

THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

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PROBLEMS OF PUBLIC TORTS

By

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Where a public officer commits a breach of his official duty and thereby causes injury to any person, he is liable to an action for damages, if the breach complained of amounts to misfeasance, for non-feasance the officer, if not a servant of the Crown, is liable if the law casts upon him a specific duty to the plaintiff is one, to perform the act omitted. Statutory protection against civil and criminal proceedings is conferred upon persons acting in pursuance of the legislation relating to lunacy and mental deficiency, unless they act in bad faith or without reasonable care.

Negligent exercise of statutory powers:

The fact that an act which causes injury is done under statutory authority will not afford a defence to the person performing the act in an action by the party injured, where there is negligence¹ or want of proper precaution in doing the act which causes the injury even though the authority is exercised in the public interest and not for private gain, unless the right of action in respect of negligence is expressly or impliedly excluded by the Statute. The burden of proof that a common law right of action is taken away by statute rests on those alleging it. The existence in a statute of a compensation clause does not take away a right of action for negligence in respect of something which is not the subject of compensation. Rights of action at common law are sometimes expressly preserved by statute.

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1. Darling V- A.G. 1950 2 All. E.R. 793.

Powers obligatory and discretionary:

Persons upon whom discretionary powers are conferred by statute for specific purposes are under no obligation to exercise them and no liability attaches for not doing so. If they do exercise such powers they must do so strictly in accordance with the terms of the statute; but it does not follow that, because a statute confers powers the exercise of which might prevent injury to persons who would otherwise be injuriously affected, the donees of such powers are liable in damages for the non-exercise thereof. If in the exercise of its discretion, an authority decides to execute a power, but executes it imperfectly, it is not liable for damage which would have occurred even if it had not executed it. Where a statute imposes a duty to exercise the power, any person or any member of a class or persons for whose benefit the duty is imposed, may maintain an action for injury arising out of failure to fulfill the duty. If there is no absolute duty, but merely a duty to exercise reasonable care and diligence, negligence or misfeasance must be proved.

Delegation of statutory powers:

Without statutory authority to do so, statutory powers cannot be assigned. Although such powers may, in general, be exercised by the hands of the servants, agents or contractors and in the case of corporate bodies, must be so exercised, the question whether statutory powers may be delegated in any wider sense than this depends on the proper construction of the enactment conferring the powers and, in particular whether that enactment specifically authorises delegation. In addition, a public authority on which statutory powers are conferred may have a general statutory power to delegate. The employment of the local authority by another to perform work which the latter has decided is necessary to be done is not regarded as delegation.

Public authorities exercising statutory powers or liable to statutory duties are, in general responsible for the acts or omissions of their servants or agents, although, in some cases their liability extends only to providing competent persons of professional skill. Persons having statutory powers to execute work are responsible for injury sustained by its negligent execution whether it is executed by a servant or contractor, though they are not liable for the collateral negligence of the person executing it if that person is an independent contractor.²

2. Blackpool Corpn. V. Locker 1948, I K.B.349,C.A.

Wrongful acts of officers:

Whether a local authority is responsible for the wrongful acts of its officers depends upon whether the act done purports to be done by virtue of something imposed as a public obligation to be done, not by the local authority, but by such officers. A local authority delegating to its officer duties which it has to perform or powers which it is entitled to exercise, is responsible for his wrongful acts provided that they fall within the scope of his employment. If, however, the sole duty of the authority is to appoint the officer and the duties to be performed by him are of a public nature and have no peculiar local characteristics, the local authority is not responsible for acts of negligence or misfeasance on his part. Furthermore, it has been held that, where a subordinate body is acting merely ministerially in the performance of statutory duties for the due performance of which it is answerable only to some higher authority, it is not responsible for the negligence of an official through whose agency it performs an official act. A public authority which employs a technical expert under a contract of service is liable for injury caused by the negligent acts of that person where those acts are within the scope of the obligation undertaken by or imposed on, the authority towards the injured person.³

Torts committed by a Corporation:

A Corporation aggregate is liable to be sued for any tort provided that (i) it is a tort in respect of which an action would lie against a private individual (ii) the person by whom the tort is actually committed is acting within the scope of his authority (iii) and in the course of his employment as agent of the Corporation and the act complained of is not one which the corporation would not, in any circumstances, be authorised by its constitution to commit. Thus an action will lie against a corporation for conversion, for trespass for wrongful distress, for assault, for negligence, for nuisance, for false imprisonment, for infringement of a patent, for keeping a dangerous animal, for breach of trust and even for fraud and for torts involving malice, such as malicious prosecution and libel. A corporation may be sued upon a fraudulent representation

3. Gold V. Essex County Council, 1942, 2 K.B. 293, C.A.

as to the credit of a third person if made under its seal but not if made in a letter written and signed by its agent. A corporation can be made liable in a civil action for maintenance.

Principles governing liability:

In order to fix a corporation with liability, the relation of principal and agent, or of master and servant, must be established between the corporation and the person who commits the tort in respect of the tort in question.

It is not necessary to prove that the agent was appointed under seal or even that he was in any way formally appointed. Express authority to commit the tort need not be proved, it is sufficient to show that there is an implied authority, which is to be inferred from the nature of the agent's employment. Where the wrongful act is done without the express authority of the corporation, an authority from the corporation cannot be implied if the act is outside the statutory powers of the corporation.

Civil liability in relation to statutory powers:

No action lies at common law for damages inevitably caused by a proper exercise of statutory functions, through the corporation exercising them must use due diligence to prevent damage to others resulting.⁴ Whether a Corporation is liable civilly for a breach of statutory duty depends on the terms and construction of the statute, where an Act of Parliament imposed duties on a trading Corporation for the benefit of its customers, but provided no penalty for default nor any right of action at the suit of the persons aggrieved, no right of action lay at the suit of private individual for failure to comply with the requirements of the Act.

Conclusion:

A corporation whether it is a public authority or not, is in general liable in tort in the same way as a private individual if the person by whom the tort is actually committed is acting within the scope of his express or implied authority and in the course of his employment, as the Corporation's agent, but where

4. Manchester Corpn. V. Farnworth 1930 A.C. 171.

the tortious act is ultra vires, the Corporation is liable only if it has purported expressly to authorise the act. Such bodies are not liable for damages inevitably caused by the proper exercise of statutory functions.

Public officers are generally liable as private individuals, for torts committed by them, but, if the alleged tortious act is done in the exercise of a discretion conferred by law, no action lies in the absence of malice or improper motive.

A critical study of important Indian Cases on the subject:

State of Rajasthan v. Mst. Vidhyawati & another
A.I.R.1962 S.C.933

Where the driver of a jeep owned and maintained by the State of Rajasthan for the official use of the Collector of a district, drove it rashly and negligently, while bringing it back from the workshop after repairs and knocked down a pedestrian and fatally injured him.

Held that the State can be made vicariously liable for the tortious act, like any other employer. Viewed from first principles there can be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment but wholly dissociated from the exercise of sovereign powers, as any other employer.

Comment:

The principle laid down in this case is a commendable proposition suited to the new circumstances of the society in our country.

M/s Kasturi Lal Ralia Ram Jain v. State of U.P.
A.I.R. 1965 S.C. 1039

In this case the act of negligence was committed by the police officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers, Now, the power to arrest a person to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers; and so there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the

course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained.

There is a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to the public servants, and acts committed by public servants which are not referable to the delegation of any sovereign powers. If the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose.

Comment:

The judgment is clearly wrong. It failed to distinguish between an act of state and an act done or purporting to be done under the authority of municipal law, thus over-looking the distinction made by a long line of Privy Council decisions.

The observation in the judgment that the distinction made in the P & O case between the trading and the sovereign functions of the company had been consistently followed, is clearly wrong and is made per incuriam.

The judgment is self-contradictory. Gajendragadkar J. rightly observed that in England the immunity of the Crown from liability for a tort was based on the maxim that the "king can do no wrong." But the P & O case had in terms said that in determining the liability of the East India Company that maxim had no force. Consequently, the P & O judgment required Gajendragadkar J. to hold that the Union of India could claim no immunity from liability for tort, since the East India Company could claim none.

Reform needed:

I am of the opinion that in a welfare State we should adopt the principle of distribution of loss. The State should be made liable on the basis of vicarious liability. Now the State's interference is increasing day by day and the State employs persons after selection by the Public Service Commission and hence they are supposed to act with due care. In case the State is not made liable in

cases like Kasturi Lal Ralia Ram Jain v. The State of U.P. I am afraid of that the real meaning of welfare State will be defeated and a time may come when we will see farewell to the State instead of a welfare State. In view of the foregoing, I propose that the liability of the State should be determined in all cases on the basis of vicarious liability.
