Lecture Note on Ethiopian Extra-contractual Law

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Lecture One

Liability is to mean accountability to one's conduct. The conduct may be an action or an omission. When society expects one to do something and the latter fails to do so, this conduct is termed as omission. Then, the omitting party may be liable either criminally, contractually, extra contractually or in any other way. Conversely, an action is a positive act. An action is said to have been committed when society expects someone not to act in a certain way and he acts otherwise. Owing to This conduct, the actor may be held liable for his positive action either criminally, extra contractually, contractually or in any other way.

Liability may have multiple features. For example, people may think of them liable to a supernatural force. This is to mean, people may think that their deeds will be judged in the hereafter. However, as a lawyer, someone is and must be interested solely on the day-to-day life or the earthily deed of human beings. Therefore, we eventually limit our liability to one's society or to one's law. Even within its limit to one's society or to one's law, liability may still be armed with numerous features. In some cases, liability may take the form of political liability (liability through the political process). In other cases, there could be administrative liability (liability through the administrative process). Technically, these liabilities are not of purely legal, but of extra-legal characteristics. For example, the law that regulates the powers and responsibilities of parliamentarians provides that the electorate may recall a member of the parliament when they

lose confidence on him. This liability is theoretically political liability. Similarly, a certain political official may be removed from his post through a government decision due to his action or omission. Administrative organs may also have the power to hold someone administratively liable for his action or omission. For example, trade offices of Addis Ababa city administration may seal shopping centers that are found operating business short of a valid license. Such liabilities are, for the current purpose, outside the sphere of tortious liability. Therefore, we will limit ourselves to liabilities through the legal process whose execution depends solely upon the judicial process and that bases the law as a source of liability. This branch of liability may take the form of criminal liability in one side and contractual liability in the other and extra contractual liability somewhere in between.

What is the source of criminal liability? The source of criminal liability is the criminal law. Society has enacted criminal law to regulate certain actions or omissions as crime taking multiple considerations into account. Then, someone is held criminally liable if he violates not any law, but any of the criminal provisions in the criminal law.

What is the source of contractual liability? The source of contractual liability is breach of commitments entered into voluntarily. In the case of criminal liability, as long as the society prescribes certain actions or omissions as crime, the like or dislike by a member of the society of the law is immaterial. On the contrary, contract is a law or commitment people voluntarily entered into. However, even with voluntariness, if the person voluntarily entered into fails to stick to his commitment, he will be contractually liable.

What is the source of extra contractual liability? The source of extra contractual liability turns out to be violation of societal standard of conduct. Within a certain society, there are expected conducts even if they are not clearly stated in black and white. People living within such society are subject to certain expectation of how to behave with regard to those expected standards of conduct by the society. If a member of the society fails to meet that expectation and causes damage on another, he may be held tortiously liable of his blameworthy conduct (blameworthiness) in the eyes of the society, and not of individuals. In majority of the cases, tortious liabilities stem from negligent conducts. As said previously, society expects a certain standard of care that someone should observe in his interaction with members of the society. If anyone fails to observe such standard of care, he may be held negligent. From this we can

apprehend that there may not be violations of promises/commitments or violations of criminal provisions for a tortious liability to exist. It is simply, as said before, violation of a general standard of care with which someone is held extra contractually liable.

What is the remedy or sanction for criminal liability? The generic term for criminal sanction is termed as penalty. Penalty may be expressed in many ways. At a serious level, it could be dubbed as capital punishment (death penalty). At another level, it could be imprisonment for life or for definite period. Unlike capital punishment with which the life of the criminal is claimed, in the case of imprisonment, freedom of movement is only restricted. Penalty may also be said as fine. It is usually for less serious crimes; and In this case, a certain amount of money is paid in the form of penalty. Sometimes, a combination of fine and imprisonment could be given in the form of penalty.

What is the sanction for tortious liability? A sanction for tortious liability may be compensation and in some cases, restitution. For example, if one's conduct gives rise to the taking away of another's property, he may be more required to reinstitute the property than to defray compensation. The same remedy may be given for breach of commitment; i.e. compensation or specific performance (similar to reinstitution) may be ordered.

What does criminal Proceedings look like? When someone commits crime, the law considers it as violation of peace and order. In this case, the misconduct is against the public at large. Consequently, the proceedings will be public proceedings. By public proceedings, we mean that an accusation or compliant will be reported to the police for the latter to undergo investigation. The police will, after investigation, hand the file over to the public prosecutor. The public prosecutor may, on his part, frame charge against the criminal before a criminal bench if he feels that the investigation is equipped with sufficient evidence. If the public prosecutor feels that the investigation is of not sufficient evidence, he may close the file; or he may refer it back to the police for further investigation. In public proceedings, the victim will serve as a witness. In the case of public proceedings, the actors are the police, the public prosecutor, the judge, prison facilities and the accused.

When someone is extra contractually or contractually liable, the proceedings will be private. By private, we mean, in the case of breach of contract, the party who alleges to have been adversely

affected by the breach will institute an action against the other party who is said to have breached the commitment. In this case, no report of breach to the police is made; the action is a civil suit to be instituted before a civil bench; there will be court and lawyers fee to institute and win the suit. If the civil court found that the individual is really in breach, it will award the victim compensation. In the case of private proceedings, the state is involved only as a judge. However, if the parties reach an agreement, they can finalize the case through extra-judicial instrument, arbitration.

Extra contractual liability is a gray area between criminal liability and contractual liability. It consists of the traits of both criminal and contractual liabilities. In majority of the cases, criminal liability may simultaneously give rise to extra contractual liability, of course, subject to exceptions with which criminal liability does not bring about tortious liability. Another similarity in between is that both criminal and tortious liability may be imposed irrespective of the will and whim of the wrong doer. The wrong doer may not approve the criminal provision or the societal status. It is rather simply an expectation to confirm to the standard of conduct by the society.

Both contractual and extra contractual liabilities are civil liability, liability towards private individuals (the victims). In both cases, no one can be sent to jail for his failure to observe the standard of conduct or commitment, of course, subject to exceptions. The maximum thing required of the violator is to compensate the victim or specifically perform what is promised.

Imagine that Ato Belachew is judged to make good the damage he caused against Ato Degu. In this case, if Ato Belachew has nothing to give at hand, Ato Degu remains to be judgment creditor. However, if Ato Belachew, having the means to make good the damage, creates obstacle only to do away with execution of judgment, he may be sent to prison. In dealing with this exception, we need to determine two things, inability to pay and unwillingness to pay. Note must be taken that despite unwillingness to pay, if the unwilling judgment debtor is not challenged for uninterrupted period of ten years, even the exception may be set aside by period of limitation.

Traditionally, there was not as such distinction between criminal and extra contractual liabilities. In traditional society, even the criminal case was to be privately handled through private taking

of revenge against or conciliation made with the offender. In modern society, despite conciliation or any private measure, the criminal process will continue however.

A clear demarcation between criminal and extra contractual liabilities comes at a later time in human history. Currently, they are distinct branches of liability. Criminal liability usually regulates unacceptable and intentionally committed individual conduct while extra contractual liability predominantly regulates unacceptable and negligently committed individual conduct.

Title 13 of the civil code is dedicated for extra contractual liability and unlawful enrichment. Article 2027 lays the foundation for sources of extra contractual liability. It reads as follows:

Art. 2027. — Sources of extra-contractual liability.
[Translation that was missed is inserted in square brackets]. (1) Irrespective of any undertaking on his part, [apart from any promise of his,] a person shall be liable for the damage he causes to another by an offence [by his fault].

(2) [Apart from any fault of his] A person shall be liable, where the law so provides, for the damage he causes to another by an activity in which he engages or by an object he possesses.

(3) A person shall be liable where a third party for whom he is answerable in law incurs a liability arising out of an offence [a fault] or resulting from the law.

This article consists of three sub-articles regulating three sources of extra contractual liabilities. According to George Krzeczunowich, the term “offence” is a mistranslation of the French version for the term “fault”. Unlike the term “fault” the term “offence” is a criminal law terminology.

The phrases in brackets do not substantially change the content of the article; rather give much clarification for the discussion in question. Note must be taken that prior to title 13, extra-contractual liability and unlawful enrichment, title 12, contracts in general, has been dealing with promise and possible breach of promise. Therefore, immediately after the coming into an end of title 12, contracts in general, title 13 under article 2027 (1) should have begun “apart from any promise of his“(contractual liabilities). Under the latter title, the law maker is trying to tell us that even if there is no contractual breach, there may be still liability. Even if one is performing his promise, he may still be held liable for the damage he causes to another by his fault. Whether or

not he expressly committed himself not to cause damage to another turns out to be immaterial. The law simply assumes that when someone lives in society, he has an implied commitment not to commit fault and cause damage to another.

The three important things are damage, causation and fault. It is to mean, there should be fault; that fault should be associated with damage to another; finally, the damage and the fault should be casually connected. In other words, the cause for the damage should be the fault of the wrong doer. If these elements are satisfied, even if someone doesn't have any commitment, he will be extra contractually liable for the damage he causes to another.

Fault is the most important source of liability. Of course, the three sources of extra-contractual liability under sub-article 1-3 of Art. 2027 are numbered or placed on the basis of their level of importance. Fault, as the major source of extra-contractual liability, is further extended or analyzed from Art. 2028-2065 of the civil code.

The other source of liability even moves further. Sub-article (1) of Art. 2027 is saying that if someone is at fault, and if the above elements are satisfied, whether or not he has promise, he will be extra-contractually liable. Sub-article (2) of Art. 2027 puts further restriction into one's liberty. It says, even if someone is not at fault, if the law provides so, his activity or object may give rise to liability on him. Firstly, the law tries to deal with contractual liability under Arts. (1675-2026). Secondly, it tries to deal with fault based liability under Art. 2027 (1) and 2028-2065). Thirdly, it tries to deal with strict liability under Art. 2027 (2) and 2066-2089). Fourthly, it tries to regulate vicarious liability under Art. 2027 (3) and (2124-2036). The law dealing with strict and vicarious liability is as good as criminal law. This is because, as in the case of criminal law, if the law provides so, the person will be held tortiously liable owing to the prescription of the law. Strict liability under sub-article (2) of Art. 2027 is further analyzed from Arts. 2066-2089 of the civil code.

The third source of liability, action of third party, is provided under sub-article (3) of Art. 2027. This source is somehow complicated for the reason that third party is involved. Immediately before our beginning to deal with this source, we have been talking about the fault of the individual, his activity or object. In this case however, there is someone by whose fault damage has occurred; and the act of this individual is related to another by law. Therefore, in dealing

with this source, we find the victim, the wrong doer (principal offender), and the individual answerable to the wrong doer (vicarious offender). It is not one's fault or activity or property that causes damage to another and makes him liable under sub-article (3) of Art. 2027. It is rather the action of another individual (principal offender) to whom he (vicarious offender) is answerable. Vicarious liability under sub-article (3) of Art. 2027 is further elaborated by Arts. 2124-2136 of the civil code. In the case of strict and vicarious liabilities, liability arises only when the law expressly provides. However, in the case of fault-based liability, so long as the elements of fault are satisfied, liability will follow for the reason that faulty conduct is not an expectation of society upon individuals.

Lecture two

In our previous class, as provided under article 2027, we've dealing with the sources of tortious liability, fault-based liability, strict liability and vicarious liability. When is someone held liable for his faulty conduct? Fault-based liability is provided from 2028-2065 of the civil code. The principle for fault-based liability is given under article 2028. It reads, whosoever causes damage to another by an offence shall make it good. Under fault-based liability, for someone to be held liable, his faulty conduct must be shown first. Secondly, certain damage must be sustained by the plaintiff. Thirdly, there must be a causal link between the faulty conduct and the damage sustained; i.e. it must be shown to the satisfaction of the court that the reason for the damage sustained is the faulty conduct of the defendant. What is fault? What is damage? How is causation established? In the case of contractual liability, article 1791 (1) reads, the party who fails to perform his obligations shall be liable to pay damages notwithstanding that he is not at fault. How is this article similar with or different from article 2028? Firstly, both articles deal with liabilities; however, article 1791 speaks about contractual damage while article 2028 deals with extra-contractual one. In terms of remedy, both aim at making the damage good. However, existence of commitment is an important element for article 1791 while it is not of the same meaning for article 2028. For fault-based liability (2028), fault is an essential element while for contractual liability (1791), fault, unlike non-performance and loss, is not necessarily the same. This is to mean, the party who has been victimized by a certain breach of commitment is not required to show fault. So long as he is able to show non-performance and loss, he can strictly hold the other party liable.

The law tries to state types of fault from the aspect of mental and physical element. From mental point of view, someone may be at fault intentionally or negligently; i.e. fault may consist of an intentional act or mere negligence. From the physical (conduct) aspect, fault may consist of a positive act or forbearance; i.e. it could be action or omission. In the case of criminal liability, intention and negligence are dealt with under articles 58-59 of the criminal code. Article 58 (2) provides that intentional crime is always punishable. On the other hand, article 59 (2) provides that negligence is punishable if it is expressly stated by law. In short, criminal liability through intention is the principle while criminal liability through negligence is the exception. In the case of extra-contractual liability however, intention and negligence are simply alternative. Both of them may equally bring extra-contractual liability. This makes extra-contractual liability different from criminal liability as the major concern for criminal law is punishing criminal intention. Article 58 provides as:

(1) A person is deemed to have committed a crime intentionally where:

(a) He performs an unlawful and punishable act with full knowledge (full knowledge of its consequences or its criminality) and intent in order to achieve a given result. [Technically, we call it direct intention.]

Or (b) he being aware that his act may cause illegal and punishable consequences, commits the act regardless that such consequences may follow. [This is to mean, he may not have a full knowledge that his act may be punishable or result in punishment. He may anticipate that it may cause; but, he acts anyways. Technically, it is called indirect intention.]

(2) An intentional crime is always punishable save in cases of justification or excuse expressly provided by law (Arts. 68-81). (3) No person shall be convicted for what he neither knew of an intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence. Article 59 reads, (1) a person is deemed to have committed a criminal act negligently where he acts. (a) By imprudence or in disregard of the possible consequences of his act while he was aware that his act may cause illegal and punishable consequences. Or (b) by a criminal lack of foresight or without consideration while he should or could have been aware that his act may cause illegal and punishable consequences. A person is guilty of criminal negligence when, having regard to his personal circumstances, particularly to

his age, experience, education, occupation and rank, he fails to take such precautions as might reasonably be expected in the circumstances of the case. (2) Crimes committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society. The Court shall assess sentence according to the degree of guilt and the dangerous character of the criminal, and according to his realization of the possible consequences of his act or his failure to appreciate such consequences as he ought to have done. A person with similar condition with the criminal may foresee that the act may cause punishable consequence. However, he failed to take into account this possibility/foreseeability. That is what makes his act negligent. The mental element of someone who intentionally commits a crime is more socially dangerous than the one who commits a crime negligently. This is the reason why the criminal law makes distinction between intention and negligence. However, as we said before, in the case of extra-contractual law, intentional act and mere negligence are simply alternative. Unlike the criminal law where intention and negligence serves as principle and exception respectively, in the case of tort law, both equally entail liability. Discussion needs in the case of action and omission as well. As far as criminal liability is concerned, the main concern is action. It is only in exceptional circumstances that failure to act will cause criminal liability. Theft, homicide, bribe and others are, for example, crimes by action. Failure to lend aid (575), Omission to Register the Birth of an Infant or to Report its Abandonment (656), failure to maintain (658), failure to bring up(659)and failure to report the commission of certain crimes (254, 335 and 443) are examples for crimes by omission. Extra-contractual liability may, however, come into the picture either through action or omission without making one of them exception to the other. From this discussion, it is possible to say that all extra-contractual liabilities may not necessarily entail criminal liability due to the fact that both in the case of mental and physical element, the former are broader in scope than the latter.

The negligence aspect is not required to be gross negligence/gross deviation from the standard for tortious liability to arise. Mere negligence/minimal deviation from the standard is sufficient to invoke liability. Article 2029 (1) provides that an offence may consist in an intentional act or in mere negligence.

The other element mentioned under article 2028 turns out to be 'damage'. 'Damage' may mean damage to one's property, life, person or morality. A single incident may bring all these bundles

of damage. Therefore, damage should be broadly understood from the tangible (for example, loss to property) to the intangible (moral damage). The other associated issue turns out to be 'making the damage good'. In the case of property, it is easy to make the damage good. The same does not go true for other types of damage. In the case of loss to property, the expense to repair the item could serve as one way of assessing the damage. However, the problem arises to compensate damage to life, person or moral having no market value. In previous times, there was no concept of moral damage as such. Recognition was only for material or personal damage. With the development of society however, moral right came into the picture; and as a quantification of moral right, moral damage came to be recognized.

The third element under article 2028 turns out to be "cause-effect relationship". The reason for the damage, be it material, personal, moral or all, should be the faulty conduct of the defendant. There must be two incidences, one receiving the other. Under normal circumstances, where a preceding incident happens and is followed by the other incident, it may said that the one is cause to the other; and hence, cause-effect relationship. Note must be taken that the law is not interested in an abnormal circumstances. Someone may shoot at another and the latter may die. The same person may insult another and the latter may die. In both cases, there is a preceding incident and subsequent reality. From time immemorial, human being has noted that shooting at someone results in death. In the case of the second scenario however, under normal circumstances, insulting does not entail death. If it happens, it is an abnormal; therefore, one cannot establish cause and effect basing his claim on abnormal circumstances. Indeed, the civil code doesn't have a principle of how to establish cause and effect. The reverse is true for criminal code. The second paragraph of article 24 (1) provides that "This relationship of cause and effect shall be presumed to exist when the act within the provisions of the law would, in the normal course of things, produce the result charged". From this, we can apprehend that Causation is to be established by referring to "normal course of things" or "social reality". In general, for someone to base his claim on this article, the three requirements should be cumulatively satisfied. Fault, damage and connection in between must be necessarily shown by the plaintiff. In the case of criminal liability however, damage may not necessarily be sustained. Good example is attempted crime. A driver was driving his car despite the red traffic light. A passenger, surprised of the driver's action, fell down and was broken his leg while staring at the

driver. In the case at hand, there is fault (that of the driver); there is damage (that of the passenger); but, there is no connection in between in the normal circumstances.

Lecture 3

What are essential elements of fault-based liability seen in the previous class? The first element tends to be duty of care. Indeed, duty of care is not expressly stated under article 2028. It is rather an implied duty in the sense that when someone lives in society, he is expected to have a certain behavioral duty towards another. Some countries try to make it express; and the duty someone will have to another depends on the circumstance. Therefore, the defendant, under normal circumstances, owes the plaintiff a duty to confirm his conduct to a standard necessary to avoid the unreasonable risk of harm to others. Whether an owner of a property has a duty of care to another who wants to steal his property is controversial.

The second element turns out to be breach of that duty (fault). Whether the defendant's conduct by way of positive action or omission falls below the applicable standard of care set by law should be answered by the element, breach of duty. The third element turns out to be causation. In this element, whether the defendant's failure to meet the applicable standard of care is casually connected to the plaintiff's harm should be proved. The fourth element turns out to be occurrence of damage sustained by the plaintiff. In this element, whether the plaintiff really suffers harm or an injury should be dealt with.

Under article 2028, the phrase "whosoever" implies that the article is applicable to everyone who commits fault and by his fault, causes damage to another. However, article 2137 provides the exception to article 2028. It reads, No action for liability based on an offence committed by Him may be brought against His Majesty the Emperor of Ethiopia. The then prevailing political system tries to put the emperor above the law. He was believed to be fountain of justice; therefore, impossible to impose liability against him. The Amharic saying, "nigus ayikeses, semay ayitares", was even incorporated in the emperial constitution. The same principle was enshrined in the civil code.

Is article 2137 applicable to the current president? According to the rules of interpretation, exceptions should be interpreted very narrowly. Article 2028 is the general rule, which says that everyone is liable; and article 2137 is the exception which says that his majesty, the emperor, is not liable for any wrong doings. If it is an exception, it must be interpreted very narrowly. Since the provision says, "his majesty emperor of Ethiopia, it should be limited to the emperor himself. Had the provision been drafted to include other presidents, it would have inserted the phrase, heads of state, in place

of the word, emperor. Secondly, article 12 (2) of the FDRE constitution provides that any public official or an elected representative is accountable for any failure in official duties. The word, "any", implies that there is no public official that cannot be held accountable for his action under the present system. Therefore, article 2137 is impliedly repealed; and the same fate is for article 2138.

How do we assess whether or not a certain conduct is faulty? Articles 2030 and 2031 provide two assessment standards required for the issue under consideration. The former deals with ordinary fault while the latter deals with professional fault. A society has these two types of fault in it. We exploit two standards of measurements for these two types of fault. Article 2030 (1) provides that a person commits an offence where he acts or refrains from acting in a manner or in conditions which offend morality or public or order. Offending morality is one parameter; and public order is the other. Professor Krzeczunowich translates morality as usual standard of good conduct. If one's action or omission is against public morality, the law will consider him as though he is at fault. Or if one's act is against the usual standard of good conduct, the law will consider him as though he is at fault as well. Do we have a uniform morality? What does an act or omission offending morality mean? The law uses "reasonable person". Who is this? Pursuant to article 2030 (2), in order to determine whether an act or omission offends morality, public order or usual standard of good conduct, Regard shall be had to the behavior of a reasonable person. The standard for ordinary fault turns out to be "reasonable person". Reasonable person is a legal fiction; i.e. it is a making of the law as a person of ordinary prudence. The law doesn't require an extra-ordinary prudence to label a person reasonable. A reasonable person is like any other people, but of ordinary prudence that doesn't offend morality, complies with the law, protects his rights, respects the right of others and so on. This is a person of ordinary prudence that the law creates to bring a uniform social behavior for the common good. The creation of a person of ordinary prudence turns out to be one of the areas where the law involves in social engineering or in engineering the behavior of society. According to the study of law and development, law is not there only to determine rights and obligations and to resolve disputes. It is also there to play the role of social engineering. As an actor of social engineering, the law regulates and tries to standardize social behavior, which turns out to be important for the wellbeing of a society. Note must be taken that People of extraordinary prudence are accepted. This is because; they do perform even higher or better than the average standard. However, for those people who will deviate downwards from what is accepted, the law tries to bring them back to the position of a person of ordinary prudence.

Even if a person is a minor or mentally deficient, the parameter turns out to be ordinary prudence. Article 2030 (3) provides that unless otherwise provided by law, the offence shall be assessed without regard to the age or mental state of the person concerned. In some legal systems, if a minor is at

fault, he will be assessed by an ordinary prudence of reasonable child. The Ethiopian legislator makes use of a single parameter without taking age or mental condition into account. Some people tend to argue that the position of Ethiopian legislator in this regard is harsh. This is because, it is not fault-based liability, but strict liability at the level of minors and mentally deficient persons. Such position is taken by the legislator in order to strike a balance between the minor wrong doer and the innocent victim. If the minor is going to be held liable, the foregoing outcome will be that the guardian will take the necessary care to shape the behavior of the minor. Therefore, the message of article 2030 (3) is mainly to make guardians and tutors cautious enough towards their minor. Secondly, if minors and persons with mental deficiency are not to be held liable, people may be actively involved in evidence falsification with regard to their age and mental condition. This situation may be worsened in countries such as Ethiopia where the law of birth registration and certificate remained to be paper tiger. Thirdly, the innocent victim should not remain uncompensated with a view to counter-balancing the interests on both sides. Fourthly, Even if, in the case of assessment of liability, age and mental condition is not taken into account, in the case of assessment of damage however, it is taken into account; i.e. the rigid standard will be mitigated at the time of assessing damage caused by the persons in question. Fifthly, the liability in question is a civil liability. Therefore, if the minor or the mentally deficient person has the economic capacity, he should pay compensation. If he does not have the economic capacity, he will not be detained for not having discharged the obligation.

In social reality, fault is not ordinary only. There are people from whom society expects a different standard of their profession due to the knowledge and skill they acquire through time. The law puts a different standard for these people under article 2031. The parameter is a little bit different from that applicable to ordinary people. Article 2031 reads, (1) a person practicing a profession or a specific activity shall, in the practice of such profession or activity, observe the rules governing that practice. (2) He shall be liable where, due regard being had to scientific facts or the accepted rules of the practice of his profession, he is guilty of imprudence or of negligence constituting definite ignorance of his duties. In professions, be it in Medicine, law or driving, there is a conduct that is expected to be observed. Many of these codes of conduct could be written; and few of them could be unwritten or developed through practice and recognized from time immemorial. Whether someone is at fault is to be assessed against these professional codes of conduct. In other words, a faulty professional is to be assessed against reasonable professional in the profession. Doctor's mal-practice is a substantial case in the case of professional fault. Sometimes, to determine whether a certain professional was negligent or not, it is said that "the act speaks for itself". For example, if a doctor forgets a surgery material within the body of the patient, in this case, the act speaks for itself. In each

profession, there are certain minimum quality expectations. Among the professional people, there is what we call "conspiracy of silence"; i.e. a certain professional wouldn't testify against another professional. They would like to protect one another for the reason that none of them knows who will be on call for the next trial. In order to counterbalance the conspiracy of silence principle, in some countries such as USA, they do not fully rely on testimony of experts in the same field. If the act is very obvious that gross negligence has got involved in it, whether the professionals testify in its favor or against it, the court prioritizes "the act speaks for itself" principle. This principle comes into the picture for the reason that there is a certain degree of unwillingness among professionals to testify against one another. Driving is another profession where extra-contractual cases become common. Drivers, as a professional, have a duty towards the passengers, pedestrians or other drivers. In this case too, their act will be assessed against the code of conduct applicable to drivers. Whether a reasonable driver acts in that particular way will be the parameter to assess whether he was professionally at fault or not. In case of assessment, no difference is made between new and experienced drivers. Nb. In a case, there may be cause in fact and adequate or approximate cause. However, the type of cause taken into account is the latter one. This is because, adequate or approximate cause is recognized under 2028 as a cause bringing about that result under normal circumstances.

Lecture 4

Sociologists define fault as:

Fault is a peace of conduct which wouldn't have been pursued by prudent person placed in the same external circumstance as the author of damage. Prudent person for sociologists is what lawyers call as reasonable man. Nb. Conduct is broader than action for the reason that the former embraces both action and omission.

Economists state as:

A person is at fault where he fails to take precaution in cases where the cost of accident prevention is lower than the cost of accident if it occurs. For economists, cost turns out to be important. For economists, a person will be relieved if the cost of accident prevention is higher than the cost of accident if it occurs. This is to mean, society will be better off if the damage sustained than prevented.

In law of contract, age and mental condition are taken into account under certain circumstances; and every contracting party is not assessed by a reasonable man standard. His subjective condition will be somehow taken into account. Age and mental condition are also taken into account to determine criminal liability. For criminal law, professional fault must be grave enough to warrant punishment; i.e. unlike extra-contractual law, mere professional fault is not sufficient enough to

result in criminal liability. In this case, it can be said that the criminal law requires higher standard than the extra-contractual law. Professionals are important for society; and they are exerting maximum effort to that effect. Therefore, society should give them certain latitude to exercise their potential with full confidence. For example, we should not take judges to criminal court for their misinterpretation of the law.

On the basis of article 2030, the standard is an act that offends morality. On the other hand, in the eye of a reasonable man standard, an act that offends morality turns out to be fault. This is a general statement; therefore, whether an act offends morality or not will be determined on case by case basis. In some cases however, the law itself puts items that offend morality and hence labels them as fault. Whether or not they are undertaken by a reasonable person, the law will consider them as fault; i.e. fault is presumed in that case. Instead of relying on the general standard of article 2030, the law specifies certain conducts and presumes them as fault. If the law chooses that way, the reasonable man standard will not be applicable. Whether or not the reasonable person would do the same will be immaterial. The reasonable person will be even held liable if he resorted to that conduct. One of these conducts turns out to be intent to injure another without seeking or gaining personal damage.

Article 2032 (1) provides that a person commits an offence where he acts with intent to injure another notwithstanding that he seeks no personal gain from his act. In a social setting, when people live together, one should not, as a principle, have an intent to injure another. That turns out to be an immoral character. However, it would be more offending if someone intends to injure another without gaining personal advantage from that transaction. Indeed, intending to injure another with a view to gaining personal advantage is acceptable to a certain extent. A typical example for the case at hand is competition in business. Business competition involves in it an element of obtaining personal advantage at the expense of other business persons. Let alone the liability, encouragement is forwarded to the person involved in business competition. The problem will come when someone intends to injure another without seeking or gaining personal advantage. Articles 2032 and 2033 deal with abuse of right and power respectively. A person may have a certain right; but, he may misuse that right to injure another short of gaining personal advantage. A person may also be given a power; but, he may misuse the power for a purpose that is not intended for. The argument that a reasonable person could do the same will not serve as a defense for the reason that the law specifically singles out that behavior and labels it as fault. Article 2030 is general while article 2032 is exception. A person has an appeal right. this person, even if he has an appeal right, knows that he has no ground to appeal on a case at his hand. However, he may appeal simply for the purpose of delaying execution and

injure the judgment creditor. He is not there to gain personal advantage, but to cause the judgment creditor to incur unnecessary cost of court fee, lawyerly fee and so on. In this case, the action turns out to be an abuse of right. Article 2032 (2) provides that a person commits an offence where, with full knowledge of the fact, he causes substantial damage to another in seeking personal gain disproportionate to the damage caused. In addition to intent to injure another without gaining personal advantage, article 2032 tries to deal with another related issue; i.e. it is similar; but, the gain he gets and the loss to the other party are disproportionate. A person is gaining 100 birr; but, due to his action, another person is losing 150 birr. Such disproportionate effect makes one's conduct blameworthy.

A person may be given power to exercise on another's behalf. If he exercises that power in a manner that is not intended to its purpose, the act will be presumed to be fault.

Lecture 5

In our previous classes, we've seen that fault is an essential element within fault-based liability. We've also tried to define and assess fault through reasonable person's standard. We've also started dealing with another standard of assessing fault, presumed fault; i.e. fault will be presumed if a certain action or omission specified by law is committed. Whether or not the action or omission is committed by a reasonable man is immaterial. In general, the reasonable person parameter doesn't serve as a defense for actions or omissions under articles 2032-2033, 2035-2036 and 2038-2065. The fact that these articles are violated will be sufficient to presume fault. This is a gray area towards strict liability. Even if we begin with fault-based liability, we tend to move towards the approach of strict liability.

We've started discussing about intent to injure another. The fact that a member of society has the determination to injure another member of society turns out to be morally offendable. If someone is to injure another without gaining benefit or obtaining proportional advantage, he will be said to have socially unacceptable disposition. Theoretically, a reasonable person wouldn't do that behavior. In some cases however, it may be possible. For example, in traditional society, a member of a certain clan may intentionally injure a member of another clan. According to a reasonable man standard within that locality, we may say that a reasonable person would do that. Irrespective of a reasonable man standard, the very commission of an act or omission is sufficient to hold the individual faulty provided that the other requirements are fulfilled. Note must be taken however that the fact that someone is at fault doesn't mean that he is extra-contractually liable. The requirements under article 2028, fault, causation and damage, should be satisfied. At this level,

we are simply establishing fault from different perspectives, reasonable man perspective, reasonable professional perspective and presumption of fault.

What is the difference between right and power? Right is an entitlement accorded by law to the holder to enjoy it to his own advantage. If someone has a power to do it, he has the right in it. Sometimes, power could be to exercise for oneself or in the interest of another. Power is an authority or a functional prerogative conferred in the interest of another. Power may be sourced of laws (public or private laws), court order, contract (example, agency) or will. Article 2033 reads, (1) a person commits an offence where he turns to his own advantage powers conferred upon him in the interest of another. (2) A public servant commits an offence where he turns to his own advantage or to the advantage of another individual, powers conferred upon him in the public interest by his office. The first sub-article is about private law while the second sub-article turns out to be about public law. Guardian-minor relationship turns out to be a good example for cases to fall under sub-article one. For agent-principal relationship, since the relationship is contractual, the liability will be contractual. Therefore, extra-contractual liability will be limited to those sources emanating from laws, court order or will. In the case of 2033 (2), the power is basically conferred upon him for the benefit of the public; but, unfortunately, he diverted it either to himself or to a third party. In criminal law, if it is committed intentionally, it is going to be corruption. For purpose of extra-contractual liability however, even negligent action is sufficient to make the individual at fault. This is because, in extra-contractual law, both intention and negligence have equal position to be sources of liability. In general, as in the case of article 2032, in the case of article 2033 too, fault is presumed. Under sub-article 1 of article 2033, it is read only as "where he turns to his own advantage". When we read sub-article (2) of article 2033 however, it is read as "where he turns to his own advantage or to the advantage of another individual". There are two elements in this case, to his own advantage or to the advantage of another. So long as the right holder is adversely affected by the action of the holder of the power, whether the diversion is to his own advantage or to the advantage of another will be immaterial. Therefore, there cannot be logical distinction between sub-article 1 and 2 other than poor drafting of sub-article 1 or slip of pen thereon by the legislator.

Other than these limitations, everyone is free of exercising his rights. Article 2034 is not there to state fault; i.e. it is there rather to state what is not fault. It reads, Subject to the provisions of the preceding Articles, the manner in which a right is used may not be challenged on the ground that it is contrary to the economic or social purpose of that right. Whether or not someone exercises his right in a socially or economically meaningful manner is not the concern of another so long as there is no intent to injure other individuals. For example, a land holder may put his land idle. If anyone can show that the land was made idle with a view to intent to injure

another, the case will be falling under article 2032. Other than this, no one can challenge the land holder for not having farmed the land. If at all there is a concern, it will be the concern of public authorities, who are responsible to insure the cultivation of plots of land given to different members of society such as investors. This is to mean, it will be an issue of public law and not of extra-contractual law.

Article 2035 is another area where presumption of fault is prescribed. It reads, (1) person commits an offence where he infringes any specific and explicit provision of a law, decree or administrative regulation. According to this article, if anyone violates any or many of these instruments, the law presumes that the person is at fault. Being a broad area, it tries to provide remedies for violation of all branches of laws. Whether a reasonable man could violate that law turns out to be immaterial. This article is a very sweeping provision in that it tries to be a bridge between extra-contractual liabilities and other branches of law. Note must be taken however that article 2035 is only establishing fault; it doesn't presume damage nor causation. Rather, the plaintiff must show that the violation of the explicit law has been a cause for certain damage. No one can bring an action against an individual only because the latter commits fault. A certain medical institution had a license for the last three years even if it is expired in the last month and not renewed yet. Despite not renewal of license, the institution continued rendering medical service; and a patient passed away before the renewal takes place. Is the absence of a valid license a cause for the death? The law is establishing only one aspect of the liability, breach of duty. It will be up to the plaintiff to prove the other requirements, damage and causation. Contractual laws are not falling under article 2035. Sub-article (2) reads, Ignorance of the law is no excuse. If the legislator puts ignorance of the law as a defense, no member of society will have an incentive to get acquainted with the law. The legislator is saying that even ignorance of directives that are not published in negarit gazette is no a defense. It looks apparently unfair when seen in line with its limited accessibility. The other presumption is equally devastating. If people are allowed to raise ignorance of the law as a defense, then, legal literacy will be meaningless. People will pick only the laws that give them right and ignore those that put obligation against them. For example, criminal law will be ignored altogether for the reason that rights are not provided in it. The same principle is enshrined under article 81 of the criminal code. The government has a corresponding obligation to the public; i.e. it should make laws accessible and understandable. Accessibility is not only in terms of availability in the market but also in terms of affordability in price. During the derg regime, irrespective of pages, the negarit gazette had a fixed price, 60 cents. The sale would cross-subsidize one another. Nowadays however, people are required to equally and even more incur cost to purchase laws than newspapers. It's becoming beyond the purchasing power of the ordinary people. Indeed, so long as it is a

public good, it shouldn't have been left to the free market price. Reading a private newspaper is not a duty; but, reading a negarit gazette is a duty due to the principle enshrined under article 2035 (2).

Another issue turns out to be the issue of superior-subordinate relationship or chain of command. The subordinate is required to obey the order of his superior. For example, the subordinate, as a member of society, is required to obey the law as given under article 2035. Under administrative law however, as a subordinate, he is required to obey the order of his superior. When the order is lawful, it may not be an issue. The problem comes into the picture when the order is unlawful. Literatures provide three approaches to this problem. The approaches are the rule of law approach, the strict obedience approach and the intermediate approach. The Nazi criminals used to strongly raise the defense of strict obedience approach. The same used to be raised by the Derg officials. According to the rule of law approach, law must always prevail over orders; and therefore, the existence of superior's order should never constitute a defense to a tort action against the subordinate. In short, the approach says, obey the law; disregard the order if it is unlawful. The problem is however, if the subordinate is required to check every order against the law, state machinery cannot move in a smooth and orderly manner. In such a case, delay may inevitably come into the scene. Especially, if we apply to the military, everything would be defeated for the reason that in military, exigency or quick action is required. According to the strict obedience approach, for subordinates, orders ought to prevail over laws; and therefore, the existence of the superior's specific order which was unerringly executed should constitute a defense for tort action against the subordinate. This approach places the subordinate as a tool to the superior, which is against human dignity. Note must be taken that the subordinate is a human being with full mental faculties. Sometimes, the subordinate could be more intelligent than the superior. Therefore, even if this approach tends to be good efficiency of state machinery, the approach does dehumanize the subordinate. The intermediate approach is placed in between with a view to reconciling the two extremes. According to this approach, the subordinate should execute the order if it is clearly legal or its illegality is doubtful. He should decline to execute the order if it is manifestly illegal. In the case of manifested illegality, the act will speak for itself.

Lecture 6

Which approach is adopted by the Ethiopian legislator? Article 2036 provides that (1) the fact that an act has been carried out on the orders of a higher authority shall not necessarily relieve the doer of liability. (2) The doer commits an offence where he is aware of the illicit nature of the order, in particular by reason of the lack of competence of the person giving the order, and the criminal nature of the act ordered. (3) There is no offence where, in the circumstances of the case, and in

particular having regard to the strict exigencies of administrative or military discipline, the doer was placed in such a position that he could not discuss the order received or act otherwise than he did. If someone, despite understanding that the order is illegal, acts anyways, he will be at fault. If someone is aware that his superior has no power to give the order and if he acts in accordance with the order, he will be at fault. If someone is aware that the order given is to commit a criminal act, and if he keeps on complying with the order, he will be at fault. However, if someone is not aware of the order's illegality, or the fact that the superior has no power to giver that order or that the order is criminal, he will not be at fault. In this case, the first impression is important; i.e. it is important to check whether the subordinate understands the manifested illegality of the order at that particular moment. This turns out to be a sort of intermediate approach. Sub-article 1 of article 2036 appears to be a strong rule of law approach. However, when we look into sub-articles 2 and 3 in particular, the strength of the approach under sub-article (1) is diluted. Therefore, in general, we can say that the Ethiopian law is trying to adopt an intermediate approach. Even if the subordinate knows that the order is illegal ; or that his superior doesn't have such power; or that the order is criminal, he can still comply with the order if he is not in a position to challenge it. According to sub-article (2), if the subordinate knows that the order is illegal, he should not comply with that. Sub-article 3 however tries to take into account the circumstances. In military circumstances, the order may be given to the subordinate at gun point. Indeed, when look into the article very thoroughly, it tends to give emphasis for order compliance. Note must be taken that the chain of command principle is applicable only to public and military service. This can be inferred from the phrase " exigencies of public service or military discipline" under sub-article (3). Of course, there is a hierarchical order in the private sector as well. The employee has the duty to obey the order of his superior. However, since what has been involved is the private interest, the law doesn't give that immunity for the wrong doer. Therefore, the applicability of 2036 turns out to be in the public interest only.

What is the difference between higher in rank and higher in authority? The fact that someone is higher in rank doesn't mean that he is higher in authority. For example, the state minister in the ministry of finance is higher in rank than the department head in the ministry of health. However, the former cannot have the authority to give order to the latter. Therefore, the department head in the ministry of finance cannot invoke the defense of superior order. In order to invoke the defense of superior order, it must be shown that both the superior and the subordinate are structurally related. The other thing is that the act must be done by the order specific to the superior. If the order given is general and the subordinate translates it into specific, it will not serve as a defense. Assume that the military has occupied a certain enemy territory. The commander has given an order to the subordinate to

shoot and kill everyone in the occupied village. In this case, as per article 2036 (2), the subordinate should never execute the order for the fact that it is manifestly illegal. However, on the basis of article 2036 (3), if the commander is giving the order to the subordinate at gun point, the latter will not have any alternative except executing the order. If the order is not given at gun point or similar other, the issue will be falling under article 2036 (2).

The superior has given an unlawful order; the subordinate executed the order despite manifested illegality. Now, on the basis of article 2036 (2), the subordinate turns out to be at fault. Is the superior relieved in this case? The superior, as he violated a specific law by giving an unlawful order, will be liable under article 2035; and the subordinate will be liable under article 2036 (2). Therefore, it can be said that both of them will be jointly liable to make the damage good on the basis of article 2155. Akin to our extra-contractual law, the intermediate approach is also followed by the criminal law in the case of superior-subordinate relationship. When we assess extent of liability, the superior-subordinate relationship will be taken into account. Article 2100 is dealing with the same scenario. It reads, (1) the court may, where equity so requires, reduce the compensation awarded where a sense of duty deriving from discipline or obedience moved the author of the offence to commit it. (2) Regard shall be had to the degree of imperativeness of the duty. According to this article, the court will take into account the situation the subordinate was in in executing the order to determine compensation.

Article 2037 reads, (1) a person shall not commit an offence involving his extra-contractual liability where he fails to discharge his obligations under a contract. (2) The provisions regarding the non-performance of contracts shall apply in such case. If there is contractual remedy, we should rely on that contractual remedy; and extra-contractual remedy is a last resort. This point is also already indicated under article 2027. If there is any undertaking, the provisions in that undertaking will regulate both the existence and the extent of liability. It is only when there is no contractual relation that extra-contractual remedy will come into the picture. When we rely on contractual provision, the compensation is assessed as a normal damage. When we rely on extra-contractual provision, the compensation will be actual damage. Normal damage is a damage that may be sustained under normal circumstances. The normal damage is always within a foreseeable parameter. However, sometimes, there may be unforeseeable damage that may incur in some particular situation. In this case, the actual damage, which is, in majority of the cases, greater than the normal or expected damage, will come into the picture. The period of limitation in the case of contractual damage is also longer than the period of limitation for extra-contractual damage. Up to now, we've been discussing the elements necessary for the plaintiff to show fault. We've extensively discussed what fault is. We tried to assess fault in terms of reasonable man standard, reasonable

professional standard or in terms of fault-implying specific provisions (2032-2033 and 2035-2036). All these help the plaintiff to prove fault. This is necessary, but not sufficient for claiming compensation. This is because, the defendant should show that he sustained damage; and that the cause for the damage is the fault of the defendant.

What are the defenses to be raised by the defendant? The defendant should try his best to delink the fault and the damage; i.e. he may admit that the committed fault. He may also admit that the plaintiff sustained damage. But, he will challenge the cause-effect relationship. He may also try his best to show that there is no fault. One way of showing that there is no fault is to show that a reasonable person under similar circumstance could do that. Likewise, the reasonable professional standard can be raised to show that professional fault doesn't exist. If the plaintiff bases his claim on article 2032, the defendant should show that there is no intent to injure another. If he is unable to show that there is no intent to injure, he should show that the act was with a view to gain personal advantage. If the claim is based on article 2033, the defendant should show that there is no abuse of power. If it is on the basis of article 2035, the defendant should show that there is no specific law violated. From this discussion, we should understand that from each provision, everyone concerned should take out a defense. If there is a contract between the parties, any of them can raise as a defense that extra-contractual law is not applicable to the suit. The fourth defense is to challenge the existence of damage; i.e. the defendant may state that there is fault; but, there is no damage sustained.

Lecture 7

Of the first section, we've been dealing with paragraph one of fault-based liability. The current discussion point will be paragraph two of the same section. The first paragraph turns out to be general part of the first section while paragraph two tends to be special part of the same section. Paragraph two, the special part, extends from article 2038-2065. The specialty of this paragraph will be understood from different perspectives. There is a distinction as "law of tort "versus "law of torts" among tort literatures. . . the principles of 'law of tort' and 'law of torts' belong to the civil law and the common law legal system respectively. For the law of tort, the principle is article 2028. On the basis of this principle, the civil law legal system tries to regulate every factual circumstance in terms of reasonable man standard, reasonable professional standard or presumption of fault. They usually enshrine 5-6 provisions on extra-contractual liabilities. In the common law legal system however, they specify every tort or fault/source of liability as in the case of criminal law. They spell out every misdeed that may bring about extra-contractual liability. The listings came to be known as nominate torts. The provisions under 2038-2065 are within the category of nominate torts. This paragraph was borrowed

from the common law legal system. Therefore, one of the things that make it special is that it is unique to Ethiopian legal system; i.e. our extra-contractual provisions Aare an outcome of mixture of law of tort and law of torts principles. The other thing that makes this paragraph special is that, in most cases, the provisions are there to protect constitutionally guaranteed fundamental rights. The constitution simply gives the right and the restriction; but, it doesn't give an answer as to what to be done at the time of violation of those rights. It is the ordinary law that gives the remedy for the violation of those rights. Therefore, the extra-contractual law provides for the civil remedy while the criminal law provides for the criminal one. The civil code was enacted before the coming of the 1995 constitution. The fundamental rights were incorporated in the revised constitution of 1955. The paragraph in question was there to protect those rights recognized by the 1955 constitution. Therefore, even if the civil code came before the coming of the 1995 constitution, as legal documents is living documents (principle of living documents); it must be interpreted in line with the current constitution so long as they are inconsistent with it. The third thing that makes it special is that, under the general part, we say that damage is an essential element to claim compensation. However, as per this paragraph, even if actual damage is not sustained, the very violation of these rights is sufficient to claim redress. There are what we call general damage and special damage. The presumption is that when these constitutionally guaranteed fundamental rights are violated, there is general damage. If the plaintiff can show damage however, he will be compensated for special damage. If damage is not shown, the court will provide nominal damage. By actionable person, we mean that by the mere violation of those rights, legal action emanates. Article 2104 provides 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. Articles 2038-2065 need to be seen in line with article 2104. The fourth thing that makes it special is the way it is organized; i.e. it is of liability-defense arrangement. Article 2038 lays down the principle establishing liability. Article 2039 provides the defense for article 2038. Articles 2040-2043 are organized in similar manner to regulate one incident. The same goes right for articles 2044-2047/2049.

Article 2038 deals with physical assault. Sub-article 1 reads, a person commits an offence where he intentionally makes contact with the person of another against the latter's will. Physical assault turns to be unpleasant or unauthorized contact of someone against his will. . Krzeczunowich translates physical assault as battery. This right is incorporated under article 14 of the constitution. When we discuss the general part, we said that both intention and negligence are equal source of liability. However, when the special part states that intention is a source of liability, we cannot think of a negligent physical assault. The special part requires a special state of mind; therefore, in the physical assault, it must be shown that the contact

was intentional. No matter how minimal the contact will be, there should be unauthorized contact. Should the contact be necessarily direct and physical? Sub-article 2 gives the answer. It reads, an offence shall be committed regardless of whether the bodily harm done to the other person is caused by personal contact or by the use of an object, animate or inanimate. As per this sub-article, the contact could be direct or indirect. Someone may flash a mirror on another. Is it contact? It is argued that this article may affect social relation as touching one another is common in the society. The defenses are provided under article 2039. It reads, No offence shall be deemed to have been committed where:

(a) "The defendant could not reasonably have foreseen that the plaintiff would object to his act". The will was not obtained; however, the one who made the contact would say that he didn't think that the contactee would object the touch in this circumstance. A student may touch another student who sleeps in class so that the latter would wake up. In this case, the one who made the contact can raise this as a defense. A friendly prior relationship and similar others could also serve as a defense.

(b) The act was done, in a reasonable manner, in legitimate self-defense, or in the legitimate defense of another, or to safeguard property of which the defendant is the lawful owner or possessor; or

(c) The act consists in reasonable corporal punishment inflicted by the defendant on his child, ward, pupil or servant. Is this sub-article valid under the current constitutional framework? On the basis of article 646 of the repealed section of the civil code, the word "servant" may refer to wife in certain cases. Therefore, is wife subject to corporeal punishment? Is this sub-article impliedly repealed? Owing to the current stand of the constitutional framework, this defense cannot be invoked anymore as a defense.
(d) the plaintiff was a dangerous lunatic whom it was necessary to restrain from doing harm, and the act was done in a reasonable manner; or

(e) There are any other circumstances such as to justify the defendant's action in the eyes of a reasonable person.

Sub-article 3 of article 2038 reads, (3) unless otherwise provided, the mere threat of physical assault on another shall not constitute an offence. As per this sub-article, threat of a contact does not constitute fault, of course, unless otherwise provided. The issue will be now to search where a mere threat of contact is provided as fault. This takes us to the criminal code. Article 580 of the criminal code provides that Whoever threatens another with danger or injury so serious as

to induce in him a state of alarm or agitation, is punishable, upon complaint, with fine not exceeding five hundred Birr, or with simple imprisonment not exceeding six months. If it is regulated under the criminal law, violation of this law will extra-contractually fall under article 2035 of the civil code. In this case, it may require damage for the reason that it falls back under paragraph one.

Article 40 as to Interference with the liberty of another reads, (1) a person commits an offence where, without due legal authority, he interferes with the liberty of another person, even for a short time, and prevents him from moving about as he is entitled to do. (2) In such a case, an offence shall be deemed to have been committed notwithstanding that no injury is done to the plaintiff's person. (3) 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. This article is there to protect the fundamental right provided under article 17 (2) of the constitution. It reads, No person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him. Here are two things that need due consideration. One is that the constitution does not prohibit arrest in general. It is rather there to prohibit arbitrary arrest. The second one is that it does not give a remedy. As per sub-article 1 of article 40, the action becomes fault if the one exercising the violation does not have lawful authority. The implication is that there are situations where someone may have legal authority to arrest another. Good examples are those under the criminal procedure code where lawful authorities could be given to public authorities. An ordinary person may also have such authority as in the case of guardian-minor or guardian-lunatic relationship under family law. An ordinary person may also detain a suspect to hand him over lawful authorities.

Lecture 8

In our previous class, we've dealt with trespass to personality and liberty/false imprisonment. Article 2040 (3) provides that 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. In the case of article 2038, physical contact is an essential element. In case of unlawful detention (2040 however, physical contact is not an essential element. Should the restraint be absolute? Assume that guards at gate 5 deny a student an exit through gate five. They told the student that he can have exit through gate one rather. Is their act restraint of liberty? In some jurisdictions, in order to invoke 2040, the movement should be restricted in all directions; i.e. it should be absolute. In some other legal systems, restraint is not required to be absolute. For example, the above scenario is considered to be restriction despite the presence of alternative exit. No clue is found as to which position Ethiopia is following. Defenses for 2040 are lawful authorities under private laws (2041 and public laws (2042 and 2043). Under article 2042, the phrase, "good reason" is mentioned. When can someone have good reason to suspect that another individual committed criminal offence? Looking at someone committing a crime, looking at someone being pursued, finding a picture-released suspect by public authorities and so on could serve as good reason. Under 2042(2), handing

the arrestee over public authorities forthwith is set as a must. What does forthwith mean? In case of restraining another individual, A person's action could be justified; but, his omission to hand the restrained over public authorities forthwith could be a source of liability. The constitution provides 48 hours for police to take the suspect to court. The same legal document does not regulate that of private person under article 2042 (2). Logically however, the time taken by the private person to hand over the arrestee to the police should be shorter than 48 hours. The third justification turns out to be bail. If the bailee is suspected of flying away, the bailer may restraint and submits him to the police. In general, there are four defenses for article 2040; i.e. denying the commission of restraint under article 40, legal authorities under 2041, 2042 and 2043 are there to serve as defenses for 2040.

The other issue to discuss here turns out to be defamation.

Article 24 (1) reads, everyone has the right to respect for his human dignity, reputation and honor. The law of defamation is usually associated with media law for the reason that the media is the main instrument to engage itself in defamatory statements. The law of defamation is also a gray area in the sense that there are two interests in it. On the one hand, there is the right to reputation and honor. On the other hand, there is freedom of expression. Freedom of expression is broader than freedom of speech. The law of defamation is there to strike a balance in between. Article 2044 reads, a person commits an offence where by his words, his writings or by any other means he acts in such a way as to make another living person detestable, contemptible or ridiculous and to jeopardize his credit, his reputation or his future. There are defaming tools such as words, writings or any other mechanisms. The phrase, any other mechanism, refers to sins, cartoons, pictures or gestures and so on. The other issue in connection with the law of defamation is that this law is there to protect the reputation and honor of a living person. If the defamatory statement refers to a dead person, the governing law will be other than extra-contractual law. The other feature of this law is that it is a triangular relationship. In defamation, communication is important. However, the communication should not limit itself to the one who has been defamed. The wording of article 2044 implies the existence of third party who develops adverse attitude towards the defamed individual. The other thing is that it doesn't regulate group defamation. This may have come from the fact that the law in question is an old law. The solution has been given by the freedom of press proclamation. Some legal systems make distinction between printed and spoken defamatory statement. If the defamatory statement is oral, they require special damage to be shown. If the defamatory statement is written, it becomes actionable person. In the Ethiopian case however, no distinction is made. The distinction may have been made due to the fact that written statement is more permanent than oral statement. Secondly, someone is more serious in writing than in speaking.

Lecture 9

Slander is oral defamatory statement while libel is a written defamatory statement. In some legal systems, slander is actionable when there is special damage. In other legal systems, libel is actionable whether it has brought special damage or actionable person. As to the distinction, we say that libel more deliberate; hence we need to sanction what is more deliberate. The second one is sphere of influence; libel will have a broader reach of audience than orally uttered statements; and hence subject to serious sanction. Thirdly, it is more durable than slander; hence, the longer should be more seriously sanctioned than the shorter. Others argue that so long as the purpose is similar and is achieved, there should be no distinction in between. Ethiopian law doesn't seem to make distinction. The distinction in between is nowadays less relevant due to the development of technology. When we try to see recorded speech, it is technically oral. However, in terms of sphere of influence and durability, it is as good as written statement. Therefore, in modern laws, the distinction has been made less relevant. Some people may have a written statement; but, they may read it orally. Is this written/oral? The other requirement turns out to be communication to third party. This is what we call publication requirement. By publication, we are not to mean to print; but, to make it public. "A" wrote a defamatory statement to "b"; and "b" read out and showed it to "c". Is this defamatory? The action by "b" is known as republication. In some legal systems, if the one who claims to have defamed republishes the defamation to a third party by himself, it will not be considered as defamation except in cases of illiterate persons. In some other legal systems, if defamatory statement to "b" is communicated by a husband to his wife, it would not be considered as defamation for the reason that the husband and wife are considered as one. The other issue is defamatory statement against public officials/figures in the one hand and defamatory statement against private citizen. If the statement is against public official in his official capacity, there is a certain aspect of tolerance involved for the public interest. The rational is that when someone holds a public office, he is exposed to public criticism. In case of public officials or public figures, freedom of expression will be given higher emphasis. In case of private citizen however, the right to reputation will be given higher emphasis. Does the Ethiopian law make such distinction? How about between public officials and public figures? In some legal systems, if the one defaming public officials is the media, the assumption is that the media is doing this for public interest. Therefore, the media should be given wider flexibility to express its position. In short, freedom of expression will be given higher emphasis when the media is the defendant. As per 24 of the constitution, honor and reputation is presumed; i.e. everyone is presumed to have credibility in society. Therefore, the plaintiff is not expected to show that he was famous or of good name and reputation prior to the defamation. It is rather for the defendant to show that what he stated was correct as truth serves as a defense (2047). However, truth cannot serve as a defense

if the defendant speaks the truth with intent to injure another. Article 2047 (1) is dealing with truth serving as a defense while article 2047 (2) deals with truth not serving as a defense. With a view to avoid court litigation, when a person defames another through media, the one who ledges to be defamed writes a counter-article (right to reply). The other one is that they may avoid court litigation through apology. Due to public interest, parliamentary deliberations are immune from defamatory suit. The same goes right for actors of court proceedings such as witnesses, judges, lawyers and so on. The press is also immune to a certain extent for the public to get information. In general, we can say that the right to reputation is not an absolute right due to public interest. Article 2050-51 is speaking about protection of marriage. Family protection is constitutionally recognized. It has sufficient room in the criminal code as well.

Lecture 10

In our previous session, we have seen that, as provided under Art. 2027 (1), the basic source of extra-contractual liability is fault-based liability. The second source of extra-contractual liability, as framed under Art. 2027 (2), and which is technically called as strict liability is a liability irrespective of fault. It reads as:

A person shall be liable, where the law so provides, for the damage he causes to another by an activity in which he engages or by an object he possesses. The requirements of damage and causation, as discussed in connection with fault-based liability, are still intact. Under fault-based liability, if someone is at fault, assuming that the remaining two elements are satisfied, he is liable except, to some extent, in such cases under Arts. 2137-2138 of the civil code. However, when we look into Art. 2027 (2), liability comes into the picture only and only if the law so provides. Of course, this can be taken as an exception to the basic source of tortious liability, fault-based liability. There should be a law declaring that a person is liable if he engages in an activity or possesses an object and causes damage to another thereby. The source of liability is either a law-stipulated activity in which he engages or a law-stipulated object he possesses. To briefly state, it is not all activities or objects taken as source of liability, but activities or objects that the law so provides. The other point worth noting is, in the case of fault-based liability, the victim is required to show that the defendant is at fault. Conversely, the defendant is, to avoid liability, required to show that he is not at fault. However, under strict liability, the plaintiff is not required to show fault. Likewise, the defendant cannot avoid liability using the fact that he was not at fault. In general, under strict liability, the plaintiff is required to show:

the existence of a law making mention of the activity or the object in which the defendant engages or possesses;

due to such activity or object, damage has been sustained to him;

It must be shown that there is a causal link between the damage sustained and the activity or the object mentioned. Note must be taken that the activity may be even a lawful activity.

What are the activities or objects to bring about strict liability? Why does the law so provide? These questions are elaborated under Arts 2066-2089. Note must be taken that in the elaborating section, not only activities or objects in which the defendant is held liable are found, but also general and special defenses available for the defendant to get rid of liability. Special defense is available only to a specific provision.

For example, Art. 2066 (1) provides that A person shall be liable for any damage he deliberately causes to another in order to save himself or another from an imminent damage to person or property. Sub-article (2) of Art. 2066 provides a defense for the liability declared under sub-article (1). It reads, No liability shall be incurred where the damage is due to the victim's fault. 2067 (2) and 2068 are defenses for Art. 2067 (1). 2070 is a defense for Art. 2069. The same organization goes true for other provisions in the section as well. General defense is, however, applicable to all liabilities or provisions comprised in the section. 2086 (1) deliberates what is not regarded as defense. 2086 (2) and 2087-2089 establish general defenses available to all provisions in the section.

We have just seen that the law provides certain activities or objects to be sources of liabilities. Arts. 2066-2067, 2069 and 2085 are provisions related to activities chosen by the law to be sources of strict liability. For objects chosen by the law to bring about liability, 2071, 2077, 2081 and 2085 are the relevant provisions. Art. 2085 is a gray area to be falling under provisions that declare activities and objects as sources of strict liability. In the case of the activities or objects not referred under any of the above articles, a person will be held liable only if he is found at fault. For the aforesaid activities or objects however, a person will be held liable no matter how utterly he was not at fault unless he is relieved of special or general defenses.

One of the activities resulting in strict liability is the state of necessity (2066). State of necessity is to mean taking an action to save oneself or a third party from an eminent danger to life or property. To make it more concrete, if we are to assess a fault in light of a reasonable man standard, a reasonable person on that status may do the same. Therefore, it seems implausible to hold this person liable under fault-based liability. This is because, technically, there is no fault. The law is trying only to say, "You are not at fault; but, with a view to saving yourself or a third party, your property or the property of such third party, you caused damage to the person or property of another individual". Therefore, even if the action is not adjudged blameworthy, as the damage is caused to another, compensation needs to be given for the individual damaged. The rationale behind strict liability is, the action is not blameworthy; but, the innocent victim should, in no way, remain uncompensated.

State of necessity is also an issue in the area of criminal law. Art. 75 (1) of the criminal code reads, An act which is performed to protect from an imminent and serious danger a legal right belonging to the person who performed the act or a third party is not liable to punishment if the danger could not have been otherwise averted. If the requirements under this article are fulfilled, As far as penal liability is concerned, liability is zero under state of necessity. As we understand from Arts. 2066 and 75 of civ. And cr. Codes respectively, the law is making a person causing damage to another under state of necessity exonerated of criminal liability while not of civil liability.

A typical case is a case occurred once in continental Europe. People, while sailing on an ocean, found that their boat was overloaded; and hence was inexorably to sink down. Following this realization, some sailors were thrown out by the others so as to maintain the load of the boat. Immediately after their arrival to their destination, those who threw out some sailors and maintained the load of the boat were accused of homicide before a criminal court. They raised a defense of state of necessity to exonerate themselves of any liability. Finally they were fruitful in getting rid of their criminal liability, but not of their civil liability.

Imagine that the engine of a vehicle suddenly caused fire. The driver picked up a hang-out blanket in the nearby veranda and controlled the fire. Even if the fire was controlled from being spread to other parts of the vehicle, the blanket burnt down; and hence was of no more use.

In this case, the driver is, despite not at fault, held strictly liable to compensate the owner of the blanket. In terms of society, society is better off for the fact that it saved a motor vehicle at the expense of a blanket. But, at an individual level, there is an innocent victim at the expense of whose the vehicle is saved. Justice requires that the damage should pass to the individual who obtained an advantage from that activity, the owner of the vehicle. This illustration is a good example for a private necessity. Both owners of the blanket and the vehicle are private individuals. And the measure was taken on the basis of private necessity.

There could also be necessity of a public nature, public necessity. Assume that a buss loaded by hundreds of passengers was rushing from shiro meda to stadium. Further assume that when the buss reaches around the American Embassy, its break fails at the very Plunging topography. The driver realizes the failure of the break when he is around the church of medahniyalem. Then, the driver, to avoid further damage to passengers and pedestrians, deliberately drives the buss into a certain kiosk and manages to halt the buss. Huge damage has been sustained by the kiosk however; and of course, certain personal injuries have occurred upon the pedestrians. Had the buss continued rushing on such plunging topography, in terms of society, numerous damages could have been sustained by passengers and plenty of pedestrians. This illustration is a sort of public necessity with which a greater interest has been protected. In this transaction, no fault is committed either criminally or civilly. But, in reality, the activity has caused damage on the property of the kiosk owner. Therefore, the innocent kiosk owner should be compensated for the damage caused to his property. This is what 2066 (1) tries to regulate. Note must be taken, however, that if there is any other option with lesser damage to take, no exoneration will be made from fault-based civil and criminal liability under the pretence of state of necessity. In this case, the famous article 2035 may come into picture.

The law tries to regulate state of necessity in an attempt to reconcile two interests. The interest of the defendant, the situation he was in and the eminent danger for life or health on the one hand, and the interest of the victim with no contribution to the transaction/eminent danger are to be taken into account. Art. 2066 (1) provides that A person shall be liable for any damage he deliberately causes to another in order to save himself or another from an imminent damage to person or property. The wording of the article doesn't start as "the person shall not be at fault or commits an offence" for it is simply a liability. In the case of strict liability, what is looked into

is the existence of three cumulative elements, activity/object, damage and causation. The activity may be an innocent and blessed activity.

Other activity causing strict liability is an activity under no state of necessity and/or ensuing bodily injury. Whether the person is at fault or not turns out to be immaterial. The sole fact that the person caused bodily injury to another will make him strictly liable. This turns out to be the area where the law provides greater protection for body integrity. No injury to one's property or any similar other is protected in tandem with body integrity under Art. 2067.

Art. 2067 (1) reads, A person shall be liable where by his act he inflicts bodily harm on another. Owing to the fact that the legislator decides to protect body integrity more than anything else, be it at fault or not, the ensuing party will be liable for the damage ensued. The only defenses that he has turn out to be those whose mention is made under Sub-article (2) of Art. 2067. Even, for state of necessity, victim's fault has been enshrined as a defense under sub-article 2 of Art. 2066. The legislator makes use of "victim's fault" both as a special defense in each specific provision and a general defense under sub-article (2) of Art. 2086. For an activity causing bodily injury however, apart from victim's fault, further defenses are provided under sub-article (2) of Art. 2067. It reads, No liability shall be incurred where the act causing the harm was ordered by law or was done in legitimate self-defense, or where the harm is due solely to the victim's fault. Pursuant to this sub-article, apart from victim's fault, if an act causing damage is ordered by law or done in legitimate defense, the ensuing party will be exonerated of strict liability.

Is there any act to be ordered by law? Particularly at the time of the coming into force of the civil code, depending on the nature of the crime, flogging was ordered just as a secondary punishment to imprisonment or fine. The criminal who was sentenced to be flogged used to have a medical check-up in order to know his health status. If he is found healthy, he would be sentenced to be flogged forty times of traditional whipping ropes on his back. In such a case, the prison ward who executes the punishment is relieved of strict liability for the reason that he is committing an act ordered by law. Another good example turns out to be the issue of surgery. Had a professional undertaking surgery been strictly liable, no one would be ready to do so. As we all know, everyone is duty bound to lend aid should he be in a position to save one's life without imperiling his. If the person doesn't do so, he will be held criminally liable. On the other hand, if the law holds him liable for bodily injury ensued to save the life in question, it will be of an

absurd consequence. The other defense is legitimate self-defense. If an aggressor is on the very verge of attacking another, no matter how actually the law doesn't give such right, the latter tends to instantly and instinctively defend him of that aggression. On the other hand, instinctively defending oneself of an eminent aggression is not only the nature of human being but also of other animals. The issue of self-defense is also regulated, with numerous requirements, under Arts. 78-79 of the criminal code as normal and excessive defense respectively.

The other defense is sporting activity. Sporting activities are usually known to have the potential of causing bodily injury owing to the existence of frequent body contact. If we did hold sportsmen/women liable to bodily injury despite not at fault, everyone would be reluctant to engage in sporting activities. Consequently, the whole sporting activities will be collapsed either. However, if the code of conduct for a certain sporting activity, if any, is violated, there will be fault; and hence, the resultant liability will be ruled under the section of fault-based liability.

Art. 2068 provides that No liability shall be incurred where, in the exercise of a sporting activity, a person injures another taking part in the same activity, or present as a spectator, provided that there is no deceit or gross infringement of the rules of the sport. The rationale implicit behind this exception turns out to be theory of "voluntary assumption of risk". When someone engages in such kind of transaction be it either as a sportsman or a spectator, he somehow assumes a certain risk that may be consequential to such transaction. Owing to this assumption of risk, the law will tolerate the other individual to certain extent. What if a spectator of a team causes damage to a spectator of the same or another team? For stronger reason, the spectator of a team causing damage to spectator of the same or another team may be relieved of strict liability as well so long as there is no fault on the former's part. When anyone decides to join a sporting activity either as a sportsman or spectator, he may assume a risk, not a risk of boxing or of the same nature, but a regular and anticipated risk emanating from the very engagement. In general, even if Art. 2067 (1) is framed in a very strong wording, it has been relaxed due to Arts. 2067 (2) and 2068.

Art. 2069 is also there to regulate a risk of modernization. When modern technology comes into picture, there are risks involved therein to the extent it improves our way of life. Following the advent of modernization, there appears what we call as "ultra-hazardous activities. These

activities are imperative to society; but, they are of devastating effect should they escape. Art. 2069 (1) reads as:

A person who exposes another to abnormal risk, by using or storing explosive or poisonous substances, or by erecting high-tension electric transmission lines, or by modifying the lie of the land, or by engaging in an exceptionally dangerous industrial activity, shall be liable where the danger he has created materializes, thereby causing damage to another. The fact that the risk is an abnormal risk makes the activity ultra-hazardous as found in different literatures. Within modern world, people may use or store explosive. It is not only for military deeds that explosives are being used, but also for road and other construction purposes for they are socially beneficial. The problem is However, if they explode for whatever reason, they will result in dangerous outcomes. Their damage is sometimes unthinkable with higher magnitude. Moreover, they are, owing to heat, technical error and similar others, susceptible to explosion even within at most care. On one hand, we cannot deny using or storing explosives owing to their socially beneficial purpose; and on the other, if they escape, their damage is of huge magnitude. To create harmony in between, there needs to make policy consideration. The other one is poisonous substance. In agricultural areas, we make use of pesticides, insecticides, agrochemicals and so on. All these are socially beneficial substances, with certain risks on their other side however. The same goes true for high-tension electric transmission lines. Risk may also be realized at the time of modifying the lie of the land. When we construct a dam, we modify the natural landscape for social benefit. We store large quantity of water therein whose outflow tends to be devastating. In all these cases, the law is trying to strike a balance between the two interests.

Is qera dangerous activity? Neighboring People had instituted an action before a court of law against qera for they became asthmatic by the latter. Other people had also instituted an action against a cement factory here in Addis to be compensated as the latter emitted polluting substances with which the health condition of the villagers was jeopardized. Both of them invoke Art. 2069 (1) as a legal foundation for their claim. Do you think they will succeed?

Many countries, in order to avoid such risk, make use of the system of zoning. In their urban planning, they try to assign each part of the city as a business center, industrial zone, social service zone and residence center. Under this system, one zone is segregated from another. Note must be taken that There are arguments in favor and against system of zoning.

Art. 2069 (2) provides that the provision of sub-art. (1) Shall apply notwithstanding that the author of the danger is the State or has received an authorization from the public authorities. To be a state or licensed practitioner is not a defense. The article is not about whether the activity is lawful or not. The fact that a person is licensed to run that activity doesn't mean that he is authorized to cause damage to another. So long as the actor is generating income from that activity, the liability consequential to that activity must be compensated by the actor himself. The liability in question naturally flows from this argument.

Common to constricted dams, especially in case of qoqa dumb, government issues public notice through electronic media sometime in July or August. The notice reads as follows:

"As the qoqa dumb is utterly filled with water, we are to give off some through the water-gate thereof. Therefore, we announce all downstream residents to take the necessary precaution."

Does this warning serve as a defense? What type of precautionary measure are the residents to take? What the measure could be particularly for their plants or crops? How serious was the warning? To what extent was it communicated to residents? All these questions must be well considered.

Lecture 11

In our previous session, we have seen, in the absence of fault, individuals may be held responsible. What is the rationale behind this? The defendant is gaining benefit from the activity or object under his possession. So long as he is gaining benefit from the activity he undergoes or object he owns or possesses, he should also assume the liability arising therefrom. On the other hand, the rationale is dependent upon the principle of cost-benefit analysis. It is irrational to let the defendant derive the benefit and deny the cost. He should rather be made to shoulder a corresponding duty to his right of driving benefit from the activity he undergoes or objects he owns/possesses.

Art. 2070. — 2. Potential danger.

Except in the case of fault, no liability shall be incurred where the value of neighboring property is reduced in consequence of an abnormal risk being created. This article is well connected with Art. 2069. What is the article trying to convey? As we discussed under Art. 2069, when a certain

ultra-hazardous activity, despite authorization or absence of fault, causes damage on another, the individual behind the activity is required to compensate the damage. Art. 2070 is, however, trying to come up with a different version. Art. 2069 is dealing with a materialized risk while Art. 2070 is dealing with a potential risk, a risk that is not yet materialized. In the real world, when a road, supermarket or similar others are constructed, the value of houses near by these infrastructures will appreciate. However, when the constructed items may be of a potential risk, the value of houses near by these constructions will depreciate. This is because; people would not like to assume risk whenever something dangerous escapes from these constructions such as petroleum stations. Therefore, it goes without saying, Art. 2070 provides that if the danger is simply potential/speculation, no claim of compensation will be made under strict liability.

So far, we've been dealing with strict liability from an activity individuals undergo. The other cradles from which we can establish strict liability are objects under individuals' ownership/possession. What are these objects specified by law? These objects are animals, buildings, machines and motor vehicles. If individuals possess or own these objects and the objects cause damage to another, the individuals, irrespective of fault, will be held liable. The rationale is what we said before; i.e. if someone gains benefit, he should also incur the cost thereof. The liability from ownership/possession of animals is regulated from Arts. 2071-2076; and that of building is regulated from Arts. 2077-2079; Art. 2080 is not indeed a building but an accessory thereto; Machines and motor vehicles are regulated from Arts. 2081-2084.

Animals may be wild or domestic. Wild animals are animals in the jangle, animals of a savage character while domestic animals are those domesticated by human beings for the benefit of protection/security, pleasure, transportation, dietary service and the likes. In primitive society, when an animal causes damage to a person or a property, and if the owner/possessor had no fault, the so-called "thing liability" would come into picture. By "thing liability", we mean, the animal was itself considered liable. Of course, in primitive society, the distinction between an animal and human beings was blurred. For example, pursuant to fetha negest, if an animal causes damage to another, it would be killed and the meat thereof would not be meant for dietary service. In due course of time, thing liability was transformed into personal liability; i.e. the possessor was held liable. (ተናካሽ ውሻህን፣ ተዋጊ በሬህን ያዝ፣ Tenakash wushahin, tewagi berehin yaz).

If an individual fails to be compliant with this rule, he would be held strictly liable. Prior to such transformation, personal liability was a sort of fault-based liability.

Consequently, in modern society, the apparently fault-based liability began to become a sort of strict liability. Countries are however seen to follow different approaches. In some jurisdictions, animal liability is still fault-based liability. In this case, the one who alleges to have been injured by an animal is required to show the failure by the possessor to herd the animal. In some other jurisdictions, they make distinction between wild and domestic animal. Still in other jurisdictions, the distinction is made between dangerous and harmless animals. This is because, in the group of wild animals, some are dangerous while others Aare not. In some jurisdictions again, for wild animals, liability is declared strict. If someone brings a wild animal to his custody, and if the animal causes damage to another, the possessor is held strictly liable. He is taming or fetching something unique to the neighborhood. Then, he is held strictly liable if the unique animal gives rise to a unique risk. If the animal is domestic, the liability becomes fault-based. The same goes true to the distinction as dangerous and normally harmless animals. If the animal turns out to be dangerous, the liability becomes strict and if the animal is a harmless type, the liability becomes fault-based.

What sort of approach did the Ethiopian legislator adopt?

Art. 2071. — Liability for animals, — 1. Owner. The owner of an animal shall be liable for any damage caused by the animal, notwithstanding that it has eluded his control accidentally or the damage caused was unforeseeable. Sometimes, the animal could be under the custody of the owner; in some other times, the animal may be under the custody of another giving benefit for the latter. Therefore, in some jurisdictions, strict liability may not base itself on ownership but on whose custody the animal was at the time of causing damage to another. However, pursuant to 2071, the Ethiopian position is that even if the animal was under custody of another, the owner is held liable. Note must be taken, these animals are under the custody of private individuals.

Some jurisdictions have special legislation for their animals in special circumstances. Animals in zoo, animals available for circus purpose, animals meant for laboratory and the likes are good examples. Since there is public interest involved in these animals, many countries desire to regulate them through special legislation. In this case, the liability is fault-based; i.e. he who

alleges to have been injured by these animals is required to show the existence of fault on the part of the administrator. Circussing, laboratory, zoo and other services with those animals are beneficial to society. Therefore, they do not impose strict liability on these activities as it discourages such type of engagement. Note must be taken that the level of responsibility is higher in strict liability than in fault-based liability.

Coming back to Ethiopian case, the owner is responsible for any damage caused by his animal. It doesn't seem to make distinction between wild and domestic animals.

Art. 2072 — 2. Custodian. (1) A person who has taken possession of an animal for purposes of personal gain shall be liable for any damage caused by the animal while in his custody. (2) The provisions of sub-art. (1) Shall apply where a person has hired or borrowed the animal, or has taken possession of it in order to take care of it, or for any other reason. (3) An employee attending to an animal, or making use of it for the owner's account or for the account of another person, shall not be liable for any damage caused by the animal unless it is due to his own fault. Pursuant to this article, the custodian is coming into picture. The custodian will be liable no matter he is not the owner, but if he was managing the animal at the time of causing damage to another. In this case, the victim has three opportunities; i.e. he can proceed against the owner on the basis of Art. 2071; or he can proceed against the custodian pursuant to Art. 2072. He can also bring an action against both of them jointly on the basis of Art. 35 of the civ.proc.c or Art. 2155 of the civil code. All these three alternatives will be available if the animal causes damage to another while it was under the custody of an individual other than the owner.

Art. 2073. — 3. Transfer of liability. (1) The owner who has paid compensation to the victim may recover from the person in whose charge the animal was. (2) He may claim to be indemnified in full, unless the damage be due to his own fault or that of a person for whom he is liable. If the victim brings an action against the owner, the owner cannot defend himself by invoking the fact that the animal was under the custody of another at the time of causing damage. The owner can, however, claim what he incurred from the custodian as the ultimate liability lies on the latter. But, it is possible to say that liability towards the victim lies on the owner. The law is trying to create favorable condition to the victim.

Art. 2074. — 4. Surrender of animal by the owner. (1) Where damage is caused by a domestic animal, the owner of the animal may relieve himself of his liability by surrendering the ownership of the animal to the person who has suffered the damage. (2) He may not relieve himself of liability under sub-art. (1) Where the damage is the consequence of an offence committed by himself or by a person for whom he is liable. (3) Only those animals which it is customary to keep for purposes of pleasure or gain shall be deemed to be domestic animals. The Amharic version to sub-article one of this article reads, "belela sew habt lay (በሌላ ሰው ሃብት ላይ)". The English version however deals with damage in general. Pursuant to Art. 2028, damage could be personal injury, property damage and moral damage. The Amharic version singles out only property damage; i.e. Noxell surrender is available if the damage is related to property. What the phrase, "domestic animal" consists of turns out to be an issue. Assume that an ox was passing by a house whose dog is ferocious. The dog suddenly bit the ox; and the latter was severely damaged. Can the owner of the dog relieve himself by surrendering the dog to the victim? The above sub-article 3 is a sort of definition. The Amharic version thereof reads, የቤት እንስሶችና የቤት አራዊት ተብለው የሚቆጠሩት ለመደሰት ወይም ከነሱ ጥቅምን ለማግኘት እንደተለመደው ሰው የሚያኖራቸው ናቸ, yebet ensisana yebet arawit teblew yemiqoterut lemedeset weyim kenesu tiqim lemaggnet endetelemedew sew yemiyanorachew nachew. Don't you think that the Amharic version makes distinction between phrases "yebet insisa" and "yebet arawit"? whenever we find the English version absurd, it is necessary to countercheck the Amharic version for there is a sort of mistranslation. In the English language, domestic animal such as cat and dog are known as pet animals. They are domestic to their owner but savage to outsiders. Therefore, it is possible to say:

The noxal surrender applies to domestic animals other than pet animals.

The noxal surrender applies solely to property damage. Note must be taken that the law treats personal damage more seriously than any other damage. In the presence of fault, the theory of noxal surrender (limited liability concept) doesn't come into picture.

Art. 2075. — 5. Surrender of animal by custodian. (1) The person in charge of the animal shall only be liable to the value of the animal at the time when the damage was caused. (2) His liability shall not be limited where the damage was caused by an animal other than a domestic animal or arises from an offence committed by himself or by a person for whom he is liable. The

custodian cannot surrender the domestic animal to the victim and relieve himself of unlimited liability. The prominent principle of property law says, “One cannot transfer a better title than he has.” On the basis of this principle, the custodian cannot surrender the animal for the fact that he doesn’t have ownership title over that animal. The solution is, therefore, the custodian can surrender the value of the animal and relieve himself of unlimited liability. In short, the noxal surrender is effected through payment of the value of the animal. Pursuant to sub-article 2 of the above article, if it is fault-based liability or the animal is a sort of pet animal, payment of value will not be effected to escape from unlimited liability. From the theory of noxal surrender, we can apprehend that the law is of the idea, “you are gaining a certain benefit from the animal; therefore, you need to be held liable to the extent of that gain in case the animal causes property damage to another”. The gain from the animal is the animal itself or the value of the animal together with its services.

Lecture 12

Art. 2076. — 6. Victim's guarantee. (1) In order to secure compensation which may be due to him, the owner or possessor of land may seize and take charge of animals belonging to another person which have caused damage to his property. (2) He may kill them where circumstances require this in order to prevent substantial damage disproportionate to the animal's value. (3) He shall in both events notify the owner of the animals without delay or, where the owner is unknown to him, take the necessary measures to ascertain him. Sub-article 1 is dealing with a concept known as “afelama” in the Ethiopian rural society. The term “afelama” envisages cattle-farm relationship. When cattle or a head of cattle crosses another individual’s farm and destroys whatever is in the farm, the possessor of the farm has the right to detain the cattle/head of cattle until such time he is compensated. This is a sort of self-help measure. In this case, the cattle owner is required to make sure that his cattle do not cause damage on the farm. Is the possessor of the farm not required to fence the farm to protect the cattle from entering into?

In some legal systems, the situation is different. They do not have a sort of harmonized law across their regimes. For example, in the U.S.A, some states are agricultural while others are cattle breeding. In agriculturalist states, the rule is “fence-in”; i.e. the cattle owner is under obligation to make sure that his cattle do not cross into the farm of another. However, in cattle breeding states, the rule is “fence-in-out”; i.e. the agriculturalist is under obligation to make sure

that no cattle should trespass his farm for the fact that farming turns out to be an exception in those states. Do we have the same position in Ethiopia? Note must be taken that the civil code is agriculturalist in its behavior. Putting these rules into practice will have an implication on cost/price of cattle or agricultural products. If the duty is imposed on the cattle breeder, the price of a head of cattle or products thereof will go up. The same goes true if the duty is imposed on the farmer. Despite necessity of further discussion, in our civil code, the cattle breeder apparently seems to be under obligation to assert that his cattle do not trespass the farm of another.

Art. 2077. — Buildings. — 1. Principle. (1) The owner of a building shall be liable for any damage due to the building even where the damage was unforeseeable. (2) The owner may claim compensation from the person who built the building, from the occupier or from the person by whose fault the damage was caused. The other object where strict liability is imposed turns out to be building. Where a building, due to collapse, causes damage on another, the liability, under Ethiopian law, lays on the owner of the building. There are two personalities upon which liability is imposed, the owner and the occupier. In a situation where the owner occupies his building, the issue may not be controversial. The issue may be controversial where the building is, through lease or any other arrangements, occupied by a person other than the owner. In such a case, the law tries to regulate two things:

Object falling from a building;

Part of or the whole building falling and causing damage. If an object falls from a building and causes damage on another, the case will be dealt with under Art. 2080. In such a case, the occupier will be held liable. If part of or the whole building collapses and causes damage on another, the case will be falling under Art. 2077; and it will be the owner to be held liable. Issue: When do we say an object falls from a building and causes damage? When do we say part of or the whole building collapses and causes damage? The answer given to this question will have a significant impact on assumption of liability. This is because, if we say that an object is falling from a building, the liability goes to the occupier. And if we say that, even in the existence of another occupier, part of or the whole building collapses and causes damage, the liability goes to the owner. Indeed, at the end of the day, the owner will have recourse against the occupier. This is what Arts. 2077-2078 are trying to state.

What is the criterion to determine whether the falling item is an object or part of a building? The requirement of Fixation is a determinant factor. For an item to be part of a building it must be fixed to the building; i.e. it should be an intrinsic element of the building. If the falling item has no inherent connection to the building, the occupier will be held liable. When part of a building under ordinary circumstances (circumstances other than phenomenon such as earthquake) falls and causes damage, it could be either defect in construction or want of repair. If the building turns out to be old, it may in need of maintenance despite failure on the part of the owner to timely react. However, if the building is new, something may have gone wrong; i.e. defect in construction. In both cases, the liability goes to the owner. Indeed, at the time of defect in construction, for example, the owner may ultimately claim compensation against the contractor. However, the easier task for the victim is to detect the owner than to detect the contractor. If the occupier doesn't inform the owner that the building does require a certain repair, that will be a fault on the side of the former. Therefore, depending on case-by-case basis, ultimate liability may rest either on the occupier or contractor. Traditionally, an object from or part of a building would fall and cause damage on another. But in the modern world, glassed buildings are born here and there. Consequently, the glass reflects and causes damage on another. Does Art. 2077 give solution to such problem? Sub-article 1 of Art. 2077 reads, "The owner of a building shall be liable for any damage due to the building even where the damage was unforeseeable." One advantage of law is its generality. Its generality makes it flexible so that it could be applicable on thousands of cases. Therefore, the reading of this provision seems to incorporate the damage in question as well. The only thing for the owner to avoid liability is to change glassy windows to something less dangerous to society. Note must be taken that the Burdon of proof lays on the plaintiff for the assumption is that the defendant has discharged his obligation. Art. 2141 provides, "The victim at the injury shall establish the amount thereof and prove the circumstances which render the defendant liable to make it good."

Art. 2078. — 2. Surrender of building. (1) The owner may relieve himself of his liability by surrendering the ownership of the building to the person who has suffered the damage. (2) He may not relieve himself of liability under sub-art. (1) Where the damage is the consequence of an offence committed by himself or by a person for whom he is liable. As we can understand from this article, noxal surrender has come into picture again. As said before, noxal surrender consists of the theory of limited liability in it. If the victim wants to get more compensation, he may

resort to the other section, fault-based liability. This is because; noxal surrender is not a remedy under fault-based liability.

The other object from which strict liability emanates is machine or motor vehicle. The two most important tort cases in the developed world are traffic accident (2081) and product liability (2085). In traditional societies, however, the most prominent case is animal liability.

What is the difference between machine and motor vehicle? Machine is stationed in a certain location. Good examples are grinding mills and so on. However, even in that state, due to their mobility, machines may cause damage on another. Motor vehicles are, on the other hand, moving entities here and there, while In the meantime, they may cause damage to another. Different legal systems adopt different theories on these items in general and motor vehicles in particular.

In some jurisdictions, motor vehicles are regulated under the law of negligence, fault-based liability. In this case, the victim will be required to show that either the driver was at fault or the vehicle had technical failure. Motor vehicles usually cause accident either due to incompetent driving or technical unfitness. When motor vehicles are technically fit, they are said to be roadworthy. However, when they are unfit and driven on a highway, they become a risk to society thereby making the rule fault-based liability. They made the rule fault-based owing to the fact that they stick to the idea that traffic accident requires a bilateral care. By bilateral care, we mean that both the drivers and the pedestrians should take the necessary care to avert the accident.

In some other legal systems, motor vehicles are regulated under dangerous activities as in the case of Art. 2069. According to these systems, driving is dangerous activity; therefore, anyone engaging in such activity and causing damage on another is strictly liable. Still in some other jurisdictions, motor vehicles are regulated under possession of dangerous object like that of wild animals. In this case, those benefiting from the possession of such objects will shoulder the strict liability stemming therefrom as in the case of 2081. In some other legal systems, apart from their civil code, a special law is formulated on traffic accident. This special law includes compassable insurance. This is to mean, before a vehicle is driven on a highway, it must be ascertained that it has a compasible insurance. The risk is there; and this risk must be insured in advance. If the risk is materialized, the insurance company would somehow cover it. In Ethiopia, despite not

comprehensive, third party liability insurance has been formulated as type of compasible insurance. However, unfortunately, its application is very much limited to bodily injury and cost of medication. For any additional compensation however, the victim is eventually to pursue either the owner or the driver. In general, fault-based liability, regulating machines and vehicles under dangerous object, possession of dangerous object and regulating them with special law are the different approaches that are possibly followed by various jurisdictions.

The other issue is, if it is strict liability, on whom is it to be imposed? Is it on the owner or driver or custodian? Hereto, countries differ in their approach. In some countries, the liability, be it strict or fault-based, is imposed on the one who was operating the vehicle. In some other countries, the liability, be it fault-based or strict, is imposed on the owner. Imposition of liability on the owner is justified in that:

The owner should have taken the necessary care to employ a competent driver;

The owner is in an economically better position; i.e. he fulfills the deeper pocket principle to compensate the victim.

Still in some other jurisdictions, if the car is possessed by custodian other than the owner, the victim may proceed against the possessor. The driver is simply an employee of the owner or the custodian with no independent action. The custodian is different from the driver in that the former is an independent individual with independent action of operating the vehicle for his own benefit. The driver is, however, operating the vehicle under the direction and supervision of the custodian or the owner for the benefit of either of the latter.

Art. 2081. — Machines and motor vehicles. — 1. Owner. (1) The owner of a machine or motor vehicle shall be liable for any damage caused by the machine or vehicle, notwithstanding that the damage was caused by a person who was not authorized to operate, handle or drive the machine or vehicle. (2) He shall not be liable where he proves that, at the time when the damage was caused, the machine or vehicle had been stolen from him. As seen from this article, under Ethiopian law, liability primarily lies on the owner. Sub-article two provides theft as a special defense. In 1970s, in a case brought before an Ethiopian court, a woman had a motor vehicle usually parked in her compound. The woman would put the key with the car parked. However, every night time, when the woman went to bed, her old boy would secretly drive the car to party.

Unfortunately, once in a blue moon, when the boy was, as usual, driving back from party to home, he caused bodily damage on a pedestrian. The woman with title deed in her name was brought before a court of law by the injured pedestrian to compensate. The defendant raised theft as a defense. Is it tenable? The position of courts is, in this case, more or less similar. Theft presupposes an intention to take the thing away permanently. In the case at hand, however, despite secretly, the fact that the boy would take the vehicle and bring it back cannot constitute theft.

In reality, people automatically report to the police whenever their car is stolen. In majority of the report, the understanding of the people is to get assistance in looking for their stolen car. The other major advantage is, when people report, from that very moment on wards, they will be relieved of any liability for the damage caused by the vehicle until retrieval thereof. In such a way, they prepare evidences to defend themselves of the liability in question. Note must be taken that stolen vehicles are susceptible to committing crimes.

Lecture 13

In the common law system, the operator of the vehicle, be it an owner or a driver , is held liable if and only if negligence is proven. However, under Ethiopian law, the rule is a rule of strict liability. This may have its own danger; i.e. pedistrians will take it for granted that the owner of the motor vehicle is always held liable. It needs to be taken into account, however, if the owner of the vehicle can prove that the victim was at fault, he can be relieved of strict liability. This is because, traffic accident needs a bilateral care; i.e. the fact that the owner of the motor vehicle is of a higher responsibility doesn't mean that the pedestrian is at liberty. The victim will remain uncompensated if the defendant proves the fact that he was at fault.

Akin to the case of animal or building, motor vehicle can also be operated by custodian other than the owner. This datum is usually common around tour and travel agencies. When tourists come to Ethiopia, they may rent cars from the aforesaid agencies to go Lalibela, Axum and so on. In some arrangements, the tourist operator, the agency, will rent out the car in tandom with the driver for the benefit of the tourist. In some other arrangements, the tourist will rent the car and derive by himself or assign another driver at his choice. In such senario, Art. 2082 will come into picture. It reads:

(1) A person who has taken' possession of the machine or vehicle for purposes of personal gain shall be liable for any damage caused by the machine or vehicle while in his possession. (2) An agent who has charge of the machine or vehicle for the owner's account or for the account of another person shall not be liable for any damage caused by the machine or vehicle, except in cases of fault. In the case at hand, the tourist is a custodian for the fact that he takes the car in his possession for his awn benefit. If an accident occurs while the car was under the custody of the tourist, the victim can proceed against the former. At another option, the victim can proceed against the owner; in this case, the owner can have a recourse against the custodian. This applies when the tourist takes charge of the car by himself. If the car was rented out together with the driver being an employee of the owner, the owner will still be held liable.

In cconnection with car accident, there is a common Ethiopian practice. If someone is owning a car, how is his ownership proved? Title deed (librie) is a document issued by a competent authority showing that a certain individual turns out to be the owner of a car. When a certain vehicle causes injury to another, the victim will have the plate number and go to the competent government authority, of course, assisted by a traffic police. In such a way, the victim will be aware of who the owner of the car turns out to be. As a victim, someone institutes an action against the owner of the car relying on the title deed issued for the car and the owner thereof in question.

Sometimes, the title deed is found as issued or registered in the name of a certain individual; but, the car is sold out to another. The buyer pays the price and takes the car under his possession. Even if the name is not changed yet, he takes delivery of the title deed as well. If title deed is officially transferred to another, two percent of the car's price will be paid to the transferring authority. If the title deed is not officially transferred however, the payment in question will be avoided. Therefore, With a view to getting rid of such payment, The seller and the buyer, in leu of transferring the title deed, are viewed to conclude contract of special agency. In such senarrio, the buyer may possibly cause injury on a pedestrian with the car under his castody. Who do you think is responsible for this? On the basis of Art. 2081, the original owner will be held liable. This is because, the owner of the car for the purpose of the law is the one in whose name the title deed is issued. Note must be taken, in the case of other movable properties, ownership is presumed by possession, of course, subject to rebuttal by any other means. However, for special movables, a special document called title deed is required to indicate ownership thereof. Therefore, so long as the name in the title deed is not changed, on the basis of Art. 2081, the original owner will be held liable. However, on the basis of Art. 2082, as the new owner took possession of the car and was making use thereof at the relevant time, the new owner will be held liable. As the victim should go to the competent authority and determine under whose name the car is registered, it is highly unlikely for the victim to proceed against the custodian. The original cannot reject the action by the victim as Art. 2083 prohibits him from doing same.

Art. 2083. — 3. Transfer of liability. (1) The owner who has paid compensation to the victim may recover from the person in whose keeping the machine or vehicle was. (2) He may claim to be indemnified in full, unless he has committed an offence or an offence has been committed by

a person for whom he is liable. The two concepts, liability towards the victim and ultimate liability come into picture again. Liability towards the victim rests upon the original owner, while the ultimate liability rests upon the custodian. Once the original owner discharges his obligation towards the victim, he will have a recourse against the custodian. At this juncture, it is advisable to say, if someone sells a car, he should transfer it in the way required by law. in the absence of such transfer, liability may come five or ten years after the sale of the car in question. There is also a risk on the side of the buyer. While the buyer is simply dependent on the power of agency, if the original owner dies, the agency contract will terminate. In such a case, the heirs of the original owner may validly claim the car.

Art. 2082 (2) reads, An agent who has charge of the machine or vehicle for the owner's account or for the account of another person shall not be liable for any damage caused by the machine or vehicle, except in cases of fault. The term "Agent" under this article is referring to the term "driver". The driver may operate the car for the benefit of the original or the new owner as the case may be. This driver cannot be held liable unless he commits fault. The other agent operating the car for his benefit is not a driver, but a custodian. The distinction between the owner, the custodian and the agent must be accentuated to the extent possible,. The agent is an employee who acts under the direction of either the original owner or the custodian. The custodian is taking possession of the motor vehicle for his own gain. For this reason, the new owner is not an agent but, a custodian. Pertaining to liability of the three persons, the owner and the custodian are strictly liable while the driver is subject to fault-based liability. The tricky issue is however, if the accident causes bodly injury, on the basis of Art. 2067 (1), the driver could be held strictly liable. The said sub-article reads, "A person shall be liable where by his act he inflicts bodily harm on another." On the basis of Art. 2082, The driver is liable only in the presence of his fault for the damage caused. However, on the basis of Art. 2067 (1), if the damage is personal injury, he is also held strictly liable. This happens for the reason that personal injury is given a different status under the law.

Owing to their inherent nature of mobility, motor vehicles are susceptible to collision. The most car accedents is caused by collision between motor vehicles. In the case of collision, how is the liability allocated?

Art, 2084. — Collision between vehicles. (1) Where two motor vehicles are in collision, each of the vehicles shall be deemed to have contributed equally to the accident. (2) The owner of each vehicle, or the person responsible for it, shall bear half the total amount of the damage resulting from the accident. (3) The provisions of this Article shall not apply where it is proved that the accident was due, entirely or chiefly, to the fault of one of the drivers. In the case of collision, the owner(s) or custodian(s) will be strictly liable on an equal footing. Equal liability remains to be the rule unless proved otherwise. It may be shown that the collision occurs owing to the fault of one of the motor vehicles. Unless proved otherwise, the Primafacie rule is equal responsibility.

What does equally responsible mean? Different legal systems regulate it differently. For some legal systems, equally responsible is to mean, each motor vehicle will cover its own damage. For some other legal systems, equally responsible is to mean, each motor vehicle will cover the damage of the other. Still for some other legal systems, the damage of the two motor vehicles will be aggregated and divided into two. Assume that a minibus collided with a cinotrack. Both the minibus and the cinotrack incurred damage of 4000 and 2000 birr respectively. According to the first scenario, the minibus will be disadvantaged. According to the second scenario, the cinotrack will be disadvantaged. At the third scenario, both motor vehicles incur 3000 birr each. Which position is taken by the Ethiopian legislator? Pursuant to Art. 2084 (2), the Ethiopian legislator has resorted to the third senario. The damage will be aggregated and divided into two; and the outcome of the division will be allocated to each motor vehicle.

When do we say there is a ccollision? Does ccollision presuppose that both vehicles were on movement? Some may collide while moving towards one another; i.e. in different direction. Others may collide while moving one after another. Still others may collide while one is moving and the other is parked. There is no clue as to which type of ccollision the law resorts. What is clear enough is however, Art. 2084 comes into picture when collision occurs.

Art. 2085. — manufactured goods. (1) A person who manufactures goods and sells them to the-public for profit shall be liable for any damage to another person resulting from the normal use of the goods. (2) No liability shall be incurred where the defect which has caused the damage could have been discovered by a customary examination of the goods. This liability is again the result of modernization. In modern life, society is becoming dependent upon consumption of processed goods as a means of subsistence. In traditional society, we consume what nature

provides without undergoing further process. In modern world however, for consumption, we utilize processed or “manufactured” goods. In the meantime, there is an intervention of a human being in the process.

Under the article in question, there is a phrase which says “a person who manufactures”. The person may be either juridical or physical person; and he must be manufacturer. Selling the manufactured goods to the public for profit is another requirement. Finally, the damage must have come from normal use. In this case, the manufacturer will have liability towards an end user. In the traditional system, due to limitation of what would be manufactured, manufacturers would have direct dealings with the end user. The fact that the producer produces an item and directly sells it to the consumer brings contractual relationship between the two parties into picture. Therefore, this becomes the subject matter for law of contract. In modern marketing system however, owing to mass production, the producer produces an item and sells it to the whole seller; the whole seller will again sell the purchased item to the retailer; and the retailer will sell it to the consumer. Under this chain of transaction, there is no contractual relationship between the producer and the consumer. This transaction is the scenario what the law of extra-contractual liability is trying to regulate.

In earlier times, the position was privety of contract. Owing to such position, if the liability comes into picture, the consumer will proceed against the retailer; and the retailer will proceed against the whole seller; and the whole seller, on his part will proceed against the producer. At a later stage, it proved to be difficult to rely on the retailer. Because retailers are small holders, they cannot compensate victims to the extent damaged. Secondly, they do not involve anything human. They deliver the product to the end user as packed by the producer. Due to this reason, it will be difficult to hold the retailer accountable. In due course of time, there was a need to make the producer accountable to the end user. This is because; the society expects the producer to meet standards at the level of production. There should be a manufacturer; he must sell the manufactured goods for profit. Only profit-oriented enterprise is governed under this article. This is, therefore, cost of doing business. The manufacturer is there for profit; and hence, he should bear the risk when liability occurs. In order to hold the producer liable for that, the consumer must have sustained the damage while normally using the item. The existence of “normal use” implies the existence of abnormal use. “Normal use” refers to the use as intended by the

producer. Producers usually put instructions of how to use the product at what level and for what purpose on the package. In this case, the consumer is required to comply with that instruction.

For example, akin to any other pills, tetracycline is to be consumed as prescribed by doctors. However, in many rural areas, tetracycline is sold and purchased in the market like any other ordinary product. The purchaser does not swallow the pill; rather, he distracts the pill and put it on a wounded skin. This is a practically good example of abnormal use. If the purchaser sustained damage by using tetracycline in such a way, he cannot be compensated from the drag administration office or the producer.

In the case of product liability, until recently, the most serious case was the issue of cigarette. Can cigarette smokers institute action against tobacco companies? In order to raise a voluntary assumption of risk, it must be shown that sufficient information is provided. Many tobacco companies write a warning on their product, as: “smoking cigarette is dangerous to your health!” is this warning sufficient? To what extent the warning must be given?

Lecture 14

In order for a claimant under product liability to succeed,

The claimant must have sustained damage. Damage is an essential element unlike issues of actionable person where damage may not be there. Indeed, under strict liability, damage is an essential element.

The damage must have resulted from normal use of a product; i.e. cause and effect relationship must be shown.

The claim must be brought against the manufacturer, the entity that produces or processes the product at issue.

The manifacturer’s activity must be aiming at obtaining profit from the product available to the public. Product liability comes into the picture with mass production and making it available to the public. This is said to be a liability for doing business. When the manufacturer distributes the product free of charge, unless it is shown that he commits fault, the claimant cannot rely on this provision.

Could cigarette smokers institute action against tobacco factories for the damage due to sigarette smoking? What may be the justification to be raised by the plaintiff advocate? What may also be the justifications to be raised by the defendant advocate? The plaintiff may not be expected to show defect. Because, in a complicated production process, the consumer is not in a position to understand how the process goes on. It is in order to avoid this that the law resorts to strict liability and requires the plaintiff to establish the objective thing only. The plaintiff with a lang cansor due to prolonged smoking may have smoked not only nyala but also roseman and other types of cigarette. In this case, the plaintiff may be in a difficulty to specifically relate the cause of his lang canser to nyala. The defendant may raise the existence of varieties of cigarette in the market as defense and request the joining of other tobaaco companies to the suit. The lawyer for the tobacco company may argue, “many people are smoking nyala cigarette; but they are not contracted with a lang canser. This is because, unlike our other customers, you have over consumed it.” In the case of overconsumption, note must be taken that the issue of normal use is challenged. The plaintiff should bring an action against the company within two years not from the date of smoking but from the date of being contracted with the lang canser. In adition to the defense of overconsumption, the company raises that the duty of warning is discharged on its part. Drug companies or doctors are seen to prescribe how much should be consumed per day and so on. If someone exceeds beyond this instraction, it will be an abnormal use. No cigarette company has however specified the amount of cigarette to be smoked per a day. Under this circumstance, it will be implausible for them to raise the issue of abnormal use as a defense. If the plaintiff has full information as to the risk associated with a certain object, the issue will be a well informed choice and the principle of voluntary assumption of risk comes into picture. Are ccustomers really given that cigarette smoking is dangerous? In deed, at the very margin of the package and in a very small font, it says, “smoking cigarette is dangerous!” however, on the well visible part of the package, there will be an individual in a resort or somewhere elce smoking and enjoying it with bolded advertisement defeating the whole purpose. Under this circumstance, can they really raise as defense that they have discharged their duty of warning? The other defense that may be raised by the company is victim’s fault. Are all smokers at fault? If the company realizes that everybody smoking is at fault, why should people open a cigarette manufacturing company? Is it possible to say, a reasonable person could not smoke cigarette?

In the United States, in many of the cases, cigarette companies have lost the suit. They have been required to pay millions even billions of dollars in the form of compensation. Historically, the first defense for cigarette companies was victim's fault. Victim's fault was not however accepted by court for there was no wrong commited by the plaintiffs. The second defense to avoid liability was voluntary assumption of risk. In this case, the defendants are asked: "do you really explain the risk involved in it as company?" it is from the medical practitioners and not from the cigarette smoking companies that the risk of smoking used to be explained . the companies are rather reserved to explain the risks associated with smoking cigarette. They should have issued warnings and graphic pictures. However, at what level the graphic pictures should be produced is unclear. As seen practically, The pictures do not provide us with full knowledge so as to make a well informed choice whether to smoke or otherwise. Owing to this failure, the courts were pushing the companies to take a couple of steps. Companies would be pushed to make the price of cigarette higher and higher thereby inserting the liability therein and causing majority of the consumers to be triced out. Consumers are triced out as they tend to be unable to cover the price set for the cigarette. Those who can afford to cover the high price will keep on consuming. At the end of the day, if they claim, they can easily be compensated. The court would argue as "they should be compensated as they have already paid a premium."

The other relevant option is to undergo "relocation". Tobacco companies tend to relocate either their market or the very factory. Traditionally, in the US, there were large number of tobacco companies. Many of these companies relocated their market or the very factory either to Africa, Asia or Latin America where there is laxed product liability rules. This is why most Asian and African youngsters are seen to become smokers. NB. The fact that the victim cannot institute action against the wholesaler is taken to be the gap under Art. 2085. Particularly, in 1960s, this article was taken to be cosmetic. At the time in question, most of the products that bring about product liability were outputs of foreign companies. Therefore, it was impossible for the victims to proceed against the manifacturers situated in Europe or anywhere elce. With a view to filling this gap, currently, a proclamation known as "fair trade practice and consumer protection" has come into picture. Under this proclamation, the end user is allowed to proceed against the whole seller. Therefore, currently, product liability is hardly becoming an issue of contractual or extra-contractual liability but of consumer protection/public interest.

Consumer protection laws do perform two things. The first task they perform tends to be quality control. They check whether or not the products being marketed to the public are up to the standard. Inspecting the product or quality control may help us prevent some of the possible risks that may be associated with consuming processed product. The other task is remedial task. Despite quality control, we may not decidedly avoid the risk that may be materialized through normal use. In such a case, the remedial task of the proclamation comes into picture.

When seen in retrospect, the development of product liability was regulated through principle of privity of contract. According to this principle, the consumer has entered into a contract with the retailor; and hence, the consumer can bring an action against the retailer only. However, usually, the retailer is economically too weak to compensate the consumer. So long as it is a civil case, unless the defendant has a deeper pocket, the whole exercise of bringing an action will be of no value. Subsequent to this factual situation, another argument began to develop. When the manufacturer sells his product in bulk to the whole seller, he is cognizant of the fact that the latter doesn't purchase the product for his consumption. The whole seller is there to serve as a transmission belt to the consumer. If the role of the whole seller is as such, the argument is that warrantee goes with the goods. If the manufacturer has a contractual responsibility towards the whole seller, such responsibility should reach wherever the goods reach so long as an intermediate never intervenes on modifying the goods; i.e. the products should reach the end user as packaged by the manufacturer so that warrantee should go with the goods. In general, the development began from contractual liability, then moved to extra contractual liability and finally reached the currently applicable theory of consumer protection.

Article 2085 (2) provides that No liability shall be incurred where the defect which has caused the damage could have been discovered by a customary examination of the goods. To the extent his knowledge permits, the consumer is required to customarily examine the thing. One way of customarily examining the good is to go through the shelf life of the product. Packed items especially those meant for consumption have expiry date attached to them. Products are not there to be consumed indefinitely; i.e. there is a time limit within which they need to be consumed. If a consumer consumes a product whose expiry date has lapsed, he will take the risk at his own thereby bringing voluntary assumption of risk into picture. Note must be taken that expired products are usually ~~chip~~ for the reason that many people do not like to take the risk. If the

manufacturer wants to discharge his obligation of warning consumers, he needs to affix an expiry date on the product. Sometimes, manufacturers prefer to put the expiry date on a piece of paper rather than to put on the can or the product. In such a case, it is easy for people to remove the affixed paper and replace it with their own. Therefore, manufacturers should put the expiry date on the product itself in order to avoid misuse thereof. Another mode of customary examination is to thoroughly read and stick to the directions/instructions given by the manufacturer. A well-developed manufacturers put directions of how, when to use the product and so on. Of course, the directions are written in English. Despite such difficulty in language difference, the reasonable standard of the consumer is taken into account. Therefore, the reasonable consumer is, when he moves to the market, presumed to read and understand the language or be assisted by others to apprehend the message.

2086-2089 are defenses of various types. Article 2086 (1) provides that The persons declared legally liable for the creation of an abnormal risk (2069) or for a damage caused by animals (2071), buildings (2077), machines (2081)-2082, motor vehicles (2081-2082)or manufactured goods (2085), may relieve themselves of their liability to the victim: by proving that they have committed no offence, or that it was impossible to establish the cause of the damage, or that it was not within their power to prevent the damage or that the damage was due to the fault of a third party. We are already cognizant of the persons liable under these different articles. The article is trying to summarize what we have discussed by now. However, under the article in question, there is an important word missing and able to change the meaning of the sentence. The phrase “may relieve” should have been written as “may not relieve”. Note must be taken that article 2086 (1) is not a defense. It is rather trying to show what not a defense is. The Amharic version expresses the true intention of the legislator. According to article 2086 (1), Persons legally declared liable may not relieve themselves by proving that:

They did not commit fault: as it is strict liability (liability irrespective of fault), no one can relieve himself of liability by proving that he was not at fault. The law makes a person liable not because he committed fault but his activity was dangerous and caused damage to another; or it was the object under his possession and from which he gains benefit caused damage to another. The same rational goes right for the other items as well.

Causation is not established: this phrase seems to be irrelevant. To begin with, the plaintiff is obliged to show causation. Article 2141 as to burden of proof provides that the victim at the injury shall establish the amount thereof and prove the circumstances which render the defendant liable to make it good. If the cause is not established, or if the plaintiff does not establish a premafacie case, the defendant is not required to appear to defend the case. In short, in the absence of cause, an action may not be brought against the defendant.

Force majeure (in some literatures, act of God) force majeure under law of contract serves as a defense to a certain extent. However, under extra-contractual law, force majeure does not serve as a defense. The rational is, despite force majeure, the person declared liable was deriving benefit from the object he possessed. The person declared liable is also the one to bring the object (for example, building) into that location. Of course, in some countries, force majeure or an act of god such as earth queck serves as a defense. Professor Krzeczunowich argues that the Ethiopian law of strict liability is extra-strict liability. By extra-strict liability, He is to mean that the strict liability in our case tends to be very strict.

Fault of third party. Be it fault or generally an act , if a third party is to be responsible, the person legally declared liable can compensate the victim and then proceed against that third party with a view to recovering what he has incurred. In connection with liability of third party, it is necessary to remember the issue of the custodian discussed herein above.

The only general defense available is the one stated under article 2086 (2). It reads, they (those held liable under sub-article (1)) 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. From this sub-article, we can apprehend that victim's fault is the most important defense. If the fault of the victim was the entire cause for the damage, the victim will be entitled to zero compensation. If the victim's contribution is partial (contributory negligence or fault), the victim will remain uncompensated to the extent of his contribution. Good example is when the contributory fault of the victim is put in mathematical formula. We have seen that each article under the section of strict liability is equipped with its own specific defense. Victim's fault is , however, a general defense serving for the whole section of strict liability. According to this general defense, a person is not held liable not because he showed that he was not at fault but that the other person (victim) was at fault for the occurrence of the damage.

Lecture 15

In our previous class, we have seen that victim's fault serves as a major defense. The purpose of the law is to compensate an innocent victim. The traditional approach in the United States was that whether the victim was fully or partially responsible for the damage caused, the victim was made to benefit nothing. Their approach was known as either "all or none" approach. By this approach, they mean that the victim needs to be compensated all his damage; or he will benefit nothing from the damage caused despite his contributory negligence. The first theory to this stand was that no one can benefit from his own fault irrespective of the level thereof. One should seek justice with clean hands. However, if there is fault on the victim's side, he is not clean; hence, he cannot seek justice. Such theory has been currently changed by court decisions into partial/total compensation theory. According to this theory, the victim should be compensated what is equivalent to the level of his contribution. Article 2086 (2) cum. 2098 reveal that the Ethiopian extra-contractual law adheres to the theory in question.

Article 2086 (2) reads, they (those held liable under sub-article (1)) 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. Article 2098 provides that (1) where the damage is due partly to the fault of the victim; the latter shall be entitled to partial compensation only. (2) In fixing the extent to which the damage shall be made good, all the circumstances of the case shall be taken into consideration, in particular the extent to which the fault committed have contributed to causing the damage and the respective gravity of these faults. According to these articles, denial of compensation is proportionate to the fault that has been committed by the victim.

The other defense is provided under article 2087 as "other objects". Article 2087 reads, without prejudice to the provisions of the preceding Articles, the owner or keeper of an object shall be liable for any damage caused by the object only where he has committed an offence or an offence has been committed by a person for whom he is liable. By "other objects" the law is to mean objects other than those mentioned earlier under articles 2071, 2077, 2081-2082 and 2085. Therefore, for all objects other than those mentioned under the section of strict liability, tortious liability is fault-based only. As remembered, we've seen that article 2027 (2) reads as "when the law so provides". The law provides for animals, buildings, machines, motor vehicles and

manufactured goods. Is damage by cart (gari) strict liability /fault-based? How about that of bajaj? How about those carts movable by the hand of janitors?

Article 2088 provides that (1) the rules relating to liability arising out of abnormal risks, or out of animals, buildings or objects, may not be invoked by a person who, under a contract concluded by the person legally responsible, is connected with the dangerous industrial activity, animal, building or object which has caused the damage. (2) The consequences of the damage shall in this case be settled in accordance with the rules governing the agreement reached. This article is of similar position with article 2037 under fault-based liability. It reads, (1) A person shall not commit an offence involving his extra-contractual liability where he fails to discharge his obligations under a contract. (2) The provisions regarding the non-performance of contracts shall apply in such case. According to this article, if there is a contractual relationship, the extra-contractual laws of fault-based liability do not apply. The same stand goes right for article 2088. Therefore, if there is a contractual relationship between the victim and the owner of the object/operator of the dangerous activity, and if damage occurs on that relationship, the relationship in question will be governed by the agreement reached. “A” is a passenger in a minibus; that is to mean, he has entered into a contract of carriage with the minibus driver/owner to be transported from point “a” to point “b”. Under this type of arrangement, if the person sustains an accident, the accident will not be governed extra-contractually. It will rather be an issue of contract of carriage to be regulated under the commercial code. If “A” is an employee of a chemical factory, and if he sustained damage while working therein, this will be considered as an employment injury to be regulated by labor law. In the above case, the passengers will have a remedy under the commercial code; and the pedestrian, if sustained damage, will have a remedy under extra-contractual law. In short, it depends upon the type of the relationship they had at the relevant time. The relevant time is the time when the accident was sustained.

The other defense is the defense of disinterested parties. Article 2089 provides that (1) the rules governing liability arising out of animals, buildings or objects may not be invoked by a person who, even in the absence of a contract, was at the time of the damage making use of the animal, building or object without the owner or keeper thereof deriving benefit from such use.
(2) In such a case, the owner or keeper shall not be liable unless he has committed an offence. Sometimes, people may establish contact with an object without having a benefit-based

contractual relationship with the owner/possessor. The absence of consideration makes the contact disinterested relationship. The typical case of disinterested relationship turns out to be someone stepping in one's motor vehicle in the form of "lift/a ride". If damage occurs at this juncture, the relationship is a disinterested relationship; hence, the law gives an exemption for the owner/driver of the vehicle from extra-contractual liability. There were seven passengers in a minibus. One of them was a gratuitous passenger, a passenger being transported at no cost. The minibus suddenly caused damage against two pedestrians, and three passengers. One of the injured passengers was the gratuitous passenger. These injured people will have three independent remedies. The two passengers were the subject-matter of contract of carriage under the commercial code. They had a contract to safely arrive at a certain place. Therefore, they will bring contractual action against the person liable on the basis of their contract. The gratuitous passenger cannot bring extra-contractual nor contractual action against the person liable for the reason that he was being transported at no cost. However, he can be compensated if he is able to prove that the driver/owner was at fault to cause the damage. The two pedestrians had no relationship of any type with the driver; therefore, they are to be governed by virtue of extra-contractual provisions. In connection with this article, there was a court case in Ethiopia. A person was going from Addis Ababa to dessie by means of different cars. He was transported from Addis Ababa to debrebirhan by means of a bus. From debrebirhan, he asked the driver of a lorry to transport him to dessie in tandem with the cargo. The driver accepted the offer of the passenger for consideration; however, the passenger was made to be loaded with the cargo on the outer part of the lorry. The lorry, while arriving at debresina, turned over and the lower limps of the passenger were broken. Subsequent to the accident, the medical board proved that the working capacity of the passenger was reduced with 40 percent. Using the report as evidence, the passenger instituted action against the owner of the lorry. What could be the action, contractual/extra-contractual? The commercial code regulates passenger-carrier relationship with the expectation of buss or airplane for transportation of human beings. On the other hand, Lories are expected to transport goods. The road transport regulation also states that passengers should not be transported with any means of transportation for goods. If it is said fault-based liability, the injured man is to hold only the faulty person liable. The passenger instituted extra-contractual action against the owner basing his argument on article 2081. What defense could be raised by the advocate of the owner? Victim's fault/voluntary assumption of risk/act of God/fault of third

party/disinterested relationship? If voluntary assumption of risk is raised, the passenger could be said that he has risked himself for sunny or windy weather condition, not for turning over of the lorry. For someone to be transported on a lorry, sunny or windy weather condition could be presumed as opposed to turning over of the means of transportation. In other words, sunny or windy weather condition is the principle while turning over of the Lori is the exception. The victim could also be said that he has committed partial fault when he desired to be loaded with cargo. The owner argues that 2081 comes into picture when the lorry, while being driven, injures a person; However, turning over of the Lori is an act of God. On the other hand, Turning over of a car comes from either technical failure or incompetent driving. In the case of technical failure, the owner is required to make the car roadworthy. The owner, as an employer, is also required to employ competent driver. In both cases, the issue comes back to the owner. Therefore, the defense of "an act of God" or the fact that article 2081 doesn't apply to turning over of a vehicle was not accepted. Even worse, an act of God is described under article 2086 (1) to serve as no defense. The owner could also raise the act of the driver as fault of third party. Because, the driver was not ordered to transport persons but goods. However, under article 2086 (1), fault of third party is declared as one that cannot be used as a defense. The owner may also raise the defense of disinterested relationship; i.e. the owner may claim that he did not take delivery of the fare. These were some of the issues that were raised in this particular case. Of all these defenses, the court accepted the defense of victim's partial fault. Nb. If we join the driver in the suit, we will be compelled to show fault. The driver cannot be responsible without fault. But, if we depend on article 2081, we will be relieved of showing fault. Therefore, the better choice for an advocate is to rely on strict liability.

Lecture 16

Vicarious liability is an extension of 2027 (3). It reads, A person shall be liable where a third party for whom he is answerable in law incurs a liability arising out of a fault (fault-based liability (2027 (1)) or resulting from the law (strict liability). This sub-article is taking us back to the earlier sources of liability. The difference in this section is, however, the parties involved are three in number. They are the principal defendant, the vicarious defendant and the victim. The principal defendant is the one who is liable either in a fault-based or strict manner. The vicarious defendant is the one for whom the law makes him answerable. This section is spelt out from

2124-2136, which is an illaboration of 2027 (3). Articles 2124-2125 deal with guardian-minor relationship. If a minor incurs liability, we must note, he is assessed on equal footing with a reasonable person. The guardian will be liable for the liability of the minor. The other type of relationship relevant for vicarious liability turns out to be employer-employee relationship. Where an employee incurs liability either fault-based or strictly, the employer will be vicariously liable. However, to this effect, the liability must be associated with the work for which the employee is employed. The employment relationship may be either civil service employment, corporate body employment or private person employment. The classification is based on who the employer is. If the employer is the state, the employment is a civil service or public service employment. Of course, the phrase "civil service employment" is usually limited to employees of the executive branch. Public service employment, however, covers all employees of the public sector, including those of the legislative, executive and the judiciary. Articles 2126-2128 deal with liabilities arising from state-employee relationship.

Articles 2129 and the presumptions 2131-2133 deal with corporate bodies. Corporate body (fictitious person) refers to an employer having legal personality other than the state. These include companies, NGOs, associations and so on. 2129. — Liability of bodies corporate. Bodies corporate shall be liable under the law where one of their representatives, agents or paid workers incurs a liability in the discharge of his duties. The other employment relationship comes into picture when a private person becomes employer. Article 2130 tries to regulate private person as an employer. It reads, The employer shall be liable under the law where one of his employees incurs a liability in the discharge of his duties. Finally, vicarious liability comes from author-publisher rrelationship. As the code is to old, it tries to regulate a situation of printed media only. The electronic media neglected by the code will be regulated by the press proclamation. When an author of a certain article or a note has been published in a book or a news paper and defames another person, the publisher will be held vicariously liable. The managing editor of the newspaper, the printer of the pamphlet or the publisher of the book shall be liable under the law for defamation committed by the author of a printed text. Why is the guardian, employer or publisher liable for the act of a minor, employee or author respectively? What is the common denominator in between? Under fault-based liability, the individual is held responsible as he committed fault. Under strict liability, the person is held liable as he is gaining benefit from his activity or objects under his possession. The theory behind vicarious liability turns out to be

power of supervision theory. The guardian and the employer have the power to supervise the activities of the minor and the employee respectively. The publisher has, to a certain extent, the power to supervise the writings of the author as well. When a minor commits an act that incurs liability, the law presumes that the guardian failed in his power of supervision or putting of instraction/direction. The same assumption goes true for employers and publishers. The liability gives the vicarious defendant an incentive to exercise his power to supervise, direct, discipline and so on deligently. If an animal of a minor causes damage, the guardian will be still vicariously liable. On the other hand, the employer is not a 24 hours insurer of his employee. It is only for those liabilities that are associated with employment. In the case of publisher, it is only associated with article published and defamatory statement therein. In common law legal systems, vicarious liability is "instead of" liability; i.e. the vicarious defendant is held liable aulternatively. For French legal system however, vicarious liability is "in addition to" liability; i.e. the liability is cumulative. It is in addition to the principal defendant that the vicarious defendant will be held liable.

Article 2136 provides that (1) A person who caused damage shall repair it notwithstanding that another person is declared by law to be liable for such damage. (2) The person who caused the damage and the person whom the law declares to be liable for such damage shall be jointly liable to repair such damage. As indicated under sub-article (2), the liability is joint, not alternative as that of common law legal system. Unlike the common law legal system, In civil law legal system, the fact that the injured man proceeds against the vicarious defendant doesn't mean that he will not have a right to bring action against the principal defendant. There is also a certain procedural difference between strict liability and vicarious liability. As understood from article 2073 and 2083, in the case of damage causing animal and motor vehicle under the custody of another, if the victim directly brings action against the owner, the owner will compensate the victim and then proceed against the custodian. However, in the case of vicarious liability, on the Basis of article 2136 (3), when an action is brought against the vicarious defendant, the vicarious defendant can call in the principal defendant into the suit. The sub-article in question reads, (3) The person under the law liable for the action of another may demand that the author of the damage be made a party to the proceedings brought by the victim for compensation. Why did the legislator deviate from its previous position?

2124. — Father's liability. The father shall be liable under the law where his minor child incurs a liability. Why the father? We had a historical background that supports the existence of patriarchy. This patriarchy was reflected under article 635 of the repealed section of the civil code. It reads, the husband is the head of the family. Unless otherwise expressly provided by this code, the wife owes him obedience in all lawful things which he orders. As we see from this article, the law had nominated and approved the father to be the head of the household. The mother was there to accept the lawful orders of the father. Therefore, when we try to see article 2124 in light of article 635, it's logical that the father should be held accountable for the action of the minor. This is because, in his power as a statutory head of the household, he had full authority not only over his children but also over his wife. In short, the law had chosen one of the spouses as a head and the other as a subordinate in a household. Under the RFC however, both of them are theoretically or legally the heads of the household. Unfortunately, the legal empowerment has preceded the economic empowerment of women. The economic empowerment is still in the hands of men for the reason that men are the major bread winner in the economy. Should we still stick to the position of 2124? 2124 also speaks about a minor child. Article 198 of the civil code provides that any child of either sex who as not attained the age of majority (18 years of age) is a minor. What about university students? Art. 2125. — Other guardians of the child.

The following persons shall be liable in lieu of the father:

(a) the mother, where she exercises the paternal authority over the child;

(b) the person in whose charge the child has been placed, where the child lives outside the family home. Good example is orphanage institution. If the minor is given to an orphanage institution, the institution will be held liable for the act of the minor. The minor may have been given to a relative. In such a case, the relative will be held liable for the act of the minor.

(c) the headmaster or the employer during the time when the child is at school or serving an apprenticeship. If the child commits wrong in school, the head master or the school itself will be held liable. But in practice, when a minor commits fault, for example, injures another child, the school calls upon the parents to discharge their responsibility. Is it legal?

(d) the employer where, under the terms of the following Articles, his liability is involved in consequence of an act committed by the child. Nb. We should not consider the law in its abstract. We need to put it in context. When we attain the level where the legal and economic

empowerments are equally realized, we will be really practical. If we are interested solley in its doctrinal aspect however, we will deviate from the reality. The status of adult people living with their parents for further education or any other reason is also a crutial point.

The other one is state liability. In fact, state liability is a recent concept. Traditionally, states were not held liable for the action or omission of their subjects. Note must be taken that power was realized as driven from the will and whim of God. When capitalism was developed and establishment of authority began to be considered as emanating from the social contract, accountability of state for its operators (public officials or civil servants) comes into the picture. At the time our code was enacted, Capitalism was in its full-fledged state in countries of Europe. European countries had already incorporated state liability for the action of its officials/employees. Subsequent to the European experience, the legislator of the Ethiopian civil code has also adopted state liability even if in practice we do not have a strong enforcement mechanism in place.

Article 2126 reads, “Any civil servant or government employee shall make good any damage he causes to another by his fault”. The principle is that the civil servant will be personally liable for an action committed by his fault. This article is as good as article 2028. for a civil servant, The only difference is what is spelt out under sub-articles 2 and 3. Sub-article 2 reads, “Where the fault is a professional fault, the victim may claim compensation from the State, provided that the State may subsequently claim from the servant or employee at fault”. It is a matter of providing favorable condition for the victim. It comes up with distinction as professional fault and personal fault as well. If it is a professional fault, the victim will proceed against the state. Then, the state will, after compensating the victim, proceed against the civil servant”. As to personal fault, sub-article 3 reads, “The State shall not be liable where the fault is a personal fault”. If it is personal fault, the civil servant will be held personally liable. Article 2027 tries to define what professional fault is. It reads, A fault shall be deemed to be a professional fault where the person who committed it believed in good faith that he acted within the scope of his duties and in the interest of the State. (2) A fault shall be deemed to be a personal fault in other cases. (3) Unless the contrary is proved, the servant or employee shall be deemed to have acted in good faith. The victim is, to the maximum possible, required to show that the fault is professional fault in order to be primarily compensated from the state. Formerly, state was immune. Whatever state

committed, it was not held accountable. This is because, the state was thought to be exercising each power only for public interest. In the exercise of power for public interest, if any damage is caused against an individual, that individual should tolerate it. However, at the later stage, as we've seen above, state liability was brought into the picture. Different legal systems follow different enforcement mechanisms of state liability. In some legal systems, state liability is regulated under administrative law. it is not regulated under the civil code. Despite administrative law, The organ of enforcement is the ordinary court. In other legal systems, the law regulating state liability is the administrative law; but, the organ of enforcement is administrative tribunal. According to these systems, the state is an executive organ; it cannot be brought before an ordinary court due to the existence of separation of power in between. Still in other legal systems, the state, for all practical purposes, is a person; therefore, an action can be brought against the state on the basis of the civil code as a private organ and before ordinary court. The Ethiopian experience can be gathered from article 394-403 and 2126 of the civil code. Article 394 reads, (1) The State is regarded by law as a person. (2) As such, it can have and exercise, through its organs, all the rights which are consistent with its nature. As we understand from the article in question, For the purpose of the civil code, the state is a private person. Article 403 reads, The bodies referred to in this Chapter shall he liable for any damage arising from the fault or act of their organs or servants in accordance with the provisions of the Title of this Code relating to "Extra-Contractual Liability and Unlawful Enrichment" (Art. 2027-2161). All these reveal that we are on third regime of those listed above; i.e. the civil code regulates state action; and ordinary courts intertain suits against the state.

Lecture 17

If the fault is a professional fault, the victim will have the opportunity to proceed against the employer. However, if the fault is a personal fault, a fault that is not associated with the duties and responsibilities of the employment, the victim can proceed against the employee only. Unfortunately, at the end of the day, in both cases, the employee is the bearer of ultimate liability. Therefore, it is simply to create a smooth condition for the victim that this arrangement is put in place. "A", a public prosecutor in anticorruption commission, has received a case to prosecute. After rereading the case, he decided to institute action against the suspect. He instituted a charge against the suspect and indicated to the court an article of the criminal code

with which the accused may be denied of bail. Therefore, the accused was defending the case in custody. Five years later, the court found out that the suspect is innocent. Subsequent to his acquittal, the innocent considered that he sustained both personal and material damage; and hence, he is fervent to institute action against the state. Can he succeed? There are two interests that we need to consider. If we make a public prosecutor faulty whenever he loses a court case and hold the state liable, the state will be unjustly harassed; and the state, after compensating the victim, will proceed against the public prosecutor. If the public prosecutor bears the ultimate liability every moment he loses a court case, no public prosecutor will have a gut to institute a court action against suspects. Therefore, the whole system will collapse owing to the public prosecutor's feeling insecure. One concern is the concern of the state/prosecutorial system on the one hand. Citizens are seen to live in custody due to inappropriate investigation and inadequate evidence. Therefore, Individual interest is the concern on the other. The question of how to reconcile these two conflicting interest needs due consideration. The public prosecutor should be given margin of appreciation. Given the evidence under his custody, the public prosecutor should be given a sort of discretion to prosecute or quit the case. In the case of this discretion, the public prosecutor should not be considered at fault for the reason that everyone is equipped with his own level of appreciation. However, if there is gross misconduct or immargin of appreciation, he will be considered at fault. For example, because of similarity in name, the prosecutor may institute action against another individual. At the time of his detention, the detainee may tell the police that he is not Mr. "X" whom they want. At this level, the police/prosecutor should have investigated and identified the appropriate "X". However, if the public prosecutor decides to prove the identity of the suspect at a later stage and sends him to custody, this will be a gross misbehavioral misconduct. As to the merit of a case, two public prosecutors/judges/law students could defer in their opinion; i.e. the very profession of law is subject to diverse interpretation. Unfortunately, the prosecutor's line of argument may not coincide with the interpretation of the lower court. It may coincide with the interpretation of the high court. Even, it may coincide only with that of cassation. The cassation decision is even subject to debate. Therefore, losing a court case should not necessarily be considered as fault. The other concern, individual interest, is also a valid concern. Particularly, in the current Ethiopian judicial system, bail is denied in many of the corruption cases. However, such sort of cases should either be disposed of as soon as possible; or there should be a serious and valid ground to deny bail. People who were deprived of

the right to bail and proved innocent after five or six years imprisonment should be compensated. Unless we do so, we are not doing justice for the public. In short, balancing the two interests is important; i.e. a stronger parameter than to lose a court case is important to make the prosecutor at professional fault.

Under the private sector, the parameter is not as such a professional or a personal fault. It is rather another concept, "in discharge of duties". Articles 2129and 2130 are dealing with the private sector. The former regulates juridical persons' employees or agents while the latter regulates those of physical persons. In both cases, the employer will be vicariously liable if the liability arises in discharge of duties. Discharge of duties is defined under article 2131. It reads, (1) For the purpose of Art. 2129 and 2130, a liability shall be deemed to have been incurred in the discharge of duties where the wrongful act or the abstention was committed for the purpose of carrying out the duties. (2) The fact that the wrongful act or abstention was ultra vires, or that its author was strictly forbidden to commit it, shall not release the person who is legally responsible from his liability unless the victim knew or ought to have known of that fact. If the wrong was committed while carrying out duties of employment, the presumption under article 2132 shall come into the picture. It reads, (1) where the damage is caused by the representative or agent of a body corporate or by a paid worker at the place where or during the time when he is normally employed, he shall be deemed to have caused the damage in discharge of his duties. (2) Proof to the contrary is admissible to rebut such presumption. The conjunction "or" under sub-article (1) is written as "and" in the Amharic version of the civil code. So, liability arises if the wrong is committed at the time and place of work while discharging duties. If any of these requirements is missing, vicarious liability will not come into the picture. There was a case involving an employee of power providing company in USA. Power interruption somewhere in a city was reported to the company to fix the problem. The company assigned a person causing him to wear the company's uniform and equipping him with instruments to identify and fix the problem. The employee went to the house and knocked at the door thereof. Unfortunately, the parents were not around; only a teenage girl was keeping the house. The girl, after proving that the man was wearing the uniform of the power company, opened the door and let him get in the house. The employee identified and fixed the problem. Then, before he moved out of the house, he raped the teenager. The court before which the case was brought held the company liable to pay compensation. The rational of the court was that "this liability will give the company an

incentive to look for employees not only on the basis of technical competence but also on the basis of good behavior". "Especially, for employees that render door to door service, the issue of behavior is as equally important as technical competence". Some people were criticizing the court decision. If the court holds the company liable for actions of employees that seem apparently personal, it may make the company out of the market. Can the Ethiopian court reach the same conclusion? Article 2133 reads, the liability shall not be deemed to have been incurred in the discharge of duties where such duties have merely provided their author with an opportunity of committing the wrongful act or abstention which caused the damage. Should the amendment of the civil code include the scenario in question? Or should it remain to be a personal/private fault?

When dealing with vicarious liability, it is necessary to be cognizant of distinction between employer-employee relationship and client-independent contractor relationship. This distinction is relevant not only for law of employment but also for extra-contractual law. The issue of vicarious liability, both in the civil service and private sector employment regime, presupposes the existence of employer-employee relationship. Article 2134 deals with client-independent contractor relationship. It reads, A person shall not be liable for the faults or offences committed by another while carrying out work which he has asked him to do, where the author of the offence is not subject to the former's authority and is to be considered as having retained his independence. Good examples are domestic servants and tailors. Both of them are the outcomes of contract to provide service. Of course, the former one is relatively a continuous relationship. That of the tailor is however an occasional service which people want to have occasionally. In client-independent contractor relationship, clients are interested in the outcome. In the case of employer-employee relationship however, the employer is not interested only in the outcome but also in the process thereof. To this effect, the employer will have a strong managerial power over the housemaid. There is not vicarious liability in the case of client-independent contractor relationship for the reason that the latter performs at his own risk. A person agreed with another person so that the latter cut his tree and hand it over to him. Unfortunately, the tree, while falling down, damaged the house of the neighbor. The owner of the house brought action against the tree's owner. The tree's owner defended the case on the basis of article 2134. Is it tenable?

Lecture 18

For extra-contractual liability, there are two concepts, existence of liability and extent of liability. The concept on existence of liability tries to tell us when and what sort of extra-contractual liability is said to exist. We've been going about this concept in a better detail. This concept is necessary but not sufficient to succeed in a suit of extra-contractual liability; i.e. showing the magnitude of the liability in question is as equally important as determining the existence thereof. This is because; article 2141 puts an obligation against the plaintiff (the victim) to prove not only the existence of liability but also the extent thereof. It reads, "The victim at the injury shall establish the amount thereof and prove the circumstances which render the defendant liable to make it good". Once the existence of liability is proved, the quantum of liability will be the issue. The quantum of liability is discussed under articles 2090-2116/2122 of the civil code. This part (extent of liability) is more controversial than the former (existence of fault). Many reasons may be mentioned for the controvertiality of the part in question. One of those reasons tends to be that determining the existence of liability is mainly a legal issue. When we come to extent of liability however, the issue is not purely legal. It tries to bring in the expertise of other disciplines. A claimant, with a view to showing personal injury, may be required to come with the opinion of medical board, physicians or medical practitioners. The same claimant, with a view to having the damage caused to his motor vehicle assessed, may be required to bring in technicians, mechanics or electricians. In the case of buildings, we may be required to bring in the expertise of engineers and other professionals. To be brief, unlike determination of the existence of fault, the legal aspect is minimal in the case of determining the quantum of liability. The judge, by himself alone, cannot professionally apprehend the technicalities involved in the assessment of a certain liability for the reason that determination of liability is predominantly multi-disciplinary and extra-legal. The other thing is that what cannot be quantified in terms of cash is to be compensated by cash. Someone may sustain bodily injury; however, body organs do not have market value. On the other hand, this person should be compensated. To this effect, we are to convert a non-marketable object into money. This turns out to be another reason making the section more controversial. Note must be taken that damage may be material, personal and moral damage. In the case of material damage, the object might have market value; hence, it is easier to quantify the damage in terms of money. Moral damage is however more problematic. This is because, moral is, by its very nature, internal and personal. Therefore, the judge may not easily apprehend the extent of which the person is internally harmed. The third reason for the

controvertiality of this section is that the compensation is expected to cover both present and future damage. Present damage is the damage existing at the time the court renders decision. If the damage tends to have an effect of continuity after decision is rendered by court, it will be said as future damage. However, despite its futurity, the damage is still compensable. Unfortunately, no one is sure about what will happen in the future. It is simply an approximation that the judge is going to make. Even if both present and future damages turn out to be problematic, the latter is worse than the former to be compensated at the former. The fourth problem relates to the behavior of the parties themselves. Naturally, the plaintiff wants to get high amount of compensation. To this effect, the plaintiff will try, to the extent plausible, to exaggerate his claim. On the other hand, the defendant tries his best to underestimate the amount of the damage sustained. In such a case, the court will be cornered with the arguments raised by the parties. In general, this is an area where courts are unable to come up with a uniform and harmonized approach. Of course, the cassation bench is trying its best to come up with a uniform approach. Read, for example, vol. 13, 14 and 15 of cassation decision.

Actually, this section covers not only extent of compensation but also the mode thereof. The mode tries to show how the claimant is to be compensated. In the modern world, the predominant mode of compensation is compensation in cash equivalent to the amount of the damage sustained. This is not, however, the only mode of compensation. Even if the principal mode of compensation turns out to be equivalent money, in addition to or instead of cash, modalities such as restitution, apology for defamation and others may be ordered by courts.

Even if monetary compensation is preferable, the manner of delivering it may defer. It may be delivered in the form of lump sum or periodical payment. This is also to be determined by the court, of course, taking various circumstances into account. Lump sum payment is a mode of paying money in its totality at a time while periodical payment is a mode of paying same periodically. Where there is a sort of future damage, courts usually prefer to put periodical payment as a settlement modality. This is because, such modality helps to withhold or revise the payment in case circumstances change in the long run.

The purpose of the law through compensation is to place the victim in the position he would have attained had the damage never been sustained. In order to meet its objective, the law uses a certain equation (equivalence); i.e. compensation equals to damage. On the other hand, this

equation conveys the message that the victim cannot profit from his damage through over-compensation. The purpose of the law is to remedy the real damage and not to meet business purpose of the victim. Not only over-compensation but also under-compensation is not allowed. There are some exceptions however with which over/under-compensation may be ordered. In short, no loss or profit is made from compensation. This principle is well enshrined under 2091 of the civil code. It reads, the damages due by the person legally declared to be liable shall be equal to the damage caused to the victim by the act giving rise to the liability.

What does damage mean in this case? What are the elements that will be considered in damage? A person had a private automobile that is mint for him and his family to transport to and from place of work. Assume that this person had a traffic accident against his private automobile. He took the automobile to a garage; and the cost of maintaining the car proved to be 13,000 birr. The automobile remained in garage for one month. During the month in question, the person hired a tax for him and his family with the price of 300 birr per day. Sunday is not a working day; hence it should be excluded from computation. To calculate the damage, 300 times 26 equal 7,800 plus 13,000 equals 20,800 birr. There are two things here, actual loss (out-of-pocket expense to repair the car) and consequential loss (a loss in consequence of the former damage). Is consequential damage part of actual damage? Insurance policies do not cover consequential damage. Why should extra-contractual liability cover consequential loss? The earlier understanding was that only actual damage should be compensated; and other peripheral damages were not taken into account by courts. However, in the current understanding of extra-contractual liability, peripheral damages are also entertained by courts. In the case of peripheral damages, courts try to be cautious enough and restricted. Because, the issue of mitigation of loss come into picture at this juncture. The car owner is required to mitigate loss. For example, if the garage took one month to repair the car, the court will consider whether or not one month was really necessary. It will try to go through whether it was not possible to make the duration shorter than one month by pressing the mechanic to repair the car faster and to cause it to be taken out within 15 days so that the consequential loss could be minimized. The other issue is whether the cost that has been incurred was proportionate to the situation the victim had prior to the accident. For example, the court will try to investigate how much the car owner incurs cost for him and his family whenever the car is taken in garage for service prior to the accident. Nb. Cars are taken in garage for service every six months or if they are driven about 5000 kilo meters long after a certain service.

A claimant whose used and weak Volkswagen is damage and taken in garage for maintenance may not hire a very latest Mercedes and incur higher consequential loss than he would have had prior to the accident. These issues tell us that the claimant, to the extent possible, should be in good faith to claim compensation. The principle of good faith is also enshrined under article 2097 of the civil code. It reads, 1) Compensation for the damage may not be claimed contrary to good faith. (2) The victim may not claim compensation for the damage he has suffered in so far as, by acting in a reasonable manner, he could have avoided or limited the damage. If a claimant is requesting an exaggerated compensation, the court will cause him to be compensated to a reasonable level. Not only the loss of service but also the maintenance cost should be reasonable. A minibus used for commercial purpose was collided with another car; and serious damage was caused to it. It was taken in garage for maintenance. The garage owner requested 17,000 birr to repair the car. The car stayed for about 30 days in garage. Then, the car owner claimed compensation of 17,000 birr for maintenance plus 400 times 30 days birr of consequential loss. On the other hand, at a time the car owner reported his yearly profit to the tax authority, it was declared that his daily income was 100 birr per day. Can this evidence be produced by the defendant to rebut the claim by the plaintiff? This is an issue to be raised in determining the amount of cost of repair and loss of earning.

Should the judge admit evidences that have been brought to the attention of tax authority? Some people argue that courts should not be concerned with the issue of taxes. It should be for the tax authority to detect and prosecute those people who are involved in tax evasion. At this juncture, the case before the court is an issue of compensation. So long as the plaintiff can show that he was actually earning 400 birr per day, the court should not bother on the issue of tax. Others argue that the amount revealed to the tax authority was a declaration that was given in a normal day (without the occurrence of the damage). Therefore, we should give weight to this declaration; otherwise, we are saying that reducing income while declaring to the tax authority is normal and legal; hence it is tolerable.

Lecture 19

We’ve been discussing that one of the purposes of extra-contractual liability is said to be an insurance goal. The insurance goal is to be fulfilled by compensating the damage sustained; i.e. compensation equals to damage. The equation is easy; but it is easy said than done. This is

because, social Variance or reality is very complex. The other thing with which this equation practically becomes complex turns out to be its goal of compensating future damage. This is because; in the case of future damage, the compensation is to be awarded prior to the occurrence thereof. Therefore, damage equals to actual damage plus future damage in certain conditions. Article 2092 reads, a future damage which is certain to occur shall be made good without waiting for it to materialize. It is not all future damages that are to be compensated but only those damages that are considered to certainly occur in the future. How do we determine the future damage? Does the judge need to be profit? The issue of future damage is usually relevant when the damage is associated with bodily injury. A certain bodily injury may be temporary; that temporary injury may be partial or total. It may also be permanent; that permanent injury may be partial or total. It may also take the form of fatal accident (death). Temporary damage may be recovered some times later. Therefore, it may not be a problem at the time the judge hands down its decision. The level of its injury could be determined at that stage. Permanent disablement is, however, something that will perpetuate throughout the life of the victim. In this case, even if the decision is duly given at this point, the injury will perpetuate after the court rendered its decision. This is why the law requires the judge to compensate. An adult of 37 years old sustained a bodily injury with a traffic accident. The medical report says that the injury is a permanent partial disablement (partial is to mean less than hundred percent). The report added that 60 percent of the victim's working capacity is reduced due to the accident. The injured individual was a mechanic earning 4000 birr per month. The victim wants to claim compensation, more probably from the deeper pocket, the owner of the vehicle. In addition to being the deeper pocket, it is also easier to proceed against the owner. If he is going to proceed against the driver, not only that the driver is economically weak, but also he needs to show that the driver was at fault. The evidentiary task will be over the victim's head. In some of the cases, victims bring both the owner and the driver as joint defendants. In majority of the cases however, victims proceed against the owner. The victim alleges that he would live to the age of 80 years. The 60 percent of his previous income, four thousand birr will be claimed for the remaining 43 years. What will be the counter arguments to be raised by the defendant? The defendant's advocate should reject the age of 80. The national retirement age in this country turns out to be 60. Therefore, assessment of the compensation should be limited to the age of 60. Another argument is that it is uncertain that

an adult of 37 years of age may not live to the age of 60. Of course, we do not have absolute certainty; it is only reasonable certainty we may have.

The medical people have their own chart to assess the reduced working capacity, as a human being in general, when a certain bodily injury is sustained. They do not associate it with a particular job that the victim was doing prior to the occurrence of the injury. This mode of assessing the damage as a human being in general is known as "general utility concept". For example, they usually provide with similar result of five and seven percent reduced working capacity if the victim loses his left and right hand respectively. The assumption is that many people are right-handed. They do not make distinction between the two eyes however. If we are going to compensate the individual, another argument in some literatures is that we need to associate the injury with the type of job the victim was working prior to the accident. Ethiopian courts are seen to follow the general utility model while others prioritize specific utility model. For purpose of employment law, permanent injury or death is defined to be five years.

In the case of salary, income tax and pension contribution are to be deducted from the gross amount. Therefore, if the victim makes his assessment depending on the gross income, the defendant can argue that the former should make his assessment on the net salary. As far as the maximum age is concerned, the cassation bench has come up with a certain solution; i.e. under vol. 16, it takes retirement age as a basis in assessing future damage. Still, under vol. five, the cassation bench has decided that assessing future damage should be based on the net salary. Another uncertainty comes into the picture when victims of an accident are of minor age, short of actual income at the time of the injury, or short of monthly regular income like farmers and traders and so on. A minor died of a car accident at the age of 13. The mother brought action against the car owner that the latter should compensate her the gross income that the minor could have made as a doctor when he served his society to the age of 55. The age, 55, was taken into account for it was a retirement age at that time. When there are difficulties of assessing compensation as in the case in question, the legislator has provided with a rule on which the judge depends for equitably assessing the damage. Therefore, on the basis of equity, the judge will have a certain margin of flexibility to assess the damage so long as he is certain as to the existence thereof. Despite the existence of the damage, note must be taken that the equation is not also applicable in such a case. If these two requirements are satisfied, article 2102 will come

into the picture. It reads, (1) where the exact amount of the damage cannot be calculated, the court shall fix it equitably, taking into account the ordinary course of events and the measures taken by the injured party. (2) No indemnity may be awarded in respect of a damage of which the very existence, and not only the amount, is doubtful. In the above case, the mother claimed 31,000 birr as compensation in general. The lower court rejected her claim considering that there is no legal basis to claim that way. This is because; the defendant was rising the defense of victim's fault for the minor was being transported hanging over the back of the car and was dead while trying to get off. The high court reversed the decision of the lower court and decided 7000 birr to be paid as compensation. The defendant appealed to the Supreme Court. The Supreme Court reversed the decision of the high court; and the mother of the minor remained devoid of the 7000 compensation. Nowadays however, the cassation bench tends to take a position that victims of the type in question should at least obtain what a daily laborer can averagely make in the form of income. All in all, to what extent we should be certain is something that needs due consideration. A person may have property or life insurance policy. The moment he sustained the injury, the insurance policy would be payable to him. He can also bring an action against the wrong doer for the same incident. If he is allowed to do so, isn't he in effect profiting from his injury? Isn't he violating the principle, compensation equals to damage? In order to answer this question, article 2093 of the civil code must be read in conjunction with articles 683 and 690 of the commercial code. The logic behind article 2093 of the civil code is more or less applicable to article 2094 of the same code. A motor vehicle is insured for possible damage at the public highway to the extent of 300,000 birr. In the meantime, the vehicle sustained damage incurring 250,000 birr for maintenance. The owner is entitled to make 250,000 birr from the insurer. Is he entitled to claim the same amount from the wrong doer by violating the principle, compensation equals to damage? Article 2093 reads, (1) where the victim is insured, he may claim compensation for the damage he has suffered on the same terms as though he had not been insured. (2) The insurer may not claim compensation on his own behalf from the person who by his act has brought about the risk covered by the insurance contract. (3) The insurance contract may, however, provide for the subrogation of the insurer to the victim's claim against the person liable. The insured will have two options; i.e. he will proceed against the insurer, which is the shortest path for there is no court litigation owing to the already concluded contract (premium). Then, the insurance company will have in the insurance policy the right of subrogation to

proceed against the wrong doer for the same amount. He will have also the right to proceed against the wrong doer. Article 683 of the commercial code reads, 1)The insurer who has paid the agreed compensation shall substitute him to the extent of the amount paid by him for the beneficiary for the purpose of claiming against third parties who caused the damage. 2)Where the beneficiary makes substitution under sub-art. (1) Impossible, the insurer may be relieved in whole or in part of his liabilities to the beneficiary. 3)Notwithstanding any provision to the contrary, the insurer may not claim against the ascendants, descendants, agents or employees of the insured person nor against persons living with him, unless such persons have acted maliciously. Article 690 reads, notwithstanding any provision to the contrary, the insurer who has paid the agreed amount may not substitute himself for the subscriber or beneficiary for the purpose of claiming against third parties who caused the damage. The former article is applicable for property damage while the latter is for personal injury. As we understand from these provisions, substitution or subrogation is not optional for the victim rather mandatory.

Lecture 20

In our previous class, we've discussing the interface between extra-contractual liability and insurance policy. If the victim is allowed to be compensated from the two sources, the equation will be disturbed for the reason that the compensation will be higher than the damage sustained. If we require the victim to take an action from one of them, obviously, he will resort to the insurance company for action against the latter tends to be the shortest path. Then, the wrong doer will go unpunished. In such a case, the wrong doers who cause damage against an insured object will be lucky enough for the reason that they will not be held liable. Therefore, the deterrence goal of extra-contractual law will be adversely affected. Here, the law needs to reconcile these two contradictions. On the one hand, it needs to create equality between compensation and damage. On the other hand, it needs to achieve deterrence goal on those who by their action or omission cause damage on another. To this effect, the commercial code has come up with the concept of subrogation. According to this code, the insurance company will pay the victim; and to the extent it pays to the victim, it can proceed against the wrong doer in the name of the insured as the insurance company has no direct dealing with the wrong doer. In this case, the principle, compensation equals to damage will be achieved; deterrence goal will be attained; and insurance as a business will be encouraged. Due to the fact that subrogation is not

optional, if the beneficiary renders subrogation impossible, he can be denied of compensation from the insurance company. His option will be to proceed against the wrong doer only. If the victim is allowed to take compensation from the two sources, he may deliberately cause damage to his property. Indeed, if his intention to cause damage to his property is known to the insurance company, the insurance company will invoke his intention as a defense and deny compensation.

Is similar approach followed for personal damage? Article 2093 is not clear whether or not it covers both property damage and personal injury. For property damage, on the basis of articles 2093 of the civil code and 683 of the commercial code, subrogation is mandatory. When we come to personal injury, it will take us to insurance of persons, articles 689 and 690 of the commercial code. Article 689 provides that a contract for the insurance of persons shall not be deemed to be a contract for compensation. An issue of personal injury is not an issue of compensation. The amount insured may be freely fixed and shall be due regardless of the damage suffered by the insured person. Article 690 deals with substitution not possible. It reads, notwithstanding any provision to the contrary, the insurer who has paid the agreed amount may not substitute himself for the subscriber or beneficiary for the purpose of claiming against third parties who caused the damage. Unlike property damage, in the case of personal injury, subrogation is not allowed. From this perspective, it can be said, the law has deviated from its position; i.e. the victim of personal injury may claim from the insurance company on the one hand and from the wrong doer on the other. He can benefit from the two sources. What is the rationale behind this deviation? We've already said that body organs do not have market value. Therefore, the amount to be insured can be freely determined. This is what is enshrined under article 689 of the commercial code. However, when we insure an object, the amount cannot be freely determined. It should be proportional to market value of the property damaged. If over-valuation is allowed, the owner would have an incentive to deliberately destroy it and collect money. However, in the case of bodily injury, as body organs do not have market value, the equation "compensation equals to damage" is a mere approximation, not an exact equation. In this case, the principle is "value your life" or "lehiywetih waga sitt". It is the person who sets the value of his body organs. Therefore, the person injured can claim compensation both from the insurance company contractually and the wrong doer extra-contractually.

There is also another issue related with insurance proceedings. A person insured his motor vehicle with a maximum ceiling of 80,000 birr. The vehicle was damaged; and the actual damage including the consequential damage became 100,000 birr. The person will be paid the actual damage, 80,000 birr, from the insurance policy. However, he has still a deficit of 20,000 birr, consequential damage. In this case, both the individual and the insurance company can jointly proceed against the wrong doer for the whole amount, 100,000 birr. The insurance company is there to recover what it paid to the insured (80,000 birr) and the insured individual is there to obtain the remaining 20,000 birr, consequential damage, from the wrong doer. With this arrangement, the wrong doer will be required to pay the whole 100,000 birr at a time without further or separate court litigation.

What if the damage results in fatal accident/death? There are three approaches used by different legal systems. One of them is that when a person dies because of an injury, any person who has been adversely affected by the death of the victim may claim compensation from the author of the damage. Any person may refer to descendants, ascendants, widow/widower, brothers and sisters particularly if the deceased was generous enough and supporting an extended family. The evidence the claimant needs to show is that he was being supported by the victim prior to his death. The second approach is that only the heirs will claim compensation from the author of the damage. The heirs include descendants, ascendants and horizontal heirs such as brothers and sisters. Note must be taken that these heirs are mutually exclusive; i.e. if there are descendants, other heirs will be excluded. In this case, we can mention of two limitations. One limitation is that the coverage is very limited. If there are descendants, ascendants who were being supported by the deceased cannot claim compensation from the author of the damage. Secondly, Strongly enough, the widow/widower cannot claim compensation as they cannot succeed one another under the law. The third approach turns out to be “nominated beneficiaries”. In some legal systems, instead of any persons or heirs, the beneficiaries are expressly named in generic terms. In the Ethiopian case, beneficiaries are generically nominated by law. article 2095 (1) reads, In the case of a fatal accident, the spouse of the victim, his ascendants and his descendants may claim compensation on their behalf for the material damage they have suffered as a result of his death. As a result of article 2096, the list in question turns out to be an exhaustive listing. Article 2096 provides that other persons may not claim compensation on their own behalf in cases of fatal accidents, even where they show that they were materially assisted or supported by the victim. By “other persons”, the law is to mean persons other than those mentioned under article 2095 (1). In principle, the wrong doer is responsible to the victim. This is an exception to the principle as the persons under article 2095 (1) are not direct victims of the author of the damage. The other issue is the one enshrined under article 2095 (2). It reads, “In this case the compensation for the damage shall be in

the form of a maintenance allowance". It is not an issue of compensation of damage, but an issue of maintenance allowance. What does maintenance allowance mean? What maintenance allowance means is not provided under the extra-contractual provisions. We are to resort to family law provisions to uncover the meaning thereof. The family law is an integrated part of the civil code. Therefore, the assumption is that the legislator makes use of words consistently. Therefore, with a view to determining what maintenance allowance is, we need to consult provisions from 807-825 of the civil code. Article 807 provides that the person bound to supply maintenance shall supply to his creditor the means to feed, lodge, clothe, and to care for his health in a decent manner having regard to the social conditions for the interested person and local custom. Article 812 reads, the obligation to supply maintenance shall not exist unless the person who claims its fulfillment is in need and not in a state of earning his livelihood by his work. The first requirement is not that the individual is the relative of the creditor. Rather, it should be need based; i.e. the individual should be in need of lodging, feeding or caring for his health. It must be shown that the need in question cannot be satisfied by his own work as well. When we come to extra-contractual law, the argument is, the wrong doer will have an obligation to pay compensation to those people if only if they are in need. If they are well to do, the wrong doer will be lucky enough.

This turns out to be one of the areas where diverse views among lawyers exist. Some lawyers argue that the maintenance allowance for extra-contractual law is used only as form of payment. It is remembered that payment may be effected either in the form of lamp some or periodical payment. On the other hand, maintenance allowance is invariably paid in the form of periodical payment. Therefore, according to these lawyers, it is only the mode of payment and not the substance thereof that must be considered as maintenance allowance. However, the cassation bench, under vol 5 has decided that the concept, maintenance allowance, under article 2095 (2) is used both in its mode and substance. In its other decision, the cassation bench has rendered decision as to mode of payment. According to this decision, the maintenance allowance should be taken out in the form of lamp sum payment from the hand of the wrong doers and deposited in bank. Then, the bank should periodically pay the deposited amount to the claimant.

Lecture 21

In our previous section, we've seen that damage must be understood in a broader way with a view to including property damage, personal injury and moral damage or present and future damage. Property and personal damages are material damage; i.e. they are tangible/occasionally visible. The other one is moral damage, which is intangible. Moral damage is personal and internal to the victim. At times, it may not be visible to the external world. It is difficult to be verified by a third party. Indeed, personal injury has that element. However, it is not as strong as that of moral damage. There are various arguments whether or not moral damage should be compensated.

1. Some people tend to argue that moral damage is non-compensable and non-assessable in monitory terms. This is because; moral damage is too personal and internal to the victim. Other

modes of compensation such as apology should be rather in effect in this case so that moral damage is rehabilitated.

2. Others argue that in a modern world, there is no damage that cannot be quantified. An approximation could be created as in the case of personal injury. In other words, the logic in the case of personal injury holds good for moral damage. Therefore, the amount obtained through approximation should be paid to the victim. Despite not possible to determine actual compensation, it is not impossible to arrive at fair compensation to moral damage.
3. However, some legal systems are too skeptical to vest this power in courts. This is because, it becomes subjective; and hence, prone for abuse due to individual appreciation of the judge. Therefore, according to these legal systems, the legislator should fix the maximum ceiling. Within this range, courts can have the flexibility to determine the amount from zero to the ceiling provided.

Which position is adopted by Ethiopian legal system? As clearly understood from articles 2105-2117, The Ethiopian legal system has resorted to the third option. The legislator under 2116 has put the maximum ceiling beyond which courts cannot go higher to compensate moral damage. Article 2116 (3) provides as "The compensation awarded for moral injury may in no case exceed one thousand Ethiopian dollars".

The other point is that it is not for all damages that compensation for moral damage will be claimed. Article 2105 (1) reads as "The author of a misdeed shall make good the moral harm resulting from his misdeed wherever adequate procedure exists for such redress". The law is saying that moral damage will be compensated for those cases where the legislator deems appropriate to compensate. Sub-article 2 reads, "Unless otherwise expressly provided by law, moral harm may not be made good by way of damages". In principle, moral harm is non-compensable in monetary terms. Here, it deems necessary to thoroughly and conjointly relate article 2090 (1) and 2105 (2). For material damage, the principle is that all damages are compensable unless the law states otherwise. Article 2090 (1) reads, "Unless otherwise provided, the damage shall be made good by awarding the victim an equivalent amount in damages". The reverse is true for moral damage; i.e. all moral damages are not compensable unless provided by law. For material damage, compensation is the rule; and other remedies are the exception. For moral damage however, other remedies are the principle; and compensation is the exception. The reason/assumption is that moral damage cannot be made good in cash. Compensable moral damage is spelt out from 2106-2117 of the civil code. There may also be other laws that provide compensable moral damage. One of the exceptions is intentional fault. Article 2106 provides that where moral harm has been inflicted upon the plaintiff deliberately, the court may, by way of redress, order the defendant to pay fair compensation to the plaintiff or to a charity named by the plaintiff. If someone becomes a victim of intentional wrong doing by another, he will be entitled to obtain moral damages. It is

necessary to see back the discussion on intent to injure under article 2032. Note must be taken that intentionally doing something wrong is dangerous for social relationship. The other thing that needs to be taken into account is that we come across the phrase "fair compensation" and "to the plaintiff or charity named by him" in many of the provisions from articles 2106-2117. Since moral damage is not assessed in monetary terms, the only thing is to provide fair compensation. It is a matter of fairness not of actual compensation; i.e. it is not a matter of creating equality between the damage and the compensation. In material damage, the plaintiff is highly interested to be compensated. For example, according to article 2097, the plaintiff is required to claim compensation for him in good faith without intent to injure the wrong doer. In the case of moral damage however, the plaintiff can claim compensation not for himself but for a third party, charity. The purpose of moral damages is to rehabilitate the victim's moral. Therefore, the assumption is that the victim's moral could be rehabilitated when he leaves the compensation to a certain charity organization.

The other exception is provided under article 2107. It reads, "Where the defendant has forced an unpleasant or repulsive contact on the plaintiffs person, the court may, by way of redress, orders the defendant to pay fair compensation to the plaintiff or to a charity named by the plaintiff". This fault is what we call unauthorized contact under article 2038. Someone cannot be contacted without his will. If a person creates contact on another either animate or inanimate, it is said to be fault. Indeed, if there is a material damage, special damage will be compensated. In the absence of material damage however, for the very purpose of violation of right, nominal damage will be available on the basis of article 2104. Then, moral damages will be available on the basis of article 2107.

Article 2108 provides that where the plaintiff has been unlawfully deprived of his liberty by the defendant, the court may, by way of redress, order the defendant to pay fair compensation to the plaintiff or to a charity named by the plaintiff. See the discussion under article 2040 of the civil code. Article 2110 reads, Fair compensation may be awarded by way of redress to the plaintiff or to a charity named by him, where the defendant has injured his or her rights as a spouse (Art. 2050). Abduction of child and Indecent assault under article 2011 and 2014 respectively are aspects of criminal law. For moral damage to be available in this case, criminal prosecution should precede the civil claim. Article 2111 reads, Fair compensation may be awarded by way of redress to the plaintiff or to a charity named by him, where the defendant has been sentenced by a criminal court for having abducted a child who is in the plaintiff's lawful custody. Article 2114 provides that Where a person has been sentenced by a criminal court for rape or indecent assault, the court may award the victim fair compensation by way of redress. In both cases, criminal sentence is a precondition for moral damages to be

claimed. Article 2112 provides that Fair compensation may be awarded by way of redress where the defendant has, against the clearly expressed will of the plaintiff, forced his way into his land or house or seized property of which the plaintiff is the lawful owner. This article is to be read in tandem with articles 2053-2054. Article 2113 reads, Fair compensation may be awarded by way of redress to the victim of bodily injuries or, in the event of his death in consequence thereof, to his family. This is generally for personal injury cases. It is remembered that there are different levels of personal injury cases such as permanent partial, permanent total or death. Who is the family? The family is found under article 2117. It reads, in the absence of any applicable local usage, the following shall alone be considered as qualified to represent the family:

(a) The victim's husband or wife; or

(b) Failing such or where he or she is incapable, the victim's eldest child who is capable under the law; or

(c) Failing such or where he or she is incapable, the victim's father; or

(d) Failing such or where he is incapable, the victim's mother; or

(e) Failing such or where she is incapable, the eldest of the victim's brothers or sisters who is capable under the law.

2115 is an interesting article. It reads, (1) Fair compensation may be awarded by way of redress to a husband against a person who, by inflicting bodily injury on the wife, renders her companionship less useful or less agreeable to the husband. (2) The action which the husband may bring on this ground shall be independent of the action for damages which the wife may bring in respect of the injury she has suffered. This provision is creating confusion among the people. People argue that a wife does not become a wife only for her external beauty. Even if her tooth is injured, her being wife keeps on going shorts of anything problematic. Others argue that it is a matter of culture that unlike the husband, wife should keep on being cute and beautiful. Should this article be given effect today? The Ethiopian women lawyers association at the time of codification had made this article one of the discriminatory civil code provisions that affects women’s rights. It is known to us that Law is armed with the purpose of social engineering. Sometimes, as a programmatic norm, law directs how and to where the future behavior of society should be guided. Therefore, if we insist on proceeding with this provision, the developmental goal of the law to shape society will be adversely affected. Note must be taken that law not only perpetuates the statusquo but also consists of developmental approach.

Another major issue turns out to be the maximum ceiling, 1000 birr. At the time the code was enacted, 1000 birr would outshine the value of 100,000 birr and even more of today. Secondly, the law is not clear whether or not the 1000 birr is given per head. No clue is provided as to the existence of separate claim for each claimant as in the case of article 2115. Indeed, under article 2113, the concept of collectivity is envisaged while referring to the group, family. Under article 2117, the concept of representative has come into the picture. Therefore, from the two provisions, the issue of independent action does not seem to be dealt with. The cassation bench, under volume 13, has decided that there is no legal basis for members of family to separately claim the 1000 birr in the form of moral damage. The maximum ceiling of 1000 birr has been amended in the case of copyright violation. According to article 34 (4) of the proclamation, 100,000 birr is set as a threshold, not as a ceiling. The other amendment as to the moral damage is found in freedom to mass media and access to information proclamation No. 590, 2008. Article 41 (2) of the proclamation says, in case of an action for defamation through the mass media, the court may award, having regard to the seriousness of the moral damage, compensation up to birr 100,000.

Lecture 22

In the following section, we are to deal with a chapter known as action for compensation. It is more of a procedural chapter. It is also more of a concluding chapter for the discussion we made by now. Who is plaintiff? The victim is the first potential plaintiff. Despite note necessarily in the case of fatal accident only, the spouse, descendants and ascendants of the deceased may be plaintiff. According to article 2115, the husband can have an independent claim for moral damage even if the injured wife is alive. In case of abduction under 2111, the family of the abducted girl will have an independent claim. The same standing is enshrined in case of indecent assault under 2114 as well. In the case of property damage on the basis of articles 2093 of the civil code and 683 of the commercial code, subrogated insurer can bring action in the name of the victim. There are two types of claims, independent claims and successorial claim. In the case of 2095, the widow/widower, ascendants, and descendants have an independent claim against the wrong doer. The issue under 2144 however is the issue of a successorial claim as an heir of the deceased. The claim is brought in the name of the deceased as “ye ato beqele werashoch”. Article 2144 (1) reads, (1) “The victim's heirs may claim compensation for the material damage he has suffered”. What is to be claimed is not a maintenance allowance; it is rather a material damage that has been sustained by the victim. The deceased may have, prior to his death, incurred hospitality cost to recover his health. Owing to the accident, the vehicle of the deceased may have been broken and out of use. In this case, the heirs can claim compensation for the above material damage as plaintiff. Generally, these are the potential plaintiffs in an extra-contractual suit.

Who are the potential defendants? In the case of fault-based liability, the wrong doer is the primary defendant. In the case of strict liability, persons engaged in nominated activities, manufacturer, owner and possessor of nominated objects are answerable to the plaintiff's claim. In the case of vicarious liability, parents, schools, state, employers, publishers and others are answerable to the plaintiff's claim. In terms of arrangement, there is a possibility of joint and several liabilities. The wrong doer and the owner of the nominated object could be jointly and severally liable. The same goes true for vicarious liability. Article 2136 deals with joint and several liabilities as to vicarious defendants. In the case of fault-based and strict liability, article 2155 comes into the picture. Article 2155 reads, (1) Where several persons are required to make good the same damage, they shall do so jointly. (2) No distinction shall be made between instigator, principal and accomplice. (3) Persons required to make good the same damage shall be jointly liable regardless of whether the liability has its source for one or other of them in a contract or in an extra-contractual liability. In the case of joint and several liabilities, the advantage is that the plaintiff is not dependent on the asset of only one but of two or more defendants for his claim. The other issue turns out to be burden of proof. The plaintiff is required to establish the existence of damage, quantum of damage, causation and answerability. In principle, these all are expected of the plaintiff. In case of causation, if it is an action, it must be shown that the cause for the damage is the action of the defendant. If it is an object, it must be shown that, at the relevant time, the object was under the possession or ownership of the defendant. If it is an issue of vicarious liability, it must be shown that the vicarious and the principal defendants have, at the relevant time, a legal connection recognized by law. This turns out to be a general principle for burden of proof. However, there are exceptions that will have an effect of mitigating the obligation of the plaintiff. If a certain fundamental right is violated, the individual can have a claim without showing any damage sustained. He may be awarded nominal damages. Article 2104 provides 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. We've already discussed that articles 2038-2065 are there to protect fundamental rights. In those cases, a claimant may not be required to strictly show sustained damage. He will rather satisfy the court if he is able to show that a certain fundamental rights are violated. The other exception is the case of article 2102 (equity). In this case, it may be shown that damage has been sustained; but, it could be difficult to assess the quantum thereof. It is easy to assess the quantum of damage if the claimant is of a regular income as in the case of employee. However, if the injured is a trader or farmer, we will not have an objective basis to assess the damage. In such a case, article 2102 will mitigate the burden of the plaintiff; i.e. the plaintiff will prepare his statement of claim as follows. Instead of applying as "let the plaintiff pay me compensation of birr 7000",

he will apply as "on the basis of article 2102, let the court by virtue of equity decide compensation in my favor". Article 2102 (1) reads, Where the exact amount of the damage cannot be calculated, the court shall fix it equitably, taking into account the ordinary course of events and the measures taken by the injured party. The clause, the measures taken by the injured party, refers to loss mitigation principle. The claimant is required to mitigate loss through reasonable measures. In general, this is one of the areas where the plaintiff is not required to prove the quantum of damage sustained. Google and Read the case, samers v. tice in 1948. This case is the basis for the principle that if the victim is victimized by an activity of one of several persons involved, all of them shall be jointly and severally liable to the victim. This principle seems to have been included under article 2142. Our law was enacted in 1960 while the principle in question was laid down in 1948. Article 2142 reads, (1) Where damage has been caused by one or other of several persons and it is impossible to ascertain, which of the persons involved is the author, the court may, where equity so requires, order the damage to be made good jointly by the group of persons who could have caused it and among whom the author of the damage is certainly to be found. (2) In such case, the court may order the damage to be made good by the person who is beyond doubt liable under the law for the undetermined author of the damage. This case, collective responsibility, is an exception to the obligation of the plaintiff to identify the defendant. In general, articles 2102, 2104 and 2142 are exception to article 2141. After identifying the defendant, the victim's concern will be where to institute the action. The action may be taken to court or extra-judicial settlement. According to article 27 of the civil procedure code, In the case of court, the action shall be taken to a civil court where the injury to person or property was sustained. The amount of claim will be taken to determine material jurisdiction of courts. Remedy for extra-contractual liability may also be sought through extra-judicial settlement such as compromise and arbitration. This is usually common in the case of vehicle to vehicle collision. Article 2148 provides that after damage has been caused, the parties may agree that it shall not entail compensation or may compromise on the conditions on which it shall be made good. The parties may also resort to arbitration for the reason that arbitration is of advantages such as expediency, informality, confidentiality and being entertained for the parties by their chosen arbitrators. The advantage, being entertained for the parties by their chosen arbitrators, is not available in the case of court-annexed arbitration for the fact that the judge chooses arbitrators from the already deposited list of arbitrators in the court. In the case of product liability, manufacturers resort to arbitration mainly for the sake of confidentiality.

Lecture 23

By period of limitation, we mean that no one can have an open-ended right against someone. Someone needs to exercise his right at the earliest time possible in order not to be denied of his

right due to disuse or lapse of time. Period of limitation is all about prohibition of presentation of long-over-due claims. Firstly, a certain claim should not be an enduring harassment for the defendant. Secondly, it will be to create a case-load to courts if they are to entertain long-over-due cases. Thirdly, if long-over-due claims are to be brought before a court of law, due to lapse of time, evidentiary problems will be created; facts will be forgotten; or witness's memory may fade away; witnesses may die. In these cases, administration of justice will get into trouble. Period of limitation is applicable both for civil and criminal cases. The only crimes that have no period of limitation are genocide and crime against humanity. Article 28 of our constitution is there for such type of crimes. These crimes are, by their very nature, timeless and borderless crimes. By timeless, we mean that they are not subject to period of limitation. By borderless, we mean that every state has the power to prosecute or extradite the criminals even if the crime is not committed in its territory. The Nazi criminals that were recently found in Latin America are good examples. Deliberations are under way among the international community to create legal instruments with a view to making corruptions timeless and borderless.

There are two types of period of limitation, bar/absolute period of limitation and defense period of limitation. In case of bar/absolute period of limitation, once the period limited expires, the court can reject it on its own initiative. Not only the defendant but also the court can invoke it anywhere in the proceeding. In case of defense however, it is only the defendant that can invoke period of limitation. The defendant should even invoke it at the first appearance. If he failed to invoke at the first appearance, he cannot do so thereafter.

Article 2143 reads, (1) the action shall be brought by the victim within two years from the time at which he suffered the damage for which he is claiming compensation. (3) Nothing in this Article shall affect the right of the victim to make a claim for the recovery of his property or to invoke the provisions relating to unlawful enrichment (Art. 2162-2178). Is sub-article (1) a bar or a defense? The period of limitation under article 1845 is a defense period of limitation as indicated under article 1956 (2). On the other hand, this period of limitation is there for civil claim, contractual claim. By analogy, as extra-contractual claim is a civil claim, the period of limitation in question can be said to be defense period of limitation. Under criminal law, period of limitations are bars. Article 216 of the criminal code reads, (1) Unless otherwise provided by law, in all criminal cases the prosecution and the criminal action shall be barred and may no longer be instituted or brought upon the expiration of the legal period of time stated below.

Limitation extinguishes the liability to punishment in respect to any of the participants. As soon as the limitation period has elapsed neither a conviction nor penalties or measures may be pronounced.

(2) Even where the defendant fails to raise the barring of the charge by a period of limitation the Court or the Prosecutor shall, at any time, consider the barring of the charge by limitation. As understood from the articles, Period of limitation is a bar in

criminal law and it is a defense in contractual law. as extra-contractual claim is a civil claim and the claim is with regard to payment of damage, it seems to be more related to law of contract; and hence, defense period of limitation. However, this argument should be farther strengthened. the strengthening point for the argument in question comes from article 1677. Article 1677 (1) reads, the relevant provisions of this Title shall apply to obligations notwithstanding that they do not arise out of a contract. By virtue of 1677 (1), provisions of a contractual law will have applicability to extra-contractual law. Therefore, the provision of 1856 (2) will apply to article 2143 (1). On the other hand, extra-contractual claim is governed by the civil procedure code. The civil procedure code also states that period of limitation should be raised as a defense by the defendant. Note must be taken that some people argue that the period of limitation under article 2143 (1) is a bar by taking into account the word, "shall".

The other issue comes from the phrase "within two years from the occurrence of the damage". This phrase tends to focus on the victim. When the victim is the plaintiff, it makes sense. How about the victim dies and the claimants under article 2095 institute action against the wrong doer? Prior to instituting an action against the wrong doer, for example, the widow should prove that she is the wife of the deceased; her kids are really fathered to him; and the parents are really the deceased's parents. To this effect, there is a court procedure required. Therefore, unlike the victim, they cannot automatically institute action against the wrong doer. If so, Does the period of limitation under article 2143 (1) apply to claimants under article 2095? Wouldn't it be too short to that effect? A widow whose husband died of a car accident instituted action for maintenance against the owner seven years after the occurrence of damage. In her pleading, she argued that article 2143 (1) should not be applicable to her. This is because; she delayed to institute action for maintenance as the procedure to prove that she was the wife of the deceased and that the kids were children of the deceased took times. Therefore, the time passed in the process of proving those facts should be considered as period of interruption. However, the cassation bench, under vol. 3, has decided that article 2143 (1) is also applicable to actions for maintenance.

The other issue comes into the picture when one and a single act is both crime and tort. The act as a crime and tort has separate period of limitations. Good example turns out to be negligent homicide. If a driver runs over a pedestrian and causes fatal accident, with negligent homicide, he will be punishable under article 543 of the criminal code. Obviously, relatives will also bring an action for maintenance allowance on the basis of article 2095. This shows that one and single case may bring about both criminal and extra-contractual liability. Which period of limitation are we to consider in this case? In some legal systems, for the extra-contractual case, the civil period of limitation will be applicable while for the criminal case, the

criminal period of limitation will be applicable. In our case, the criminal period of limitation which is relatively longer than the civil period of limitation is provided under article 217. In other legal systems, as a principle, the civil period of limitation will apply for the civil aspect of a case. However, exceptionally, if the criminal period of limitation is higher, it will also be applicable for the civil aspect as well. This position is adopted by our legal system. This is because; article 2143 (2) provides that Where the damage arises from the commission of a criminal offence in respect of which the Penal Code prescribes a longer period of limitation, the latter period shall apply to the action for damages. Article 217 provides that (1) the limitation period of a criminal action shall be as follows:

(A) twenty-five years for crimes punishable with death or rigorous imprisonment for life;

(b) twenty years for crimes punishable with rigorous imprisonment exceeding ten years but not exceeding twenty-five years;

(c) fifteen years for crimes punishable with rigorous imprisonment exceeding five years but not exceeding ten years;

(d) ten years for crimes punishable with rigorous imprisonment not exceeding five years;

(e) five years for crimes punishable with simple imprisonment exceeding one year;

(f) three years for crimes punishable with simple imprisonment not exceeding one year, or with fine only. On the other hand, According to article 543 (2), Where the negligent homicide is committed by a person, such as a doctor or driver, who has a professional or other duty to protect the life, health or safety of another, the punishment shall be simple imprisonment from one year to five years and fine from three thousand to six thousand Birr. Therefore, in the case above, the period of limitation will be 5 years.

Another issue comes here again. Should the criminal be charged or convicted for the period of limitation to apply? The cassation bench, under vol. 11, has decided that criminal prosecution is not a precondition for a crime’s period of limitation to apply in civil cases.

However, this issue is still controversial. The criminal liability is to be applicable on the driver of not on the owner of the vehicle. Therefore, for negligent homicide, it is the driver who is criminally liable. In the case of compensation however, many people are not interested in the driver as he is not a deeper pocket. They rather resort to the owner of the motor vehicle who is not criminally responsible. As we all know, criminal liability is based on intention or negligence of the criminal. Intention or negligence will be invoked only in the case of the driver. Therefore, it becomes

procedural controversy to apply the period of limitation for the criminal liability of the driver to civil liability of the owner. Unfortunately, the cassation bench has not yet encountered this issue.

Another issue here is the issue of joinder of claims. We've just seen that a single act may entail both criminal and extra-contractual liabilities. Can we join both claims in one suit? In some legal systems, joinder of both claims is allowed. The reason is that so long as the issue is similar, it must dispose of with a joinder device to save judicial economy. Another reason is that poor or illiterate claimant who is unable to hire lawyers will be beneficiary from the arguments of the public prosecutor. In other legal systems, joinder of both claims is allowed as a principle. However, the criminal court has the discretion; i.e. it may reject the civil claim and instruct the victim to bring an action before a civil court. Still, in some other legal systems, joinder of both claims is totally prohibited. Their reason is that the objectives of both liabilities are different; the evidentiary standard in both liabilities is not one and the same; and the competence of criminal judge is less reliable than civil judges to assess compensation. Which position is adopted by the Ethiopian law? Joinder of both claims is allowed in the Ethiopian law. article 101 of the criminal code provides that Where a crime has caused considerable damage to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be ordered to make good the damage or to make restitution or to pay damages by way of compensation. To this end they may join their civil claim with the criminal suit. Such claim shall be governed by the provisions laid down in the Criminal Procedure Code. This article is not the end of the matter. It cross-refers to the criminal procedure code. Article 154 provides that (1) where a person has been injured by a criminal offence, he or his representative may at the opening of the hearing apply to the court trying the case for an order that compensation be awarded for the injury caused. The application shall be in writing and shall specify the nature and amount of the compensation sought. He shall not on filing his application pay the prescribed court fees as though it were a civil case. This article lays down the principle consistent with article 101 of the criminal code. However, article 155 puts down a condition where a civil file could be dismissed. It reads, (1)the court shall consider the application and shall of its own motion or on the request of the prosecution or the defense refuse the application where:

(a) A young person is the accused; or

(b) The accused is being tried in his absence; or

(c) The injured party has instituted proceedings in a civil court having jurisdiction; or

(d) The person making the application is not qualified for suing; or

(e) the claim for compensation cannot be determined without calling numerous witnesses in addition to those to be called by the prosecution and defense; or

(If the court is of opinion that the hearing of the injured party's claim for compensation is likely to confuse, complicate or delay the hearing of the criminal case. (2) The application shall be dismissed where the amount of compensation claimed exceeds the pecuniary jurisdiction of the court.

(3) Where the court dismisses the application its decision shall be final and no appeal shall lie against it. The injured party shall be informed by the court that he may file a claim against the accused in a civil court. The criminal court has the discretion to entertain or to reject it. The fact that the criminal court has rejected the claim doesn't mean that it will be the end of the matter; i.e. the claimant can institute action before a civil bench. In practice, criminal courts do not allow joinder of claims for the reason that criminal case requires speedy trial. Assessing compensation while dealing with the criminal court in the meantime, they believe, defeats the purpose of speedy trial. Good example turns out to be the case of derg officials. In the case of derg officials, the high court rejected joinder of claims for the reason mentioned above.

The other issue is whether or not the defendant is held civilly liable to compensate if he is set free of criminal liability. Article 2149 reads, in deciding whether an offence has been committed, the court shall not be bound by an acquittal or discharge by a criminal court. The reason turns out to be the difference in the provatory value required of the criminal and civil cases. In criminal cases, the provatory standard is beyond reasonable doubt, not beyond doubt. In civil cases however, the provatory value is preponderance of evidences. In some legal systems, criminal conviction is binding for civil liability while acquittal turns out to be non-binding for civil courts in that it vests in them discretion. Their reason is that if a person is liable at a higher standard, there is no condition with which he cannot be held liable at a lower standard. The acontrario reading of article 2149 is that conviction is binding for civil courts to determine civil liability. Some say however that it endangers independence of the judiciary. Independence of the judiciary is not only from the influence of political officials but also from that of courts of similar status. This happens when the acontrario reading comes into the picture.