

New

Since 2001

BUSINESS AGE

INFORMATION + ANALYSIS

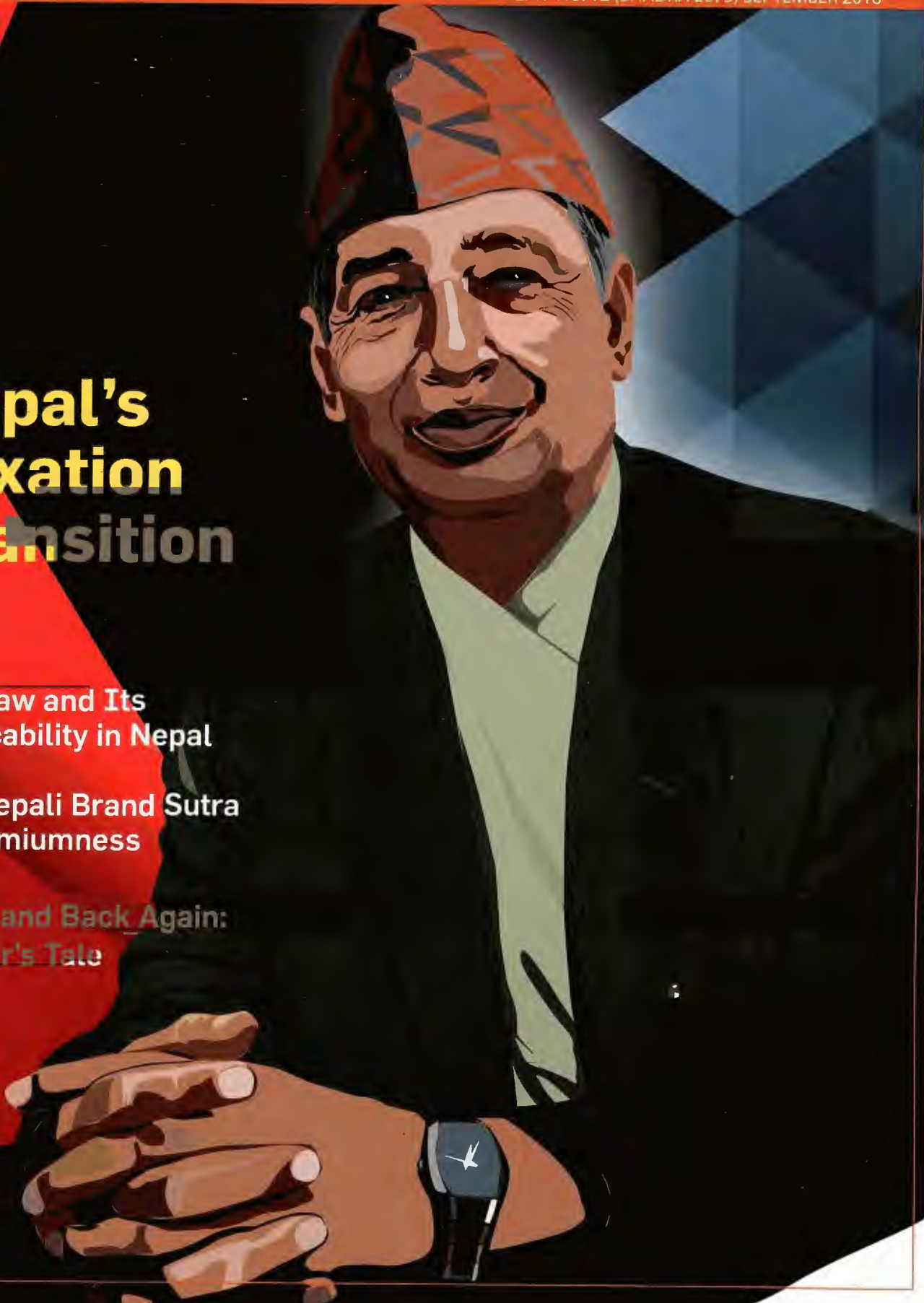
VOL. 17 NO. 12 (BHADRA 2075) SEPTEMBER 2018

Nepal's Taxation Transition

Tort Law and Its
Applicability in Nepal

The Nepali Brand Sutra
of Premiumness

There and Back Again:
A Rider's Tale



Tort Law and Its Applicability in Nepal

Nepali courts may not interpret tort law in the same manner as it is interpreted and adopted by courts in common law jurisdictions.



BY DEVENDRA PRADHAN

In 2017, the Parliament of Nepal passed, and the President of Nepal authenticated, the Civil Code Act 2074 (2017) ("Civil Code"), with the aim of updating and unifying various civil legislations into a single comprehensive unified code. The Civil Code came into effect on Bhadra 1, 2075 (August 17, 2018). The new Civil Code replaces the Muluki Ain, which has been in force for over five decades. Muluki Ain was principally based on traditional Hindu practices and moral values.

In contrast, the Civil Code adopts major principles of



BY DEEPTI SHARMA

common law as well as of private international law, which could have far-reaching effects on the Nepali legal system. The Civil Code includes a separate Chapter on Tort, formally codifying tort law, part of common law, in the Nepali legal system. This article provides a general overview of the principles and evolution of tort law under common law and summarises the major provisions of the Civil Code's Chapter on Tort.

What is a "Tort"?

A "tort" is a civil wrong conducted by a person that causes injury or loss to another person for which a civil remedy, ideally money damages, is appropriate. A basic principle of tort law is that as a member of society, a person has a duty to behave responsibly towards others. In other words, tort law is the law governing relationship between individuals who are not in a contractual relationship with one another. For example, if a person breaches a contract, the non-breaching person has a claim against the breaching party under

contract law. But in countless everyday situations, individuals may not necessarily have a contractual relationship to govern their conduct towards one another. For example, a homeowner cuts a tree in his backyard, which falls in his neighbour's backyard and injures the neighbour. The homeowner must now pay for the medical bills of the injured neighbour as well as lost income due to the injury.

The Civil Code includes a separate Chapter on Tort, formally codifying tort law, part of common law, in the Nepali legal system.

Tort principles shift the burden from the victim (the neighbour or the consumer) to the wrongdoer (the homeowner or the manufacturer). The most common form of remedy in a tort case is money damages from the wrongdoer to the victim. The money damages can be for direct economic loss (such as medical bills, lost income, etc.) and/or indirect non-financial loss (such as emotional pain and suffering). Tort law serves two major purposes. First, tort law allocates fault and balances losses that result from harmful conduct. Second, tort law

encourages individuals to act more carefully and discourages people from engaging in risky behaviour by requiring the wrongdoers to be liable for compensation to the victim.

Differences between a 'Tort' and a 'Crime'

The purpose of tort law is to provide a civil remedy to a victim who has been injured or has suffered losses due to another person's negligent conduct. In most circumstances, tort law's purpose is to financially compensate and make the injured party whole again, but not to punish the wrongdoer. On the other hand, the purpose of criminal law is to punish the wrongdoer's crime and to deter others from committing similar crimes. Criminal law is less concerned with victim's compensation. In criminal cases, the state's (and by extension, the public's) interest supersedes the victim's interest, and the state becomes the plaintiff in such cases.

Types of Tort Tort can be classified in three categories:

1. Intentional Tort: Intentional tort is a civil wrong that results from the wrongdoer's intention to cause harm to others. In intentional tort cases, the focus is on the wrongdoer's



intention and the element of 'intent' must be present. The most common intentional tort is trespassing. The owner may recover compensation for physical damage caused by the trespass. Some other examples of intentional torts in common law are assault, battery, false imprisonment, defamation, wrongful death, etc. Depending on their gravity, some of these torts, such as battery, could also be prosecuted as a crime.

2. Negligence: In simple terms, negligence is carelessness, and most tort cases are based on a theory of negligence. It is the type of conduct that society deems unreasonable. If such

A tort case based on a theory of negligence must satisfy four elements: (i) Defendant's duty of care to victim; (ii) Breach of the duty of care; (iii) Causation (i.e., accident); and (iv) Injury or loss to the victim. Generally, the victim's loss or injury may be physical or economic. Some common examples of injury or loss include loss of earnings or profits, property loss, medical expenses, etc. Sometimes, the wrongdoer may also be required to pay for the victim's "emotional distress." In exceptional cases where the wrongdoer's conduct is particularly egregious, the court may also impose punitive damages intended to punish him.

presume the existence of these two elements. Such cases are based on a theory of *res ipsa loquitur*, or "the thing speaks for itself." The theory of *res ipsa loquitur* applies only in limited cases where injury would not have occurred if someone was not negligent. In other words, a judicial presumption of negligence can arise based on the facts. *Res ipsa loquitur* is often applied in medical malpractice cases where a surgeon accidentally leaves a piece of surgical equipment inside a patient's body during the surgery. In these cases, the court reasons that the only way surgical equipment could be left inside the patient's body is if the surgeon was negligent.

deprived of compensation even if her role in causing the accident was only minimal. To address this unfairness, some jurisdictions have adopted a modified theory - Comparative Negligence. Under comparative negligence, even if the plaintiff (victim) had contributed to the accident, she shall still be entitled to compensation, but the quantum of damage shall be reduced based on the degree of her negligence. Comparative negligence theory has also been classified in two parts - "Pure Comparative Negligence" and "Modified Comparative Negligence".

3. Strict Liability: Strict liability is applied to certain behaviours that are considered risky enough that liability is imposed regardless of whether the wrong doer acted intentionally or negligently. In a tort case based on strict liability, the victim does not need to establish the wrongdoer's fault, i.e., intent or negligence; the wrong doer only needs to establish harm or injury resulted from the wrongdoer's inherently dangerous conduct. Even if a wrongdoer was not at fault or was not negligent, if her conduct caused injury or loss to another, no defence shall exist and she must pay compensation to the injured party.

Limits of Duty of Care

Another common question faced by courts is to whom does this duty of care extend to? Courts in the U.S., for example, have settled this question by ruling that a person's duty of care extends to only those persons who are "reasonably foreseeable." For example, a product manufacturer would be liable if its defective product causes harm or injury to a consumer because the consumer, being the end user, is foreseeable.

Contributory Negligence and Comparative Negligence

In order for a victim to succeed in a negligence claim, she must show that the accident that caused the injury did not occur due to any voluntary action or contribution on her part. If the victim's own fault contributed to her injury or loss, then the victim would not be entitled to any compensation irrespective of the degree of her negligence. This principle is known as "Contributory Negligence." In practice, this principle resulted in a victim being

The primary objective in imposing strict liability is to minimise the risk of reckless behaviour and to encourage potential wrongdoers to take every precaution possible to avoid similar future liability. Strict liability is often imposed against manufacturers in case of defective products, which is known as "Product Liability." For example, if a manufacturer sells a defective product that causes injury to a consumer,

unreasonable conduct causes injury or loss to another person, the wrongdoer may be liable for negligence. Unlike intentional torts, the wrongdoer's intent is not required. Instead, the victim must establish that the wrongdoer failed to exercise reasonable care under the circumstances, and that the negligence caused injury or loss to the victim. A tort claim based on negligence is easier to establish than an intentional tort. The majority of tort cases involving car accidents, personal injury, and medical malpractice are based on a theory of negligence.

The purpose of tort law is to provide a civil remedy to a victim who has been injured or has suffered losses due to another person's negligent conduct.

In order to prevail on a tort claim, a plaintiff has the burden to satisfy all four of the above elements. In certain types of cases, however, the plaintiff need not satisfy (i) duty of care and (ii) breach of duty of care. In these cases, courts



the manufacturer of the product must compensate the consumer, regardless of whether the manufacturer took precautions in design, manufacturing or marketing of such defective product.

Tort Principles Established by Landmark Cases in England

Tort law first developed in common law in England during the 19th and 20th centuries. At that time, the basis for tort law was the recognition that remedies for certain human behaviours were available neither under contract law nor under criminal law. English judges sitting in courts of equity devised civil remedies to individuals on a case-by-case basis. Over time, this body of law comprising of judges' opinions in specific cases came to be known as tort law.

In *Vaughan v. Menlove*, (1837), the appeal court found that the proper standard for duty of care is determined by an objective standard of a "reasonable person." This case is significant because it was one of the earliest tort cases that imposed a "reasonable person" standard. In *Donoghue v. Stevenson* (1932), the plaintiff, Mrs. Donoghue, was at a café with a friend. Her friend ordered and paid for her beer. The beer bottle had a decomposing snail at the bottom, which she did not notice until she had consumed most of the beer. After seeing the snail, Mrs. Donoghue had to be hospitalized and incurred treatment costs. She could not sue the defendant, the beer manufacturer, for breach of contract because she had not bought the beer herself. So, she sued on the theory of negligence. She was unsuccessful at trial and appealed to the House of Lords, the upper house

of the Parliament of the United Kingdom, which at the time had the authority to hear appellate cases. (Its judicial function has since been replaced by the Supreme Court of the United Kingdom in 2009). The House of Lords ruled in favour of Mrs. Donoghue finding that a product manufacturer must be careful to avoid acts that can foreseeably cause injury to another. In this case, the beer manufacturer was held liable because its faulty

be entitled to compensation. In *Palsgraf v. Long Island Railroad Co.* (1928), the New York Court of Appeals held that the duty of care is owed only to foreseeable plaintiffs. An unforeseeable plaintiff, who the defendant cannot reasonably anticipate will suffer injury, is not entitled to damages. This case is significant because it established the principle of "reasonable foreseeability", later widely adopted by U.S. courts, that a defendant

Punitive Damages: Examples from the United States

Damages in a typical tort case are intended to compensate the victim, not to punish the wrongdoer. In a small number of cases where a court or jury finds that a defendant has been extremely egregious, courts impose an additional type of money damage as a way to punish the wrong doer and deter others. This type of damage is called "Punitive Damages". In such cases, the



product had caused injury or loss to its consumer. This principle evolved over time, and today it forms the basis of consumer protection laws in many countries, including the Consumer Protection Act 2054 (1998) in Nepal.

Tort Principles Established by Landmark Cases in the United States

The United States adopted common law principles from England. Over time, the US courts began developing their own theory of tort law, which was distinct from principles established by English courts.

In *Baltimore and Ohio Railroad v. Goodman* (1927), the Supreme Court of the United States found that the plaintiff, who did not act as a reasonably prudent person, is contributorily negligent and would thus not

The primary objective in imposing strict liability is to minimise the risk of reckless behaviour and to encourage potential wrongdoers to take every precaution possible to avoid similar future liability.

cannot be held liable for harmful results that are too remote or unforeseeable. In *US v. Carroll Towing Co.* (1947), the United States Court of Appeals for the Second Circuit ruled that to determine whether the duty of care has been fulfilled, a court must balance three important factors: (i) the probability of the injury; (ii) the gravity of the injury; and (iii) the burden on the defendant to take adequate precautions.

court or jury usually concludes that the defendant's conduct was "outrageous" or showed "reckless indifference" for the safety of others. The United States is known as a mecca for punitive damages.

In *Liebeck v McDonald's Restaurants* (1994), Stella Liebeck bought coffee at a McDonald's outlet. As she removed the lid to add cream, she spilled the coffee burning herself. Liebeck incurred significant costs to treat her burns and was in the hospital for a week. She sued McDonald's Corporation alleging that it was negligent for making the coffee too hot. The jury deciding this case considered whether McDonald's should be penalized for its gross negligence as McDonald's had previously ignored hundreds of customer complaints about its coffee's excessively hot temperature.

Its coffee was almost 20 degrees hotter than its competitors and at trial, McDonald's admitted that its coffee was too hot to drink right away and could even cause burns. The jury imposed a punitive damage of USD 2.7 million against McDonald's for its gross negligence by continuing to sell coffee that was too hot even after it received several customer complaints. The trial judge further reduced the punitive damages to USD 480,000. Ultimately, the parties settled out of court, and the case ended at trial level.

USD 2 million by a higher court. BMW appealed to the Supreme Court of the United States. The Supreme Court of the United States reversed the award of punitive damages, holding that excessively high punitive damage violates the "due process" clause of the Constitution.

In *Philip Morris v. Williams* (2007), Williams died of lung cancer caused by smoking. His wife sued the cigarette manufacturer Philip Morris alleging that Philip Morris's advertisements had implied that cigarettes were less

court found the punitive damages "grossly excessive" and reduced it to USD 32 million. Philip Morris appealed the case all the way to the Supreme Court of the United States and the case was remanded to a lower court, which eventually held that Philip Morris was liable for almost USD 100 million (including interest).

Alternatives to Tort

Many former British colonies (such as United States, Canada, Australia, etc.) based their legal system on the principles established by English common law, including tort law. In each jurisdiction, the body of tort law developed over time through litigation and court decisions. Over time, these common law jurisdictions have revised tort law to create greater efficiency. For example, in the U.S. and Australia, carrying liability insurance for motor vehicles is mandatory by statute. In these countries, claims brought by victims of car accidents are settled by the insurance companies.

Similarly, countries such as United States, UK, India, Australia, Canada, etc. have adopted a workers' insurance programme, often referred to as Workers' Compensation, which provides compensation to employees in case of workplace accidents. In return, employers are assured that they will not be sued or held liable for damages in case of workplace accidents and employees receive benefits (such as lost wages, treatment costs, etc.) directly from the insurance programme instead of having to sue their employer in court on negligence theory.

Tort Law in Nepali Context

The Nepali legal system is a unique legal system that is a hybrid between common law and civil law. Historically, the

Nepali legal system did not recognise tort principles as they were recognised under common law. Civil remedies for certain conducts—such as slander, land encroachment, arson, sale of defective products, environmental pollution, etc.—were scattered throughout various legislations. But Nepal lacked a single, uniform statute of general applicability allocating liability and damages for tortious conduct. The Civil Code's Chapter on Tort incorporates the common law principles of tort and statutorily codifies tort principles in the Nepali legal system.

The Civil Code 2074 (2017) Major Elements of Tort Under the Civil Code

Under the Civil Code, the three major elements of tort are: (i) an act or omission causing; (ii) damage or loss to another person's body, life, property or other legally protected interest; and (iii) due to error, negligence or recklessness.

Unlike in common law, the Chapter on Tort in the Civil Code does not distinguish between the different types of tort, such as intentional tort, negligence, or strict liability. Interestingly, the Chapter on Tort also does not require a plaintiff to establish the existence of the defendant's "duty of care," which is an essential element in a tort claim under common law. The drafters of the Chapter on Tort in the Civil Code seem to have borrowed tort principles in haste without proper analysis of all the elements required to establish a tort claim. As a plaintiff is not required to establish duty of care, there is a risk that many plaintiffs may be encouraged to file frivolous lawsuits, regardless of how remote the relationship between the defendant and the plaintiff may be.

The Chapter on Tort also does not specify which standard

In *BMW v. Gore* (1996), BMW, a car manufacturer, sold slightly damaged cars as new cars for full value, but never informed the buyers about the damage. Gore bought a new car from BMW and later discovered the damage. He sued to recover the loss of property caused by buying a damaged car. At trial, the jury awarded USD 4,000 in compensatory damages (lost value of the car) and USD 4 million in punitive damages. The jury reasoned that the punitive damages were due to BMW's egregious behaviour towards its customers over several years during which BMW repaired damaged vehicles and sold them as new without informing its customers. The punitive damages were reduced to

Civil remedies for certain conducts—such as slander, land encroachment, arson, sale of defective products, environmental pollution, etc.—were scattered throughout various legislations.

dangerous than they actually were. The jury concluded that Mr. Williams had smoked cigarettes because he felt smoking was safe. The jury found Philip Morris engaged in fraud (an intentional tort), and awarded almost USD 80 million in punitive damages to his widow. The trial



