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TORT LAW

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I INTRODUCTION

TORT LAW occupies a central position in the common law as a means of compensating individuals for harm inflicted by others. Law of torts involves a search for norms of proper behaviour for evaluating the propriety or wrongfulness of human conduct. Tort law imposes on each person certain rules of conduct for avoiding improper harm to others and for determining when compensation for harm is due. Tort covers a wide field, embracing many cases of accidental injury, as well as interference with a person's liberty, reputation or dominion over his body, and with his goods, land or economic interests. It fastens legal liability on a tortfeasor. The liability in tort law is based on a tripartite responsibility scale based on the culpability of the actor. On this basis all tort actions are conventionally classified into three categories: intentionally inflicted harm, negligently caused harm and no fault or strict liability for causing harm. Or, liability in torts depends sometimes on proofs of an intention to injure, sometimes on inadvertent fault, and sometimes arises in the absence of anything that is properly called fault at all. This survey will highlight the important developments that have taken place in India in the realm of tort law during the survey year.

II CONSTITUTIONAL TORT

Lawlessness and violation of human rights on the part of the state is not to be tolerated. Therefore, the writ courts in the country are bestowed with ample power to grant compensation to citizens if their rights are violated by the state. Article 21 imposes an obligation on the state to safeguard the right to life of every person. In respect of deprivation of the constitutional rights guaranteed under part III of the Constitution the position is well settled that adequate compensation can be awarded by the court for such violation by way of redress in proceedings under articles 32 and 226 of the Constitution.¹ Any violation of constitutional right makes state liable for the constitutional tort.

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¹ *Rudul Sah v. State of Bihar*, AIR 1983 SC 1086; *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746; *Bhim Singh v. State of J&K*, AIR 1986 SC 494 and *Consumer Education and Research Centre v. Union of India*, AIR 1995 SC 922.



The award of compensation as public law remedy for violation of fundamental rights enshrined in article 21 of the Constitution in addition to the private law remedy under the law of torts was evolved by the Supreme Court in a series of decisions.²

As a rule, the compensation cannot be claimed against the state in the matter of tort committed by one private party against another which may result in criminal case. In case of damage on account of injuries or death caused by the employee of the state, compensation can be claimed by filing a civil suit. But, since 1983, in appropriate cases, the Supreme Court and the high courts have granted compensation claimed on account of violation of fundamental right, while hearing petitions under article 32, appeal under article 136 against judgments passed under article 226 and under article 226 of the Constitution of India.³

Custodial violence

There are several cases in which the courts have repeatedly held that the state shall be liable to pay compensation in case of death due to custodial violence. *The State of Tamil Nadu Rep. by its Chief Secretary v. Pulliammal*⁴ presents a manifest instance of custodial violence. It was a case wherein a widow was awarded a sum of Rs.2,00,000/- as compensation for the death of her husband while he was in custody of the jail authorities.

As per the facts of the case, one Panchuraj had been arrested by the police in connection with alleged offences punishable under the Tamil Nadu Prohibition Act, 1937. Subsequent to his arrest he was severely assaulted by the police before he was taken to the central prison, Madurai. While he was in the custody of the jail authorities his health condition deteriorated as a result of injuries caused to his internal organs due to the police assault, ultimately resulting in his death. Meanwhile, just to avoid their liability the jail authorities sent letters, purportedly written by Panchuraj, to his house stating that he was keeping good health. The revenue divisional officer who conducted an enquiry as directed by the district collector, submitted a report as if the death was due to pulmonary tuberculosis, a natural cause. However, the court after an appraisal of the evidence came to the conclusion that Panchuraju was tortured inhumanly while he was in the custody of police and the same led to his unfortunate death. The court held that the death was due to custodial violence and that concerted efforts were made by the jail authorities and police to project it as a natural death due to pulmonary tuberculosis.

It is well settled that the state is liable to pay compensation if death was the result of custodial violence. Hence in the writ as well as in the writ appeal

2 See *People's Union for Democratic Rights v. Police Commr.*, (1989) 4 SCC 730 and *State of Maharashtra v. Ravikant S. Patil*, (1991) 2 SCC 373.

3 *Ramjan and Ors. v. State of Rajasthan and Anr.*, RLW 2008 (3) Raj 2030.

4 W.A. No. 1328 of 2001.



the High Court of Madras rightly held that the state was liable to pay compensation for the death of Pancharaju due to custodial violence.

*Sunita v. State of National Capital Territory of Delhi and Anr.*⁵ is another instance of brutal custodial death. The deceased who was an employee of the Haryana State Electricity Board (HSEB) was taken into custody on 15. 8. 1999 at 5 a.m. after two policemen found him carrying Rs. 1,30,000/-. In fact, the deceased had withdrawn this money from his provident fund account to give the same to his sister since she had lost her husband due to cancer. During his interrogation by the police, he was beaten up, tortured and third degree methods were used on him as a result of which he suffered severe bodily injuries. Though the police took him to hospital on the same day, at about 8.40 p.m., he was declared brought dead. The panel of doctors set up for conducting post mortem also confirmed custodial death in their report.

In a writ petition filed by the wife of the deceased, the high court awarded compensation of Rs. 3 lakhs and it was subsequently enhanced by the apex court to Rs. 5 lakhs. While enhancing the compensation, the court observed that the sum of Rs. 3 lakhs awarded by the high court to the widow and the minor children of the deceased after a period of six years was wholly inadequate. Although the widow had the liberty to approach the civil court for regular compensation, it was barred by limitation. By awarding the enhanced compensation the court reiterated that it is an obligation of the state to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody.⁶ Preservation of human life is of paramount importance which the courts are bound to protect.

In *Naren Moran v. State of Assam and Ors.*,⁷ by holding the army personnel responsible for the disappearance of one Muleswar Moran, the High Court of Gauhati awarded a sum of Rs. 3,00,000/- as compensation to his family. As per the army version, Muleswar Moran, who was a sympathizer of the banned ULFA organization at one point of time, was an army informer for reward. He was arrested on 24.07.2003 by the army and was retained in custody for four days for further information. He went missing from 28.04.2003. The villagers also had seen him cooperating with the army in their operation either as a detained person or as a collaborator.

In dealing with a *habeas corpus* petition seeking the production of Muleswar Moran the court observed that the detenu was with the army authorities during the four days preceding his disappearance and there was nothing on the record of the police as to his release from the army custody.⁸

5 151 (2008) DLT 192.

6 See *Smt. Nilabati Behera*, *supra* note 1.

7 2008 (3) GLT 224.

8 The army authorities while exercising powers under the provisions of the Armed Forces (Special Powers) Act, 1958 are required to hand over the detained persons to the custody of police.



Also the army had failed to explain to the court under what circumstances the detenu went missing. Holding the army responsible for the detenu's disappearance and consequently their liability to compensate the family of the detenu for their failure to protect him, either as a detained person or as an informer for the army, the court said thus:⁹

Onus of his security and safety lies with the Army. The responsibility of Army did not end at the point of payment of monetary reward. If Army had used him as source and overlooked his safety and security then the Army cannot escape from being termed as slack and irresponsible.

In *Naga People's Movement of Human Rights*¹⁰ the Supreme Court has laid down some "Do's and Don'ts" for the army authorities to follow in their functioning. Through this case, it was reiterated that no violation of the said norm would be tolerated by the judiciary.

The expression 'death in police custody' was given a wider meaning in *Harendra Kumar Deka v. State of Assam and Ors.*¹¹ by the Gauhati High Court. In the instant case one Prakash Deka died on account of police firing, while he was driving a car. His vehicle was involved in a hit and run accident. The vehicle driven by the deceased had knocked down and killed a minor boy. He did not stop the vehicle when he was signaled to stop. The police were extra conscious since it was the eve of Independence Day. On that day the police had been alerted about the extremists actively working in that area. The police personnel on checking duty, thinking that the passengers travelling in the vehicle were ultras, as the vehicle did not stop despite repeated signals, resorted to firing resulting in the death of its driver. In a writ moved by the deceased's father for compensation, the main issue before the court was whether the killing of Prakash Deka by the police personnel of the State of Assam was justified in law?

After a detailed analysis of various provisions in the IPC, the Armed Forces (Special Power) Act, 1958, etc., which grant immunity to state for causing death of any human being, the court held that the personnel of the police forces of Assam, who caused the death of Prakash Deka, were not entitled to the protection of the said provisions as they were not armed forces within the meaning of the Armed Forces (Special Power) Act. The court, by avoiding technical interpretation of law, treated the death as a death occurred in police custody and held:¹²

9 *Supra* note 7 at 225-26, para 4, quoting from the magisterial enquiry report of Additional Commissioner, Tinsukia.

10 *Naga People's Movement of Human Rights v. Union of India*, AIR 1998 SC 465.

11 2008 (III) GLT 344.

12 *Id.* at 360 para 43.



The expression “amounts to death in police custody” is significant. On the facts like the one on hand the deceased may not have been technically in the custody of the police but in the circumstances the death of Prakash Deka amounts to death in police custody. Any other interpretation, in our view, would be inconsistent with the scheme of Section 78.¹³

The court directed the state to pay damages of Rs. 1,00,000/- to the petitioner. Though the amount of compensation was meager comparing to the amount of compensation which the writ courts usually award, the decision is important since it has given a wider meaning to the expression ‘death in police custody.’

Police atrocity

In *Dr. Ranjit Reang v. State of Tripura and Ors.*,¹⁴ the High Court of Gauhati (Agartala bench) awarded compensation to a medical officer who was humiliatingly assaulted by police personnel though he was not arrested against any specific case. The police personnel slapped him resulting in perforation of his left ear drum and loss of hearing. In a petition seeking appropriate action against the Tripura Government and the police authorities for the unauthorised detention and physical assault on the petitioner, the court observed thus:¹⁵

In a society, where Rule of Law is paramount and when there is no evidence to suggest that the petitioner resisted the police from arresting him, no force whatsoever could perhaps be justified...The use of force and assault on the petitioner by the police obviously transgressed the authority of the police to make an arrest even if the arrest is considered to be justified. The police must not exceed the powers, which have been entrusted to it and it must duly perform the duties which have been laid upon it. If it does not do so, they must answer for it...The State must be considered answerable and also to be vicariously liable to pay damages.

13 The reference is to s. 78 of the Assam Police Act, 2007 which authorizes the State Level Police Accountability Commission to enquire into allegations of “serious misconduct” against police personnel. As per the explanation to the said section, ‘Serious misconduct’ includes *inter alia* any act or omission of a police officer that leads to or amounts to ‘death in police custody. By holding the death as one occurred in police custody, the court also directed the state to cause an enquiry into the incident which resulted in the death of Prakash Deka by the commission and take consequential action in accordance with the report of the commission.

14 2008 Cri LJ 4607.

15 *Id.* at 4607-08 para 7.

16 R. S. A. No. 4013 of 2007 dated 27-03-2008.



In *Jarnail Singh A. S. I v. Gurbachan Kaur*,¹⁶ the of an army personnel was abducted by the police officials from her house and taken to police station wherein she was sexually assaulted. In a suit for damages, the Punjab and Haryana High Court awarded Rs. 1,10,000/- as compensation for harassment and mental torture.

Culpable inaction

In *Ramjan and Ors. v. State of Rajasthan and Anr.*,¹⁷ the petitioners were the victims of acid burn. Acid was thrown by four residents of the village while the victims were sleeping in their house. Though the culprits were convicted the victims had suffered various injury on their faces and bodies on account of the acid attack. They had incurred huge medical expenses for treatment and plastic surgery. Even after the treatment, the scars remained on their bodies. The petitioners contended that since the state failed to protect their fundamental rights guaranteed under article 21 of the Constitution, they were entitled to reimbursement of medical expenses as well as suitable compensation. The state advanced counter argument that since the dispute was between two parties, the victims were not entitled to compensation from the state, and the compensation could be sought against the private persons only by filing a civil suit.

By allowing medical allowance and compensation to the tune of Rs. 50,000/- per victim, the High Court of Rajasthan (Jaipur bench) held thus:¹⁸

Where the State has failed to protect the fundamental rights, the writ is also the proper remedy and the State cannot be allowed to take the defence of filing of civil suit for compensation against the private person who has caused the injury as the State is duty bound to protect fundamental right, maintain the law and order situation, prevent the crime; the prosecution of the accused, in case the crime is committed. If the State fails to discharge its aforesaid duties, then the fundamental right of the citizens guaranteed under Article 21 of the Constitution of India will be violated, crimes against the persons of human being more particularly against women, resulting in permanent disfiguration, continuous mental torture for whole of the remaining life or loss of status (which) are violative of fundamental right under Article 21 of the Constitution of India (will be increased). In the instant case, the right to life with dignity guaranteed under Article 21 of the Constitution of India of the four injured female victims has been violated by throwing acid, the scars of which are still existing on the face and other parts of the bodies

17 RLW 2008 (3) Raj 2030.

18 MANU/RH/0361/2008, para 13.



of the victims, therefore, the State was liable to provide free full medical aid and compensation also, as per new horizons of constitutional tort.

Through the new jurisprudence of constitutional tort, the writ courts are ensuring due compliance with the constitutional mandate enshrined under article 21 and redressing violations of constitutionally guaranteed fundamental and human rights.

III MALICIOUS PROSECUTION

Tort of malicious prosecution, in practice, is held on much tighter rein than most other torts. It is an actionable wrong to institute certain kinds of proceedings against another person maliciously and without reasonable and probable cause. In an action for damages for malicious prosecution, the plaintiff must prove that, the proceedings initiated against him were malicious without reasonable and probable cause, that they terminated in his favour and that he suffered loss. All prosecution cases which ended in acquittal cannot be treated as malicious prosecution, unless the malice is established by the plaintiff. Unless malicious prosecution is proved, the question of granting decree for damages does not arise.

In *W.E. Sathyanarayana v. W.S. Vijayakumar*,¹⁹ the issue before the High Court of Karnataka was whether closure of a criminal case in itself would confer any right to claim damages on the ground that it was a malicious prosecution. The defendant in the present case had filed a complaint against the plaintiff and at his instance the prosecution was launched. However, the criminal case got closed because of a general direction issued by the apex court. In a subsequent petition for malicious prosecution, the court opined that the closure of the criminal case cannot be held as a malicious prosecution unless it is shown that, the complaint filed by the defendant is false and the acquittal order is passed by the jurisdictional magistrate on a clear finding that, the initiation of the criminal case is based on false complaint.

In *Ram Lal v. Mahender Singh*²⁰ the plaintiff had faced criminal trial for over three years. It was initiated by the defendant against the plaintiff since he had reasons to suspect the plaintiff's involvement in the murder of his son. The criminal proceedings ended in favour of the plaintiff as the prosecution failed to establish the case. Subsequently, the suit for malicious prosecution was filed by the plaintiff. While dismissing the suit, the High Court of Rajasthan observed thus:²¹

19 2008 (3) Kar LJ 681.

20 AIR 2008 Raj 8.

21 *Id.* at 13 para 12.



It is duty of the State and the Public Prosecutor to prosecute the criminal trial and the defendant as a complainant could very well assist the prosecution as complainant through his advocate. Merely because the plaintiffs came to be acquitted or discharged by the criminal court as the prosecution failed to prove the case beyond doubt as is required in criminal law, it does not mean that such acquittal or discharge could necessarily boomerang upon the defendant as a case for malicious prosecution.

Hence, merely because the plaintiffs were acquitted or discharged in a criminal trial, it cannot be said that the prosecution was malicious.

In *Ashwani Kumar v. Satpal & Anr.*,²² the High Court of Himachal Pradesh granted damages to the plaintiff on account of malicious prosecution lodged by the defendant solely for the purpose of settling scores with the plaintiff. The evidence on the record unequivocally established that there was no reasonable and probable cause for launching a prosecution against the plaintiff and the defendant was very well aware that the plaintiff was not involved in any offence. Still the defendant acted as an eyewitness in the prosecution case against the plaintiff and had suborned other witnesses to testify against the plaintiff. As per the court, since any probable excuse for launching a prosecution was totally absent in the case, the defendant ought to compensate the plaintiff.

Tort of malicious prosecution is thus a means by which the guilty person can be punished for his behaviour and the person injured compensated.

IV NEGLIGENCE

Negligence implies absence of intention to cause the harm complained of. Negligence may mean a mental element in tortious liability or it may mean an independent tort. Persons guilty of careless conduct are liable to their victims and accordingly carelessly inflicted harm occupies a central position in law of torts.

Contributory negligence

Contributory negligence may be defined as negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so.

When is a person said to be guilty of contributory negligence? Ordinarily the question of contributory negligence is a question of fact.²³ The question of contributory negligence would arise only when both parties are found to be negligent. When two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging

22 R. F. A. No. 120 of 2000 dated 31.3. 2008.

23 *Muthuswamy and Anr. v. S.A.R. Annamalai and Ors.*, (1989) 2 MLJ 480.



negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Where the injured is himself partly liable, the principle of 'composite negligence' will not apply.²⁴ Contributory negligence would apply only if the complainant is guilty of an act or omission which materially contributed to the accident and resulted in injury and damage.²⁵

In *Sudhir Kumar Rana v. Surinder Singh and Ors.*,²⁶ the appellant did not possess licence and an accident occurred due to the rash and negligent driving of the other vehicle's driver. The court held that a person is said to be guilty of contributory negligence only when he made no efforts to avoid consequences of other person's negligence. By merely not possessing a licence, the appellant cannot be said to be negligent in driving. He is only guilty of an offence. That, by itself, may not lead to a finding of contributory negligence as regards the accident, if he was not driving rashly and negligently which contributed to the accident.

In an accident involving two or more vehicles, to determine the question as to who contributed to the occurrence of the accident, it becomes relevant to ascertain who was driving the vehicle negligently and rashly and in case both were so doing who were more responsible for the accident and who of the two had the last opportunity to avoid the accident. The issue of contributory negligence was considered by the Supreme Court in *A.P.S.R.T.C. and Anr. v. K. Hemalata and Ors.*,²⁷ and it was held that in cases where the damages are to be apportioned, it must be found that the plaintiff's fault was one of the causes of the damage and once that condition is fulfilled, the damages can be apportioned according to the apportioned share of the responsibility. If the negligence on the plaintiff's part has also contributed to damage this cannot be ignored in assessing the damages. He

24 See, *T.O. Anthony v. Kavarnan and Ors.*, (2008) 3 SCC 748 where it was held that 'composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, the person is injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In cases of composite negligence, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand, where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

25 *New India Assurance Company Ltd. v. Avinash*, 1988 ACJ 322 (Raj).

26 AIR 2008 SC 2405.

27 AIR 2008 SC 2851.



can be found guilty of contributory negligence if he ought to have foreseen that if he did not act as a reasonable, reasoned man, he might be hit and he must take into account the possibility of others being careless also.

Medical negligence

A doctor is not negligent, if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. In the realm of diagnosis and treatment there is sufficient scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men. To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established: (a) it must be proved that there is a usual and normal practice; (b) it must be proved that the defender has not adopted that practice; and (c) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.

In *Samira Kohli v. Dr. Prabha Manchanda and Anr.*,²⁸ the respondent doctor had advised the appellant for laparoscopy. When the appellant was unconscious the assistant doctor took the consent from the appellant's mother for hysterectomy on the pretext of saving the life of the appellant. The respondent performed abdominal hysterectomy and bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes) on the consent of the appellant's mother. The appellant's complaint before the National Consumer Commission seeking compensation for loss of reproductive organs was dismissed by the commission. On appeal before the apex court one of the main issues was whether the respondent was guilty of the tortious act of negligence and battery in removing uterus and ovaries? It was observed that unless the unauthorized additional or further procedure is necessary in order to save the life or preserve the health of the patient, a doctor cannot perform such procedure without the consent of the patient. When the consent form refers to diagnostic and operative laparoscopy and "laparotomy if needed", it does not amount to consent for OH-BSO surgery removing the uterus and ovaries/fallopian tubes. In medical law, where a surgeon is consulted by a patient, and consent of the patient is taken for diagnostic procedure/surgery, such consent cannot be considered as authorisation or permission to perform therapeutic surgery either conservative or radical. Similarly, where consent by the patient is for a particular operative surgery, it cannot be treated as consent for an unauthorized additional procedure involving removal of an organ, just because such removal is beneficial to the patient or is likely to prevent some danger developing in future. Further, the correctness or appropriateness of the treatment procedure does not make the treatment legal, in the absence of consent for the treatment. In the opinion of the court

28 AIR 2008 SC 1385.

performance of AH-BSO surgery was an unauthorized invasion and interference with appellant's body which amounted to a tortious act of assault and battery amounting to deficiency in service. The appellant was, consequently, liable to pay damages, the court held.

A patient who was suffering from subarachnoid hemorrhage (SAH) died on account of medical negligence as per the facts in *Dr. Narayana K. Swamy v. A. Nazir Ahamed Khan*.²⁹ No radiologist was available in the hospital to conduct angiogram test, despite doctors opinion that such a test is imperative to find out clues pertaining to presence of SAH. Instead lumbar puncture test was carried out repeatedly within short duration though the test was not required. The patient was put on paracetamol tablets nonetheless there was blood clot in her brain. The respondent hospital did not even provide a stretcher to the patient and she was literally lifted from place to place though she was 24 week pregnant with serious complications. Hence in the opinion of the High Court of Karnataka there have been several lapses on the part of the hospital authorities and fatal omission in not conducting the angiogram test which ultimately led to the death of the patient. Consequently, the court held the hospital liable for not giving required treatment and adequate care to the patient and awarded damages of Rs. 1 lakh.

The court also ordered to send a copy of the judgment to the Indian Medical Council for taking necessary steps and for giving suitable directions to all the hospitals which come under its purview to ensure that similar lapses and fatal omissions do not recur.

Following the yester years' precedents the National Consumer Dispute Redressal Commission³⁰ and various high courts³¹ held that in case of birth of child despite tubectomy operation, if there is nothing on record to prove that doctors have been negligent in carrying out the operation, the principle of *res ipsa loquitur* will not be applicable and the claimant would not be entitled for damages.

The scope of negligence in the realm of tort law continues to grow. Today the law of negligence has emerged as a dominant tort.

V VICARIOUS LIABILITY

Vicarious liability is a form of strict liability that arises under the doctrine of *respondeat superior* – the responsibility of the superior, who had the right and duty to control the acts of his subordinate. In other words, this tort doctrine imposes responsibility upon one person for the failure of another, with whom the person has a special relationship to exercise such care

29 2008 (1) Kar LJ 397.

30 *Smt. Lakshmi v. Director of Medical Services Family Planning and Welfare Dept. & Anr.*, Rev. P. N. 3990 of 2007 dated 15.1.2008.

31 See for example, *Abida Begum v. State of H. P. & Anr.*, 2007 (3) Shim LC 250; *Smt. Sita Devi v. State of H. P.*, RFA No. 75 of 2001 dated 24.12.2007.



as a reasonably prudent person would use under similar circumstances. It refers to legal responsibility for the actions of another. The legal doctrine of vicarious liability assigns liability for an injury to a person who did not cause the injury but who has a particular legal relationship to the person who acted negligently.

State's liability

In *P.N. Kanagaraj v. The Chief Secretary, State of Tamil Nadu and Ors.*,³² the High Court of Madras awarded compensation of Rs. 4.10 lakhs holding the state and government school authorities vicariously liable for the death of petitioner's son who was murdered in the class room by a classmate during the school hours. On the fatal day, due to the absence of the teacher, the students indulged in free for all activities. The deceased patted the accused on his back and this infuriated the accused. He caught hold of the shirt of the deceased and banged his head on the corner of the wall. The deceased died on the spot. As per post mortem certificate the death was caused by brain stem injury due to fracture of cervical bone. The juvenile board convicted the accused for committing murder.

As per the writ petitioner, the school authorities were responsible for the death of the petitioner's son by not sending any teacher to the class at the relevant time and hence the respondents were liable to pay compensation on the ground of vicarious liability.

After going through a number of similar cases wherein the liability of state and its agents were specified the court observed that when a teacher is absent, it is the duty of the headmaster of the school to post a substitute teacher to handle the class or the headmaster himself is bound to supervise the class. Since this was not followed by the school authorities, as per the court, death of the petitioner's son happened only due to the negligence and carelessness of the school authorities.

VI COMPENSATION

Compensation is amongst the main functions of tort law. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the state as a shield.³³ Right to compensation is an enforceable right.³⁴ Victims of harassment and torture have a legal right to claim compensation in a civil suit or under law of torts. The development of tort law has been fuelled by a perceived need to compensate the victims of certain types of accidents. Especially, in matters relating to personal liberty

³² (2008) 8 MLJ 1085.

³³ *Rudul Sah*, *supra* note 1.

³⁴ *D.K. Basu v. State of West Bengal.*, AIR 1997 SC 610 and *Vishaka and Ors. v. State of Rajasthan and Ors.*, AIR 1997 SC 3011.



and freedom of a citizen, it is not permissible to take either a liberal or a generous view of the lapses on the part of the officers.³⁵

The public law remedy for the purpose of compensation can be resorted to by the aggrieved citizen when his fundamental right under article 21 of the Constitution is violated.³⁶

In *Mohd. Riyaz Khan and Ors. v. State of Chhattisgarh and Ors.*,³⁷ the petitioners were engaged in the occupation of cattle trading to earn their livelihood. On 28.12. 2003 when they were proceeding to Surajpur weekly market to sell 255 oxen for agricultural purposes the respondents claiming to be the members of the ruling political party of the state and members of Vishwa Hindu Parishad illegally looted the cattle and distributed them amongst the villagers. The petitioners were kept in police custody and were subsequently released on 3.1. 2004 since there was no evidence against them of having committed any offence under the Prevention of Cruelty to Animals Act, 1960. Though the petitioners filed a series of complaints before various authorities and got orders in their favour, the police authorities neither restored the cattle to them nor took any action against the respondents who retained the animals. Hence the petitioners were deprived of their livelihood for more than four years and their family members reached the stage of starvation. On the other hand, the miscreants, who looted their cattle, used these animals for their own purposes. In the meantime a number of these cattle died while they were in the possession of the villagers/police authorities.

While awarding compensation to the petitioners, in a writ under article 226, the High Court of Jharkhand at Ranchi held thus:³⁸

Illegally seized cattle of the petitioners could not be restored to them even after four years because of inaction and indifference on the part of the police authorities/district administration and the State is vicariously liable for the acts of its officers....By acts of commission and omission on the part of the police authorities and group of certain miscreants allegedly the members of the ruling political party, the petitioners were deprived of their means of livelihood for a period of 4 years and thus, there is a clear violation of Article 21 of the Constitution and therefore, this Court is of the opinion that there is no impediment in awarding compensation.

No legal or political system can place the state above the law. It is unjust and unfair to illegally deprive a citizen of his property by the negligent acts of officers of the state.³⁹ The state has statutory obligation either to return

35 *Hem Lal Bhandari v. State of Sikkim*, AIR 1987 SC 762.

36 *Hindustan Paper Corpn. Ltd. v. Ananta Bhattacharjee and Ors.*, (2004) 6 SCC 213.

37 2008 Cri LJ 3453.

38 *Id.* at 3465 para 34.

39 *Nagendra Rao & Co. v. State of A.P.*, AIR 1994 SC 2663.



the illegally seized properties or to pay its value if it has disabled itself from returning it by its own act or by any act of its agents or servants.⁴⁰ If there is an obligation upon the state to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. Correspondingly, religious sentiments cannot be used as a pretext for taking the law in their hands by the miscreants and interfering with the peaceful vocation of the members of society. The state has to ensure that no citizen is deprived of his property and means of livelihood by the officers of the state, and if it happens so for whatever reason, it has to set right the wrong committed by its agents.

In cases of motor accidents, the endeavour is to put the dependents/claimants in the pre-accidental position. Compensation in cases of motor accidents, as in other matters, is paid for reparation of damage. The damages so awarded needs to be adequate enough to put the party, who suffered, in the same position as before. Compensation is, therefore, required to be paid for prospective pecuniary loss, i.e., future loss of income/dependency suffered on account of the wrongful act. The courts on several instances have been confronted with the question how does the pecuniary compensation for loss of future earnings and loss of dependency of the parents, etc., in the case of infants and non-working students be calculated?

Traditionally, courts in India have recognized that it would be impossible to determine the pecuniary loss to the parents if the child had died and the reasonable expectation of pecuniary benefit if the child had lived. Compensation of varying amounts have been awarded by the courts depending upon the facts and circumstances of each case in the event of death of young children. Therefore, none of these cases can be taken as binding precedents. Each case has to be dealt with on its own peculiar facts, depending upon the financial and social status of the family, environment in which the deceased was brought up, academic career, health and other relevant facts. In *Shri Kishore Kumar v. Naresh Kumar and the Oriental Insurance Company Ltd.*,⁴¹ the High Court of Delhi found it just, fair and equitable the amount of Rs. 2,60,000/- awarded to the parents on the death of a brilliant college student who was unemployed.

Alternative efficacious remedy

A court can grant compensation under article 226 or 32 of the Constitution of India which is a remedy available to a citizen in public law for the contravention of his fundamental rights. Nonetheless, a writ petition for compensation may be dismissed on the ground of alternative efficacious remedy available to the petitioner. The question whether compensation is payable or not, requires recording of findings of fact on the basis of oral and

40 See *State of Gujarat v. Memon Mahomed Haji Hasam*, AIR 1967 SC 1885.

41 MAC App. No. 326 of 2004, decided on 21.07. 2008 by the High Court of Delhi.



documentary evidence by a civil court. This exercise is not feasible by a court exercising writ jurisdiction. This was reiterated by the High Court of Allahabad in *Rakesh Vij s/o R.K. Vij v. The Vice Chancellor, Banaras Hindu University*.⁴² In this case, the petitioner was detained by the police in a chain snatching case and subjected to torture. Excessive custodial violence perpetrated by the police officials resulted in serious incapacitation of his physical faculties. As per the petitioner, he was falsely implicated and got arrested by the authorities of the Banaras Hindu University. As a consequence of torture inflicted on the petitioner as found by the medical board of AIIMS, the petitioner suffered from post traumatic stress affecting his overall personality. He demanded compensation from the vice-chancellor who passed a misconceived order of expulsion of the petitioner on the complaint of chain snatching lodged by one Chandana Haider, Reader in Zoology, Banaras Hindu University. The court observed that Haider had only made a complaint to the university regarding snatching of her golden chain. There was no allegation either against the university or against Haider that atrocities by the police had been committed at their instance and that they were involved in any manner in the atrocities and physical torture by the police. Therefore, atrocities were committed on the petitioner by the police personnel and not by the university or the complainant, Haider. The state CBCID recommended prosecution of the erring policemen. Hence in the opinion of the court compensation could be claimed only from the policemen in a civil suit.

When disputed questions of facts are involved, writ petition is not a proper remedy. The High Court of Punjab and Haryana restated in *Jogindro v. State of Haryana and Ors.*,⁴³ that the remedy in public law cannot be availed of if the facts regarding liability of the state or its instrumentality has been disputed. In *Jogindro*, where two victims had died because of the alleged negligence of the state electricity board, the Electricity Board of Haryana disputed its liability to pay the compensation to the heirs of victims on the ground that death did not take place due to the negligence of the electricity department. Relying on a series of judgments,⁴⁴ the court held that if the claim to compensation is factually controversial the claimants must resort to the ordinary remedy of a civil suit. Actions in torts and negligence are required to be established firstly by the claimants. The mere fact that the wire of the electric transmission line belonging to the respondent had

42 *Rakesh Vij S/o R.K. Vij v. The Vice Chancellor, Banaras Hindu University through Registrar and Dr. Chandana Halder Reader in Zoology Banaras Hindu University*. Decided On: 27.02.2008

43 (2008) 3 PLR 26.

44 *Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) v. Sukamani Das*, (1999) 7 SCC 298; *SDO, Grid Corporation of Orissa Ltd. v. Timudu Oram*, AIR 2005 SC 3971; *W.B. SEB v. Sachin Banerjee*, (1999) 9 SCC 2 etc. wherein it was laid down that when a disputed question of fact arises and there is clear denial of any tortious liability, remedy under art 226 of the Constitution is not proper.



snapped and the deceased had come in contact with it and had died was not by itself sufficient for awarding compensation. The disputed questions of facts, i.e., whether the alleged accidents in question in which the victims had died due to the electrocution, had taken place on account of the negligence of the respondent electricity board or not; and whether the said accidents had taken place due to the illegal acts of the deceased themselves, cannot be decided in the writ petition.

The Supreme Court under article 32 and the high court under article 226 can grant compensation for deprivation of a fundamental right but that remedy under the public law cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts.

However, in *Smt. S.K. Shangring Lamkang and Anr. v. State of Manipur and Ors.*,⁴⁵ the Gauhati High Court took a totally opposite stand though the question of negligence was a disputed issue. Holding the electricity board liable to pay compensation on the principle of strict liability, the Imphal bench held thus:⁴⁶

In view of the clear proposition of law laid by this Court in *Sukumani Das* case when a disputed question of fact arises and there is clear denial of any tortious liability, remedy under Article 226 of the Constitution may not be proper. However, it cannot be understood as laying a law that in every case of tortious liability recourse must be had to a suit. When there is negligence on the face of it, it cannot be said that there will be any bar to proceed under Article 226.

Assessment of damages

Assessment of damages has never been an exact science⁴⁷ which can be arrived at by precise mathematical calculation. It is essentially practical⁴⁸ and the amount recoverable depends on broad facts and circumstances of each case.

In *Sunita v. State of National Capital Territory of Delhi and Anr.*,⁴⁹ where a widow was awarded a sum of Rs. 3 lacs as *ex gratia* compensation by the high court after a period of six years of the custodial death of her husband, the Supreme Court treated the compensation unjust and unfair. The deceased was the only breadwinner of the family who was survived by his wife and two minor children. Keeping in view the fact that the widow was illiterate and the period of limitation for compensation in a civil remedy was

45 AIR 2008 Gau 46.

46 *Id.* at 47 para 5, quoting from *T. N. Electricity Board v. Sumathi*, (2000) 4 SCC 543.

47 151 (2008) DLT 192.

48 *Charter House Credit v. Tolly*, (1963) 2 QB 683.

49 *Supra* note 5.



barred by limitation, the apex court enhanced the compensation to Rs. 5 lakhs to meet the interests of justice.

Where a tort has been committed, damages are designed to place the victim as nearly as possible in the position he would have been in had the tort not occurred, but this compensatory goal is to be pursued only within the framework of corrective justice.

VII DEFAMATION

The law of defamation is concerned with the protection of reputation. Reputation is an integral and important part of the dignity of the individual. Protection of reputation is conducive to the public good. Tort law, by way of civil actions against defamation protects a person's reputation, that is, the estimation in which he is held by others. Courts are duty bound to protect the reputation of citizens and vindicate their grievance by way of damages in case of defamation, lebellious publication, etc.

*Salena Dandasi v. Gajjala Malla Reddy*⁵⁰ was a case where a practising lawyer approached the High Court of Andhra Pradesh claiming damages on the ground that without properly probing or verifying the facts, false news were published in a newspaper, by virtue of which his reputation was seriously injured. In response, the respondents argued that their action was safeguarded by the freedom of press. The trial court disposed of the matter without granting any compensation to the petitioner on the ground that he had not sustained any loss. On appeal, the high court holding that the matter was published without proper verification, without due diligence and in a reckless manner awarded Rs. 10,000/- as damages. The court further observed thus:⁵¹

The freedom of press is having its privileges and also equally the duties, the responsibilities and also the obligations... false statements and exaggerated defamatory statements made in a reckless and negligent manner without even verifying the truth or otherwise would constitute defamation and such claim cannot be totally negated on the ground of the protection to be extended to the journalists by virtue of the freedom of press.

Therefore, the media defendant is in no way different from any other defendant in respect of defense in case of defamation.

In *Ramesh Kumar Sharma v. Smt. Akash Sharma & Anr.*,⁵² the husband filed a suit against his wife claiming damages on ground of defamation. The wife in her written statement in a divorce proceeding had levelled allegations

50 *Salena Dandasi S/o. Late Kayanna v. Gajjala Malla Reddy and T. Venkataram Reddy*, Appeal Suit No. 2078 of 1992: MANU/AP/0233/2007.

51 *Id.* para 18

52 Civil Suit No. 16 of 2002, dated 1-1- 2008.



against the husband of having illicit relations with his sister-in-law and had accused him of transferring his ancestral property to his brother for sexual comfort purportedly rendered by his sister-in-law. The High Court of Himachal Pradesh awarded damages of Rs. 1,50,000/- to the husband holding these allegations defamatory.

Defamation is a tort of strict liability and it is actionable whether the defendant intended to injure the claimant or not. Human rights conventions recognize that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.

VIII RULE OF STRICT LIABILITY

Rule of strict liability operates in the domain of torts law to compensate for the injury suffered by any persons irrespective of any negligence or carelessness on the part of the persons undertaking an activity involving hazardous object. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the respondents did all that which could be done for avoiding the harm, he cannot be held liable when the action is based on any negligence attributed but such consideration is not relevant in cases of strict liability where they can be held liable irrespective of whether they could have avoided the particular harm by taking precautions.

There are certain activities in industrial society which though lawful are so fraught with possibility of harm to others that the law has to treat them as allowable only on the term of insuring the public against injury irrespective of who was at fault. The principle of strict liability or no fault liability was thus evolved, which was an exception to the general principle in the law of torts that there is no liability without fault. By virtue of the doctrine of strict liability, where an enterprise is engaged in a hazardous or inherently dangerous activity and harm is caused on any one on account of the accident in the operation of such activity, the enterprise is strictly and absolutely liable to compensate those who are affected by the accident. Such liability is not subject to any of the exceptions of the principle of strict liability.⁵³ As per the principle of strict liability undertakers of hazardous activities have to compensate for the damage caused by them irrespective of any fault on their part. Strict liability focuses on the nature of the defendants' activity rather than, as in negligence, the way in which it is carried on.

In *Union of India v. Prabhakaran Vijaya Kumar and Ors.*⁵⁴ one Smt. Abja who was a *bona fide* passenger died due to accidental falling from a train. The railway claims tribunal held that since the deceased Abja had fell

⁵³ See, *The Chairman, Railway Board v. Chandrima Das*, 2000 (1) RCJ 429.

⁵⁴ (2008) 9 SCC 527.



down from the running train when she attempted to board the train, it was not an 'untoward incident' within the meaning of the expression in section 123(c) of the Railways Act, 1989 as it was not an accidental falling of a passenger from a train carrying passengers. While setting aside this finding the Supreme Court observed that it would not legally make any difference whether the deceased was actually inside the train when she fell down or whether she was only trying to get into the train. In either case it amounts to an 'accidental falling of a passenger from a train carrying passengers'. Hence, it is an 'untoward incident' as defined in section 123(c) of the Railways Act.

It is possible that two interpretations can be given to the expression 'accidental falling of a passenger from a train carrying passengers', the first being that it only applies when a person has actually got inside the train and thereafter falls down from the train, while the second being that it includes a situation where a person is trying to board the train and falls down while trying to do so. Since the Railways Act is a beneficial piece of legislation, the provision for compensation in the Act, in the opinion of the court, should receive a liberal and wider interpretation and not a narrow and technical one. As per the court, if it adopts a restrictive meaning to the expression 'accidental falling of a passenger from a train carrying passengers' in section 123(c) of the Railways Act, it will be depriving a large number of railway passengers from getting compensation in railway accidents. Hence, the expression includes accidents when a *bona fide* passenger is trying to enter into a railway train and falls down during the process.

In order to meet to some extent the responsibility of the society to the deaths and injuries caused in road accidents there has been a continuous agitation throughout the world to make the liability for damages arising out of motor vehicle accidents as a liability without fault. Compensation in motor accidents can be awarded on many grounds. Negligence is only one of the species of the causes of action for making a claim for compensation in respect of accidents arising out of the use of motor vehicles. There are other premises for such cause of action. Even when there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, the owner can be made liable for damages to the person who suffered on account of such accident.⁵⁵ However, 'no fault liability envisaged in section 140 of the Motor Vehicles Act is distinguishable from the rule of strict liability. In the former the compensation amount is fixed and is payable even if any one of the exceptions to the rule can be applied. It is a statutory liability whereas compensation on account of accident arising from the use of motor vehicles can be claimed under the common law even without the aid of a statute. The provisions of the Act permit that compensation paid under 'no fault liability'

55 See *Smt. Kaushnama Begum and Ors. v. The New India Assurance Co. Ltd.*, (2001) ACJ 421.



can be deducted from the final amount awarded by the tribunal. Therefore, these two are resting on two different premises.

Even apart from section 140 of the Act, a victim in an accident which occurred while using a motor vehicle is entitled to get compensation from a tribunal unless any one of the exceptions would apply. In *New India Assurance Co. Ltd. v. Sh. Malkhan Singh S/o Sh. Jamadar*,⁵⁶ where a pillion rider on a scooter died the High Court of Delhi upheld the finding of the tribunal that the heirs of the deceased was entitled to compensation. The court has rightly observed that where a pedestrian without negligence on his part is injured or killed by a motorist whether negligently or not, he or his legal representatives as the case may be should be entitled to recover damages if the principle of social justice should have any meaning at all.⁵⁷

Electrocution

In *Smt. S.K. Shangring Lamkang and Anr. v. State of Manipur and Ors.*,⁵⁸ the Gauhati High Court was approached by wives of two deceased persons who died due to electrocution. As per the petitioners electrocution was caused by the falling of a high tension electric line from its pole while the deceased were riding a scooter. The electric line was broken and got detached from its pole as it was very old and it was not repaired despite repeated request. According to the respondents, the fall of the electric wire was due to the lightning stroke resulting in the breaking of a tension disc insulator and not due to negligence of any of the respondents. Negating the argument of the respondents, the court opined thus:⁵⁹

The possibility of falling of high tension electric line from its pole as a result of storm or lightning should have been reasonably anticipated by the respondents and as such appropriate steps should have been taken by them so that no harm was caused when someone touched the fallen electric line. The risk involved in the management of supply of electricity was very great and a high degree of care was expected of the respondents inasmuch as they ought to have appreciated the possibility of falling of the electric line from its pole as a result of storm or lightning. Apart from the said consideration, since the management of supply of electricity is a hazardous or inherently dangerous activity, when harm is caused to any one on account of any cause in the operation of the activity, the respondent, who are responsible in respect of the said activity, shall be strictly and absolutely liable to compensate to those who are

⁵⁶ MAC App. No. 373 of 2008, decided on 28.08.2008 by the High Court of Delhi.

⁵⁷ Also see, *Gujarat State Road Transport Corporation, Ahmedabad v. Ramanbhai Prabhatbhai and Anr.*, AIR 1987 SC 1690.

⁵⁸ AIR 2008 Gau 46.

⁵⁹ *Id.* at 48 para 9.



harmful in the course of, operation of the said activity. Such liability is not to be subject to any exception to the principle of strict liability under the rule in *Ryland v. Fletcher*. Accordingly, the respondents are liable to pay compensation in respect of the death of the said two persons resulting from electrocution.

*Smt. Merlilyn Sangriang & Anr. v. State of Meghalaya & Ors.*⁶⁰ gives another instance of electrocution. In this case, compensation of Rs. 1,50,000/- was awarded to the brother of a minor boy who died due to electrocution. By relying on a number of cases⁶¹ the court held that when the deceased himself was a dependent, the petitioner would not be entitled for enhanced compensation. In a similar incident where an electric post in a damaged condition broke and fell down on a nine year old girl causing her death, the High Court of Madras declined to interfere with the quantum of compensation (Rs. 65,000/-) awarded by the trial court.⁶²

A loosened live wire energized an iron pole and electrocuted a minor boy in yet another incident.⁶³ According to the defendant electricity board, the deceased minor boy died only because he was unable to resist the induction from the electric pole and that the board cannot be burdened with the liability of the accident. They further argued that the touching of the pole by the live wire was beyond the control of the board and it was solely due to natural calamities and causes. Negating the contentions of the board, the High Court of Madras held that the deceased died of electrocution due to the improper maintenance of the poles by the defendant board and hence the board was liable for its carelessness and negligence.

As per the facts of *Chhattisgarh State Electricity Board v. Smt. Teras Bia & Ors.*,⁶⁴ theft of electricity was committed by one 'S'. On account of negligence of 'S' live wire of illegal connection became exposed which caused death of the respondent's husband. The High Court of Chhattisgarh held the electricity board wholly negligent in regularly making inspection of the supply lines. According to the court, the board and its employees were in complete slumber regarding the illegal connections. For its failure in supervising the safety of and pilferage from the supply lines the court fastened liability on the board to pay damages.

Applying the principle of strict liability, the High Court of Gauhati held Assam State Electricity Board liable when a person suffered injuries and died as a result of being electrocuted.⁶⁵ The court also reiterated that for

60 W. P. 250 (SH) of 2003.

61 AIR 2002 SC 551.

62 *Tamil Nadu Electricity Board, Chennai & Ors. v. Thangaraju & Anr.*, A. S. No. 267 of 1996.

63 *The Superintending Engineer, Coimbatore Electricity Distribution v. Ramaswamy*, A.S. No. 746 of 1992.

64 2008 (4) MPHT 15 (CG).



compensation arising out of tortious acts of employees of state a writ petition is always maintainable, provided there is no disputed question of fact.

IX CONCLUSION

The core of tort law embodies the doctrine of corrective justice that those who are responsible for the wrongful losses of others have a duty to compensate them. The review of the decisions surveyed reveals that the courts seek to reduce undesirable conduct by protecting the interests of right holders. The courts in our country are vigilant in protecting rights and remedying violations of rights by requiring the tort feasons to make good the loss. Today the courts are assuming the role of social institutions performing social function by compensating the injured rather than resorting to any punitive role in tort actions. By making the defendants liable in damages in almost all cases surveyed, the courts seek to reverse a disturbance of the pre-existing state of affairs insofar as it can be achieved by the award of pecuniary compensation. Though in the survey year there has not been much judicial discourse on the core issues of the tort law, the decisions like *Harendra Kumar Deka* underlines that the Indian judiciary is deeply conscious in addressing the question of constitutional tort.

65 *Smt. Khiradabala Nath v. Assam State Electricity Board, Guwahati & Ors.*, W. P. (C) Nos. 5772 of 2001 with 3418 of 2003, dated 4. 6.2008.