THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

Mt.Abu - May 1969

KASTURILAL'S CASE - SOVEREIGN IMMUNITY OR TORTFEASOR'S CHARTER

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The two leading cases decided by the Supreme Court in respect of Government's liability for the torts of its servant has put lawyers and legal academicians in confusion. The two decisions are State of Rajasthan v. Mst. Vidyawati (A.I.R. 1962 S.C. 933) and Kasturilal Ralia Ram v. State of Uttar Pradesh (A.I.R. 1965 S.C. 1039). The two cases give two different decisions and both decided by the highest Court of Appeal in the country. In both these cases the age-old and Britisher's distinction between sovereign and nonsovereign functions is made. But both these cases have put us in still greater confusion by not mentioning the criterian by which an act is to be classed as sovereign and nonsovereign function of the Government.

Though the facts of these two cases are too wellknown, a brief narration, to refresh the memory is, I feel, necessary. In Mst. Vidyavati's case, due to the negligence of the driver of a state Jeep, maintained by the Collector of Udaipur for office use, the husband of the plaintiff was killed. At the time of the accident, the Jeep was being driven from the Garage, where it was sent for repairs, to the Collector's place (it is not known whether to his office or his residence; but this point need not detain us, as the Courts themselves have not considered it.) The widow of the deceased, brought a suit against the defendant on the principle of vicarious liability, claiming damages. The Trial Court dismissed the suit against the state of Rajasthan. On appeal to the High Court the suit was decreed against the State. The State went in appeal to the Supreme Court. The Supreme Court confirmed the decision of the High Court. At page 314 of 1963 Supreme Court Journal Vol.,1 C.J. Sinha said - "there should be

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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 and functioning as such, as any other employer." (Emphasis supplied).

This case, therefore, clearly and unhesitatingly puts the state on part with any individual (or company) employer. C.J. Sinha strongly conten s that "ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India."

This was the clear position of the law till 29th September, 1964, when the case of Kasturilal was decided and the decision became sensational, in as much as it evoked criticism from all quarters. The facts in brief are the police, on suspicion arrested a partner of the plaintiff firm. They seized the property he was carrying viz. gold and silver. He was kept in a lock up. But next day he was released on bail. The silver was returned but the gold valued at about Rs.11,000 was not returned. It appears that the partner in the plaintiff firm was not prosecuted for any offence. Inspite of repeated demands, the gold was not returned. So a suit against the State of Uttar Pradesh, as employers of the police constables and sub-Inspectors, was filed to recover the gold or its price. In the meantime, the Headconstable who was incharge of the seized property absconded to Pakistan with that gold and he could not be apprehended. The Trial Court decreed the claim, but the High Court of Allahabad on appeal dismissed the claim. The plaintiff preferred an appeal to the Supreme Court which disallowed the appeal. C.J. Gajendragadkar, who delivered the judgment said at page 1048 - "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." (emphasis supplied).

It is this 'there is no difficulty' clause in both cases which has created difficulty for us. The case of Vidyavati has been reconciled with Kasturilal's case by C.J. Gajendragadkar, on page 1048 as - "the Court must always find that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise of sovereign power, or to the exercise of delegated sovereign power, and in the case of the State of Rajasthan.....

this court took the view that the negligent act in driving the Jeep car from the workshop to the collector's bungalow for the collector's use could not claim such a status". (It is only in para 27 on page 1048 of Kasturilal's report that the words 'collector's bungalow', 'Collector's residence' appear, suggesting a private use of the Jeep by the Collector; but in 1963(1) S.C.J. 307 case we do not find a reference to 'residence' or 'bungalow'. By inserting these words, I feel the ground is made clear for Kasturilal's case). "In fact the employment of driver to drive the Jeep car for the use of a Civil servant is itself an activity which is not connected in any manner with the sovereign power of the state at all. That is the basis on which the decision must be deemed to have been founded; and it is this basis which is absent" in Kasturilal's case (emphasis supplied).

The main aim of this article is to show that Kasturilal's case is not of universal application and that Vidyawati's case dealt with an act done in exercise of sovereign function of the State and the possible solution to problems arising in this sphere.

Two possible interpretations can arise from the Supreme Courts (underlined) statement quoted above. 1. A civil servant can never have an opportunity of exercising a sovereign function of the state. 2. That if the personnel be a military servant it will be a case wherein the military servant will be discharging a sovereign function. Both these interpretations which arise naturally, with due respect to the judges, are not correct. Contrary to the first interpretation, a civil servant may be engaged in doing a sovereign function delegated to him. Maintenance of law and order is one of the main sovereign functions of the state. It is as much the concern of the District Collector, (a Civil servant) as a District Magistrate under the Code of Criminal Procedure, to maintain law and order in his area, as the concern of the state. Is he not, therefore, connected in some manner with the discharge of the sovereign function? To discharge this function, he is provided by the state with various agencies, including a Jeep. He can appoint a driver, as a Government servant, to drive this instrument (Jeep) through which the 'function' can be discharged. Again, if the President of India wants to declare a state of emergency on account of the circumstances

prevailing in the country, and his Secretary has been instructed by him to take the matter to the printing press, get the copies printed and issue it to the Press, Public and for the information of all in the country, and on his way the Secretary due to his rash driving kills a citizen. Was not the Secretary doing a sovereign function? Though he was a civil servant, I believe, he was nevertheless engaged in doing an act which the sovereign alone could have done. Coming to the second interpretation, the fact of wrongdoer being a military personnel does not ipsofacto make it a case of sovereign power. It again depends upon whether such a military personnel was at the crucial moment engaged in doing a sovereign function. This can be illustrated by two cases. In Union of India v. Harbans Singh (A.I.R. 1959 Punjab, 1959), due to the rash and negligent driving of a driver employed for driving a military truck engaged in a 'military duty', the father of the plaintiff was killed. At the moment of the accident, the military truck was being used for the purpose of supplying meals to military personnel on duty at various places. The suit as against the Union of India, defendant No.1, as the employer of the driver of the military truck, failed. J. Mehersingh based his decision on three points. (1) The vehicle belonged to the Military Department (2) The driver had taken out the truck in pursuance of the orders of his Superior Officers and (3) The use of the truck was supplying meals to military personnel on duty. (The first wo points seem to be present in Vidyawati's case, except the use of civil in place of military). At page 40, para 6 - "It is obvious that what was being done was that the military personnel of defendant No.1 were carrying on their duty, which must necessarily be that what was being done in exercise of the sovereign powers of defendant No.1 and it was in those circumstances, that they were being supplied with their meals, again an act done by another military man in pursuance his duty and under orders of his superiors." If this is carried to its logical conclusion, it will mean that the servant who cooks food or a servant who sweeps the house of a military personnel is doing a sovereign function, because the cook or the servant in turn enables his boss to carry out his (boss's) military duty or sovereign function. This is fantastic as well as ridiculous. In another similar case of Union of India v. Bhagwati Prasad Mishra (A.I.R. 1957 M.P. 159), a driver of the military truck owned by the Government military farm, due to the negligent driving

injured a delivery man, a fellow-servant travelling in the same truck. The High Court of Madhya Pradesh held that (1) the farm run by the Govt. was not an undertaking which could be referred only to its sovereign powers. (2) it was not an act of a Govt. servant which was performed in exercise of any statutory powers and (3) the Union of India was liable.

Just as in the M.P. case the supply of milk from the military farm can be done by any private individual, so also in the Punjab case it was possible for any private individual to cook food and also carry the food to various personnel engaged on military duty. The decision in Punjab case (1959 Punjab 39) is unsound. At least from the MP. case it is clear that even though wrongdoer is a military personnel working for a military establishment, the act cannot be classed as a sovereign function. Hence the statement of C.J. Gajendragadkar on page 1048, para 27 of A.I.R. 1965 S.C. and the two interpretation arising out of that are not correct.

The Collector of Udaipur in Vidayawati's case being an agent or a representative at the district level (or the head of the district) has twofold characters similar to the Government. He has revenue powers and he has judicial powers derived from the Code of Criminal Procedure, There is no yardstick or had and fast rule by which an act may be determined as sovereign or non sovereign function. (And the usual test to be found in the decisions - that which can alone be done by the sovereign or by any private individual to whom it is delegated - is very difficult to be followed. The two cases decided by the Supreme Court do not lay down any rule by which an act can be classified into sovereign and non-sovereign.) Collection of revenues, maintenance of law and order, or any powers derived from the statute, can all be termed sovereign functions of the Government. When once we fix up that the Collector can have sovereign functions, it becomes very smooth to say that the driver of the Jeep was helping the Collctor in discharging that the function. The Jeep was sent for repairs and brought after reparis only at the instance of the Collector. It was being taken to the place mentioned by the Collector. It is not the contention of the State of Rajasthan that the driver was on' a frolice of his own'. Even if the driver had deviated he would be still within the course of employment of the Collector who was to have discharged the sovereign functions." When the servant temporarily deviates

from his route on personnel business and during the detour negligently causes harm to another, the purpose and degree of the deviation has a material bearing on whether it is to be regarded as merely incidental to the employment or as an independent journey of his own." Fleming, law of torts page 337 (1961 edition), It is not proved that the driver had deviated. So from the moment he started from garage for the place directed by the Collector, he must be taken to be in the course of employment. So it can be contended that the driver, as in the Punjab case, was helping the Collector in discharging his sovereign functions; but nevertheless the state of Rajasthan was held liable, because there was no immunity.

C.J. Sinha delivering the judgment of the Court in Vidyawati's case, clearly and explicitly said at Page 314 of 1963 S.C. J 307, - "In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India. Now that we have, by our constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification in principle, or in public interest, that the state should not be held liable vicariously for the tortious act of its servant." Inspite of this clear ruling, C.J. Gajendragadkar interpreted Vidyawati's case as - "in the case of the State of Rajasthan (A.I.R. 1962 S.C. 933) this court took the view that the negligent act in driving the jeep car from the workshop to the Collector's bungalow, for the Collectors use could not claim <u>such a status</u>." Such a status here means that it was not a sovereign function delegated to the Collectoro. This interpretation of Vidyawati's case in Kasturilal's case is, with due respect to the learned judges, incorrect, unsound and illogical. So Vidyawati's case can be taken as laying down the principle that in India there is no immunity to the sovereign (i.e. Government) and that is why the plaintiff succeeded against the government.

In Kasturilal's case C.J. Gajendragadkar observed at para 29 of page 1048 (A.I.R. 1965 S.C.) - "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 <u>their statutory powers</u>. 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." The plaintiff firm is not challenging this. The firm does not complain against these acts. No doubt these acts can be done by the police officers and can claim immunity under the defence of act done in pursuance of statutory authority. It is never the contention of the plaintiff - appellant that these acts are illegal or wrongful. What the plaintiff wants the court to decide is- can the Head constible who absconded to Pakistan with the seized gold also claim statutory authority as a defence and also the State Government? In fact as regards the seizure, custody, safe deposit of such goods is governed by U.P. Police Regulations. If tyese provisions are complied with, the plaintiff cannot complain on the ground that there is statutory authority to do these acts. Admittedly these were not complied with. At para 10 of page 1043 (A.I.R. 1965 S.C.) - "In substance, it provides that property of every discription will remain in the custody of the malkhana moharrir under the general control and responsibility of the prosecuting insepctor unitl it has been finally disposed of .....It is thus clear that gold and silver which had been seized from Ralia Ram had to be kept in a separate box under lock and key in the Treasury; and that, admittedly, was not done in the present case." Now the question is- whether those acts which are not done in pursuance of statutory provisions can also be brought under the category of 'statutory authority as a defence?' If the answer to this question is in the affirmative, it will lead us to the inference that the sovereign (or statutory) immunity extends to all those acts done in pursuance of the statute and also those acts which are done contrary to the statute, which appears to be absurd and untenable. At para 11 on page 1043 the learned Chief Justice observed, after scanning the entire evidence and the U.P. Police Regulations, - "not only was the property not kept in safe custody in the treasury, but the manner in which it was dealt with at the Malkhana shows gross negligence on the part of the police officers." Is this gorss negligence permitted or authorised by the Regulations? It is not. This gross negligence is not incidental to the performance of the statutory duties. The act in question viz. misappropriation, absconding with the seized property, are independent acts, not authorised or contemplated by any Regulation or statute.

The second problem posed by Kasturilal's case is - can sovereign immunity be claimed for doing an act for which there is no ground or justification or suspicion? Neither the facts set out in the judgment of C.J. Gajendragadkar nor the summary made by the C.J., in the judgment, of the evidence show any germ of suspicion behind doing the act of arrest, seizure, etc. No doubt the Criminal Procedure Code confer certain powers on the Police Officers of arrest, seizure of property etc; but this power can be made use of only after a suspicion has arison not otherwise. In the present case, the acts of arrest and seizure of property are done without any basis; there is no suspicion. The police officers have not suspected that Ralia Ram was moving about in suspicious circumstances or that they suspected that he was carrying stolen goods or that they suspected him to have committed any offence. If the present case is considered as an authority, it will mean that any police officer or any person to whom sovereign powers are delegated and who wants property, money etc. can simply arrest a person who has property seize the property, keep it in his custody, release the arrested person at a later date, claim that the act was done in pursuance of sovereign powers and without returning the property, quietly abscond with the property. The Government or the employer claim sovereign immunity and the tortfeasor will not be available for being sued or prosecuted. Another point is, if the police does not prosecute the arrested person, can the employee or the state claim sovereign immunity for the act of arrest, seizure? The fact that the arrested person is not prosecuted means that there is no case for doing the acts mentioned in the statute, like seizure of property, and so the police officers nor the government as the employer, can claim immunity for these acts which they ought not to do and the sovereign immunity stops at this point and does not extend further. It does not cover the act done thereafter viz. misappropriation of seized property. Therefore, I am of the opinion, based on the above reasons, that the government cannot claim sovereign immunity <u>for the act of misappropriation of seized goods</u>, which is complained of by the plaintiff. The plaintiff does not grumble about the arrest, seizure of gold and silver and putting him in the lockup. All these acts are acts done in exercise of delegated sovereign function. What he resists or complains of is the misappropriation of gold and consequently the nonreturn of gold seized from him. It is shocking to see that the poor plaintiff is denied this remedy, though the position was quite clear.

In fact in the present case, when the court was satisfied that the position of law in this respect was not satisfactory and that the facts of the case had disturbed it by the thought of denying, I would say, justice to the plaintiff, the court was not prevented by any statute or law from giving the necessary remedy. The court could have given the relief to the plaintiff on the principle of equity, justice and good conscience. When there is no written or codified law, the court has greater freedom in meeting the cases and realising the hardship caused to a party, could have granted any suitable remedy. But the court denied that and suggested to the successful defendant to 'pass legislative enactments' "When the rule of immunity in favour of crown, based on common law in the united kingdom has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution." 1963 S.C.J. 307 at P.315. Similar observation is to be found in Kasturilal's case on Page 1049 of A.I.R. 1965 S.C. In view of these observations of the Supreme Court, the plaintiff would have succeeded but for the conservatism of the judges. It has been rightly pointed out by Prof. S.M. Hasan, in 1966 An Sur. I. L. Page 123 - "Added to this is the paradox that judges who have championed the cause of socielogical jurisprudence have reaffirmed and resurrected governmental immunity even where precedent left them a choice." Here was a fine opportunity available to the Supreme Court of India for adjusting the law to the social changes and the needs, by holding the state liable; for, the state would have been able to absorb the loss and later would have spread over the loss to the public in one form or the other. This would have also made loss spreading capacity as the ground of liability.

C.J. Gajendragadkar has suggested that the Government can regulate and control their liability by passing suitable legislative enactments. But legislation in itself is no solution to this problem. The crown Proceedings Act, 1947, in England and the Federal Tort Claims Act, 1946, in the United States have not freed themselves from difficulties and problems arising. Dr. A.T. Markose, Editor of Vol.4 (1962) J.I.L.I. has rightly pointed out in his case comments of Vidyawati's case - "It is not only suggested, ..., but it is also asserted that legislation will be an inappropriate way to clear up difficulties that has arisen and would arise in this area of our law.

Experience under the Federal Tort Claims Act, 1946 of the United States as well as what little one could note under the Crown Proceedings Act, 1947 of England support the above view." Page 281 of 4 Journal of Indian Law Institute(1962). Ultimately it is the judiciary which must be bold enough to set the thing right. Ultimately it is a case of balancing the public interest and private claims, which can be done more effectively by the judiciary. It is the judge who will bring the law in line with the changing conditions and requirements of society and public interest.

The healthy trend which was started for the first time by the Supreme Court in Vidyawati's case has been acknowledged by all eminent academicians as a proper solution of the problem of vicarious liability of the Government in Torts e.g. Dr. A.T. Markose, Dr. Alice Jacob. Inspite of repeated passages in both the Supreme Court decisions, referring to the Indian Government as a welfare and socialistic state, the law laid down in Kasturilal's case does not seem to be sound. e.g. in 1963 (1) S.C.J. 307 at page 314 - "In India, eversince the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India. Now that we have, by our constitution, established a Republican form of Government and one of the objectives is to establish a socialistic state with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle or in public interest, that the state should not be held liable vicariously for the tortious act of its servant." In A.I.R. 1965 S.C. 1039 at page 1048 (para 28) - "It is not difficult to realise the significance and importance of making such a distinction particularly at the present time when, in pursuit of their welfare ideal, a Government of the states as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of Governmental activities in which the exercise of sovereign power is involved."

As a welfare state, the government is engaged in all activities towards the ultimate aim of having a socialistic state and not a monarchical regime or peculiar feudal system. The courts in India must have a broader outlook. Instead of deciding the

liability based on sovereign or nonsovereign functions, it would be proper and fitting to decide on the lines of Secretary of State v. Hari Bhanji (1882) 5 Mad.273 i.e. where in act complained of is professedly done under the sanction of Municipal law, and in the exercise of powers confirred by that law, the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual, firstly, does not out the jurisdiction of the Civil Courts and secondly, the government should be held liable for such acts. In the present set up - when the state is engaged in commercial activities like trading, manufacturing, running of railways treating of patients in hospitals, construction of bridges, roads, cannals, supply of milk and electricity, giving of education, life insurance etc. in short doing all that which an ordinary employer would do - to draw out a distinction between sovereign function and nonsovereign functions and to hold the government liable in respect of the acts falling in the latter category, is absured and is not based on any sound principle of law. In fact, it is not easy to classify an act into sovereign and non-sovereign act. Any so called sovereign act can now be done by any individual or body of person, if they are interested with that task - may it be maintenance of law and order or administration of justice. So this type of classification instead of solving our problems, will land us in sever difficulties because there is no test by which we can say that an act in question falls in one category or the other.

There are instances of broader outlook of the courts. I will cite here two instances - in Premlal v. U.P. Government (A.I.R. 1962 All.233), under U.P. Requisition of Motor Vehicles Act, 1947, the Government had requisitioned a car and a truck belonging to the plaintiff - appellant. The plaintiff sued the Government for the damage caused to him and to the vehicles and that the order was illegal and invalid. The court held that the requisition order was malafide and invalid and awarded to the plaintiff damages asked for. In fact, requisitioning of vehicles under the statutory powers is an act which cannot be done by a private person but can be done in exercise of the sovereign functions of the State. According to the classification and dictum in P & O Steam Navigation Co., v. Secretary of State(1861) 5 Bom. H.C.R. App.A), the suit could not be decreed. But J. Dhavan, delivering the judgment for the court, decreed the suit and said at page 236 "...Judicial authority and public

policy demand that the state today cannot claim immunity from the tortious liability in respect of the tortious acts of its servants and agents." In another case decided by the Bombay High Court in Lasalgaon Merchants' Co-operative Bank Ltd., v. Messrs. Prabhudas Hathibhai (67 Bom.LR. 823) at page 836, J. Naik said - "The immunity of the State in respect of acts done by its subordinates in the exercise of sovereign powers cannot be considered as a dogma or a mantra and will have to be considered on the facts of each case." Sovereign's immunity cannot be claimed for acts which are either illegal or unconstitutional. The facts of this case are - The plaintiff Bank, under an agreement with their constituents to advance loans on the security of agricultural produce like groundnuts, jaggery, tobacco etc., had secured their loan on the security of the above goods kept in the constituents' godown (but the key was with the Bank). As the constituent owed certain amounts by way of income tax dues, the Income Tax Officer issued a certificate under S.46(2) of the Income Tax Act, 1922 and forwarded it to the Collector for recovery of the income tax by attachment and sale of the goods. This certificate and the order received by the Circle Officer through the Mamletdar was executed against the goods secured by the plaintiff Bank, inspite of the Bank's protest. During the period of attachment the goods were badly damaged due to the rain water leaking through the roof of the godown. The plaintiff Bank sued the constituents, the Union of India and the three revenue officers involved claiming damages suffered by the Bank due to these Acts. The High Court of Bombay held these acts to be in excess of the powers and the seizure of the goods was illegal and unconstitutional. After critically examining the case law including Vidyawati's case, the High Court held that the State was liable. Amongst other cases, the Bombay High Court relied on passages on page 404 of the 4th edition, 4th volume of Basu's Commentary on the Constitution of India, and the view of the Rajasthan High Court (in A.I.R. 1957 Raj.305) endorsed by the Supreme Court in Vidyawati's case. The Rajasthan High Court said "The State is no longer a mere police state ..... Ours is now a a welfare state and it is in the process of becoming the fullfledged socialistic state. Every day, it is engaging itself in numerous activities in which any ordinary person or group of persons can engage himself or themselves. Under the circumstances,

there is all the more reason that it should not be treated differently from other ordinary employers when it is engaging itself in activities in which any private person could engage himself." At page 404 of the Commentary on the Constitution of India by Basu 4th Vol.4th edition, the learned author says -" The task of High Courts and the subordinate courts would, of course, have been easier if the Supreme Court had in Vidyawati's case (held) that it was Secretary of State for India v. Hari Bhanji and not the P & O.S. No.Co. v. Secretary of State for India, which laid down the correct law to be followed in India. So long as this is not done, the litigant, the Bench and the Bar would be swinging in the balance between the exploded pillar of absolute immunity and the not-yet-certain post of absolute liability for all acts done under colour of the municipal law."

So from these two cases and similar other cases, we find that the principle as laid down in Kasturilal's case derived from the second type (sovereign function) of act enumerated in P & O case, has not been uniformly followed in India. The decision in Kasturilal's case is not sound and not good law. The Supreme Court in Kasturilal's a case proceeded on a mistaken belief that the P & O case which laid down the principle - " .... where an act is done or a contract is entered into, in the exercise of the powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie." - (at para 20 page 1046), - has been uniformly followed in India. With due respect to the judges, it may be pointed out that later cases have not uniformly followed P & case. The Supreme Court has picked up only few cases wherein that rule was followed because of the facts of those cases. This aspect has been examined by Tehmtan R Andhyarujina in 67 Bom.L.R. Journal Section page 128.

Then how to solve the problems arising under this head of law? There are two ways of meeting such problems, without referring to 'sovereign and non-sovereign functions' or 'governmental and commercial acts', First is legislation. As suggested by C.J. Gajendragadkar in Kasturilal's case, the government can regulate and control their liability. Of course, this will be full further difficulties in interpreting the statute, as the government is certain to provide for many exceptions

in its favour of the principle of liability. Immunity of the government on the vicarious liability principle would put the poor victim to hardship, as he will have to sue the financially weaker tortfeaser and that his chances of recovering the loss will be minimum. If the legislation makes the official (doer) personally liable, it will discourage bold, free and dynamic action on the part of the officials entering in government employments. That will also dissuade talented men from entering into such employments. These matters have got to come to the courts for interpretation. So it is the duty of the courts in India to keep this branch of the law abreast of social needs; it is a task which cannot be transferred to the shoulders of the legislators. So legislation on the lines of the English Act will not be of much help looking to England and America as examples.

So we come to the second solution, i.e. Socialisation of risks and spreading the loss by way of insurance etc. seems to be the correct solution. "... the balancing of public interest and private claims, has today, in all progressive countries given more and more stress to the rule of equality before the law between government as an employer and as a legal person and the private individual as a victim of injuries which are part of the operational hazards of governmental functioning." Dr. A.T. Markose at page 283 of 4 J.I.L.I.(1962). If government is considered as any other individual employer, and is held liable as any individual employer, the difficulty will be solved. The government being a fit agency by which it can absorb the loss by spreading it over the Society can neutralise it. As the government is for the benefit of the society, the society must be prepared to take benefits as well as bear the losses. Viewed from this point of view, Society will be the master (or employer) and the government its servant.