



Law of tort and negligence: A burning need



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LAW of Tort is taught in Bangladesh, in every University having a Law Department. But the approach taken exposes the subject as something of a light reading, an easy subject where students can get an easy pass without putting too much effort, a course that no lawyers will ever need, a course that just takes up credit without giving any useful benefit.

But, let's stop and think about the baby Zihad. It was one of the gloomiest chapters in our national history. Human life is cheap in Bangladesh. A lot is being said about the efficacy of the fire service and other rescue attempts, numerous explanations are on sway, everyone has an expert opinion on the issue.

However in midst of this humdrum I think we all are missing one point: the negligence of the Dhaka City Corporation (DCC). We are blaming and questioning the rescuers, the media, the police. But I have not found a single press release or news that has questioned the DCC. Why was the surface of a

600 feet deep pipeline uncovered?

It is a public knowledge that in every city and town in Bangladesh, the manhole covers are frequently removed and sold to illegal businesses by people to make easy money. DCC will dig up roads, WASA will install pipes, and they will never cover up the holes. Once in a blue moon they will provide covers to manholes, only for us to find the next morning those are vanished. Bangladesh indeed is a country of wonders.

But put all the issues in a line: the uncovered pipeline, the rescue team's stop of the efforts, the Ministry's statements, the police actions, and the media behaviour. Now use some legal terms the law students learn in their very first year of legal education: continuing negligence (until the manholes are covered), lack of duty of care (by stopping the rescue efforts), defamation (by saying that the father spread a rumor about his child's accident), unlawful confinement (by detaining the father in the police station) and nuisance (by unwitty and careless interviews and hindrance to the rescue efforts). Sounds familiar?

This is where the LAW of NEGLIGENCE AND TORT comes in. It is high time Bangladesh had a tort legislation. We study tort law, but if we ever want to use this knowledge, we face a vacuum: you need an Act to file a case; you must show the violation of legislation. You know clearly that something falls under torts, but you have no way to address it.

There is a reason why so many developed countries still have Tort Acts. UK has a Tort Act. USA has numerous laws covering torts and negligence. Tort is NOT a backdated withered away topic.

Medical negligence is abundant; doctors go on strike as per their will. Drivers get licence with little trouble. Civil service offices don't care about anything. Files are hipped up without any due reason. All these issues cannot be dealt by any anti corruption commission or under the Penal Code provisions. These are not always crimes or corruption cases. When DCC does not provide manhole covers, do you continuously file writ petitions? Writs are most abused remedies in Bangladesh right now. People file writs for every issue other than the proper ones.

How will you instill in the people the sense that it is wrong to unload sacks of sand on the footpath during a construction? How do you teach them the duty of care? Once you have a tort law, you can expect a slow yet gradual development if civic sense and duty of care in the people and in public offices.

We appreciate the fire service for the effort they have given. But, what happened to baby Zihad was not only a misfortune for a developing country with poorly trained public officers and limited resources. It was the misfortune of a country that failed to acknowledge how duty of care serves the benefit of common people.

It is high time we had a Tort Act and Negligence Act in Bangladesh. If we want to become civic, people with common sense and propriety, this is inevitable.

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Case management system to reduce case backlog

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THE Case Management System (CMS) has a focus on delivering justice in time with a 'rights based approach'. Here procedural law is considered as a case management tool. Lately, the focus on 'Case Management' in judiciary is ensured all over the world but it is a new thought in Bangladesh.

Generally, civil cases are document based. However, in most of the cases oral evidence is taken as supplementary to the documents. Sometimes, it is taken to prove documentary evidence. The civil courts of Bangladesh follow the Evidence Act 1872, the Code of Civil Procedure 1908, the Civil Rules and order, The Civil Courts Act 1887, the Civil Suits Instruction Manual and some other special laws as applicable to operate a civil case.

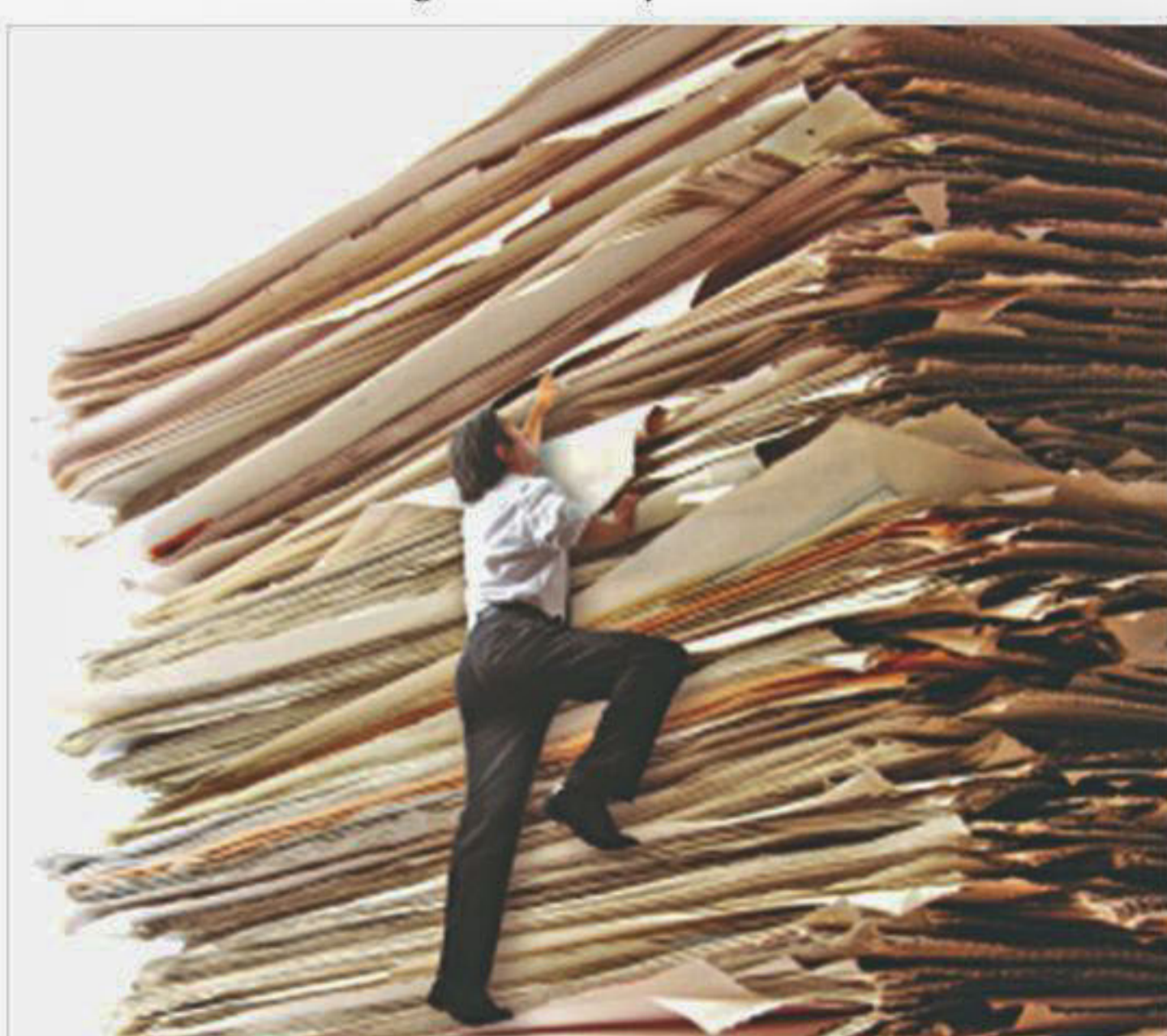
Both my professional and research experience reveals that most time consuming stage in a civil case is 'examining witnesses (evidence)' which is commonly known as 'peremptory hearing (PH) stage'. In examination of witnesses that are very often familiar as 'oral evidence', is not a very vital to prove the civil case, preferably the court looks for the documents mainly. Oral evidence are rather supplementing to the documents or when there are lack of documents to support the client's case.

The traditional way of taking evidence in civil cases has been described in sections 135-166 of the Evidence Act 1872 and Order XVIII of the Code of Civil Procedure. Among them section 138 ensures the order of the examining witness as: examination in chief, cross examination and re-examination. The witness statement is now used in civil cases for a lengthy examination-in-chief. The common practice in Bangladeshi civil courts in examining the witnesses are to state the whole case line by line and the judge has to write all the statement by hand and if not then s/he must have to clarify according the CPC (rule 5 and 8 Order XVIII of the Code of Civil Procedure 1908).

In civil cases, judges deals with commonly

two types of cases: first, those require the presentation of oral evidence to prove the case and second, those involve only the revision of documents. The first category needs the full trial and mostly is complex in nature and time consuming, whereas the second category can be identified as simple, less time consuming and those could be decided upon the documentary evidences.

In 2008 Malaysia adopted 'tracking system' that involved separation of cases/issues that could be resolved by affidavit with some other case management. Malaysia conducts the



second category of cases, termed as 'trial by affidavit' skipping peremptory hearing stage to dispose the cases quickly and they have reduced a huge number of case backlog.

The same procedure may be adopted in the Civil Court of Bangladesh to reduce case backlog. For that, when the cases are lodged, it should be classified according to complexities and right the moment it would be identified whether it needs oral evidence or not. When it needs only reviewing documents, it should be summed up with 'peremptory hearing' stage that is examination of witnesses. The statements of the Plaintiff(s) and Defendant(s) that is 'examination in chief' would be submitted to the court by affidavit because it will save time and speed up the case. In case of documents based cases, the court will fix a

date for argument or a short hearing summarising the examination of witnesses.

On the other hand, the cases need full trial with examining oral evidence would also be summarised by making the 'examination in chief' submitted through affidavit and limiting cross examination only on the question of law and question of fact. My professional experience revealed that majority of lawyers do not prepare for cross examination and waste court's time by making vague questions rather on the issues. This time consuming stage for the court must be stopped and it would only be possible when the lawyers will take adequate preparation and focus on the issues of cases. In addition, there should be an option of winding up a case on the administrative ground, for example lack of taking action on due time or expiration of the time limits.

In addition, the judgement writing procedure needs to be changed as well. The Code of Civil Procedure ensures to address all the issues at the judgement (rule 5 Order XX) but in practice, the judge writes the case of the plaintiff and defendants (very often it is made in elaborative form) which is time consuming. Here the provision of summary judgement for the appropriate cases would be introduced to save time and ensuring speedy disposal. However, we must be cautioned that summary judgment is not always appropriate for every case and it may vary.

Bangladeshi legal system is too complex for a lay man to navigate easily. As being in the common law system, Bangladesh has been able to rely extensively on the judiciary's ability to alter practices through modifications to its own rules and additional directives. However, these proposed changes will require modifications to existing procedural laws. For example, in addition to further changes to implement case management system in the civil courts of Bangladesh, simplification of introduction of evidence for civil cases - in essence the admissibility of written documents for the examination-in-chief should be allowed in the civil court proceedings.

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WORKSHOP ON

'Draft Torture and Custodial Death (Prevention) Rules' held

POLICE have to take responsibility of committing suicide in custody by any accused'- stated Salma Ali, Executive Director of BNWLA while addressing in a workshop on "Draft Torture and Custodial Death (Prevention) Rules". It is also essential to ensure budgetary allocation and witness protection for effectiveness of the law, she added.

The workshop was organised by Bangladesh National Woman Lawyers Association (BNWLA) in association with Save the Children and European Union on December 28, 2014 at BIAM Foundation, Dhaka. Advocate Salma Ali presided over the workshop. Md. Ekramul Kabir, Manager-Child Protection, Save the Children was attended as an Honorary Guest. Advocate Towhida Khondker, Director of BNWLA facilitated the group work and Fahmida Akhter Shirin, Lawyer, BNWLA shared experience of two cases filed by BNWLA under Torture and Custodial Death (Prevention) Act, 2013.

Bangladesh has ratified 'The UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT), 1984'. Bangladesh has an obligation to take all appropriate measures to protect persons in detention from torture or custodial death. Moreover, in accordance with Article 35(5) of the constitution of Bangladesh, 'No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.'

Advocate Towhida Khondker, in her statement mentioned that a preliminary draft regarding Torture and Custodial Death (Prevention) Rules has already been made by BNWLA incorporating recommendations of experts and relevant stakeholders through different discussion meetings and consultation workshops held in divisional level. She also mentioned that first ever case under Torture and Custodial Death (Prevention) Act, 2013 also filed by BNWLA.

Yasmeen Ghafoor, Additional DIG, Special Branch (SB) stated that it should be considered that whether the provision of mental torture during interrogation would be included or not in the Rules. She remarked that Police have limitations in performing their duties. She further stated that Police would be ineffective if their power is reduced. Md. Shah Alam, Additional DIG, Criminal Investigation Department (CID), Bangladesh Police stated that Police take departmental action against any of its officials if it is proved that he/she is guilty. Bangladesh Police doesn't tolerate any crime done by any of its officials, he added. He further stated that police who is involved in criminal offence got punishment on the basis of charge sheet submitted by other police officials. Md. Ekramul Kabir, Manager-Child Protection, Save the Children expected that an effective draft Rules would be made with coordinated efforts of the participants.

In the workshop, lawyers and media personalities emphasised on to ensure transparency and accountability of Police. Moreover, they unanimously agreed to ensure safety of the persons detained in custody from all kinds of torture and other cruel, inhuman and degrading treatment or punishment.

-BY BNWLA.



Speakers addressing in the workshop



State's obligation to preserve bio-diversity

THE Sundarbans is at high risk of losing its precious bio-diversity due to the government's inaction in the face of devastating oil-spills in the Shela river. That the government is totally negligent in preserving the bio-diversity and healthy ecosystem of the reserved forest is evident from its permission of commercial vessels to go on, with its potential risks of harming the biodiversity, through the Shela and other rivers of the Sundarbans.

The government's adamant decision to construct the coal-based power plant at Rampal, in the vicinity of the Sundarbans, is another bitter example of sheer negligence towards its ecological importance. Not only the toxic gases that will be emitted from the plant but also other collateral activities like traffic

movements, oil and chemical spilling and dredging will endanger the ecosystem of the Sundarbans. The recent oil-spills in the Shela River and its terrible consequences to bio-diversity demonstrate the magnitude of the risk. It can be considered as a prologue to the imminent dangers of the Rampal power plant construction and its operation. In the absence of any sophisticated technologies in case of such dangers, the Sundarbans is at high risk.

The above circumstances of the Sundarbans violate the principle of intergenerational equity propounded by Edith Brown Weiss. She said, "All generations are inherently linked to other generations, past and future, in using the common patrimony of natural and cultural resources of the planet. Each generation is both custodian and user of the common natural and cultural patrimony."

The principle of intergenerational equity has been reiterated in various leading international legal instruments that emphasise on adopting proper plans and management strategies ensuring conservation of biological diversity for the benefit of present and

future generations. The Ramsar Convention, 1971, The World Heritage Convention, The Convention on Biological Diversity, 1992 are some of the international treaties to which Bangladesh is a signatory party.

The principles endorsed in these international legal instruments have also been incorporated in Bangladesh's domestic environmental law regime. The Bangladesh Environment Conservation Act, 1995, the Environment Conservation Rules, 1997 etc., for example, embody principles of conservation and the duty of state in this respect. In addition, Bangladesh also constitutionally pledges to preserve the bio-diversity in Article 18A of its constitution.

Therefore, both under international and domestic legal regime, Bangladesh bears the responsibility to preserve the Sundarbans, which is unique with wide varieties of flora

and fauna, and significant for ecological processes, monsoon rains, flooding, delta formation, tidal influence of the region etc. To be specific, the Ramsar Convention concerning the conservation of wetlands of

international importance promotes 'wise use' concept and seeks 'maintenance of their ecological character, achieved through the implementation of the ecosystem approaches' with a view to conserving and using wetlands and their resources in a sustainable manner. On the other hand, the World Heritage Convention requires the establishment of an effective system of collective protection of the cultural heritage. The Convention on Biological Diversity requires each state party to establish a system of 'protected area or areas' where special measures need to be taken to conserve biological diversity.

The incumbent government is under national and international, legal and moral, obligations to adopt sustainable plans and strategies required for the proper conservation and protection of the unique biological diversity of the Sundarbans.

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