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TORT LAW

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I INTRODUCTION

THE ROLE of law of tort in the protection of rights of the individual in a society is well recognized. As this branch of law is mainly uncodified, the courts have played a very important role in the development of the law of tort in the recent past. In the year under survey, a number of decisions in different areas of tort law have been handed down by the Supreme Court and various High Courts, more important of which are analysed here. The year witnessed several significant judgments, giving rise to liability to compensate in cases of defamation, nuisance, trespass, negligence, medical negligence, state liability for the acts of its employees, and also under various statutes like Motor Vehicle Act, Workmen Compensation Act and Carriers Act.

In the following pages, an attempt has been made to cover various issues which have been tackled by the High Courts and Supreme Court relating to law of tort.

II DEFAMATION

Defamation is a wrong which cause injury to the reputation of a person. It is a civil wrong under the law of torts for which compensation can be claimed. It is also an offence as defined under section 499 of the Indian Penal Code 1860 for which the offender can be punished under section 500. In tort certain justifications are available to the wrongdoer proof of which will absolve him from civil liability. These are truth, fair comment and privileges.

In *Shybimon* v. *Haridar*,[1] the accused filed an affidavit before the civil court containing defamatory allegations against the complainant. A private complaint filed by the complainant before the magistrate alleging that the accused has committed the offence of defamation punishable under section 500 and 501 of the Indian Penal Code (IPC) was dismissed. The complainant made a revision petition to the High Court of Kerala. In defence the accused, *inter alia*, pleaded that (i) mere filing of an affidavit before the civil court after giving a copy of the same to the complainant's counsel will not amount to

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1 2010 (2) KLT 158.

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publication, and (ii) those statements enjoy absolute privilege since they were made in the course of judicial proceedings.

As to the first plea, the court opined that the filing of an affidavit is publication as it forms part of the court records and is available to and accessible by the public. The plea of defence of absolute privilege was rejected by the court. The court made a difference between defamation as a tort and defamation as a crime. Setting aside the order of the magistrate dismissing the complaint, the court rightly held that: [2]

> If a party to a judicial proceeding is prosecuted for the criminal offence of defamation in respect of a Statement made in such judicial proceeding either on oath or otherwise, his criminal liability must be determined by reference to the provisions of section 499, IPC alone. The English common law doctrine of absolute privilege can be set up as a defence only in a suit for damages under the law of torts. No such privilege is recognized by the Indian Penal Code beyond the limits of the Exceptions embodied in Section 499 of the Indian Penal Code. The said provision together with its Exceptions forms a complete Code in itself with regard to the criminal liability of a person accused of the offence of defamation. Every defamatory statement not coming within any of the 10 Exceptions to section, 499 I.P.C. is punishable under Section 500 I.P.C. The Court cannot engraft thereupon any further exceptions derived from the Common Law of England or based on grounds of public policy.

The court further held that the burden to bring defamatory statements under any of the exceptions is on the accused which may be discharged by him on the preponderance of probabilities. Accused is not required to prove the defence beyond reasonable doubt. The court also pointed out the difference between absolute and qualified privileges as a defence to tort of defamation.

The High Court of J & K in *Mushtaq Ahmed Mir* v. *Akash Amin Bhat*[3] was required to decide whether a poor person who has not accumulated wealth has any respect and reputation in the society and consequently the right to protect it. Plaintiff instituted a suit in *forma pauperis* against respondent seeking decree to the tune of Rs. Two Lakhs as compensation/damages. He alleged that statements published in respondent's newspaper stating that plaintiff was involved in commission of murder and is liable to be lodged in jail are libelous and false. This suit was dismissed by the court on assumptions that plaintiff's relatives were involved in criminal case as such he cannot have any status or reputation in the society. It has also been assumed that as suit was instituted in *forma pauperis*, plaintiff having not been possessed of

2 *Id.* at 161, para 7.
3 AIR 2010 J & K 11.

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sufficiently wordly possession cannot have respect in society and cannot seek damages for defamatory statement. Setting aside the order of the court dismissing suit on said grounds, the High Court observed:[4]

> The respect and reputation of a person is not dependent upon how much wealth he has accumulated. A human being is entitled to lead respectful life in the civilized society. The human rights of an individual do pronounce that every individual shall be entitled to have respect in the society. Pronounced and professed values of the society do not state that only that person who has amassed wordly possession is entitled to respect and a poor man has no respect. If this assumption is followed and accumulation of wealth is made the touch stone for determining the reputation and respect one can have in the society, then a great disservice will be done to the entire society.

III NUISANCE

The law relating to tort of nuisance has a valuable role to play in deciding the rights of neighbours. The essence of this tort is undue interference with the use or enjoyment of land. The court must maintain a balance between the right of the defendant to do what he likes with his own land and the right of the plaintiff not to be interfered with the peaceful enjoyment of his property. In striking this balance in the case of noise, vibration, smell *etc*. the court will obviously have to consider the locality, age and physical characteristics of the premises in question. Generally, ordinary use of premises does not amount to nuisance unless it is unusual or unreasonable having regard to the purpose for which the premises were constructed. Reasonableness of defendant's conduct is relevant in determining whether he has created nuisance.

The High Court of Bombay was required to dwelve upon these aspects of tort of nuisance in *GMM Pfaudler Limited* v. *TATA Life Insurance Company Limited*.[5] The plaintiff occupied and owned the top floor of a multistory building. The terrace of the building was just above the plaintiff's premises. Defendant occupied the 6th floor of the said building. It was the case of the plaintiff that defendant had put up air conditioning chiller plant consisting of 3 chillers on the terrace of the said building which caused vibration and noise in the office premises of the plaintiff. It had also been the plaintiff's case that the vibration of the chillers caused cracks in the walls and the ceiling of the plaintiff's premises. The plaintiff, contended that it was a threat to the safety and stability of the building and constitutes a nuisance to him.

4 *Id*. at 12.
5 2010 (6) All MR 562.

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The Court was to adjudge the plaintiff's actionable claim in tort for nuisance. The Court took inspection of the plaintiff's premises as well as the terrace where the chillers were installed to find out extent of noise and vibration caused by the chillers.

It was found that noise was indiscernible when only one chiller was in use. It increased slightly when the second chiller was put on. This was not put on at all times. There was some discernible noise when all the three chillers were switched on. The plaintiff itself had a sophisticated noise proof air-conditioned office having noise making or humming projector.

The court sympathed with the plaintiff who at times may not enjoy the quite of a town in the placid atmosphere of the conference room of the office. However, it was held that the reasonable noise of vibration emanating from the chiller/chillers of defendant was not such as would cause such undue annoyance and disturbance to the plaintiff as would constitute an actionable tort of nuisance.

IV STATE LIABILITY TO PAY COMPENSATION

It is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes the only suitable remedy for redressal of the established infringement of fundamental right to life and liberty of a citizen by the public servant and state is vicariously liable for their acts. *Sebastian M. Hongray*,[6] *Nilabati Behera*,[7] *Bhim Singh*,[8] and *Rudul Shah*[9] have established the norm of compensation for the violation of fundamental rights. While judicial discretion has been exercised to award compensation, the basis of compensation is often not explained; occasionally criteria that are considered relevant in other jurisdictions, including motor vehicle accident cases, have been broadly applied. Generally compensation is awarded as a lump sum payment, with liberty to move the civil courts for more particular assessment of damages.

The cases reported in 2010 include cases of death due to unjustified firing done by security personnel, undue harassment by the police, wrongful detention and abuse of power by public authority.

Death due to unjustified firing

Harimaya Dahal v. *Union of India*[10] was a case where petitioner's husband died due to firing done by security personnel. Petitioner filed the writ petition seeking compensation. From evidence as well as report of

6 AIR 1984 SC 571.
7 AIR 1993 SC 1960.
8 AIR 1986 SC 494.
9 AIR 1983 SC 1086.
10 (2010) 3 GLR 233.

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investigating official it was found that petitioner's husband died in indiscriminate and unjustified firing done by security personnel while he was employed as a chowkidar in a stone crushing firm in Manipur. It was also proved that he was neither in possession of any weapon nor trying to run away from place of occurrence at the time when bullet of security personnel hit him. The *ex gratia* compensation of rupees one lakh was paid by the government of Manipur after the finding that the firing by security personnel was unjustified. The High Court of Guwahati upheld the petitioner's claim for compensation holding that the Fundamental Right to life of the petitioner's husband guaranteed by article 21 of the Constitution was taken away not in accordance with the procedure established by law. As the age of the deceased was 26 years and he was earning Rs. 3,000 per month, the court consider it just and appropriate to award rupees four lakhs fifty thousand as compensation. It was also made clear that this amount of compensation was in addition to other civil and criminal proceedings.

Undue harassment by police

Prempal v. *Commisioner of Police*[11] was a case where the petitioner claimed compensation for the undue harassment that he and his family suffered at the hands of the Delhi Police for about 15 years in a number of false cases. He alleged that in the same police station, police had filed eighteen false cases of theft, house breaking offences under Arms Act, 1959, murder and the heinous crime of child rape against him. He was forced to remain in jail for six and a half years on various occasions and was badly beaten, tortured and harassed. He was acquitted in thirteen cases after a full-fledged trial, as compared with being convicted in five cases involving less serious offences. The most precious years of his life were spent in merely trying to defend himself against a number of false cases. Despite so many acquittals, the Delhi Police continued to dub him as a hardened criminal. The basis for the claim for compensation in the present case was a judgment passed by the Additional Session Judge, New Delhi acquitting the petitioner of the offence of child rape wherein the ASJ concluded[12]:

> I consider that this is an eye-opener case, which reveals the manner in which police lets off real culprits and falsely implicates innocent persons, who dare ask for justice or who want erring police officials to be brought to book. The police torture of Prempal has converted him into a living corpse. It is a case which shows that police force has persons of criminal character in it, who are out to damage the whole institution and needed to be weeded out. It is recommended that all police officials who were involved in framing Prempal in different

11 MANU/DE/0959/2010.
12 *Id.*, para 3.

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> cases be given exemplary punishment and Prempal be adequately compensated for loss of valuable years of life and wrongful imprisonment for several years and his harassment for 15 years and physical and mental torture. Copy of this judgment be sent to Commissioner of Police, New Delhi for necessary action.

On evidence the High Court found that after a detailed analysis of all relevant evidence the ASJ came to the conclusion that petitioner was not involved in the rape of the child; he was framed in the case and was innocent. From this finding the Court concluded that petitioner had been treated most unreasonably, unfairly by the police and his fundamental rights under Article 21 were brazenly violated. Later on the Court recapitulated the cases laying down the law of liability of the state to pay compensation to victims of police excesses and allowed the claim of the petitioner.

Abuse of power by public authority

Mirza Sanaulla v. *Davanagere Urban Development Authority*[13] raised, and answered, questions concerning the obligation of state to protect the right to shelter of an individual, power of the Courts to direct the public authorities to indemnify the citizen for the injury suffered due to abuse of power by the public authority or misfeasance in public office, and the increasingly significant issue of who pays - the official concerned, or the tax payer.

The case arose out of an act of misfeasance of the authority in allotting an unidentifiable site. The petitioner was unable to identify and locate the site allotted since the area shown at the time of issuing possession certificate was thickly covered by shrubs and small trees, bereft of clear demarcation by fixing of boundaries. Despite repeated representations and court orders, authority failed to take immediate steps to allot an alternative site. This causes harassment and agony to the petitioner for an extended period of 11 years. When execution proceeding of court's order was initiated, the authority offered to allot a site in different area on payment of current market value.

In the opinion of the court, such offer made by the authority was arbitrary, illegal, irrational, oppressive, unjustified and resulting in harassment and agony. Referring to catena of apex court judgments, the court explained that right to shelter is one of the basic human rights and is also an essential part of fundamental right to life under article 21 of the Constitution. The court decided that petitioner has suffered both mentally and physically due to malafide, oppressive capricious act of the officers of the authority and is entitled to restitution at the hands of the authority.

13 2010 (6) Kar LJ 239.

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Following the *ratio* of the Supreme Court in *Lucknow Development Authority* v. *M.K. Gupta*[14] the court directed to recover the cost of restitution from those public servants who have caused the misfeasance.

Wrongful detention

In *Indresh Kumar* v. *Ramphal*[15] appellant complainant's father and brothers were illegally detained by police. When appellant asked respondent 1-accused (Inspector of Police) about aforesaid detention, respondent 1 took appellant into custody. He was beaten up with stick not only by respondent 1 but by six other co-accused police officials also. Appellant's complaint regarding aforesaid incident, ultimately led to case being tried by trial court, which convicted only respondent 1 while acquitting the other six co-accused. respondent 1's appeal before High Court was allowed, thereby acquitting him, while appellant's revision before High Court against respondent 1's acquittal from other offences and total acquittal granted to other six co-accused was dismissed.

On appeal to the Supreme Court, it was held that as the High Court did not consider evidence which it was bound to consider, its order cannot be upheld. Therefore, matter was remanded back to High Court for consideration afresh.

Rajendran Chingaravelu v. *R.K. Mishra, Additional Commissioner of Income Tax*[16] was a case where the appellant, who wanted to buy a property at Chennai, withdrew Rs. 65 lakhs from his bank and travelled by air from Hyderabad to Chennai, carrying the said cash. At Hyderabad Airport, he disclosed to the security personnel who checked his baggage that he was carrying cash of Rs. 65 lakhs along with a bank certificate certifying the sources and withdrawals. But when the flight reached Chennai, officers of the Income Tax Investigation Wing searched him and took him to their office. Despite the appellant showing the cash and bank certificate evidencing the withdrawals and explained as to how the amounts formed part of his legitimate declared earnings which were drawn from his bank's account they seized the entire account under a mahazar, gave him a receipt and permitted him to leave. In this process, he was detained for about 15 hours. To add insult to the injury, the Income Tax Intelligence Officers prematurely and hurriedly informed the newspapers that they had made a big haul of Rs. 65 lakhs in cash, making it appear as though the appellant was illegally and clandestinely carrying the said amount, and they had successfully caught him while he was at it.

Ultimately, two month later, after completing the investigation and verification, as nothing was found to be amiss or irregular, the seized money was returned to him, but without any interest. Being aggrieved, the appellant filed a writ petition is the High Court seeking action against the income tax

14 (1994)1 SCC 243.
15 (2010) 2 SCC 241.
16 (2010) 1 SCC 457.

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officials and the newspapers, compensation for the illegal acts, and quashing of the proceedings initiated against him under the Income Tax Act and appropriate directions for reforming and streamlining the procedure relating to checking of passengers. The said writ petition was dismissed by the High Court on the ground that no part of the cause of action arose within Andhra Pradesh and the appellant was directed to approach the appropriate court at Chennai. The said order was challenged by special leave, in the Supreme Court. The main object of the petition was to ensure that at least in future, passengers like him are not put to unnecessary harassment or undue hardship at the airports. On pursuance of the matter Central Board of Direct Taxes had issued guidelines to avoid undue inconvenience to air passengers.

The court noted that nowadays transportation of large sums of money is associated with illegal activities and if investigating officers wanted to fully satisfy themselves that said funds were not intended for any illegal purpose, such action cannot be termed as high-handed or unreasonable. Bonafide actions of officers in discharge of official duties was held not to furnish cause of action for claiming compensation. The court said:[17]

> It is no doubt true that a person has the right to carry money, whether his own or under authority of the person owning it, in the absence of any prohibition. But the purpose for which the money is carried is also important from the point of view of intelligence gatherers. When the bona fides of a passenger carrying an unusually large sum, and his claims regarding the source and legitimacy, have to be verified, some delay and inconvenience is inevitable. The inspecting and investigating officers have to make sure that the money was not intended for any illegal purpose. In such a situation, the rights of the passenger will have to yield to public interest. Any bona fide measures taken in public interest, and to provide public safety or to prevent circulation of black money, cannot be objected as interference with the personal liberty or freedom of a citizen. Money drawn from a bank and legitimately belonging to the carrier, may still be used for an illegal purpose, say to pay for a crime or to fund an act of terrorism. The carrying of such a huge sum itself gives rise to a legitimate suspicion. The intelligence officers are therefore entitled to satisfy themselves, not only that the money is from a legitimate source, but also satisfy themselves that such a large amount is being carried for a legitimate purpose. That is necessary in the interest of preventing crimes and offences. Therefore, even if the carrier is not guilty of any offence in carrying the money, the verification or seizure may be warranted to ensure that the money is not intended for commission of a crime or offence. When security protocols are in

17 *Id.* at 464-465.

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place, certain hardship and inconvenience is inevitable, and should be accepted with grace, patience and discipline. Many a traveller forgets that the vigilance and checks are meant for their own interest.

Mental agony / mental distress

In *Parasnath Tiwari* v. *Central Reserve Police Force*[18] a writ petition was filed by the parents of a CRPF constable killed accidentally by a fellow constable due to mistaken identity as an intruder. Parents claimed compensation on account of mental agony suffered by them for more than 20 years as they were not intimated as to the cause of death and a photograph of wrong person was send to them. Parents also suffered financial loss as deceased's earnings were the only source of sustenance for the family. Considering these facts an amount of Rs. 2 lakhs was awarded as compensation.

V TRESPASS BY REMAINING ON LAND

In *Laxmi Ram Pawar* v. *Sitabai Balu Dhotre*[19] the court was required to decide whether for evicting a trespasser from land or building in a declared slum area, written permission of Competent Authority under section 22(1)(a) of the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act 1971 is mandatory. For that court has to decide whether a trespasser is an occupier within the meaning of section 2(e)(v) of the Act.

The appellant came in possession of the room with the permission of the owner (respondent). However, on being asked to evict, she refused and retained possession of the room. Respondent initiated eviction proceedings against her. In defence she set up a plea that room was situate in the slum area and suit filed without the permission of competent authority was not maintenable.

Court referred to the definition of the word "trespass" given in various authorities and said that even a person who has lawfully entered on land in possession of another commits a trespass if he remains there after his right of entry has ceased; to refuse or omit to leave the land is as much a trespass as to enter originally without right. It was held that a trespasser is an occupier within the meaning of section 2(e)(v) of the Act since trespasser is liable to pay to owner damages for the use and occupation of land. Hence, the suit was not found to be maintainable for want of written permission from the competent authority.

The High Court of Delhi in *Antra Rajya Bus Adda Samachar Patra Vikreta Upbhokta Co-operative Store Society Ltd.* v. *Govt. of National Capital Territory of Delhi*[20] also held that a person continuing in possession

18 (2010) 3 SCC 111.
19 2010 (12) SCALE 614.
20 2011 (121) DRJ 15.

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of the premises after termination, withdrawal or revocation of the licence continues to occupy it as a trespasser or a persons who has no semblance of any right to continue in occupation of the premises.

VI STRICT LIABILITY

In *Chellamma* v. *Kerala State Electricity Board, Trivandrum*,[21] deceased got electrocuted while rescuing stranger from electric shock who was allegedly meddling with transformer authorisedly. There was no circuit breaker installed in transformer due to which while putting on link pipe after repairs stranger sustained electric shock and deceased became victim while rescuing him. Exception of unforeseen act of stranger was held not to be applicable. Applying the rule of strict liability it was held that Board could not be exonerated on ground of unforeseen act of stranger. Claimants were held entitled to compensation for unfortunate death of deceased.

In *Chunni Lal* v. *State*,[22] the deceased got electrocuted due to snapping of transmission line laid over compound of her house. The defence of the electricity board that transmission line snapped because of fiddling with electric wires to get illegal electric supply was not accepted. It was held that state authorities are strictly liable to compensate the victim.

VII EMPLOYER'S LIABILITY FOR COMPENSATION

In *Rashida Haroon Kupurade* v. *Oriental Insurance Co. Ltd.*,[23] the Supreme Court reiterated the need for causal connection between death of workman and accident arising out of or in the course of his employment for holding the employer liable to pay compensation under section 3 of the Workmen's Compensation Act, 1923. The compensation would be payable only if the injury is caused to a workman by accident arising out of and in the course of employment. There has to be an accident in order to attract the provisions of section 3 and such accident must have occurred in the course of the workman's employment. In this case death of workman occurred due to a heart attack six months after the accident in question. The court held that the workman is not entitled to compensation as there is no nexus between death and accident.

VIII MEDICAL NEGLIGENCE

The difference between the criminal liability and civil liability of medical practitioner was considered by the apex court in the case of *Jacob Mathew* v. *State of Punjab*.[24] Simple negligence may result into civil liability and gross

21 AIR 2010 (NOC) 355 (Ker).
22 AIR 2010 (NOC) 740 (J&K).
23 AIR 2010 SC 1006.
24 (2005) 6 SCC 1.

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negligence or rashness may result in criminal liability. In civil law only damages can be awarded by the court. However, in criminal law doctor can also be sent to jail, apart from the damages imposed by the civil court or by consumer forum.

The general rule is that the burden of proving negligence as cause of the damage lies on the party who alleges it. For establishing negligence or deficiency in service there must be sufficient evidence that a doctor or hospital has not taken reasonable care while treating the patient. The complainant must allege and prove specific act of negligence.

Civil and criminal liability

In *Kusum Sharma* v. *Batra Hospital and Medical Research Centre*,[25] the apex court reiterated the legal position after taking survey of catena of case law. In the context of issue pertaining to criminal liability of a medical practitioner, Dalveer Bhandari J, speaking for the bench, laid down that the prosecution of a medical practitioner would be liable to be quashed if the evidence on record does not project substratum enough to infer gross or excessive degree of negligence on his/her part.

In this case, appellant's husband was admitted to the respondent hospital. He was diagnosed to be having tumor in the left adrenal which was suspected to be malignant. Surgery was performed by adopting anterior approach and left adrenal was removed. During the surgery, the body of the pancreas was damaged which was treated and a drain was fixed to drain out the fluids. He was discharged from the hospital with an advice to follow up and for change of the dressing. He did not visit the respondent hospital for follow up. Instead, he took treatment from other hospitals. After few months he died on account of pyogenic meningitis. After his death, appellant filed a complaint before the National Commission claiming compensation attributing medical negligence in the treatment by the doctors at respondent hospital. Her main plea was that the anterior approach adopted at the time of first surgery was not the correct approach, surgery should have been done by adopting 'posterior' approach for removal of left adrenal tumor. Respondents produced medical text and expert opinion in support of adopting anterior approach. National commission found no merit in the claim of the appellant taking into consideration the medical literature and evidence of eminent doctors of AIIMS confirming adoption of 'anterior' approach in view of inherent advantages of the approach. Against that order the appellant came in appeal to the Supreme Court.

Dismissing the appeal the court held that in the instant case, the doctors who performed the surgery had reasonable degree of skill and knowledge and they in good faith and within medical bounds adopted the procedure which in their opinion was in the best interest of patient. Doctors could not be held

25 (2010) 3 SCC 480.

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to be negligent where no cogent evidence to prove medical negligence was produced by the appellant. The medical texts speak of both the approaches for adrenalectomy as adopted in the present case. Nowhere has the appellant been able to support her contention that posterior approach was the only possible and proper approach and respondent was negligent in adopting the anterior approach. The court laid down the following guidelines[26]:

> On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerged in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:
>
> I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.
>
> II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.
>
> III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.
>
> IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.
>
> V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.
>
> VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

26 *Id.* at 506-507.

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VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be condusive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

In *Dr. Saroja Dharampal Patil* v. *State of Maharashtra*,[27] a pregnant woman was taken to the hospital of the applicant where she delivered a child by a normal delivery through vertex. The applicant noticed that patient was bleeding profusely after the placenta had come out. Since, inspite of immediate treatment, the bleeding could not be stopped, she was shifted to another hospital. There also the prognosis continued and the flow of bleeding could not be controlled inspite of medical treatment. She died ultimately due to inversion of the uterus. The father of the deceased gave statement to the police that he had no grievance against anyone about the death of his daughter. After two day, however, he lodged an FIR alleging that deceased died as a result of negligence of the applicant while treating her. The applicant sought quashing of the chargesheet filed in pursuance of the said FIR.

The investigating officer obtained the opinion of the independent medical authority which purports to show that the applicant was duly trained for conducting delivery and, therefore, was competent to undertake the work of conducting delivery of deceased, gave necessary treatment to the patient while conducting the delivery, medicines administered to the patient were proper and

27 2011 Cri LJ 1060.

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correct treatment was given and there was no undue delay committed by the applicant in referring the patient to obtain treatment at the higher centre when the hemorrhagic flow could not be stopped inspite of immediate treatment. The court after stating the general principles relating to medical negligence as laid down in *Jacob Mathew* v. *State of Punjab*,[28] and reiterated in *Kusum Sharma* v. *Batra Hospital and Medical Research Centre*[29] explained the rule for holding medical practitioner liable and held that no medical negligence was committed by the applicant. The court further added:[30]

> The recent trend appearing from the authoritative pronouncements of the Apex Court is that the criminal liability cannot be fastened on the Medical Practitioner unless the negligence is so obvious and of such high degree that it would be culpable by applying the settled norms. The Apex Court held that the Medical Practitioner would be liable only where his conduct falls below that of a reasonably competent doctor. It is further held that divergence of opinion with other doctors by itself is not sufficient to infer negligence. The Apex Court distinguished the concept of negligence as an ingredient of the offence under Section 340 of the I.P.C. and the negligence as breach of duty which may entail civil consequences. It is observed that the concept of negligence, in civil law and criminal law, are basically different. It is held that "simple lack of care" may attract civil liability, whereas "high degree of negligence" is required in criminal cases. It is further held that mere deviation from normal professional practice is not necessary evidence of negligence. The Apex Court held that protection is afforded to the Medical Practitioner by Sections 88, 92 and 370 of the I.P.C. So, if it is shown that the act of the Medical Practitioner is committed in good faith then the necessary protection is required to be given. The Apex Court noticed marked tendency on part of the complainants to look for a human factor to blame the doctor after happening of an untoward evil. The present case illustrates persecution of the applicant only on basis of surmises, guesswork of the complainant and inferences drawn by him. Needless to say, such a persecution would tantamount to the abuse of the process of law.

In *Marghesh K. Parikh* v. *Mayur H. Mehta*,[31] appellant, a one and half year old child, was admitted in hospital with complaint of loose motion. He was administered glucose saline through left foot. He complained of swelling of toe and blackening of leg but his complaint was not attended. He developed

28 *Supra* note 24.
29 *Supra* note 25.
30 *Supra* note 27.
31 2010 (11) SCALE 313.

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gangrene in his left leg and his left leg was amputated below the knee. When claim for compensation was filed in the consumer forum, the respondent produced the case papers after a gap of six years from the date of filing the complaint till the complainant's evidence was over. Respondent pleaded that the patient had been brought to his hospital in a serious condition and that there are 10-12 other causes for the gangrene to occur. He claimed to have taken patient for treatment to another doctor but failed to file affidavit of that doctor. On the finding of all these facts and emphasising on the duty of a doctor to take due care of his patient, the court remanded the case for decision afresh to the National Commission.

Failure of sterilization operations

In *Manwari Devi* v. *Union of India*[32] and *State of Kerala* v. *Illath Narayanan*[33] the sterilization operation failed and claimants get pregnant. Claimants failed to produce evidence to show negligence in matter of performing operation. The court held that in the absence of proof of negligence, claim for damages is not tenable by invoking principle of *res ipsa loquitur*.

In *Laxmi Devi* v. *State of M.P.*[34] compensation was claimed on account of alleged failure of sterilization operation. Quoting extensively from the Supreme Court judgments in *Jacob Mathew* v. *State of Punjab*[35] and *State of Punjab* v. *Shiv Ram*[36] the court held that negligence on the part of the treating doctor or operating surgeon has to be necessarily established as falling under one such category of negligence which can be classified as gross negligence because it is expected from the professional medical doctor and surgeon that they would perform their duty well and upto the best of their abilities on being professionally trained in their respective specialities. On the finding that there exist no negligence in performing the sterilization operation upon the claimant, the court refused to award any compensation.

In *Kamla Devi* v. *State of Himachal Pradesh*,[37] the plaintiff underwent the tubectomy operation which was got done in a family planning camp organized by the State. Despite that, she got impregnated and gave birth to a female child. She claimed damages pleading her operation was not performed properly. She only examined herself and no expert was examined by her to substantiate the claim that operation was performed negligently. On the other hand, the experts produced by the respondent testify that the rate of universal failure of such type of operation is 0.5 per cent to 0.7 per cent despite observing all the precautions even by an expert surgeon for no fault on his part.

32 AIR 2010 (NOC) 651 HP.
33 AIR 2010 (NOC) 652 Ker.
34 (2010) 2 MPLJ 708.
35 *Supra* note 24.
36 (2005) 7 SCC 1.
37 AIR 2010 HP 69.

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As the burden to prove negligence lies on the claimant and also that the methods of sterilization so far known to medical science which are most popular and prevalent are not 100 per cent safe and secure, the court rejected her claim. It was also observed that once the couple decided to give birth to the child, it ceases to be unwanted pregnancy and compensation for maintenance of and upbringing of the child cannot be claimed from the respondent.

In *Dr. Renu Jain* v. *Savitri Devi*,[38] the complainant became pregnant after six years of sterilization operation. She alleged that the applicant assured the complainant that latest technologies were available in her Nursing Home and she was specialist of surgery of sterilization. Taking cognizance of her complaint, the applicant was summoned under Sections 337, 420, 467, 471 of IPC. Applicant approached the court for quashing that proceeding. She pleaded that it might be a case of failure of the operation but since there was no material to show that there was any negligence on her part in conducting the surgery for which she was qualified, she cannot be blamed. Further that there was no evidence of cheating or any false assurance. The court held that the applicant is not liable for prosecution as no evidence or expert opinion by any other competent doctor was produced against her, which was made mandatory by the Supreme Court in *Jacob Mathew's case*.

Failure to treat the patient

In *Dr. Shivanand Doddamani* v. *State of Karnataka*,[39] a complaint was filed against the doctors of the District Hospital Dharwad. Complainant pleaded that his brother sustained injuries to his thigh in a road mishap and was admitted to the District Hospital. Doctors failed to provide any treatment to him which resulted in his death after four days. Magistrate issued summons and charged the doctors for the offence under section 304-A of Indian Penal Code. The impugned order was assailed by the doctors before the High Court mainly on the ground that the statement in the complaint did not make out any *prima facie* case to show that the doctors were guilty of negligence of higher degree as laid down by the apex court in the case of *Jacob Mathew* v. *State of Punjab*[40] and the guidelines laid down in that case for initiating action against the medical officer were totally flauted by the magistrate. Dismissing the claim of the doctors, the court held that guidelines of the apex court when applied to the facts in question will make out a *prima facie* case.

The allegation was that the patient died due to treatment not been provided by the doctors. The doctors had 'duty' to treat the patient who was admitted to the hospital, not treating him is 'breach of duty' and 'death' being the ultimate result due to breach of duty, negligence of higher degree is noticeable.

38 MANU/UP/1242/2010.
39 2010 (3) KCCR 1832.
40 *Supra* note 24.

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Requirement and relevance of expert opinion

An expert witness in a given case normally discharges two functions. The first duty of an expert is to explain technical issues as clearly as possible so that it can be understood by a common man. The other function is to assist the Court in deciding whether the acts of omissions of medical practitioners or the hospital constitute negligence. In doing so, the expert can throw considerable light on the current state of knowledge in medical science at the time when the patient was treated. In most of the cases, the question whether a medical practitioner or hospital is negligent or not, is a mixed question of fact and law and the courts are not bound in every case to accept the opinion of expert witness, although in many cases the opinion of the expert witness may assist the Court to decide the controversy one way or the other.

In *V. Kishan Rao* v. *Nikhil Super Speciality Hospital*,[41] the appellant got his wife admitted to respondent 1 hospital on 20-7-2002 as the wife was complaining of intermittent fever and chills. The wife did not respond to the treatment given by respondent 1 hospital for typhoid, rather her condition deteriorated. On 24-7-2002, when her condition became extremely critical (no pulse, no BP and pupils dilated), she was removed to Yashoda Hospital where certain tests were conducted and efforts were made to revive her but she expired on 24-7-2002 itself. It was alleged that when the patient was admitted in the Yashoda hospital, the copy of the hematology report dated 24-7-2002 disclosed blood smear for malaria parasite whereas Widal test showed negative. Respondent 1 hospital has not given any treatment for malaria. The appellate filed a case for medical negligence against respondent 1 hospital. The District Forum without seeking help of an expert, on the fact of the case itself, awarded compensation of Rs. 2 lakhs plus refund of Rs. 10,000. The State Commission allowed the appeal of Respondent 1 Hospital saying that in the fact and circumstances of the case, complainant failed to establish any negligence on the part of the hospital and there is also no expert opinion to state that the line of treatment adopted by the hospital is wrong or is negligent. The National Commission dismissed the appellant's appeal. The appellant then approached the Supreme Court.

Allowing the appeal, the Supreme Court held that expert evidence was not necessary to prove medical negligence in every case. Expert opinion is required only when a case is complicated enough warranting expert opinion, or facts of a case are such that forum cannot resolve an issue without expert's assistance. Each case has to be judged on it's own facts. The court held that the purpose of the Consumer Protection Act is to provide a forum for speedy and simple redressal of consumer disputes. Such legislative purpose cannot be defeated or diluted by superimposing requirement of having expert evidence in cases of civil medical negligence, regardless of factual position of a case. If that is done, efficacy of Act would be curtailed and in many cases remedy

41 (2010) 5 SCC 513.

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would become illusory for common man.

On the facts it was held that where a patient who was suffering from intermittent fever and chills, was wrongly treated for typhoid instead of malaria for four days, which resulted in her death, was an apparent case of medical negligence. It was not necessary to obtain expert opinion in the first instance before District Forum could award compensation. As investigation conducted by another hospital where the patient was removed in a critical condition showed that Widal Test for Typhoid was negative whereas test for malaria was positive, it was sufficient for District Forum to conclude that it was a case of wrong treatment.

Further, if a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence, in that event, efficacy of remedy provided under the Consumer Protection Act will be unnecessarily burdened and in many cases such remedy would be illusory. If any of the parties before the Consumer Fora wants to adduce expert evidence, members of the fora by applying their mind to the facts and circumstances of the case and materials on record can allow the parties to adduce such evidence if it is appropriate to do so in the facts of the case. The discretion in this matter is left to the members of the fora and there cannot be a mechanical or straitjacket approach that each and every case must be referred to experts for evidence.

The Court held that the present case is not a case of complicated surgery or a case of transplant of limbs and organs in human body. It is a case of wrong treatment in as much as the patient was not treated for malaria even when the complaint was of intermittent fever and chill. Instead, respondent 1 hospital treated the patient for typhoid and as a result of which the condition of the patient deteriorated and she died. There was definite indication of malaria whereas widal test conducted for typhoid was found negative. Even in such a situation the patient was treated for typhoid and not malaria. Expert evidence was not necessary to prove medical negligence in this case.

In *Jacob Mathew*[41a] case, the learned Chief Justice opined that in cases of criminal negligence where a private complaint of negligence against a doctor is filed and before the investigating officer proceeds against the doctor accused of rash and negligent act, the investigating officer must obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice. Such a doctor is expected to give an impartial and unbiased opinion applying the primary test to the facts collected in the course of investigation. The Chief Justice suggested that some statutory rules and statutory instructions incorporating certain guidelines should be issued by the Government of India or the State Government in consultation with the Medical Council of India in this regard. Till that is done, the aforesaid course should be followed. But those directions in para 52 of *Mathew* were certainly not given in respect of complaints filed

41a. *Supra* note 24, para 52.

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before the Consumer Fora under the said Act where medical negligence is treated as civil wrong for payment of damages.

This fundamental distinction pointed out by the learned Chief Justice in the unanimous three-Judge Bench decision in *Mathew* was unfortunately not followed in the subsequent two-Judge bench of the Court in *Martin F.D'Souza* v. *Mohd. Ishfaq*.[42] It is clear that in *D'Souza* complaint was filed before the National Consumer Disputes Redressal Commission and no criminal complaint was filed.

The Bench in *D'Souza* noted the previous three-Judge Bench judgment in *Mathew* but in para 106 of its judgment *D'Souza* equated a criminal complaint against a doctor or hospital with a complaint against a doctor before the Consumer Fora and gave the following directions covering cases before both:[43]

> We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/ hospital concerned. This is necessary to avoid harassment to doctor who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctor unless the facts clearly come within the parameters laid down in *Jacob Mathew* case, otherwise the policemen will themselves have to face legal action.

After refereeing to these directions the court expressed the view that the aforesaid directions in *D'Souza* are not consistent with the law laid down by the larger Bench in *Mathew*. In *Mathew* the direction for consulting the opinion of another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the Consumer Fora. The reason why the larger Bench in *Mathew* did not equate the two is obvious in view of the jurisprudential and conceptual difference between cases of negligence in civil and criminal matter.

Standard of care: Shifting From *Bolam* to *Bolitho*

In *Bolam* v. *Friern Hospital Management Committee*,[44] Hon'ble Justice McNair laid down the basic principle for deciding standard of care. According

42 AIR 2009 SC 2004.
43 *Id.* para 106.
44 (1957) 2 All ER 118.

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to this a man need not possess skills of an expert or specialist on the subject but the ordinary skill required by a competent man with regard to the task in hand is sufficient. The amount of care required is that of a prudent, careful or a diligent man. Further there may be one or more perfectly proper standard and if the doctor conforms to one of those proper standards, he is not negligent. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure, as no doctor of ordinary skill would be guilty of acting with ordinary care.

The *Bolam* case in common law jurisdiction is weakened in recent years by reason of series of decisions in Australia, Canada, United States and UK.

In *Bolitho* v. *City and Hackney Health Authority*,[45] Lord Wilkinson observed:

> The Court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice. The use of these adjectives – responsible, reasonable and respectable – all show that the Court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving the weighing of risks against benefits, the Judge before accepting a body of opinion as being responsible, reasonable and respectable, will need to be satisfied that in forming their views the experts have directed their minds to the question of comparative risks and benefits, and have reached a defensible conclusion on the matter.

Bolitho test is far more logical, but *Bolam* test is still the benchmark which is used in India to gauge the liability or culpability of a doctor in negligence cases.

However, S.B. Sinha J in *Malay Kumar Ganguly* v. *Dr.Sukumar Mukherjee*,[46] case has preferred *Bolitho* test to *Bolam* test. The Supreme Court redefined medical negligence saying that the quality of care to be expected of a medical establishment should be in tune with and directly proportional to its reputation. The Supreme Court extended the ambit of medical negligence cases to include overdose of medicines; not informing patients about the side effects of drugs, not taking extra care in case of diseases having high mortality rate and hospitals not providing fundamental amenities to the patient. The decision also says that the court should take into account patient's legitimate expectations from the hospital or the concerned

45 (1997) 4 All ER 771 [HL],
46 (2009) 9 SCC 221.

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specialist doctor.

The test is being criticized in country of its origin (England) in view of right to life available under European Convention on Human Rights (ECHR) and Human Rights Act, 1998 (England). In England, *Bolam* test is now considered merely a rule of practice or of evidence and not a rule of law. In *V. Kishan Rao* v. *Nikhil Super Specialty Hospital*[47] the Supreme Court expressed the opinion that *Bolom* test needs to be reconsidered in India also in view of article 21 which guarantees right to medical treatment and care. However, the Court expressed its inability because of binding precedent of *Jacob Mathew* which approved the said test.

IX LIABILITY OF CARRIER OF GOODS

Liability of the common/public carrier of goods are governed by the Carriers Act 1865. In any suit brought against a common carrier for loss, damage or non-delivery of goods entrusted to him for carriage, claimant is not required to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. Burden to prove damage due to fault is not on the claimant. On the contrary, common carrier of goods has no fault liability unless he succeed in proving that loss to the goods occur due to Act of God or "Act of Enemies of State".

In the year under survey, the High Court of Madras discussed the liability of carrier of goods in *Brakes India Ltd* v. *BIC Logistics Ltd.*[48] The consigner entrusted certain automobile spare parts with the defendant for being transported to Jamshedpur. The goods were insured by the owner with the insurer. Goods were not delivered to the consignee. Consigner received the amount from the insurer and executed letter of Subrogation and Special Power of Attorney in favour of the insurer. They then filed the suit against the carrier to recover amount of the goods lost with interest at the rate of 18 per cent *per annum*. The carrier established that the said goods were transported by the lorry, which they engaged from third party and in the process of transporting the same, the driver and cleaner were brutally murdered by the interstate gangsters who threw away their dead bodies in different places and decamped with the goods. They, therefore, pleaded that the protection offered under the Carrier Act was available to them to invoke the plea of act of enemies of state and court could not mulct them with liability. The plaintiffs pleaded that the term 'Acts of Enemies of the State would not include mere criminals. There was nothing to indicate that the perpetrators of the alleged crime were proclaimed offenders or terrorists, etc.

Referring to various precedents, the court said that under all circumstances, the public carrier, under Carriers Act, 1865 is liable to

47 *Supra* note 41 at 524.
48 MANU/TN/0773/2010.

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compensate the plaintiffs unless it could be shown that owing to act of God or acts of enemies of state, the goods could not be delivered at the destination and it was not the duty of the plaintiff to prove negligence on the part of the defendant and it was for the defendant to take such defensive plea and prove them to the satisfaction of the court.

The defence of act of God was not available in the case because it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be acts of God. In the present case loss occurred due to acts of human beings.

As act of enemies of State would absolve the public carrier from liability, the question arose as to whether in this case any act of enemies of State was involved in causing damage to the goods entrusted by the plaintiff with the defendant and the consequent failure on the part of the defendant to entrust the goods with the ultimate consignee. Taking into consideration the oral and documentary evidence produced before the court, the court held:[49]

> The gangsters actually indulged in braggadocion chess man type of murders and it is not an ordinary criminal act. Those gangsters indulged in brutal murder of the driver and the cleaner and also tried to secret the dead bodies. It is not an act of an ordinary criminal. The nature of the attack as found depicted would clearly display and demonstrate that the perpetrator's acts would clearly attract the definition of "Acts of Enemies of State" and it is not necessary that they should be proclaimed offenders or terrorist or some such personnel. No where, I could come across a definition as per the plea of the plaintiffs that in order to push the acts of gangsters within the ambit of the definition of "Acts of Enemies of State", those gangsters involved in the case should have been declared earlier as proclaimed offenders etc.

Distinguishing *R.R.N. Ranalinga Nadar* v. *V. Narayana Reddies*,[50] where the Kerala High Court clearly and categorically pointed out that, even in case of robbery, there should be an exclusionary clause, so as to absolve the defendant-Public Carrier from the rule of absolute liability, the Court observed:[51]

> Here, horrendous, blood curdling, hair raising, macabre and gruesome crime had been perpetrated by those inter state gangsters on hapless and helpless poor, poverty-stricken, driver and cleaner and such an act cannot be simply taken as a mere act of robbery. If their acts of

49 *Ibid.*
50 AIR 1971 Ker 197.
51 *Ibid.*

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> ghastly murders cannot be described as "Acts of Enemies of State, I am at a loss to understand as to what else could be described so. Expecting that if at all a foreign enemy indulges in such brutal acts, then only the public carrier would be absolved from liability, would amount to throwing the baby along with the bath water and consequently, rendering the defence of negligence as found embodied in Section 8 of the Carriers Act, 1865 nagatory and otiose. The defendant cannot be found fault with, as though they were negligent in not protecting the goods from such gangsters. No doubt, the common carrier is bound to provide safety for preserving the goods during carriage and till delivery even as against theft and robbery and the employees of the defendant or the employees of the contractor viz., the driver and the cleaner cannot behave in a nonchalant or cavalier fashion and simply shrug their shoulders as though they were not all responsible for the theft or robbery.

In conclusion the court decided that the theory of strict liability could not be applied in this case. Court found no negligence on the part of defendant in protecting the goods.

X MOTOR ACCIDENT CASES

Negligence

Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and duty are strictly correlative. Negligence is not an absolute term, but is a relative one; it is rather a comparative term. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence or the lack of it can be infallibly measured in a given case. What constitutes negligence varies under different conditions and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. It is absence of care according to circumstances.

Minu B. Mehta v. *Balkrishna Ramachandra Nayan*,[52] *Municipal Corporation of Greater Bombay* v. *Laxman Iyer*[53] and *State of Karnataka* v. *Muralidhar*[54] are some of the cases wherein the Supreme Court held that unless the negligence of the offending vehicle is proved, no compensation can

52 1977 ACJ 118.
53 2004 ACJ 53.
54 2009 ACJ 1526.

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be granted.

In *National Insurance Company Ltd.* v. *Kamlesh*,[55] an appeal was filed by the Insurance company challenging the award, passed by the Tribunal, on the ground that driver of the offending vehicle was not negligent. The Court on perusal of the evidence opined that the accident had occurred on account of negligence of the driver of the offending vehicle as driver of the offending vehicle had admitted that he hit the car of the deceased from behind. The Court held that minor discrepancies in the oral evidence led did not go to the extent of putting a dent in the positive evidence led by the claimants. The driver, owner and insurer of the said vehicle was held liable to compensate the victim.

In *Manam Saraswathi Sampoorna Kalavathi* v. *APSRTC*,[56] the deceased while driving a scooter was hit from behind by APSRTC bus. Tribunal accepted the testimony of the pillion rider of the vehicle involved in accident and found that the deceased died because of the rash and negligent act of the driver of APSRTC bus and awarded 4 lakhs as compensation. High Court discarded evidence of pillion rider on ground that since he was thrown into bushes it was not possible for him to see the number of speeding bus and that he had not filed any claim petition seeking compensation for injuries sustained. It was also observed that if the bus was being driven at a high speed and on dashing against scooter from behind, there should have been a dent at least, but no damage to the bus was visible. High Court held that deceased did not die because of serious injuries sustained on account of rash and negligent act of driver but due to his own rash driving and thereby reduced the amount of compensation to Rs. 75,000. On appeal the Supreme Court set aside the order of the High Court as entirely erroneous, contradictory unstainable and held that the High Court was totally unjustified in weaving out a new case not borne out from evidence on record.

When the High Court has come to the conclusion that accident did not occur due to the negligence of driver of the bus, award of compensation of Rs. 75,000 is not justified. Without proof of commission of a wrongful act, no liability at all can be imposed.

Proof of negligence

The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the

55 MANU/PH/0188/2010.
56 (2010) 5 SCC 785.

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accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence.

The Madras High Court applied this principle in *C. Kuppusamy* v. *Sri Elumalai and the Managing Director, Metro Transport Corporation*[57] and held that it was for the owner and the driver of the vehicle to prove that the accident did not take place due to the rash and negligent driving of vehicle. In this case while the plaintiff was boarding the bus at a bus stop, the driver of the bus started the bus. Plaintiff fell down and run over by the rear wheel of the bus resulting in fracture.

Composite negligence

Sometimes, accident is caused due to composite negligence of drivers of more than one vehicle. When composite negligence of both drivers were found and when the tribunal had apportioned the percentage of negligence among the two vehicles, the question is whether a third party claimant is entitled to recover the whole amount of compensation from the owner or insurer of any one of the vehicles.

In *United India Insurance Co. Ltd.* v. *Mariamma George*,[58] the High Court of Kerala analysed the difference between "joint tort feasors" and "separate tort feasors". On joint tort feasors joint liability can be fixed since their wrongful acts are not separable from each other. But in case of composite negligence of separate tort feasors, it is possible to apportion the percentage of negligence and to fix up the liability on each vehicles to the extent of negligence. Dissenting from the dictum laid down in *Sally Joseph* v. *Jose V. Jose*,[59] the court held that in case of composite negligence the driver, owner and insurance company of each vehicle could be held liable only to the extent of liability fixed on them based on the percentage of negligence and in such cases any one of the insurer could not be directed to make payment of the entire compensation to the victim.

Payment of compensation

In *Jai Prakash* v. *National Insurance Company Limited*,[60] the court noticed various problems faced by injured victims or family members of persons who died in accident in getting compensation: (1) in accidents involving hit-and-run vehicles, (2) vehicles having no insurance cover, and (3) vehicles with third-party insurance carrying persons not covered by insurance. The court observed, procedural delays in adjudication / settlement of claims by Claims Tribunals cause hardship to victims or families of deceased; and absence of in-built safeguards may cause a large chunk of compensation

57 MANU/TN/1627/2010.
58 2010 (2) KLT 44.
59 2002 (1) KLT 573.
60 (2010) 2 SCC 607.

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amount to be frittered away by relatives, agents or touts due to ignorance, illiteracy and susceptibility to exploitation of victims or their families. Having considered nature and various aspects of the problems, taking note of suggestions made by *amicus curiae* and after hearing, Supreme Court issued a set of directions to police authorities and claims tribunals, and made suggestions for implementation by insurance companies and Parliament and central government. Some of them are:[61]

Directions to the police authorities

The Director General of Police of each State is directed to instruct all police stations in his State to comply with the provisions of Section 158(6) of the Act. For this purpose, the following steps will have to be taken by the Station House Officers of the jurisdictional police stations:

(i) Accident information report ("AIR", for short) in Form No. 54 of the Central Motor Vehicles Rules, 1989 shall be submitted by the police (Station House Officer) to the jurisdictional Motor Accidents Claims Tribunal, within 30 days of the registration of the FIR. In addition to the particulars required to be furnished in Form No. 54, the police should also collect and furnish the following additional particulars in the AIR to the Tribunal:
   (i) The age of the victim at the time of accident;
   (ii) The income of the victim;
   (iii) The names and ages of the dependent family members.

(ii) The AIR shall be accompanied by the attested copies of the FIR, site sketch/mahazar/photographs of the place of occurrence, driving license of the driver, insurance policy (and if necessary, fitness certificate) of the vehicle and post-mortem report (in case of death) or the injury/wound certificate (in case of injuries). The names/addresses of injured or dependent family members of the deceased should also be furnished to the Tribunal.

(iii) Simultaneously, a copy of the AIR with annexures thereto shall be furnished to the insurance company concerned to enable the insurer to process the claim.

(iv) The police shall notify the first date of hearing fixed by the Tribunal to the victim (injured) or the family of the victim (in case of death) and the driver, owner and insurer. If so directed by the Tribunal, the police may secure their presence on the first date of hearing.

(v) Though the statute requires prosecution of the driver and owner of uninsured vehicles, this is seldom done. Thereby a valuable deterrent is ignored. We therefore direct the Directors General to issue instructions to prosecute drivers and owners of uninsured vehicles under Section 196 of the Act.

61 *Id.* at 612-617.

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(vi) The Director General shall ensure that necessary forms and infrastructural support is made available to give effort to section 158(6) of the Act.

Directions to the claims tribunals

The Registrar General of each High Court is directed to instruct all Claims Tribunals in his State to register the reports of accidents received under section 158(6) of the Act as applications for compensation under section 166(4) of the Act and deal with them without waiting for the filing of claim applications by the injured or by the family of the deceased. The Registrar General shall ensure that necessary registers, forms and other support is extended to the tribunal to give effects to section 166(4) of the Act.

Suggestions for the insurance companies

(i) In cases of death, where the liability of the insurer is not disputed, the insurance companies should, without waiting for the decision of the Motor Accidents Claims Tribunal or a settlement before the Lok Adalat, endeavour to pay to the family (legal representatives) of the decreased, compensation as per the standard formula determined by the decisions of this Court.

(ii) In cases of injuries to any accident victim, where the liability is not disputed, the insurer should offer treatment at its cost to the injured, without waiting for an award of the Tribunal.

(iii) The insurers can either by relying upon the police report (AIR) or by enquiring with the family or the employer of the deceased, ascertain the three inputs, required for calculation of the compensation, that is, age of the deceased, income of the deceased and number of dependent family members. With these particulars, the insurers can easily calculate the compensation and offer a compensation, either a lump sum or an annuity.

(iv) To protect and preserve the compensation amount awarded to the families of the deceased victim special schemes may be considered by the insurance companies in consultation with Life Insurance Corporation of India, State Bank of India or any other nationalized banks.

Suggestions were also given for legislative / executive intervention in respect of certain vital aspects viz. ensuring availability of compensation to all accident victims, rationalization of schedule II to the Act and securing compensation to victims involving uninsured vehicles.

No fault liability

Section 140 of the Motor Vehicles Act 1988 deals with liability to pay compensation on the principle of no fault. All that is required to attract the liability under section 140 is an accident arising out of the use of a motor vehicle(s) leading to the death or permanent disablement. Sub-section (3) provides that even though the death or permanent disablement resulting from

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the motor accident might not be due to any wrongful act, neglect or default of the owner of the vehicle, it would have no effect either on his liability or on the amount of compensation. Sub-section (4) conversely provides that the motor accident resulting in the death or permanent disablement might be entirely due to the wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim is made but that too would have no effect either on the right to receive the compensation or the amount of compensation. Sub-section (5) which begins with a non obstante clause makes it further clear that liability under section 140 is independent of the liability of the owner of the vehicle to pay compensation under any other law for the time being in force. The proviso to sub-section (5), of course, provides that the amount of compensation under any other law would be reduced from the amount of compensation payable under Section 140 or under Section 163-A of the Act.

In *Eshwarappa* v. *C.S. Gurushanthappa*,[62] the driver of a privately owned car, without the consent or knowledge of its owner, took out the car for a joyride along with five of his friends. The car met with an accident due to the negligent driving in which five persons died and one sustained injuries. The heirs and legal representatives of the victims filed claim petition before the MACT under section 166 of Motor Vehicles Act. The Tribunal rejected their claim holding that neither the owner of the car nor the insurance company was liable to pay anything to any of the claimants because the driver had taken out the car of his employer unauthorisedly and against his express instructions. The accident was thus completely outside the course of employment and owner or insurance company are not vicariously liable to pay compensation. The claimants prayer to grant at least no-fault compensation as provided under section 140 of the Act was also turned down as not being made at initial stage of proceedings. Accepting the appeal the apex court held that the provisions of section 140 are indeed intended to provide immediate succour to the injured or the heirs and legal representatives of the deceased. Hence, normally a claim under section 140 is made at the threshold of the proceeding and the payment of compensation under section 140 is directed to be made by an interim award of the tribunal which may be adjusted if in the final award the claimants are held entitled to any larger amounts. But that does not mean, that in case a claim under section 140 was not made at the beginning of the proceedings due to the ignorance of the claimant or no direction to make payment of the compensation under section 140 was issued due to the oversight of the Tribunal, the door would be permanently closed. Such a view would be contrary to the legal provisions and would be opposed to the public policy.

The court further said that the liability under section 140 to pay compensation to victim is of the owner of the vehicle but it can almost

62 (2010) 8 SCC 620.

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invariably be passed on to insurer unless owner of vehicle causing accident is guilty of some flagrant violation of law.

In *New India Insurance Co. Ltd.* v. *Lalawmpui*,[63] insurance company challenged the award passed by tribunal granting compensation to the minor sons of the victim of the road accident. Deceased was travelling in a tata sumo vehicle when she sustained injures resulting in her death. Her minor sons, through their next friend, filed a case against the appellant, who was the insurer of the said vehicle claiming payment of compensation on structured formula basis under section 163 A of the Motor Vehicle Act 1988. The Tribunal awarded damages which was challenged by the appellant.

The plea of the appellant was that the case was not maintainable due to non-implesdment of necessary parties. It was pleaded that the victim sustained injuries while travelling in the tata sumo because an army truck dashed it and, therefore, driver and owner of army truck due to whose fault accident occurred were necessary parties to the case.

The court emphasising on the object of inserting section 163 A to the Motor Vehicle Act 1988 by the 1994 amendment, held that it contained the concept of social justice and whose negligence was the cause of injury was not relevant for granting relief under this section. The award of the tribunal was upheld by the court.

The relevance of insertion of section 163 A to the Act was also emphasised and explained by the Allahabad High Court. *Harisaran* v. *New India Assurance Company Ltd.*[64] was a case where the claimant approached the tribunal under section 166 of the Motor Vehicles Act for compensation for the death of his son, aged about six years, which occurred on being met with an accident with an ambassador car driven rashly and negligently by its driver. Tribunal awarded compensation to the tune of Rs. 60,000 holding the owner of the vehicle to bear the liability. Insurer of the car was not held liable on the finding that driver was not having valid driving license. Claimant and the owner both filed appeal against this order of the tribunal.

The court found that driver was having a valid driving license at the time of accident and the vehicle was insured with the New India Assurance Company Ltd. Accordingly, liability of owner to pay compensation was shifted on the insurance company.

The quantum of compensation awarded by tribunal was challenged by the claimant. To decide that, the court took into account various provisions of the Act like section 140 which provides for liability upon the owner of the vehicle to pay interim compensation on the principle of no-fault; liability under sections 163-A & 163-B which deal with payment of compensation on structured-formula basis again on no-fault principle; second schedule which provides for a structured formula for the purpose of grant of compensation to

63 2010 (2) GLD 676.
64 2010 (5) AWC 4955.

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a third party involved in accident and introduced the multiplier system; section 166 which deals with award of compensation on the basis of loss suffered, and section 168 which contemplates payment of just and fair compensation on consideration of relevant factors. The court summarized these provisions as under:[65]

> Section 163-A of the Act has been introduced by way of amendment in the year 1994 to provide payment of compensation in motor accident cases in accordance with the Second Schedule by providing Structured formula which may be amended by the Central Government from time to time. Section 140 of the Act deals with interim compensation but by inserting Section 163-A. the Parliament intended to provided payment of compensation on the basis of pre-determined sum without insisting on a long-drawn trial or without proof of negligence in causing the accident. The power conferred by Section 163-A through amendment of the Act is a deviation from the common law liability under the Law of Torts and is also in derogation of the provisions of the Fatal Accidents Act. Thus, the heirs of the deceased or the victim in terms of the said provisions have been assured by the legislature of speedy and effective remedy which may not be available to the claimants under Section 166 of the Act. Thus, Section 163-A has got overriding effect with regard to payment of compensation on structured formula basis. Sub-section (1) of Section 163-A contains non-obstante clause in terms whereof, the owner of the motor vehicle of the insurer is liable to pay compensation in the event of death or permanent disablement because of accident on the basis of structured formula. Sub-section (2) of Section 163-A is in pari material with sub-section (3) of section 140 of the Act.
>
> On the other hand, section 166 is a broader remedy for a victim of an accident to claim compensation keeping in view the injuries caused. While awarding compensation under Section 166 of the Act, the tribunal may award compensation keeping in view the provision contained under Section 168 of the Act. While rendering the award of compensation under Section 168 of the Act in pursuance of the proceedings under section 166 of the Act, the Tribunal has to see justness of the compensation for which the claimant is entitled on specified ground. It is not necessary for the tribunal to rely upon the structured formula provided in Second Schedule of the Act for payment of higher compensation.

65 *Id.,* paras 22-23.

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The court enhanced the amount of compensation from Rs. 66,000 to Rs. 1,54,500 along with interest at the rate of 9 per cent from the date of filing of application before the tribunal.

Quantum of compensation

The insurance company challenged the amount of compensation granted by the tribunal in a car accident case in *National Insurance Company Ltd.* v. *Kamlesh*.[66] Argument of the insurance company was that certain deductions which were required to be made while calculating the carry home income of the deceased, were not taken care of, such as income tax, overtime, provident fund, shift and conveyance allowance. The Tribunal had considered the carry home salary for the month preceding the month in which the accident took place. However, the salary card of the deceased for the last eight months show that there was variation in various allowances paid to the deceased during that period. The court held that considering the variation in the salary on account of different allowances, it would be safe to take an average of the salary of the deceased for the last eight months.

In *C. Kuppusamy* v. *Sri Elumalai and the Managing Director, Metro Transport Corporation*,[67] claimant sustained fracture over left femur and left fibula, and according to the doctor's certificate, 30 per cent disability was shown. The court granted Rs. 1,54,000 as compensation, Rs. 54,000 towards medical expenses and Rs. 1,00,000 for the injuries and the pain and agony suffered by the claimant.

Multiplier method

In *Manam Saraswathi Sampoorna Kalavathi* v. *APSRTC*[68] for calculating the amount of compensation the tribunal adopted the multiplier method from schedule II of the Motor Vehicle Act 1988 which was incorporated only w.e.f. 14.11.1994, while the fatal accident occurred on 11.1.1993. The Court held that the tribunal was justified in doing so following *Lata Wadhwa* v. *State of Bihar*[69] wherein it was categorically held that multiplier method was a logically sound and legally well established method of ensuring just compensation which would further ensure uniformity and certainty in awards.

66 *Supra* note 55.
67 *Supra* note 57.
68 *Supra* note 56.
69 (2001) 8 SCC 197.

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XI CONCLUSION

The year 2010 saw important deliberations in the area of tort law by the apex court and several High Courts. The courts are playing the pro-active role in furthering the growth and development of tort law in the country. Concern and the humane approach of the judiciary was evident when it refused to accept the plea that a poor person who has not accumulated wealth has no reputation in the society. The recent trend appearing from the authoritative pronouncements of the apex court was that the criminal liability cannot be fastened on the medical practitioners unless the negligence is so obvious and of such high degree that it would be culpable. Courts applied the principle of *res ipsa loquitur* in medical cases with due care. However, it has also been held that expert evidence is not required in every case for fixing civil liability on the medical practitioner. Courts applied the rule of strict liability in cases of death due to electrocution. In motor accident cases courts are finding means and ways to award just and fair compensation to the victims.

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