

TEAM CODE: WS29

**1ST SURANA & SURANA AND RAMAIAH COLLEGE OF NATIONAL
TORT LAW MOOT COURT COMPETITION 2018
9TH MARCH TO 11TH MARCH, 2018**

**BEFORE
THE HON'BLE HIGH COURT OF JUDICATURE AT MUMBAI**

DISPUTE RELATING TO
NEGLIGENCE AND DEFAMATION

CIVIL CASE NO. ____/2017

[Under Order 8, Rule 1 & 2 read with Order 6A of Civil Procedure Code, 1908]

In the matter of

MR. HEISENBERG..... PLAINTIFF

V.

TRAVEL SOLUTIONS PVT. LTD.....DEFENDANT

MEMORIAL *for* PLAINTIFF

MR. HEISENBERG

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LIST OF ABBREVIATIONS

S. NO.	ABBREVIATION	FULL FORM
1.	AIR	All India Report
2.	Ker	Kerala
3.	SCC	Supreme Court Cases
4.	MPLJ	Madhya Pradesh Law
5.	ALT	Andhra Law Times
6.	Cal	Calcutta
7.	CWN	Calcutta Weekly Notes
8.	Cr LC	Criminal Law Cases
9.	ILR	Indian Law Reports
10.	MLJ	Maharashtra Law Journal,
11.	Ker LT	Kerala Law Times
12.	Co.	Company
13.	Ltd.	Limited
14.	Pvt.	Private
15.	PC	Privy Council
16.	QBD	Queen's Bench Division
17.	KB	King's Bench
18.	LR	Law Reports
19.	AC	Appeal Cases
20.	TLR	Times Law Report
21.	Bing	Bingham's Reports
22.	B&C	Barnwell & Creswell
23.	All ER	All England Law Reports
24.	Ind Cas	Indian Cases
25.	WLR	Weekly Law Reporter
26.	F&F	Foster & Finlayson
27.	LW (Cr)	Law Weekly Criminal
28.	CB (NS)	Common Bench, New Series
29.	PLT	Patna Law Times
30.	HL	House of Lords
31.	Bom LR	Bombay Law Reporter
32.	Camp	Campbell's Reports
33.	Para	Paragraph
34.	BLT	Burma Law Times
35.	p.	Page
36.	i.e.	That is
37.	LT	Law Times
38.	Cr LJ	Criminal Law Journal
39.	Hon'ble	Honourable

40.	NOC	Notes of Cases
41.	Mad	Madras
42.	SC	Supreme Court
43.	P&H	Punjab & Haryana
44.	Corpn.	Corporation
45.	v.	Versus
46.	ACJ	Accident Claims Journal
47.	PLR	Punjab Law Reporter
48.	TC	Travancore-Cochin
49.	Madh. Pra.	Madhya Pradesh
50.	Guj.	Gujarat
51.	MB	Madhya Bharat Series
52.	OWN	Oudh Weekly Notes
53.	Lah	Lahore
54.	MLT	Madras Law Times
55.	AP	Andhra Pradesh
56.	IC	Indian Cases
57.	UKHL	United Kingdom House Of Lords
58.	Ex	Exchequer
59.	Ed.	Edition
60.	Bing NC	Bingham's Reports New Series
61.	H&C	Hurlston & Coltman
62.	SC	Session Cases
63.	D&R	Dowling & Rylands
64.	Esp	Espinasse's Reports
65.	B&S	Best & Smith

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STATEMENT OF JURISDICTION

The counsel on behalf of the plaintiff humbly submits the memorandum of plaint under Order 7 Rule 1 and 2 r/w section 26 and section 19 of Civil Procedure Code, 1908 to the Hon'ble High Court of Judicature at Mumbai.

STATEMENT OF FACTS

BACKGROUND

The plaintiff, Mr. Heisenberg is a data analyst at Data Max. The defendant, Travel Solutions Pvt. Ltd., is a highly reputed company based in Mumbai which provides travel services. Mr. Heisenberg contacted Travel Solutions Pvt. Ltd. for arranging his trip to Australia with his wife and two kids. Travel Solutions Pvt. Ltd. assured Mr. Heisenberg that visa issuance takes 10-15 days. Mr. Heisenberg got the flight booked to Sydney, from Chennai instead of Mumbai on 08.09.2017 on the advice of Travel Solutions Pvt. Ltd and was asked to give the documents for visa processing on 07.08.2017, as in the list given, to Mr. Tommen which were submitted on 11.08.2017 but by that time Mr. Tommen had already left. The documents were dispatched by the receptionist on 16.08.2017 which were received on 18.08.2017 and verified on 21.08.2017 by the embassy. Mr. Heisenberg sent the missing document on 22.08.2017 which was received on 23.08.2017 by Travel Solutions Pvt. Ltd. On 06.09.2017, Travel Solutions Pvt. Ltd. received the passports and sent its image to Mr. Heisenberg on WhatsApp and also told Mr. Heisenberg that the passports shall be sent to Chennai airport directly, due to less time. Mr. Heisenberg with his family, reached Chennai by 14:00 hrs on 08.09.2017.

DISPUTE AND THE SUIT

The passports reached only by 21:00 hours by which Mr. Heisenberg had missed his flight. Out of frustration he tweeted “Travel Solutions Private Limited – a bunch of liars, cheaters and thieves with no ethics. The worst company ever”, along with a picture of his family on Facebook with #TSPL sucks and a logo of the company, which was widely condemned. Mr. Heisenberg sued Travel Solutions Pvt. Ltd. before the High Court of Mumbai for negligence for a sum of Rs. 1 crore. Travel Solutions Pvt. Ltd. filed a counterclaim for defamation.

STATEMENT OF ISSUES

ISSUE 1: WHETHER THE DEFENDANT IS LIABLE FOR NEGLIGENCE AND THE PLAINTIFF ENTITLED TO DAMAGES?

- (A): The defendant owed a duty of care to the plaintiff.
- (B): The defendant made a breach of the duty.
- (C): The plaintiff suffered a damage as a consequence thereof.
- (D): The Last Opportunity Rule.

ISSUE 2: WHETHER THE PLAINTIFF IS LIABLE FOR DEFAMATION?

- (A): The statement is a matter of truth.
- (B): The statement made is a fair comment.

SUMMARY OF ARGUMENTS

ISSUE 1: WHETHER THE DEFENDANT IS LIABLE FOR NEGLIGENCE AND THE PLAINTIFF ENTITLED TO DAMAGES?

The counsel on behalf of the plaintiff contends that the defendant is liable for negligence and therefore the plaintiff is entitled to damages. The defendant owed a duty of care to the plaintiff which was breached as defendant failed to take reasonable care towards the duty and the plaintiff suffered damage consequently.

ISSUE 2: WHETHER THE PLAINTIFF IS LIABLE FOR DEFAMATION?

It is humbly submitted before this Hon'ble court that the statements made by the plaintiff are not defamatory in nature as the statement is a matter of Truth which was also a fair comment. The statement made was a fair criticism which was made in good faith and therefore does not amount to defamation.

ARGUMENTS ADVANCED

**1. WHETHER THE DEFENDANT IS LIABLE FOR NEGLIGENCE AND THE
PLAINTIFF ENTITLED TO DAMAGES?**

The counsel humbly submits to the Hon'ble Court that the defendant is liable for negligence and therefore the plaintiff is entitled to damages. In *Minor Veeran v. T.V. Krishnamorty*¹, it has been observed that negligence involves - The defendant owed a duty of care to the plaintiff (A); the defendant made a breach of that duty (B); the Plaintiff suffered damage as a consequence thereof (C). Also, the Rule of Last Opportunity (D).

(A)The Defendant owed a Duty of Care to the Plaintiff

1. It is humbly submitted to this Hon'ble Court that the defendant is a highly reputed private limited company which provides travel services exclusively and was hired by the plaintiff for arranging his trip to Australia. Hence, the defendant was under a duty to take reasonable care towards the plaintiff to avoid the damage complained of.²

2. In *Hedley Byrne Co. Ltd. V. Heller and Partners Ltd.*³, the House of Lords has held that the law will imply a duty of care when a party seeking information from a party who possessed special skill trusts him to exercise due care and that a negligent, though honest, misrepresentation in breach of his duty may give rise to an action for damages. When anyone is engaged in a transaction in which he holds himself as having professional skill,

¹ AIR 1966 Kerala 172.

² Poonam Verma V. Ashwin Patel and others, AIR 1996 SC 2111.

³ (1964) AC 465 (HL).

the law expects him to show average amount of competence associated with the proper discharge of the duties of that profession, and if he falls short of that and injures someone in consequence, he is not acting reasonably. ⁴

3. It has been held by the House of Lords in the case of *Donoghue V. Stevenson*⁵ –

“You must take reasonable care to avoid acts or omissions which you can reasonable foresee would be likely to injure your neighbour.”

The duty depends upon reasonable foreseeability of the injury to the plaintiff. If at the time of the act or omission the defendant could reasonably foresee injury to the plaintiff he owes a duty to prevent that injury and failure to do so makes him liable. It is mentioned in para 4 of the problem that the plaintiff acted on the advice of the defendant to book his flight to Sydney through Chennai instead of Mumbai. Later, it was discovered by the plaintiff that while the flight from Mumbai to Sydney was refundable, the one from Chennai to Sydney was non-refundable. Hence, the plaintiff suffered a huge loss on account of this negligence of the defendant which makes the defendant liable.

4. In the case of *P.Narasinkha Rao v. Gundaverapu Jayaprakashan*⁶ it was held by Andhra Pradesh High Court held that “ In case of persons who undertake work requiring special skill must not only exercise reasonable care but measure up to the standard of proficiency that can be expected from persons of such profession. Failure to conform to the required standard of care resulting in material injury is actionable negligence if there is proximate connection between the defendant’s conduct and the resultant injury.”

⁴ Philips v. Williams Whitely, Ltd., (1938) 1 All ER 566.

⁵ (1932) UKHL 100.

⁶ AIR 1990 AP 207.

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5. In the case concerned, the defendant has failed to establish a reasonable degree of care. It is important to mention here that it is stated in Para 11, that the plaintiff was acting on the assurance made by the defendant that the passports would reach the Chennai Airport directly which reached only by the time when plaintiff had missed the flight.

(B) The Defendant made a Breach of the Duty

6. It is noteworthy that the defendant being a highly reputed company assured the plaintiff for the best comforts during the entire tour, to arrange the bookings and to provide all types of services including getting visa etc. The expression ‘negligence’ is well expounded and propounded in *Blyth v. Birmingham Waterworks Co*⁷. – “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”
7. The counsel humbly submits to this Hon’ble Court that the defendant has failed to act as a prudent man and failed to establish a standard of care. It is important to mention here that it was the duty of Mr. Tommen of the defendant to scrutinise all the documents for the processing of visa and then file it with embassy. To the dismay of plaintiff, when he submitted the documents to the defendant at the reception desk, Mr Tommen had already left the office and instructed the receptionist to dispatch the documents immediately. It shows that the defendant had not verified with the plaintiff regarding the requisite documentation and this in itself is a breach of the duty of care that the defendant owed to the plaintiff. If a man is, or holds out to be, specially skilled in a particular profession, he

⁷ (1856) 11 Ex 781.

will be held liable for negligence if he fails to exhibit the care and skill of one ordinarily an expert in that profession.⁸

8. The happening of the unfortunate incident affords *prima facie* evidence that it was the result of want of due care. The very negligence of the defendant can be proved by the maxim *Res Ipsa Loquitur* which means ‘the thing speaks for itself’. The doctrine of ‘*Res Ipsa Loquitur*’ applies and it is proved by the plaintiff that the defendant has not taken due care while arranging for the Australian trip.
9. It was said in *Scott v. London & St. Katherine Dock Company*⁹, “where the thing is shown to be under the management of the defendant or his servant and the accident is such that, in ordinary course of the thing, it does not happen, if those, who have management use the proper care, it affords the reasonable evidence, in absence of explanation by the defendant, that accident arose from want of care.”
10. Negligence includes omission to take due care and as a professional travel company, the defendant's act in not providing proper advice to the plaintiff about the trip, especially tickets is a pure act of negligence. The plaintiff had always followed the advice of the defendant step by step only for the purpose of convenience in fulfilling all the necessary requirements for the said trip.

⁸ The law of Torts by M.N. Shukla, p. 242.

⁹ (1865) 3 HCC 596.

(C) The Plaintiff suffered damage as a consequence thereof

11. It is submitted before this Hon'ble Court that not merely the defendant was negligent but also there was actual damage and the damage resulted to the plaintiff in consequence of negligent act was the direct and proximate cause of the damage. The plaintiff requested the defendant to send the visas immediately after they were issued but it was again advised by defendant that owing to the paucity of time, the passports will be sent to Chennai airport directly which only reached at 21:00 hours on 08.09.2017 i.e. by the time when the plaintiff had already missed the flight.
12. The plaintiff relies upon the Judgment of Hon'ble Supreme Court in the case titled "*Ravneet Singh Bagga V/s K.L.M. Royal Dutch Airlines & Another*"¹⁰, where Hon'ble Supreme Court has held that the deficiency in service cannot be alleged without attributing fault, imperfection, shortcoming or inadequacy in quality, nature and manner of performance which is performed by a person in pursuance of a contract or otherwise in relation to any services". This Judgment goes against the defendant because the facts clearly show that the defendant had committed deficiency in service and even provided inadequate and substandard services as were promised, due to which the plaintiff had to suffer grave harassment, trauma along with financial losses.
13. It is important to mention here that the cause of action for negligence arose when the damage occurred to the plaintiff on account of breach of duty by the defendant.¹¹ On account of the negligence on part of the defendant, the plaintiff has suffered damages of 1 Crore INR towards the air tickets, hotel reservations. Also, the defendant is liable to the

¹⁰(2000) I SCC 66.

¹¹ Kishore Lal v. Chairman, ESI Corpn. (2007) 4 SCC 579: AIR 2007 SC 819.

plaintiff for the mental agony and trauma suffered by him and his family as they were left stranded at the airport along with their entire luggage. The whole family trip of the plaintiff was ruined because of the fact that he was not only wrongly advised by the defendant but was also cheated by the defendant as they failed to discharge their duty of sending the visa at the airport on time which was assured by them.

Hence, the plaintiff has proved not only that the defendant was negligent but also that the defendant's negligence was the cause of the accident.¹² There stands a direct relation between the negligent conduct of the defendant and the injury caused consequently to the plaintiff.

(D) The Rule of Last Opportunity

14. It is also contented the plaintiff has not been afforded an opportunity to defer negligence on his part. It has been held in *Redley v. L. & N.W. Ry and Co.*¹³—“Although the plaintiff is guilty of negligence, yet if the defendant could in the result, by use of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him.”

15. In the concerned case, the delay in issuance of visa was solely because of the defendant as they failed to send the documents to the embassy on time. The documents which were submitted by the plaintiff on 11.08.2017, were sent by the defendant only on 23.08.17 i.e. after a delay of 12 days. There was a sufficient separation of time between the acts of negligence so that this Hon'ble Court may be gratuitous enough to hold that there was such a last opportunity as will prevent the acts of negligence from being treated as contemporaneous.

¹² Jones v. G.W. Ry., (1930) 11 LT.

¹³ (1976) 1 AC 754.

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16. It is important to mention here that the Australian embassy was closed only on 15.08.2017 on account of Independence Day¹⁴ and considering the urgency of submission of the documents, the defendant must have acted in a responsible manner by sending the documents on 14.08.2017 at most. Also, the documents which were dispatched by the defendant on 16.08.2017 were received only on 18.08.2017 i.e. after 2 days. Had it been sent by a speedier service, there stood a possibility that the documents would have reached the very next day i.e. on 17.08.2017.
17. It is established that the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiff cannot be established merely by showing that if the plaintiff had acted in a certain way, a different situation would have resulted, in which the same mischief might not have occurred.¹⁵

It is humbly submitted that the defendant cannot absolve itself for delay in issuance of visa only on the basis of non- receipt of complete documents, as the plaintiff had provided all the required documents very much well in time to the defendant. On account of failing to deliver the passports to the airport on time, the counsel on behalf of the plaintiff humbly requests this Hon'ble court that the defendant should be held guilty for deficiency in service and directed to pay a sum of Rs. 1, 00, 00000/- as compensation to the plaintiff.

¹⁴ <http://india.embassy.gov.au/ndli/holidays2016.html>.

¹⁵Spaight v. Tedaestle, (1881) 6 AC 217.

2. WHETHER THE PLAINTIFF IS LIABLE FOR DEFAMATION?

It is humbly submitted before this Hon'ble court that the plaintiff is not liable for defamation as the defendant has not come to the court with clean hands. The statements made by the plaintiff are not defamatory in nature as -The statement is a matter of Truth (A); the statement made was a fair comment (B);

(A) The statement is a matter of truth

18. The counsel on behalf of the plaintiff contends that the words complained of are in substance and in fact true. The statement made was – “*Travel Solutions Private Limited – a bunch of liars, cheats and thieves with no ethics. The worst company ever.*” A statement is true in substance if the erroneous details in no way aggravate the defamatory character of the statement or alter its nature.¹⁶ In the case of *Dainik Bhaskar v. Madhusudan Bhaskar*,¹⁷ it was held that it is not necessary to justify every detail of the charge, provided that the gist of the libel is proved to be in substance correct, and that the details, etc., which are not justified, produce no different effect on the mind of the reader than the actual truth would do.

19. It is important to mention here that every single time the plaintiff was acting on the advice given by the defendant as he booked the flight tickets from Chennai instead of Mumbai to Sydney according to the advice given by the defendant. It shows that plaintiff reposed all of his trust and confidence in the defendant which was breached by them time and again. Not only the tickets from Chennai were discovered to be non-refundable while that from

¹⁶ Clarke v Taylor, (1836) 2 Bing 654; Sutherland v Stopes, (1925) AC 78 -81.

¹⁷ AIR 1991 MP 162.

Mumbai was refundable but also the visa documents of the plaintiff were not scrutinised by the defendant nor they were sent on time to the embassy because of which the visa was issued very late i.e. on 06.09.2017, just two days before the flight of the defendant (08.09.2017).

Hence, it is established that the defendant misguided the plaintiff, cheated him and lied every single time about the visa issuance also. These characteristics are certainly not possessed by a company which has ethics and consequently it proves that imputation is true. The statement “the law will not permit a man to recover damages in respect of an injury to a character which he does not or ought not to possess”¹⁸ aptly fits on the defendant.

(B) The statement made was a fair comment

20. It is humbly submitted before this Hon’ble Court that the statement made by the plaintiff was a comment which is a statement of opinion of facts ¹⁹(which includes inference of facts) and the matter alleged to be defamatory is nothing but a fair comment on a matter of public interest, which a fair minded person can honestly make on the facts proved.²⁰ Any person, whether he is a private individual has a right to hold any view he pleases on a matter of public concern, and to express the same.

21. The matter complained of as defamatory, was an honest expression of opinion made in good faith and for the good of the public.²¹ A matter of public interest is a matter which

¹⁸ McPherson v. Daniels, (1829) 10 B & C 263.

¹⁹Christile v. Robertson, (1889) 10 New South Wales LR 161.

²⁰J.B. Jeyaretnam v. Goh ChokTong (1985) 1 MLJ 334.

²¹Balasubramania v. Rajagopalachariar, AIR 1944 Mad 484:46 Cr LJ 71.

invites public attention, is of public importance²² or in which public is legitimately concerned²³.

A man has the right to publish, for the purpose of giving the public information that which it is proper for the public to know.²⁴It is a matter of grave public concern that a highly reputed company like the defendant has failed miserably in discharging its liability towards its client. The defendant serves clients all over the country and certainly the subject matter complained of invites public attention. The comment was made by the plaintiff in good faith so that the public comes to know the reality and the defendant can be abstained from making false and frivolous assurances, thus cheating another common man like the plaintiff. Fair comment is the name given to the right of every citizen to comment on matters of public interest.²⁵

22. Hence, the plaintiff had no malicious intention in doing so as the plaintiff communicated the matter to the public from a sense of duty and legal morality being a law-abiding citizen of the country. The comments made by the plaintiff are based on facts as already mentioned about the delay in filing the documents with embassy on time, failing to send the passports to plaintiff at the airport on time. Rather, the plaintiff has always acted promptly and diligently. This statement is proved by the fact that even though the plaintiff had a hectic work schedule always²⁶, the plaintiff took a full day off to send the required document immediately by express courier on 22.08.2017 which was received by the defendant the very next day i.e. on 23.08.2017.

²² V. Mitter, Law of Defamation and Malicious Prosecution.

²³London Artists, Ltd. v. Littler, (1969)2 QB 375.

²⁴ Cox v. Feeney, (1863) 4 F&F 13.

²⁵ Silikin v. Peaverbook Newspapers, (1958) 2 All ER 516.

²⁶ Para 1, moot problem.

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23. The doctrine of fair comment is based on the hypotheses that the publication in question is one which, broadly speaking, is true in fact, that the facts stated therein are such as would go to serve the public interest.²⁷ It is said that nothing is libel which is a fair comment on a subject fairly open to public discussion.²⁸ It is the expression of criticism that has to be fair.²⁹
24. The statement as tweeted by the plaintiff amounts mere to a ‘fair criticism’ which was out of frustration.³⁰ The plaintiff sincerely criticises the deficient services discharged by the defendant. The defendant has breached the trust and confidence reposed by the plaintiff which invites criticism. Hence, the plaintiff states that the ‘fair criticism of plaintiff does not amount to defamation’ as the view expressed is honest.³¹
25. As remarked by Lord Denning in *Slim v. Daily Telegraph Ltd.*³², “He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it.”
- Therefore it is well established before this Hon’ble Court that the comment is fair as it is stated on facts. The defendant has expressed the opinions honestly, done so upon facts accurately stated and hence there is hardly any scope for complaint of defamation.³³

²⁷*VishanSarup v. NardeoShastri* AIR 1965 All 439, 1965 Cr LJ 334.

²⁸ *W.S. Irwin v. D.F. Reid*, AIR 1921 Cal 282:63 IC 467:48 Cal 304:25 CWN 150.

²⁹ V. Mitter, *Law of Defamation and Malicious Prosecution*.

³⁰ Para 14, moot problem.

³¹ *Silikin v. Peaverbook Newspapers*, (1958) 2 All ER 516.

³² (1968) 2 QB 157.

³³*Branson v. Bower*, (2002) 2 WLR 452.

PRAYER

Wherefore, in the light of facts stated, the cases cited, issues raised, arguments advanced and authorities cited, it is most humbly prayed and implored before the Hon'ble High Court of Mumbai, that it may be graciously pleased to adjudge and declare that:

- The defendant is liable for negligence and the plaintiff is entitled to damages as sought.
- The plaintiff is not liable for defamation.

Also, pass any other order that the court may deem fit in the favour of plaintiff to meet the ends of equity, justice and good conscience.

For this act of Kindness, the Defendant shall duty bound forever pray.

Place: Mumbai

Respectfully submitted,

Dated: 11th March 2018

Counsel for Plaintiff