount of the annual "dependency" by a number of "year's purchase." If the figure for the annual "dependency" remained constant and could be assessed with certainty and if the number of years for which it would have continued were also ascertainable with certainty, it would be possible in time of stable currency, interest rate and taxation to calculate with certainty the number of years' purchase of the dependency which would produce a capital sum sufficient to produce an annuity equal in amount to the dependency for the number of years for which it would have continued.' Here, two essential factors are used to calculate the

total award: the amount of annual dependency and the number of years' purchase. The term 'annual dependency' refers to the amount of annual support provided by the deceased to the dependent at the date of the former's death due to the fatal accident. The term 'number of years purchase' refers to the number of years such support may continue, that is, the period between the date of the deceased's death and that at which he would have reached normal retiring age.

Thus, the starting point in any estimate of the number of years that a dependency would have endured is the number of years between the date of the deceased's death and that at which he would have reached normal retiring age. That is reduced to take account of the possibility not only that he might have not lived until retiring age but also the chance that by illness or injury he might have been disabled from gainful occupation. The former risk can be calculated from available actuarial tables. The latter cannot. There is also the chance that the widow may die before the deceased would have reached the normal retiring age (which can be calculated from actuarial tables). But in so far as the chances that death or incapacitating illness or injury would bring the dependency to an end increase in latter years when, from the nature of the arithmetical calculation their effect on the present capital value of the annual dependency diminishes, a small allowance for them may be sufficient where the deceased and his widow were young and in good health at the date of his death…. [Id.]

The starting point in any estimate of the amount of the "dependency" is the annual value of the material benefits provided for the dependents out of the earnings of the deceased at the date of his death. But quite apart from inflation, there are many factors that might have led to variations up or down in the future. His earnings might have increased and with them the amount provided by him for his dependents. They might have diminished with a recession in trade or he might have had spells of unemployment. As his children grow up and become independent the proportion of his earning spent on his dependents would have been likely to fall.

But in considering the effect to be given in the award of damages to possible variations in the dependency, there are two factors to be borne in mind. The first is that the more remote in the future is the anticipated change the less confidence there can be in the chances of its occurring and the smaller the allowance to be made for it in the assessment. The second is that as a matter of the arithmetic of the calculation of the present value, the later the change takes place the less will be its effect on the total award of damages. [Id.]

From the above stated scholarly remarks, one can deduce that there are two essential factors that need critical consideration in the assessment of dependency awards occasioned by fatal accidents. These are the 'amount of the annual "dependency" and the number of "years' purchase". But both of these factors are amenable to different changing variables as noted above. Such changing variables that might affect both or any of the essential factors in one or another way should be critically considered., for example, the number of years purchase may be changed due to unforeseeable circumstances related to the dependant. In order to accommodate the changing circumstances that may invariably affect the quantum of compensation due to dependants, the court is at liberty to order the damage to be made good in the form of periodical allowance (structured settlement) provided that the judgment debtor is ready to produce adequate security for the payment of the allowance. This is what Article 2095(2) of the civil code of Ethiopia contemplates.

Another point that needs clarification is related to the difference between dependency awards and moral damages occasioned by fatal accidents. An award granted to the dependent of the deceased person is compensatory by its nature. Its primary objective is to recompense the dependant for the economic or pecuniary support he suffered by the deceased's death due to tortuous act of another. The support frustrated due to the fatal accident may involve cash and/or services capable of being valued in terms of money. Whereas awards of moral damages that may be granted to some close relatives of the deceased are not compensatory by

their nature, equitable moral damages may be awarded to close relatives of the deceased, not in the real sense of compensation for any pecuniary loss; rather as recognition of the grief and distress they suffered.

The Ethiopian Civil Code also clearly demarcates the distinction between dependency awards and moral awards both occasioned on the death of a certain person due to the tortuous act of another person (see Article 2095 cum Article 2113 civil code). So, while assessing the extent of damage ensued in cases of fatal accidents for the purpose of determining the quantum of compensation, it is imperative to have such distinction in mind.

13.4 Finality of Assessment and Appeals

As discussed earlier, assessment of the extent of damage is a prerequisite for determining the quantum of compensation. In order to fit the amount of compensation award to the extent of damage suffered by the claimant pursuant to the principle of equivalence or reduction to a certain amount where any of the mitigating circumstances comes into operation, it is imperative to quantify the loss suffered by the claimant and value it in monetary terms.

Save the exception provided under Sub-Article two, where the court can pass provisional judgment on the grounds of impossibility of final assessment of damage, Article 2150(1) of the Ethiopian Civil Code requires assessment of the damage to be made on the day on which the court renders its final judgment. Thus, two types of judgments are envisioned under Article 2150. The first is a provisional judgment that can be granted by the court in exceptional circumstances where it is impossible to finally assess the damage on that date. The presumable purpose of this provisional judgment is to provide an interim compensation to a victim who is in urgent need of means of livelihood. The law in this regard anticipates the

difficulties and complications abound the assessment of damage that may prolong final judgment. So, until such complications are resolved in one way or another and having regard to the conditions of the claimant, the court can provisionally fix the amount of compensation award. In this case any of the parties are at liberty to apply to the court for reconsideration of the provisional judgment within a period of two years from the date when the provisional judgment was granted. In the absence of any application to such effect within the time bound, the judgment would be final.

The other judgment is final from the very beginning. Where the extent of damage is ascertained and valued in terms of money, the court is required to pass its final judgment concerning the quantum of compensation awards. It is this court judgment that is stated as "final" in Article 2051(1) of the Civil Code. Finality in the context of this provision seems to imply two things. Firstly, it implies *re judicata.* That is, a person cannot bring fresh action for compensation for another damage that arose from the same tortuous act that has been already litigated and determined on the same issues of fact and law. Civil claims arising from a single and the same transaction cannot be split and be separate grounds of action.

Secondly, it implies the absence of statutory right of appeal as stated in Article 2152. This provision is reproduced as follows: "No appeal shall lie against the judgment of the court of first instance relating to the amount of compensation." Depending on the amount of the claim, extra contractual action for compensation can be instituted either before the Federal First Instance or the Higher Court or any of the Regional Courts having jurisdiction. The judgments passed by the courts under their respective original (first instance) jurisdictions relating to the amount of compensation are non-appealable, except for the reasons specified under Article 2153 of the Civil Code as follows:

(a) the court has considered circumstances which it should not have taken into account or has failed to consider circumstances which it should have taken into account; or
(b) the amount of compensation fixed by the court is manifestly unreasonable and could only have been inspired by prejudice or anger; or
(c) such amount is due to an error of calculation on the part of the court.

The lists provided here as exceptions to the finality of judgments related to the amount of compensation seem exhaustive. However, such exceptions especially those provided under list (a) and (b) are broad enough to cover a number of practical problems related to the assessment of damage and/determination of the quantum of compensation.

13.5 Modes of Payment

13.5.1 Lump sum Payment: the Rule

Once a claim for compensation is brought before the court having jurisdiction and upheld by the court, the next important question is how payment of the compensation award fixed by the court should be executed. Shall the court order the tortfeasor to dispose (pay) the compensation in a lump sum form – at once or in a structured form in the form of periodic allowance? These are important issues to be addressed under this chapter in turn.

As a principle, lump sum payment of compensation is widely recognized in almost all jurisdictions as an appropriate mode of disposition of awards for civil wrongs. Our Civil code also, although lacks clarity to the desired degree, seems in line with this principle. Pertinent provision in this regard is Article 2154, which deals with the possibilities where the court may order compensation awards to be disposed in the form of periodical allowance in appropriate cases. In order to make the

discussion clear, Sub Article one of Article 2154 is reproduced as follows: " (1) Where such mode of payment is justified by the nature of the damage or other circumstances, the court may order the damage to be made good by means of a periodical allowance." From the very wordings of this sub-article inference can be made that lump sum payment of compensation is the ordinary rule of compensation in Ethiopia. As an exception to this rule implied in this sub-article, the court is conferred with a narrow discretion to order payment of compensation awards in the form of periodical allowances only for strong justifications. In the ordinary parlance of the law, payment of compensation in lump sum form may have extra advantages. It is easy for execution and avoids further complications in the relation of the judgment debtor and judgment creditor. It avoids any sense of insecurity on the part of the judgment creditor whether or not payment will be frustrated by intervening events, which some times happens in the case of periodical allowance.

But it has to be noted that when the court is convinced to depart from the rule for strong reasons, it has to make sure first that the judgment debtor can produce adequate security for the payment of the allowance. Sub-Article two of Article 2154, which says: "In such a case, the debtor shall provide security for the payment of the allowance" has to be considered as a cumulative requirement to order periodic allowance as a mode of payment of the compensation award.

13.5.2 Periodical Allowance: Exception

As incidentally mentioned above, periodical allowance, also known as "structured settlement" is recognized as a mode of payment of compensation in exceptional cases. Having regard to the nature of the damage to be made good and other relevant circumstances, the court is at liberty to order the damage to be made good in the form of periodical allowance (structured settlement) provided that the

judgment debtor is ready to produce adequate security for the payment of the allowance.

Thus, the nature of the damage to be made good is a key element in determining the mode of payment of compensation awards. As was discussed somewhere else, damage is a harm caused to a person's interests and these interests at stake can be classified into various components such as material vs. moral damage, present damage vs. future damage. There are different difficulties, complications and uncertainties related to the assessment of the extent of damage, which are the prerequisite for determining the quantum of compensation awards. Particularly, these complications are prevalent in the assessment of future pecuniary losses.

For example, in the assessment of the total pecuniary losses suffered by dependants in the case of fatal accidents, there are two essential factors that need to be considered. These are 'the amount of annual "dependency" and the number of "years' purchase".' But as discussed earlier, these essential factors cannot be determined for certain as they are amenable to unavoidable intervening variables that cannot be accurately foreseen. So, the determination of future damage (pecuniary loss), particularly the overall pecuniary losses suffered by dependants in the case of fatal accidents is more than difficulty. The quantum of compensation fixed in advance based on a number of uncertain assumptions might not accurately measure the future loss. Thus, in order to make the quantum of compensation fit to the extent of the damage, circumstances dictate the court to order periodic allowance as a mode of payment. The important essence of periodic allowance is that it is amenable to changes occasioned by the changes in the assumptions made during the assessment of the damage.

These and other pertinent reasons may be taken by the court as justifications to order payment of compensation awards in the form of periodical allowance instead

of a single payment in lump some form. This is, for example, what Article 2095(2) of our civil code envisions.

Review Questions

1. Proving damage is a prerequisite for claiming compensation in extra contractual liability law. Comment on it.
2. Who shoulders the burden to prove damage?
3. Discuss the modalities of assessment of material and moral damage
4. Compare and contrast between equivalent compensation and equitable compensation.
5. Discuss why the principle of equivalence becomes relevant for material damage but not for moral damage.
6. Discuss the circumstances that justify departure from the principle of equivalent compensation for material damage.
7. Discuss the meaning of the "finality" clause in relation to the assessment of damage and determination of the quantum of compensation.
8. Discuss the following payment modalities of compensation:
    - Lump sum payment
    - Periodical payment
9. Discuss the circumstances that make periodical payment of compensation preferable to lump sum form of payment.
10. What are the measures to be taken in favour of the claimant while the court orders periodical payment of compensation
11. Discuss the difference between provisional determination and final determination of compensation envisioned under article 2150 of the Civil Code.
12. Discuss the circumstances that may justify provisional determination of compensation.

Chapter XIV: Action for Compensation

14.1. Who May Claim Compensation?

Claimants (plaintiffs) in Law of torts can be classified into independent claimants and derivative claimants. Claimants falling under the first category are those who can institute a civil action for compensation on their own behalf, whereas those falling under the second category can institute action by subrogating (substituting) the victim of the tort. The basis of the subrogation could be contractual or legal.

14.1.1. Independent Claimants

One or more persons may bring independent action for compensation for injuries resulting from a given tort. But in order to bring such action each person must have interest at stake. That is, proving damage caused to one's legitimate interest is a prerequisite for instituting action for compensation in tort. So, in order to stand as an independent claimant, the plaintiff must show vested interest in the subject matter of the suit. This prerequisite, which is set under Article 33(2) of the civil procedure code, is applicable for civil actions.

Having noted this procedural hurdle, let us discuss the possible persons that may sue for compensation on their own behalf by invoking the relevant provisions of the Ethiopian extra contractual liability law.

A. **The Victim Himself**. In a case where a non-mortal bodily injury is caused to a person or where an injury is caused to any person's material interest, only that person whose interest is at stake can sue the harm doer for compensation. As clearly provided under Article 2146(1) of the civil code, the victim's claim against the person liable for the damage may not be assigned so long as it has not been upheld by a judicial decision and the amount fixed. That is to say that the right to institute action for compensation is personal

by its nature. This very right *per se* cannot be transferred or assigned to a third party. But once the victim himself took his case before a court of law and won it, he is at liberty to assign fully or partly the compensation awarded to him to a third party in accordance with the provisions of Articles 1962 – 1975 of the civil code.

However, there are exceptional circumstances where a person can institute an independent action for compensation on his own behalf for the non-mortal bodily injury ensued to another person. These persons are stated under Articles 2114 and 2115 of the civil code. Sub-Article 2 of Article 2114 states "where a girl or a woman has been raped, equitable compensation may also be awarded to the husband of the woman, or to the family of the girl." This refers to the amount that may be independently claimed in the form of compensation by the husband of the woman or the family of the girl raped apart from the compensation awarded to the direct victims (the woman or the girl raped). For example, if 1000 Ethiopian birr, which is the maximum amount for moral injury, is awarded in the form of moral damages to the woman or the girl raped, another additional 1000 Birr or less may be awarded to the husband of the woman or the family of the girl following an independent action by the husband or the family of the girl to such effect.

Q. Would the reverse be applicable if the husband is raped in an act of homosexuality?

The other exception provided under Article 2115 deals with a bodily harm to a wife. As per this article, where the companionship of the wife is rendered less useful or less agreeable to the husband because of tortuous act of another person, apart and in addition to the compensation awarded to the woman for the bodily injury she sustained, the husband of the woman can institute an independent action for compensation against the harm doer.

B. Next of Kin in Case of Mortal Accidents

B.1. Dependants of the Deceased for Compensation of Material Damage

As was discussed earlier, when a person dies from an accident caused to him, some of his specified dependants are entitled to institute an independent action for compensation against the person liable. As provided under Article 2095(1) of the civil code, the spouse of the victim, his ascendants and descendants can institute an independent action for compensation for the material damage they have sustained because of the death of the victim. Despite the use of the term 'his' in this provision the victim of the mortal accident could be either of the spouses. Thus, if any of the persons listed under Article 2095 are able to show that he had been receiving a material support from the victim and that the support would have continued had the death of the victim not resulted from the accident, he can institute action for compensation against the person liable. The list provided under Article 2095(1) seems exhaustive. Surprisingly, brothers and sisters who were dependents of the victim of mortal accident cannot claim compensation for the loss of support they forgo due to the death of their breadwinner brother or sister. because, to this effect Article 2096 states "No other persons shall have independent claims to be compensated because of a mortal accident, even where a plaintiff was factually supported by the victim, or the latter was bound to maintain him." Another important issue related to Article 2095 is whether or not the term "descendants of the victim" covers an adopted child. But the general opinion is that since an adopted child is considered under the law as the natural child of the adopter for all practical purposes, he should be treated as the descendant of the victim in Article 2095.

So, in order to be entitled to such a right the person must not only be within the list provided under sub-Article one of Article 2095 but must also prove that he had been receiving material support from the victim of the mortal accident, which would have been presumed to continue had it not been for the death of the person ensued because of the accident. If the dependant(s) mentioned is able to show that he was

receiving some sort of material support from the deceased in a regular manner until the death of the latter, the continuity of such support has to be presumed unless otherwise the defendant proved to the contrary.

According to authorities, the purpose of the law in conferring the right to institute independent claims to the persons specified above is probably to help such claimants in getting compensation for the loss of the material support they would have received from the deceased had be not been killed by the event for which the defendant is liable. An important question may be raised here. That is, should the claimants be in a state of necessity for care and support in order to sue the defendant by invoking Article 2095 of the civil code? In this regard the law is not clear enough. As cited by Mehar Redae in a paper he presented in a workshop mentioned earlier, in a case brought before the former Sidama Administrative Region High Court in Awassa (civil case file no. 78/77 E.C.), a certain person sued another person for compensation by indicating that he had lost his child because of a car accident for which the defendant was liable. According to Mehari, the defendant objected to the plaintiff's claim for compensation stating that he (plaintiff) was a high income self-reliant trader and could support others in destitution. Mehari further cited a similar case brought before the Federal Supreme Court (Civil Appeal file no. 2325/88 E.C.) by ascendants who lost their child because of a car accident claiming compensation by invoking Article 2095 of the civil code. According to Mehari, the Court rejected the claim for compensation for the following reason:

Respondents (ascendants) did not prove that they were dependent up on the money they received from the deceased. The material support that the deceased was providing to them on the occasion of holidays could be considered as a gift; it could not be regarded as support provided to the respondents in the form of a maintenance/allowance. They did not fulfill the criteria mentioned in Article 2095 of the civil code mentioned above. On top of this, since the livelihood of the respondents depend on agriculture, they are self-reliant in terms of allowance.

Thus, their claim for compensation on the basis of the support that was provided to them in the form of bonus on the occasion of holidays has no legal basis. (Translation mine) According to this line of argument, unless the material supports that were supplied by the deceased person to the persons enumerated under Article 2095 in a regular manner and the receivers of the support were in a state of necessity to claim maintenance allowance (in the sense of Articles 807- 812 of the civil code) but for the occurrence of his death, the claim for compensation by such persons cannot be sustained under the law.

On the other hand, according to Mehari, there are arguments that contradict the reasoning of the court provided above. It is argued that the only similarity between the rights of a person who may claim maintenance allowance by invoking Article 807 through Article 812 of the civil code and those who may invoke Article 2095 of the same is that the appropriate manner of payment of compensation under both cases is periodical allowance. The obligation to provide maintenance allowance as per Article 812 & ff. of the civil code emanates from the consanguinal or affinal relationship that exists between the allowance provider and the receiver. The rights and obligations of the provider of the allowance and the receiver of the same depends, firstly on the existence of a specified family relationship under the law, secondly on the capacity of the debtor (the person responsible to provide allowance) and thirdly on the need of the creditor (the person entitled to receive maintenance allowance) from the debtor. All these are cumulative requirements. But the first and the second elements in this case are not relevant requirements for the independent claimants envisioned under Article 2095 of the civil code. The defendant contemplated under Article 2095 is liable to compensate the claimants enumerated over there for the loss of material support they would have received from the deceased had not the latter been killed by the event for which the defendant is liable. Family relationship of the defendant and the plaintiff and the credit worthiness of the defendant are immaterial.

However, it is a moot issue whether or not the third requirement should be taken as essential element to establish liability under Article 2095. According to the reasoning of the court mentioned in the above case (Civil Appeal file no. 2325/88 E.C.), it seems a requirement. But there are contradictory arguments developed in other cases. Mehari Redae cited the following conclusion reached by the Hawassa High Court in one case:

The awarding of a compensation claimed by a father for the damage he incurred due to the mortal accident resulting from on extra contractual wrong shall be considered in accordance with Article 2027 and ff, especially in accordance with Articles 2090-2091 and 2095 of the civil code. Since it is not a claim for maintenance allowance invoked between descendants and ascendants, sisters and brothers or other blood relatives, the provisions of the civil code listed from Articles 807-812 are not applicable. (Translation mine) The reasoning of the court in this case seems plausible. The strong reason behind Article 2095 may be just to help persons enumerated there to get compensation for the material benefit frustrated because of the death of a person within the relationship defined there due to the tortuous act of another person. The law may be highly motivated to provide redress for those persons who may be rendered helpless due to the death of their breadwinner within the relation defined under Article 2095. But the question is that would it be faire to deny compensation to those persons mentioned in Article 2095 for the loss of the material support they forgo due to the death of the person mentioned there by the tort of another person, for the mere reason that they are not in a state of necessity to claim maintenance allowance in the sense of Articles 807-812 of the civil code? Should the law favor the plaintiff or the defendant in this case?

Another important point related to the discussion here is where the deceased is a minor. That is, may the persons enumerated in Article 2095 claim compensation for the loss of material support they suffered because of the death of their child who was below the statutory majority age? As cited in Mehari Redae's unpublished

paper mentioned above, there was a case appealed to the Federal Supreme Court (Civil Appeal File No. 480/88 E.C.). In this case, according to Mehari, the mother of a 14 year old deceased student claimed compensation for the loss of material support she alleged to suffer due to the death of her son by an event for which the defendant was liable. The mother stated that although her son was a regular student, he used to sell cigarettes and other related items in his extra time and support her from the money he earned from such activities. She claimed a compensation of the benefit she would have received from her deceased son had not his death occurred. According to Mehari, the court rejected the claim for compensation stating that the deceased who was a 12 or 14 years old at the time of his death did not have the legal duty to provide maintenance allowance to his mother. Hence, as per the court's reasoning even though the mother's factual allegation of loss of support is proved true, she had no legal right to claim maintenance allowance from the deceased who had no legal duty to provide maintenance allowance to his mother under such age category. However, the court's reasoning in this case does not seem in the spirit of the law. As was mentioned above, the rights and obligations of the provider of maintenance allowance and the receiver of same depends, firstly on the existence of a specified family relationship under the law, secondly on the economic capacity of the debtor (the person responsible to provide allowance) and thirdly on the need of the creditor (the person entitled to receive maintenance allowance) to the debtor. Age does not seem a requirement in imposing the duty to provide maintenance allowance.

B.2. Family of the Deceased for Compensation of Moral Damage

When a person dies from a tortuous act of another person, the families of the victim may claim compensation for the moral damage they suffered by the family due to the death of their family member. Needless to say, the death of a spouse, ascendant, descendant, brother or sister or other members within the close family tie inflicts grief and sorrow to the family of the deceased. Thus, the family (through their

qualified representative who may be determined in accordance with local custom as per Article 2116 or in default of it by the law as provided Article 2117 of the civil code) can sue the person liable for compensation of the moral damage they suffered due to the death of their family member because of an event that makes the defendant liable. The court is given the discretion to award equitable moral damage to the family of the deceased having regard to local custom and the ceiling figure set under 2116(3) of the civil code.

14.1.2. Derivative Claimants

This term refers to persons who can bring action for compensation by substituting the victim of the tort. As stated earlier, the victim's claim against the person liable may not be assigned so long as it has not been upheld by a judicial decision and the amount fixed (Art. 2146). However, there are circumstances where a person may derive the right to institute an action for compensation from the victim of the wrong. The source of this right could be a contractual or legal subrogation.

A. **Heirs of the Victim**: Testamentary or in testamentary heirs of the victim may also institute action for compensation for material damage suffered by the victim. As was discussed earlier, material damage is an injury caused to a person's estate either by an act that directly diminishes the value of the estate or by increasing (creating) a third party's claim against the estate in one or another way. Where the estate of the victim of mortal accident is affected negatively by any tortuous act for which the victim could have claimed compensation had he survived the accident, his heirs can claim compensation by substituting him on behalf of the estate.

However, heirs of the victim cannot claim compensation for the moral damage sustained by the victim, unless the victim has initiated an action to such effect during his lifetime. Article 2144(2) envisions exceptions to this exception by incorporating the phrase "save where otherwise provided by law" which phrase indicates that there could be circumstances where by heirs of the victim can claim

compensation for the moral damage sustained by the victim. Article 2113 may be treated among such exceptions.

B. Creditors of the Victim

According to Article 2145(1) of the civil code, the creditors of the victim may exercise the debtor's action where the debtor has, after the date on which they became his creditors, suffered a damage affecting solely his pecuniary interests. The creditor of the victim can subrogate the latter by virtue of the law when the conditions laid down in Articles 2145(2) and 1993 of the civil code are met. These conditions are:

- There must be a debtor creditor relationship between the victim and the person to be subrogated;
- The damage suffered by the victim must be solely against his pecuniary interest as opposed to damage connected to the debtor's person, bodily integrity or honour;
- The damage must be suffered by the victim after the creation of the debtor-creditor relationship;
- The person (creditor of the victim) must apply to the court and be authorized by the court to exercise such action by subrogating the victim. But this last requirement does not seem necessary under the provisions of the commercial code that will be discussed below.

Similarly, Insurance Companies and Pension Paying Institutions can also subrogate (substitute) the victim of the tort and bring action for indemnity against the tortfeasor who is liable for the materialization of the risk covered under the insurance policy or the pension. As can be inferred from the provisions of Articles 2093 and 2094 of the civil code, subrogation is possible when the instruments creating such bonds between the insurance company and the insured victim or the pension payer and the pension recipient incorporates a clause for subrogation. Here, it is a contractual subrogation that emanates from the agreement of the parties.

Article 683(1) of the commercial code also state: "The insurer who has paid the agreed compensation shall substitute himself to the extent of the amount paid by him for the beneficiary for the purpose of claiming against third parties who caused the damage." Although Article 2093(3) of the civil code recognized the possibility of subrogation or substitution when the insurer and the insured agreed to such effect under the insurance contract, Article 683(1) of the commercial code made subrogation mandatory. But it has to be noted that even under the commercial code subrogation is made mandatory only when the insurance is related to an object. Article 678 of the commercial code states: "A contract for the insurance of an object is a contract for compensation. The compensation shall not exceed the value of the object insured on the day of the occurrence." So, if the insured victim is compensated fully by the insurance company for the risk caused to his object by a third party, then the insurance company as of right can subrogate (substitute) the insured to bring action for indemnity against the third party responsible for the materialization of the risk. As the purpose of both insurance law and extra-contractual law is not to make the victim more rich but to restore him to his previous position to the extent possible by awarding him a monetary equivalent to the harm caused to his pecuniary interest, the commercial code as contrasted to the civil code seems logical in making subrogation mandatory. Thus, to the extent the insurer compensates the insured for the material damage sustained by the latter because of the materialization of the risk covered under the insurance policy, the former can legally subrogate the insured for the purpose of claiming indemnity from the third party responsible for the materialization of the risk.

The other point of contrast between the civil code and the commercial code in relation to subrogation is that while the former makes contractual subrogation sweepingly possible in Article 2093(3), the latter makes subrogation absolutely impossible when the insurance is against a risk to persons. As per Article 689 of the commercial code "a contract for the insurance of persons shall not be deemed to be a contract for compensation. The amount insured may be freely fixed and shall be due

regardless of the damage suffered by the insured person." The human person's body or life is *extra-commercium* in the sense that it cannot be subjected to market transaction and so cannot be valued in terms of market price unlike the insurance of objects. The amount fixed under the insurance contract does not indicate the market value of the risk covered by the insurance. So, when an insured person suffers injury to his person because of the materialization of the risk covered under the insurance policy, he can claim the amount fixed under the insurance policy from the insurance company. In addition, the victim can claim compensation from the tortfeasor by invoking the relevant provisions of the civil code. Since the amount paid by the insurance company is by definition not compensation, over (double) compensation cannot be raised as an issue. In this case the insurer cannot claim indemnity from the tortfeasor by substituting the insured victim (Art. 690 com. code). Sub-Article 1 of Article 2093 of the civil code seems relevant to insurance of persons.

14.2. Who May Be Sued in Tort?

As you may remember from your reading on law of persons, any entity endowed with legal personality is the subject of rights and obligations from birth to death. So a person, be it physical or juridical, can sue and be sued before court of law. For example, minors can sue and be sued in their own names in tort through the help of their agents. Organizations endowed with legal personality such as trade unions and other bodies corporate can also sue and be sued in their own names. Having this general information in mind, let us turn to the specific point of discussion concerning persons who can be sued in tort.

14.2.1. The Author of the Damage

A person may, by his action or inaction, cause damage to another. This person may be held liable to compensate the victim. The basis of his liability is his own faulty conduct or in exceptional circumstances his faultless activities or engagements. The

author of the tort or wrongful damage could be one or more persons acting in concert or independently. For example, two drivers may involve in a car collision and cause damage to a pedestrian. Regardless of whether the wrong committed by these drivers is in concert or independent, they are equally liable to the damage suffered by the pedestrian as per Article 2084(1) of the civil code unless proved that the damage is caused solely by the fault of one of the drivers in which case the driver at fault would be made fully liable. In all circumstances the author of the wrongful damage is liable to make good the damage he caused to another by his fault or sometimes-faultless behavior regardless of whether or not there is another third party answerable under the civil law (Art.2136).

However, there may be a situation where there is a difficulty to identify the wrongful author of the damage. As a pragmatic solution to this difficulty, Article 2142(1) of the civil code provides: "Where damage has been caused by the fault of one or another of several persons and it is impossible to determine which of the persons involved is the author, the court may, where equity so requires, order the damage to be made good by the group of persons who could have caused it and among whom the author of the damage is certainly to be found." In order to make the group liable, first the court must be certain enough that the author of the damage is found within the group identified, second it must be absolutely impossible to determine the one who caused the damage from the group, and lastly the court is expected to exercise its discretion whether or not its decision is in the interest of justice. But any member of the group should be relieved from liability if he can prove his innocence in an equivocal manner.

14.2.2. The Vicarious Defendant

In addition to the author of the damage, the victim of the tort can also sue the vicarious defendant for compensation jointly and severally with the author where there is a relationship recognized under the law between the author of the damage

and the vicarious defendant and the damage is caused by the former during the course and within the scope of such relationship. As you have already appreciated in the previous parts of this course, there are certain relations recognized under the law that makes one person liable for the tort committed by another person. In this case, the author of the tort and the vicarious defendant (person answerable under the civil law) are jointly and severally liable for the damage caused to the victim. That means, the victim can sue the author of the tort and the vicarious defendant jointly and severally. This is what Article 2136(1) of the civil code clearly stipulates and Article 2155(1) of the same code reinforces. So, the person responsible for the tort committed by minors, the employers for torts committed by their employees, bodies corporate for torts committed by their agents, representatives and salaried employees, the state and its administrative territories and organs for torts committed by officials and civil servants of the state are respectively answerable under the civil law.

14.2.3. Heirs of the Person liable

As was discussed above, heirs of the victim can sue the person liable claiming compensation for the material damage suffered by the victim. Here in this sub-section, you will appreciate cases where the heirs of a deceased person may be sued for the damage caused by the latter during his lifetime. This goes with the principle that a person shall not inherit only the rights of the deceased person but also the obligations attached to such rights. So, if a certain person named Mr. Z is involved in a car accident because of his sole fault and died from such accident, and his property devolved to his son named Y, then an action for compensation can be instituted before court of law against Y by any innocent person who suffered injury in such accident or in any other actionable tort committed by Z during his lifetime. However, the liability of an heir may not exceed the value of the property devolved to him by virtue of the succession.

14.3. Immunities

As was discussed somewhere else in this course material, any person who by his fault causes damage to another is liable to make the damage good. But this is not always the case. There are certain persons to whom the law extends special protection and exculpates them from tort liability. According to Article 2137 of the civil code, "No action for liability based on a fault committed by Him may be brought against His Majesty the emperor of Ethiopia." The wording of this provision reflects the prevailing political reality of Ethiopia in the 1960s. The absolute immunity granted to the Emperor goes in line with the then saying "Negus Aykesess Semay Aytaress" which literally means the king cannot be sued and the sky cannot be ploughed.

As per Article 2138 of the civil code, ministers, members of parliament and judges are also legally immune from tort liability. Accordingly, "No action for liability may be brought because of facts connected with their office against:

" (a) a member of the Imperial Ethiopian Government; or
(b) a member of the Ethiopian Parliament; or
(c) a judge of the Ethiopian courts."

The wordings of the provisions reflect the nature of the existing government at time when the law was enacted. The phrase "members" of the Imperial Ethiopian Government under 2138(a) seems to refer to ministers. But has to be construed broadly in line with the currently prevailing governmental system to include not only "ministers" or "members of the cabinet of ministers" operating at the federal level but also the top executive officials in the respective regional states of Ethiopia.

Unlike the absolute immunity granted to the Emperor, the immunity granted to ministers, members of the parliament and judges under Article 2138 seems qualified. That is, it is not an absolute protection from liability. As per Article 2139 of the civil code, if any person protected under Article 2138 of the code has been criminally convicted under the penal code he would be personally liable to the civil

damage caused to another because of such criminal act. The immunity from personal liability in this case operates in so far as the injury causing conduct of the person(s) is connected with their respective office and such conduct is not condemned under the penal code.

However, it has to be noted here that the purpose of the legal immunity granted under the provisions discussed above is not to render the victim helpless. The victim of the tort may bring action for compensation against the state in appropriate cases by invoking the pertinent provisions of the law dealing with vicarious liability of the state for the tort of its officers. But it would be unfair and unadvisable, for example, to make a judge personally liable for damages he has caused to another during the discharge of his duty in good faith. To do so may intimidate judges and hamper the justice process.

It has to be noted further that the provisions of the code under Articles 2137 and 2138 has to be construed in line with the existing administrative structure of the Federal system of Ethiopia.

14.4. Period of Limitation

An action for compensation can be instituted only within the time bound set by law. If the victim of a tort fails to exercise such right within the time bound set under the law, he can no longer exercise such right after the expiry of the period successfully. As per Article 2143 of the civil code, there are two types of period of limitations within which an action for compensation may be instituted before the court of law. The first one is the two years period that is stipulated under sub-Article 1. And the second is the period of limitation provided under the penal code for the particular criminal offence that gives rise to civil claim, tort (Art. 2143(2)). Where the period of limitation prescribed under the penal law for the particular offence is less than two years, then the period of two years provided under Sub-

Article 1 of Article 2143 becomes operative. Whereas when the period of limitation set under the penal law for such criminal offence is longer than two years, this period becomes operative to the advantage of the victim of the tort. However, in order for the longer period of limitation prescribed under the penal code to operate, the tortfeasor has to be convicted criminally for the same act that gives rise to tort liability.

Review Questions

1. When do you think an action for compensation can be instituted?
2. Who can claim compensation in tort law?
3. Discuss the differences between independent claimants and derivative claimants.
4. Who can claim compensation for moral damage in tort law?
5. Identify the persons who can be sued for damage in tort.
6. Discuss what the concept of immunity is all about.
7. Identify persons immune from liability for damage and discuss the scope of the protection given to them.

PART IV

Chapter XV Unjust Enrichment

15.1. Doctrinal Foundation

The law of unjust enrichment, also known as restitution, is a fundamental part of our laws although neglected by legal scholars and practitioners. Some authorities labeled this law as the third branch of civil liability along with contract and torts. But some other authorities treat the law of unjust enrichment as a 'gap filler', that is, a law that only comes into operation when the laws of contract, property and tort fail to provide appropriate remedy for one or another reason in their respective province. Accordingly, they subordinate the law of unjust enrichment to other areas of private law, namely contract, tort and property laws.

The law of unjust enrichment is built upon the basic maxim of the doctrine which prescribes "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." Based on this fundamental tenet, the law of unjust enrichment, which is inappropriately named as "unlawful enrichment" under the civil code, is recognized as a separate ground of civil action in Ethiopia. So, this chapter will introduce you to the principles and rules governing unjust enrichment and the circumstances whereby this law is called upon for operation.

15.2. General Provisions Applicable to Unjust Enrichment

It seems a tautology to say that the law of unjust enrichment is one of various mechanisms adopted to protect individuals' interest to resource such as money, property and labour. Often times the law of unjust enrichment and restitution are treated as synonymous. However, there is a sharp difference between these two legal terminologies. While unjust enrichment refers to the ground or basis of the claim, restitution refers to the claim itself. When resources belonging to one person are used by another person against the interest and at the expense of the former

without any justification, the act may be treated as unjust, which is the basis for the owner or lawful possessor of the resource to claim restitution of the benefit derived by the other in an unjust manner.

Based on the maxim that says, a person who has unjustly enriched himself shall make restitution to the other. Article 2162 of the civil code sets the general principle as follows: "Whosoever has derived a gain from the work or property of another without a cause justifying such gain, shall indemnify the person at whose expense he has enriched himself to the extent of the latter's impoverishment, and within the limit of his own enrichment." This governing principle has incorporated many elements in it. Let us split and discuss these elements one by one so as to make it clear enough.

- 'Whosoever…' this is an indication that the principle applies to any person be it physical or legal person regardless of any difference on whatsoever ground;
- '…derived a gain…' this also refers to some positive material benefits obtained by the person made accountable;
- '…from the work or property of another…' this qualifies that the gain or benefit obtained must be from the work or property of another be it work of the mind or labour, be it tangible or intangible property of another;
- '…without a cause justifying such gain…' this indicates that no legal justification can be provided in support of the gain derived from the work or property of another. When there is cause justifying the gain, there is no liability. For example a person may employ another person or hire the property of another for gainful purpose. But the gain derived from this kind of relations is not only justifiable but also encouraged and usually protected by the law.
- '…shall indemnify the person at whose expense' the gain is derived. This presupposes that there is some impoverishment or loss caused to the owner of the work or lawful holder of the property because of the other

person's unjustifiable intervention. So such impoverishment or loss has to be quantified and indemnified by the person liable. Being a claim for indemnity, the liability of the person made accountable shall not exceed the impoverishment caused to the right holder because of the gainful invasion.

- '…and within the limit of his own enrichment.' This phrase implies that the gain derived from the work or property of another without cause justifying it could be less than, equal to or greater than the impoverishment caused to the right holder. In this case when the gain is equal to the impoverishment caused to the right holder, there is no problem as all such gain has to be restituted to the right holder. But the problem is when the gain derived is less than or greater than the impoverishment. As to the law, it is clear and simple; where the gain derived by the defendant is greater than the impoverishment caused to the right holder, the liability of the former is limited to the extent of the latter's impoverishment. But where the gain derived is less than the impoverishment caused to the right holder, the liability of the defendant is limited to the actual gain he derived. The question here is why the law prefers this position. Why should the law not require the defendant to fully indemnify the right holder under all circumstances?

In a nutshell, the law of unjust enrichment comprises three basic elements. These elements are:

(a) Benefit acquired by the defendant

(b) At the plaintiff's expense (from the plaintiff's resource)

(c) In an unjust manner (injustice)

Where these cumulative elements are met, the person who has been impoverished by the unjustified act of another can successfully institute an action for restitution based on the law of unjust enrichment.

The subsequent Article qualifies the principle stated under Article 2162 of the civil code. Article 2163 of the civil code under the title "Loss of enrichment" provided in

Sub-Article 1 that: "Restitution is not due to the extent to which the defendant can show that he is no longer enriched at the time of the claim for restitution." This means, even if the plaintiff proved that the defendant enriched himself at his expense, the defendant would not be liable to indemnify the plaintiff if he succeeded to prove that the benefit or enrichment had already gone from him. But this defense cannot stand valid where the defendant has parted with the enrichment in bad faith or where, at the time of parting with it he should have been aware that he was bound to make restitution (Article 2163(2)). So the defendant can raise Sub-Article 1 as a defense validly only if he has parted with the benefit in good faith before the time when a claim for restitution is brought before the court. But proof of his objective or subjective knowledge of the fact that he knew or should have known that he was bound to make restitution to the right holder when he was parted with the enrichment is a strong indication for absence of good faith. Where the unjust enrichment has been transferred gratuitously to a third person, the claim for restitution may be brought against the latter (Article 2163(3)).

15.3. Grounds of Unjust Enrichment

A. Undue Payment

Without defining what the term undue payment is, Article 2164(1) of the civil code states: "Whosoever had paid what he did not owe may claim restitution of it." In order to clarify this provision, it seems important to quote Article 2165 of the code which reads:

"Restitution is not admitted where a person cognizant of the facts pays voluntarily what he knew he did not owe." This provision qualified the scope of application of Article 2164(1). The cumulative reading of these two provisions implies that when a person paid what he did not owe due to a mistake or the wrong appreciation of facts, he can claim restitution of such payment including the increments of the thing, or

the legal interest on the money starting from the date of payment, where the payee acted in bad faith. Conversely, even if the person does not owe payment, if such payment is made voluntarily with full knowledge of the facts, restitution of such payment may not be claimed. The same is true when the payment is made in the performance of a prescribed or moral obligation unless the payer lacks capacity to alienate gratuitously (Art. 2166(1) (2)). Another provision related to restitution of payment worth noting is stated under Article 2167 of the civil code. Sub-Article 1 of this provision relieved the receiver of the undue payment from the obligation to return what he has received if, due to such payment, he has in good faith destroyed or cancelled his title, relinquished the security for his claim or allowed his action against the true debtor to lapse. When this happens, the person who made the undue payment may recourse against the true debtor only (Art. 2167(2)).

As discussed earlier, restitution is a remedy that may be sought by a person on the basis of unjust enrichment. Literally, the term restitution may be defined as the 'action of giving something that was lost or stolen back to its proper owner.' Technically speaking, restitution is a remedy that may be sought from the court to order the defendant to return things which have been taken improperly and its increments to the right holder. In a nutshell, it is an act of returning the thing itself and its increments to the right holder. Restitution as a remedy can be sought not only for an unjust enrichment; it can also be sought as a remedy in law of contract when a contract is cancelled or invalidated for one or another reason, and in tort laws in appropriate cases.

Where the thing required to be restituted has deteriorated, lost or where restitution of the thing in kind to the person entitled becomes impossible for various reasons, the defendant may be obliged to pay the value of the thing in the form of indemnity, having regard to its market value at the time when it becomes impossible to return it in kind. This is true even if the deterioration or loss of the thing is caused by force majeure, if at the time when this occurred the defendant knew that he had no valid

contractual or legal right to the thing (See Article 2175 through Article 2177). These provisions should have been incorporated under the section that deals with undue payment as alternative or supplementary remedies to restitution.

B. Expenses

The other important part of the law of unjust enrichment worth discussing deals with the deduction of expenses. This part is no more concerned with restitution of benefits (enrichments) from the acquirer to the person at whose expense such benefit is acquired. Rather it is concerned with the rights of the person bound to make restitution of the thing in controversy to demand reimbursement for some expenses he has made to preserve the thing and/or the right to retain increments made on the thing. Since the purpose of the law of unjust enrichment is to rectify injustice, it would be unjust to require the person who is bound to make restitution of the thing to surrender all the investments he has made on the thing and/or to deny him the deduction of expenses he has made in good faith to preserve the thing subject to restitution.

As discussed above, the defendant is liable to make restitution of the thing and/or indemnify the plaintiff to the extent of the latter's impoverishment and, within the limit of his own enrichment (Art.2162 civil code). This is to say not only the plaintiff's claim cannot and shall not exceed the loss caused to him by the defendant's gainful invasion but also the defendant may not be held liable beyond the limit of his enrichment. Here, there are two variables that need to be calculated: the plaintiff's loss (impoverishment) and the defendant's enrichment or positive gain, because proof of both these variables is a prerequisite to determine the extent of the liability of the defendant to make restitution of the thing and/or indemnify the plaintiff. So the critical question here is how can one calculate the benefits derived by the defendant from the work or property of another. Is the defendant entitled to deduct the expenses he has incurred in obtaining such gain? In order to

appreciate these questions, it becomes deems important to have recourse to the relevant provisions of the civil code.

Article 2168 sets a general rule as follows: "Where a person is bound to return a thing which has been in his possession for some time, his rights and obligations arising out of any modifications he may have made to such a thing are, unless otherwise provided by law, or contract, subject to the following provisions." According to Article 2168, where there is contrary stipulation provided by law or in the agreement of parties to a contract, the provisions subsequent to it will not be operative. What follows is a discussion of the governing provisions envisioned under Article 2168 of the civil code.

Reimbursement of necessary Expenses: Without defining or explaining what necessary expenses are, Article 2169 of the civil code states: "Whosoever is bound to make restitution shall be reimbursed of the expenses he has incurred in preventing the loss or deterioration of the thing, unless such expenses were not useful, or were rendered necessary by his own fault." As per this article, the person who is bound to make restitution is entitled to reimbursement of the expenses he has incurred in preventing the loss or deterioration of the thing to be restituted unless:

- Otherwise provided by law or contract (Art. 2168);
- Such expense were not useful;
- Such expenses were rendered necessary by his own fault.

However, the person bound to make restitution is not entitled to any indemnity for the cost of maintaining the thing or for the taxes he has paid because of possessing it, save contrary stipulation under the law or contract (Art. 2170 cum Art. 2168). As this person is entitled to retain the increments he has collected in good faith from the thing to be restituted (Art.2178 (1)), it is deemed rational to make him responsible to bear the expenses of maintenance. In fact, it does not necessarily mean that the person bound to make restitution of the thing is always entitled to

the increment of the thing. If at the time of taking possession or control of the thing this person had clear knowledge of the fact that he did not have valid contractual or legal right to the thing, he is not entitled to the increment of the thing. Where restitution of the increments becomes impossible for one or another reason, the defendant shall pay to the plaintiff their fair market value in terms of money (Art.2178 (2) cum Art. 2164(2)).

Reimbursement of Expenses or Investments made on the Thing: Where the person bound to make restitution is able to prove that he has made expenses or investment on the thing in good faith and because of such expenses or investment the value of the thing has increased, he is entitled to the reimbursement of the cost of such investment within the limit of the value added to the thing because of such expenses (Art.2171 civil code). In order to succeed in his claim for reimbursement, the person bound to make restitution needs to establish three things: firstly, he has to prove the expenses he has incurred on the thing. Secondly, he has to show the increment in the value of the thing and a causal relationship between the expenses incurred by him and the value added on the thing. Lastly, he has to prove the existence of such increment in value of the thing at the time when restitution was claimed.

However, the fact that the above three elements are established does not necessarily imply success to the person bound to make restitution. Although the existence of good faith in incurring such expenses may be and should be presumed, a proof adduced to the contrary by the plaintiff can nullify the person's claim for reimbursement fully or partly. If the plaintiff demanding restitution of the thing successfully proves that the defendant knew or should have known of his duty to return the thing at the time he had incurred such expenses, it could be well taken to refute the latter's claim for reimbursement wholly or partly on the ground of absence of good faith or the existence of its antonym, bad faith, when the court finds it necessary in the interest of justice.

As an alternative to reimbursement, the person bound to make restitution may before restitution of the thing remove anything he has joined to it, if it can be separated without appreciable damage to the thing (Art. 2173). The plaintiff can also raise this in order to avoid payment of indemnity to the person required to restitute the thing.

Right of Retention: As a security for the payment of his claims for indemnity and until the plaintiff (person claiming restitution) effected such payment or produced a security to such effect, the law grants the defendant (person bound to make restitution) to retain the thing (defer restitution of the thing). But it has to be noted that a person who has taken control of the thing illegally, like theft, or a person who, at the time when he took possession of the thing, knew that he had no valid contractual or legal right to the thing cannot exercise this right of retention (Art. 2174) as he does not have any right to claim restitution from the very beginning.

Review Questions

1. Jot down as many points of differences as possible between unjust enrichment and tort.
2. Mr. A, who is a well to do businessman in Addis deposited Birr 100,000 in Mr. B's account by mistake. If Mr. B is not willing to return the money, what course of action would you advise Mr. A to take?
3. Comment on Articles 2118(3) and 2143(3) of the civil code based on the pertinent provisions of the law of unjust enrichment.
4. Can you see any difference between the term "unjust" and "unlawful" enrichment? Which one do you think is appropriate to cover such matters regulated under the provisions of the civil code?

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