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on

The Problems of Law of Torts

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The need for Policy Oriented Judicial decisions on the Law of Torts in India

By

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Part.I. Introduction and General Survey of principles of tortious liability concerning Negligence, Vicarious Liability and Governmental Liability

The law of Torts, at least in the context of India is still in the formative stage as the variety of cases concerning wrongs committed against persons and property brought before the law courts in India are decided on the well-established principles of tortious liability evolved in the English and American courts. The lawyers and the courts in India invariably seek guidance from the English and American court's decisions to fortify their respective contentions concerning themselves very little to infuse a pragmatic approach in their out-look in the ever changing complexion of the society of which they are also part and parcel. Incredible it seems but it is, indeed, not so as the responsibility has been discharged creditably by the Supreme Court by discarding the dogmatic approach towards problems which require progmatic approach in the present set up of the society which is seen in the recent Judicial pronouncements discussed in this paper.

We are deeply indebted to West for the development of law of Tort but it had to struggle itself for nearly two centuries to evolve the principles upon which the tortious liability with regard to wrongs relating to persons and property is based. But even these principles have been applied differently in different circumstances so as to serve the purpose in the changed social order and to meet the requirements of the society and give due place to the change inhuman valvues. The reasons for this approach are, urbanisation, industrialisation and in particular since the last century the ever growing development of fast running

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traffic.[1] It is also correct to state that in the west, the law of Tort is never at rest, the answer is not far to seek as the courts in these countries keep it alive by evolving new principles out of set principles concerning tortious liability by making use of two well known agencies viz. "Legal Fiction" and "Equity" the twin agencies responsible for the development of law in the early stages of society[2] and these two agencies have been usually exploited in the technological and Atomic age for the common good. The most of the case law pertaining to 'Negligence', 'Vicarious liability' and other tortious wrongs relating to property and person have evolved new set of principles to fix tortious liability and the scope of the existing principles relating to above offences have been widened, is a clear proof that the law courts in these countries have done indirectly what could not have been done directly or had not been desirable to do directly mostly under the garb of legal fiction and Equity.[3]

In Dono Shree vs Stevenson case, the court for the first time was required to extend the scope of the concept of "Negligence" on the plea of social insurance. The decision in this case introduced the positive principle that for manufacturer's of dangerous subsrances any 'potential consumer' is a neighbour to whom a duty of care is owed by the manufacturer with corresponding liability for negligence in the manufacture of the product. The extension did not rest finally here but extended further to include the doctrine of " res-ipsa-loquitur" in Australian knitting Mills case"[4] where a buyer of woolen under wear was injured by an excess of sulphur, the manufacturer of the finished product was held liable although the plaintiff could not positively prove negligence, while the defendant could show that they have sold over four million similar garments without any complaint. The same trend is visible in America[5] where the tendency is to hold suppliers of certain commodities liable on warranty without regard to negligence. The position has been correctly summarised by Fried Mann who says, " A series of Torts led by negligence and concerned principally with the liability of manufacturers, occupiers of land and other property owners, seem gradually to converge into a general broad principle of legal responsibility towards public flowing from the control of property. The

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1. Friedmann.Law in changing society p.126.
2. Henry Mane; Ancient Law.
3. Donoglue vs. Stevenson (1932)A.C.562.
4. Grant vs Australian Knitting Wool Mills (1936) AC 85
5. Mac Pherson v Bruck Motor Co. 217 N Y - 382

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fault principle is not eliminated but the gap between strict and non-strict liability is steadily narrowing."[6]

The developments in the sphere of "Vicarious liability" is again due to concious efforts of the British Courts to deal with new situations by extending the scope of set principles governing the master servant relations. The phrase "during the course of the employment[6] and "under the direction and control of the master" have been given liberal interpretation to include such cases where the responsibility can be shifted over the master on the principle of Social insurance so that burden be imposed upon those who can well bear it. The courts have long discarded the principle of Social insurance so that burden be imposed upon those who can well bear it. The courts have long discarded the principle of 'for the benefit of the master"[7] as it did not fit in the changed circumstances. Since the decisions in cassidy's case[8] the concept of vicarious liability has undergone radial change, as now the Hospitals are responsible for the negligent acts of their servants even during the course of their professiional duties belonging to any category of professional persons viz radiographers, resident house surgeaons, physicians, anaesthetists, pharmacists and nurses and even specialists who are employed under a contract of service. The various defences available to the master to avoid responsibility had been abolished by enacting Law Reforms (Contributary Negligence) Act 1945 and Law Reforms (Personal injuries Act) 1948.

Lastly purely for historical reasons the crown was immune for incurring any liability for the wrongs committed bt its servant during the course of employment' as this immunity was based on the common law principles viz king can do no wrong. Because of public opinion the crown circumscribed it-simmunities under the provisions of Crown Proceeding Act 1947 passed by the British Parliament. Under the provisions of the above act the Crown has been equated with an ordinary citizen with regard to tortious liability with certain reservations viz prarogative and statutory powers.[9]

6. Mersey Docks and Harbour Board v Coggins & griffith 1947 AC 120.
7. Barwick Vs English Joint Stock Bank (1867) LR 2 Ex.259.
8. Cossidy Vs Minister of Health (1951) 2 R.B 343.
9. Section 2(i) provides that the crown shall be liable as if it were such a person(a) in respect of torts committed by its servants or agents(b) in respect of any breach of those duties which a person owes to its servants or agents at a common law by reason of being their employer (c) in respect of any breach of duties attaching in common law to the ownership, occupation, possession, or con t rol of property. Section 2(2) makes the crown liable for the breach of Statutory duty provided that the statute in question is one which binds other persons besides the crown and its officers.

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Under the provisions of the above act the damages can be recovered against the State for the tortious wrongs committed by its servants. A start has been made in this direction in India also which is a welcome step in the right direction.

In the light of the above discussion, it is proposed to examine critically some of the decisions of the supreme court given in the recent years on the law of Torts on the subject of (a) Negligence (b) Vicarious liability and (c) Governmental liability with a view to show that conciously as a matter of policy, there has been an earnest attempt to broaden the scope of basic concepts but the shifting stand taken in some cases is disappointing.

PART II.

(a) Negligence.

The first case of importance on this subject is that of the State of Punjab Vs Modern Cultivators.[10] The facts in this case were that a suit was brought against the State of Punjab to recover damages for the loss suffered by flooding of the lands of the plaintiff as a result of the breach in a canal belonging to the State of Punjab. Both the Courts below held in favour of the plaintiff but the High Court reduced the amount of damages. Both the parties appealed to Supreme Court. The Modern Cultivators, the plaintiff, contended that the High Court was wrong in reducing the damages. The State of Punjab contended that it had no liability for the loss caused by the flooding. It further contended that the plaintiff could not succeed as it had failed to prove that the breach had been caused by the defendant's negligent Act. Refuting this argument His Lordship said, "It seems to me that the role of res-ipsa-loquitur applies in this case. The canal was admittedly in the management of the defendant and canal banks are not breached, if those in management take proper care. In such cases the rule will apply and the breach itself would be prima facie proof of negligence." The state was held responsible under negligence. The decision made a welcome departure from the accepted concept of principles in the law of negligence. The inclusion of the doctrine of res-ipsa-locquitur has given new dimensions to the Negligence concept. But a note of caution was also sounded in this case while extending the scope of this doctrine. In the words of Mr. Justice Hidayatullah which reads, "The principle of res-ipsa-loquitur

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10. A.I.R. 1965 S.C. 17.

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had its origin in the falling of a barrel from a first floor window on a passerby but it had been extended to situations quite different. It is not very much in favoyr and if applied it must be correctly understood. It is not a principle which dispenses with proof of negligence rather it shifts onus from one party to another."

The second case on this subject decided by the Supreme court is that of Municipal Corporation vs Subhagwanti [11] In this case the damages were claimed by the heirs of three deceased persons who died as a result of the collapse of clock tower in Delhi belonging to the appellant and was under the exclusive control of the appellant corporation. Both the trial court and High Court decided in favour of the respondents. On appeal before the Supreme Court the appellant contended that the High Court was wrong in applying the doctrine of 'Res-ipsa-Locquitur' to this case as the fall of the clock Tower was due to inevitable accident which could not have been prevented by the exercise of reasonable care or control. Secondly that there was nothing in the appearance of the Clock Tower which should have put the appellant on notice with probablity of danger and lastly that the defects were latent and hence no liability under Negligence. Mr. Justice Ramaswami expressed his inability to agree with the first argument and said, "It is true that the normal rule is that it is for the plaintiff to prove negligence and not for the defendant to disprove it. But there is an exception to this rule which applies in the circumstances surrounding the thing which causes the damages are at the material time, exclusively under the control or management of the defendant occur in the ordinary course of things without negligence on the defendant's part." The decision in this case extended the scope of negligence to cover situations which otherwise fall under the general exceptions to excuse tortious liability. His Lordship quoted decisions of the British Courts to repel the last contention of the appellant and said, "The legal position is that there is a Special Obligation on the owner of adjoining premises for the safety of structures which he keeps besides the High ways. If these structures fall into dis-repair so as to be potential danger to the passers by or to be a nuisance, the owner is liable to anyone using the high way who is injured by reason of the disrepair."

The above two decisions speak for themselves, as a progmatic approach to the living problems of the Society were taken account of while giving the extended meaning to

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11. A.I.R. 1966 S.C. 1751.

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the doctrine of res-ipsa-loquitur, imposing liability for tortious wrongs. Such policy making decisions are greatly needed in India and the law should be developed further on the above trend. A recent decision of the Supreme Court [12] in Laxman vs Trimbak holding responsible a doctor for negligent act is a trend in this direction.

Vicarious Liability.

In the field of vicarious liability the noteable case is Sita Ram vs Santana Prasad.[13] The supreme court got an opportunity to examine the relation-ship of master and servant and to fix responsibility for the tortious acts of the servant in peculiar circumstances. The facts of the case were that the defendant entrusted his car in Ahmedabad to one M for plying the same as taxi. M was not merely the driver but was in entire charge of plying the Taxi. M had appointed C as cleaner for the Taxi. M trained C to drive the car and took him to R.T.A. for for obtaining a license. When R.T.A. was conducting the test of C, C without giving signal took a sudden turn and injured the plaintiff's leg. The owner of the car, the driver and cleaner were sued by the plaintiff for recovery of damages. The trial court decreed the amount against the driver and cleaner but not against the owner of the car. On appeal, the Bombay High Court held the owner also liable. The owner preferred an appeal against the Judgement of the High Court. Mr. Justice Hidayatullah held that the owner is not liable. After referring to Rickett*[14] and Engel [15]-hart cases and the views of salmond His Lordship observed " A master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at a time when the servant is engaged on his master's business. It must be committed in the course of that business, so as to form part of it, and not be merely coincident in time with it. The scope of employment of servant need not of course, be viewed narrowly but the essential element that the wrong must be committed by the servant during the course of employment". It is respectfully submitted that the S.C. took a narrow view of the well established principle of 'course of employment" to hold master responsible for the acts of his servants. The changing pattern of the society demands that the 'Social insurance' concept should be given extended interpretation so as to cover situations where the burden can be shifted upon those who are in a capacity to bear it

12. A.I.R.1968 S.C.
13. A.I.R. 1966 S.C. 1697
14. (1915) K.B.644
15. (1897) I.O.B. 240.

with little grudge. The dissenting opinion of Mr. Justice Subba Rao is more policy oriented as it brings us nearer to the object of social justice. His Lordship's observation that the doctrine of constructive liability is in process of evolution is worth pursuit. It is a principle of Social justice. The courts no longer need be guided with the old decisions on the subject given under radically different circumstances; for now the owner of a car in India is not burdened with an unpredictable liability as here is a statutory compulsion on him to Insure his car against third party liability and his burden within the frame work of the motor vehicle Act is now transferred to insurer and hence the burden should be shifted to master for the negligent acts of the servants under the provisions of this act to achieve the object of social justice by giving policy oriented decisions. Mr. Justice Subba Rao also referred to Rickett and Engelhart cases but reached somewhat different conclusions to support his main point. His Lordship conclusion "that an owner of a car would be liable in damages for an accident caused by his servant in the course of his employment and he would also be liable if the effective cause of the accident was that the driver in the course of his employment committed a breach of his duty in either not preventing another person from driving the car or neglecting to see that the said person drove it properly." is more in confirmity in meeting the ever changing needs of the society and the phrase 'course of employment' should be given extended meaning so as to cover situations which the earlier decisions on this branch of law has not touched directly, with the rapid progress of the society towards industrialisation, the master servant relation ships are likely to pose problems in the years to come. So it is, therefore, more in confirmity of the Social needs that the law should take into consideration the social exegencies. The law has developed faster in this direction in the western countries due to the reasons that the practical necessities have forced the legal system to adjust itself to the ever changing needs of the Society. Social policy is moving in the direction of searching for the best risk bear and the same pragmatic approach is required in our legal system. Let the guiding principle in these types of situation be "pass on the risk to a person who can bear it less grudgingly"

GOVERNMENTAL LIABILITY

The Supreme Court got opportunity to pass a Judicial pronouncement in the Vidyawati's [16] case on the subject of

16. A.I.R. 1962 S.C. 933.

Governmental responsibility for the tortious acts committed by the servants. The material point for determination in that case was "whether the Government is liable for the negligent Act of its employees committed during the course of employment?" It was decided that the negligent act in driving the Jeep Car from the workshop to the Collector's bungalow for the Collector's use could not be characterised as delegation of soverign or Governmental powers. But an observation made by his Lordship in this case is worth attention. His Lordship stated, "It is not difficult to realise the significance and importance of making such distinction particularly at the present time when in pursuit of their welfare idea the Government of the State as well as the Government of India naturally and legitamately enter into many commercial and other activities which have no relation with traditional concept of Governmental activities in which the soverign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of soverign power, so that if acts are committed by Government employee's in relation to other activities which may be conveniently described as non-Governmental or non soverign, citizens who have a cause of action should not be precluded from making their claim against the State. This is the basis on which the area of State immunity against such claims must be limited." This policy oriented decision was welcomed by all especially that class of people who came into contact with the State in its multifarious activities which are expanding every day as the State strives to achieve the Goal of welfare-State by engaging itself in commerce, trade, public utility and welfare projects. The cases are bound to arise where the interests of the citizens are adversely affected by the wrong actions of the servants of the State either done negligently or inadvertantly to execute the policies framed for the general welfare. The immunity claimed by the State so far on the basis of the distinction made between soverign and non-soverign functions [17] was for the time being given a grand trial, but unfortunately this state of law took a turn, much to the dis-satisfaction of all, when the Supreme Court got another opportunity to clarify its stand in the Kasturi Lal's case.[18] The material point for consideration again in this case was whether the respondent, the State of U.P is liable to compensate the appellant M/S Kasturi Lal Ralia Ram Jain for the loss caused to it by the negligence of the police officers employed by the respondent. The respondent State

17. P & O Steam Navigation Co. 5 Bom. H.C.R. App.1.

18. A.I.R.1966 S.C. 1039.

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resisted the claim on the basis of immunity available to State for its soverign functions, even though the act might have been committed negligently by the servant. On the basis of the evidence on the record, the learned court came to the conclusion "that there can be no escape from the conclusion that the police officers were negligent in dealing with the property seized from the appellant." with regard to liability of the State Mr. Justice Gajendragadkar quoted with the distinction made between the soverign and non-soverign functions of the State as enunciated in P & O Steam Navigation and stated "Thus it is clear that this case recognises a material distinction between acts committed by the servants employed by the state when such acts are referred to the exercise of soverign powers delegated to public servants which are not referable to the delegation of any soverign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages the question to ask is, was the tortious act committed by the public servant in discharge of statutory functions which are referable to and ultimately based on, the delegation of the soverign powers of the State to such public servants? If the answer is in the affirmative the action for damages for loss caused by such tortious act will not be. On the other hand, if the tortious act has been committed by the public servant in discharge of duties assigned to him not by virtue of the delegation of any soverign power, an action for damages will 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 the private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State liability arising from tortious acts committed by public servants. "His Lordship therefore, rejected the claim of the appellant in the present case.

This policy oriented decision extended immunity to that class of State's agent whose actions are subject to critism in the press as well as in the public. It is no secret, that the power to arrest a person, to search him and to seize his property are made use with little concern to the gravity of harm done to an individual. The powers available to the Police Officer exercised by them in the discharge of their duties should be strictly circumscribed as there is probability, and this probability is increasing with the increase in the State activity, that they may be mis-used by extending protection to this category of persons, a super privileged class has been created who can always plead immunity for the tortious wrongs

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committed by them towards less privileged class.

There is no doubt that the position of law laid down in the above case was not to the liking of his Lordship as the wish was expressed by his Lordship that the legislative enactment on the lines of Crown proceedings Act 1947 should be passed in India also to restrict the sphere of immunity in such cases.

Conclusion and suggestions.

The law of Tort is still in a fluid state in our country and needs development to cover those cases of liability which the changing complex of the society likely to create when rapid urbanisation and industrialisation is going on. The social engineering Science should be the guiding principle in evolving new concepts of tortious liability which so far are not covered under the accepted principles of law of Tortsdevised and applied under totally different Social and Economic conditions, what is needed the law of Torts suitable to Indian conditions and instrumental in chieving the object of social welfare State to which we are committed under the Directive principles of the Indian Constitution.[19]

The Indian Judiciary can play a dominent role in evolving new concepts of tortious responsibility by taking into consideration the needs of the society and the peculiar complexities of the social conditions so long as any initiative is not taken by the Indian Legislature to codify the law of Torts, the task is comparatively easy. With the advent of fast moving traffic, the life of an individual is constantly exposed to risks and it is upto the courts to compensate the aggrieved person because of the negligent act of the wrong doer. By exgending the scope of 'Negligence concept' to include such doctrines as res-ipsa-loquitur is certainly healthy trend seen in the recent pronouncement of the highest Judicial organ in the State but more policy oriented decisions are required in this direction. In the light of the decisions of the courts in England and America where 'fault principle' has been superseded by strict liability in the general social interest, the same trend of decisions shall be a welcome trend in India also. This trend shall serve the Social needs of the society.

In the field of 'Vicarious liability' the situations are bound to arise which badly need more policy oriented decisions. With the advent of industrialisation, the master and servant relations especially in the field of delegated power without which the progress can not continue unhampered, should be viewed by the court from a socialistic angle. For the tortious of the servant, the burden should be shifted to

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19. Constitution of India article 38.

that class of the society which has the capacity to bear it in the general social interest. The Indian Judiciary can play on important role in developing this branch of the law of torts by viewing the different situations from a realistic angle. The well established principles of law should only serve as a guide in extending the scope of these concepts to cover the situations under changed circumstances. Two agencies responsible for the development of law in the early society namely "Legal Fictions" and "Equity" can be profitably made use to cover the situation of liability in the absence of codified law on the law of Torts in India.

The immunity enjoyed so far by the servants of the State needs drastic changes in the changed Socio-economic conditions of the Indian society. The state is the largest employer in India and indulging itself in multifarious commercial activities and if the relations between the State and an individual are continued to be goverened on the basis of the law laid down in the Pand O Steam Navigation case, the interest of the individual are bound to be adversely affected. The decision in the Vidya vati's case was a welcome departure where the realistic approach was taken of the changed conditions of the Society by the Court but the subsequent division on the same point of law in Kasturi Lal's case was certainly a retrogative step when a fine distiction was drawn between the Soverign and non-sovereign powers of the state. This doctrine of immunity and distiction between Soverign and non-sovereign function of the state was based on the common law principles which prevailed in England and now substantially modified can be hardly made use of under the Indian set up. Here in India the State should be made answerable in the courts of law for the tortious acts committed by its servants in the courts of law for the tortious acts committed by its servants in the course of employment irrespective of the status of the servant with certain expections as is the law in England. The time is ripe to codify the law on the lines of crown proceedings Act 1947 especially when the desireablity for such an enactment has been expressed strongly by the highest Judicial Organ in our country in Kasturi Lal's case. Hon'ble Chief Justice Gajendragadkar said in this case "We ought to add that it is true that the Legislature in India seriously consider whether they should not pass legislative enactment to regulate and control their claim from immunity in cases like this on the same lines as has been done in England by the Crown proceedings Act 1947."