27
TORT LAW

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I INTRODUCTION

DURING THE survey period important judgments on different aspects of torts law have been handed out by the Supreme Court and the various high courts. Importance of these judgments can be fully appreciated only when they are situated within the overall aims and functions of the law of torts in society and the role played by judges in the evolution and development of this important branch of private law. It is said that, "many cases should be decided by the courts on notions of right and wrong, and, of course, everyone will agree that a judge is likely to share the notions of right and wrong prevalent in the community in which he lives; but suppose in a case where there is nothing to guide him but notions of right and wrong, that his notions of right & wrong differ from those of the community-which ought he to follow - his own notions, or the notions of the community?"[1] The conventional theory is that the law of torts[2] falls in the category of distributive justice as it is concerned with the allocation and prevention of losses occurring in our society, but the correct approach would be to also recognize its preventive function in our society and consider appeasement, justice, deterrence and compensation as the possible bases of action for damages in 'tort'.[3] But the compensatory regime which the law of torts establishes is neither comprehensive and perfect nor efficient because it does not automatically entitle any sufferer of loss/ injury to get redress from the author of the loss. In fact, as Rogers notes, this law 'cannot even go so far as to order every person who may be regarded as morally culpable to make redress to

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1 Gray, *Nature and Sources of the Law* in B. N. Cardozo, *The Nature of the Judicial Process* 107 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2008).

2 For definitions of tort, see Winfield, *Provinces of the Law of Tort* Ch. XII (Cambridge University Press, London, 1931) and William and Hepple, *Foundations of the Law of Tort* 22 (Butterworths, London, 1984). For a collection of discussion of English and American definitions, see Rogers, *Torts* Ch. I (4th edn.), Clerk and Lindsell, *Torts* (Sweet & Maxwell, London, 15th edn., 1982).

3 See generally, Williams and Hepple, *Foundations to the Law of Torts* 23-26 (Butterworths, London, 1984); Lindon, *Canadian Tort Law*, Ch.1 (Butterworths, London, 1984) and W. V. Rogers and Winfield *et.al*., *Tort* (Sweet and Maxwell, London, 1984).

those who suffer'.[4] As aptly observed by Lord Atkin, 'acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy'.[5] It follows from this that the law of torts is as much about non-liability as it is about liability.[6] This, however, does not mean that those who suffer but cannot get redress through an action in torts, will be without remedy; they may get compensation from other sources like the welfare state and an insurance company. As is well known, like other laws, the law of torts is not a static but a dynamic law which continuously strives to adapt itself to meet the social needs of a changing society in order to remain relevant and effective.[7] It is essentially a judge made and judge induced law. It should, therefore, not come as a surprise that many new heads of liability like invasion of privacy, abuse of statutory powers, infringement of status and intention and malice have been created by the English Courts in all these years.[8] In India too, our judges have invented the principle of absolute liability and a newly emerging tort by the name of constitutional torts in response to the changing needs of the society. This is in accord with the sentiments eloquently expressed by Bhagwati J in *Mehta* case[9] that "[L]aw has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country… We have to evolve new principles and lay down new norms which would adequately deal with the new problems, which arise in a highly industrial economy". As elsewhere, the law of torts is also slowly and steadily moving in this country from the common law of torts in response to new needs created by industrialization, modernization, advances in the fields of science and technology, requirements of a globalized economy and the human rights movement.

II NEGLIGENCE

Many cases decided during the survey period deal with the tort of negligence. Since its recognition as a separate tort in 1932 in *Donoghue* v. *Stevenson,*[10] the tort of negligence has over the years gained so much flesh, weight, fat, vigour, and vitality that it now overwhelms the other torts. A vast majority of tort actions today are for negligence. Hailed and heralded by the judges and developed in response to ever increasing changes in social and economic conditions, the development of the law of negligence is judge-led and judge-influenced, which in turn is influenced by judicial policy founded on pragmatic considerations and notions of social justice.

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4 Rogers, *supra* note 3 at 82.
5 *Donoghue* v. *Stevenson* (1932) AC 562 at 580.
6 Jolowicz, "The Law of Tort and Non-Physical Loss" 12 *JSPTL* 91 (1972) in Rogers, *supra* note 3 at 1. 2.
7 See generally, R.F.V. Heuston, *Salmond on the Law of Torts* 30-32 (Sweet and Maxwell, London, 1977).
8 *Id*. at 34.
9 *M. C. Mehta* v. *Union of India*, AIR 1987 SC 982.
10 (1932) AC 562.

Some of the judicial policy considerations that have influenced the development of the law of negligence are loss allocation, the flood gates arguments, fear of a rush of claims, moral considerations, practical considerations, public policy considerations, constitutional arguments and reluctance on the part of the judiciary to establish new restrictions on the behaviour of individuals. Policy decisions may be latent or explicit. In latent policy decisions judges do not acknowledge the true reason for the decision (e.g. *King* v. *Phillips*),[11] while in explicit policy decisions judges are prepared to discuss and analyze the reasons for deciding for or against a particular outcome. To illustrate the point, to calm the fears of the minority in the famous *Donoghue* v. *Stevenson* that a flood of actions might follow this case, Lord Atkin not only emphasized the need 'for proximity' between the parties but also went on to attempt to limit the scope of future actions by formulating his famous 'neighbour principle'.[12] Again, it was under the influence of policy considerations that Lord Wilberforce in *Anns* v. *Merton Borough Council* laid down the famous two-stage test which expanded the scope of the duty of care principle.[13] But when it appeared to many of the senior judges that the *Ann's* test had the effect of dangerous opening of the floodgates,[14] a three-stage test was laid down in *Caparo Industries Plc* v. *Dickman.*[15] The judges who led an attack on the *Anns*' approach gave the reason that it has been treated as though it were a statutory definition but the real reason was probably an apprehension that in view of its flexibility the law was in danger of expanding too rapidly.[16] The *Anns'* approach involves reasonable foresight, proximity and imposition of a duty 'fair, just and reasonable in all the circumstances'.

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11 (1953) 1 All ER 617. Compare with the approach adopted in *McLoughlin* v. *O. Brian (*1983) AC 410, wherein their Lordships relied on the *Anns'* Test and weighed the policy issues in fullest possible discussion.

12 Explicit policy decisions may also be found in *Hedley Byrne* v. *Hella Spormas Ltd.* (1964) AC 465 and *Home Office* v. *Dorset Yacht Co. Ltd.* (1970) 2 All ER 294.

13 *Anns* v. *Merton* (1978) AC 728. For the liberating influence of the *Ann's tests* on the expansion of the law of negligence, see *McLoughlin* v. *O'Brian* (1983) AC 410 and *Junior Books* v. *Veitehi Co. Ltd.* (1983) AC 52.

14 For critical statements on the Anns' two stage test, see : *Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.* [1985] AC 210*; Curran* v. *Northern Ireland Co. Ownership Housing Association* (1987) AC 718; *Leigh Sullivan* v. *Aliakman Shipping Company Ltd.* (1988) AC 785 (HL); *Yuen Kun-Yell* v. *A.G. of Hong Kong* (1986) AC 175 and *Rowling* v. *Takaro Properties* (1988) AC 473.

15 (1990) 1 All ER 568.

16 In this case Lord Roskill favoured a return to the traditional categorization of duty of care, rejecting the notion of a more general approach. *Murphy* v. *Brentwood* (1990) 2 All ER 908 marked the end of any adoption of the two stage test laid down in *Anns* for the future. In the instant case Lord Keith recommended an incremental approach by reference to decided authorities. While the *Anns*' test or the Lord Wilberforce test has two stages (i) proximity and foresight and (ii) consideration of the policy reasons which might lead to a restriction of the scope of the duty of care and thereby sanctions open consideration of policy issues, the two stage test laid down in *Caparo* appears to require less explicit discussion of the real reasons for the discussions. The new approach which is also called an 'incremental approach' involves a three stage test : Reasonable foresight proximity, and was the imposition of a duty fair, just and reasonable'. While perceiving

At this juncture, it is also necessary to mention that particular policy issues have also played a crucial role in determination of 'no-duty' situations in the following category of cases: legal proceedings, judges, witnesses etc., police cases, plaintiff caused his own misfortune, no duty to rescue, existence of an alternative compensatory system and supplanting of a cause of action by another. Judges give a variety of reasons in support of their decisions; in some cases they discuss 'principle' and 'policy' in others they sometimes put forward goal and rightness reasons. Goal reasons are forward looking and seek to achieve some social or economic aim, while 'rightness reasons' appeal to justice or fairness regardless of the consequences.

One of the prominent judgment on negligence was handed over by the Supreme Court in *Municipal Corporation of Delhi* v. *Association of Victims of Uphaar Tragedy*[17] (hereinafter *Uphaar Tragedy* case). The judgment clearly manifests that the law of negligence in the country has moved beyond *Donoghue* v. *Stevenson* and has come of age. *Uphaar Tragedy* case is a landmark judgment on negligence not only because of factual intricacies and complex questions of law it involved but also because of important principles of law laid down by Raveendran and Radhakrishnan JJ. If judicial labour and erudite reasoning of Raveendran J who has written the main judgment, makes it valuable, the concurring opinion of Radhakrishnan J makes it invaluable by offering an insightful vision for the development of the sophisticated public law jurisprudence in India. The European Court of Justice has already developed such jurisprudence with regard to liability in damages regarding liability of public bodies for the loss caused by administrative acts. Having noted that rapid changes are taking place all over the world to uphold the rights of the citizens against the wrong committed by statutory authorities and local bodies, Radhakrishnan J exhorts Parliament to enact an appropriate legislation to deal with claims to public law for violation of fundamental rights, guaranteed to the citizens at the hands of the state and its officials.[18] This is, indeed, a welcome suggestion deserving utmost attention from the government in view of uncertainty in law in respect of the liability of public bodies for negligence or violation of statutory duties.

In this backdrop, Raveendran J's analysis of the existing law on violation of statutory duties and the broad principles of law enunciated by him on this subject could be seen as an invaluable contribution to the tort jurisprudence in India. This case relates to the fire at Uphaar cinema theatre on 13.06.1997, resulting in the death of 59 patrons and injury to 103 patrons. That tragedy took place during the

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the traditional constitutional role of the judge, it obscures the real process of decision making but acknowledges the traditional constitutional role as learned interpreters of the law rather than law makers. Nevertheless, as Lord Reid has said in acknowledging that judges can and do make law : 'Those with a taste for fairy tales seem to have thought in some Aladin's care there is hidden the common law in all its splendor and that on a judge's appointment that descends on him knowledge of the magic words open sesame ..... But we do not believe in fairy tales anymore.'

17 AIR 2012 SC 100.

18 *Id*. paras 65 and 66.

matinee show of a new released film on that fateful day, shortly after the interval time. At a time when the patrons of the cinema hall which was full, were engrossed in the film; a transformer of Delhi Vidyut Board (DVB) in the ground floor parking area of Uphaar cinema, caught fire. The oil from the transformer leaked and found its way to the passage outside where many cars were parked. The cars were parked immediately adjoining the entrance of the transformer room. The burning oil spread the fire to nearby cars and from there to the other parked cars. Following the burning of the transformer oil, the diesel and petrol from the parked vehicles, the upholstery material, paint and other chemicals of the vehicles and foam and other articles stored in the said parking area, huge quantity of fumes and smoke consisting of carbon monoxide and several poisonous gases were generated. As the smoke and noxious fumes could not find its way out into open atmosphere due to all round coverage of the ground floor parking by walls, it blew towards the stair case leading to the balcony exit. Due to the chimney effect, the smoke travelled up. Smoke also travelled to the air conditioner ducts and was sucked in and released into the air conditioner. The smoke and the noxious fumes stagnated in the upper reaches of the auditorium, particularly in the balcony. By then the electricity went off and the existing signs were also not operating or visible. The patrons in the balcony, who were affected by the fumes, were groping in the dark to get out but to their misfortune found the central gangway in the balcony that led to the entrance foyer closed and bolted from outside, as that door was used only for entry into the balcony from the foyer. Faced with the precarious situation in which the patrons found themselves, they groped towards the only exit situated on the left side top corner of the balcony. The staircase outside the balcony exit was the only way out but that was full of noxious fumes and smoke. But they could not get out of the stair case into the foyer as the door was closed and locked. This resulted in a human tragedy which took toll of 59 persons who met an untimely death due to asphyxiation by inhaling the noxious fumes/smoke; 103 patrons also sustained injuries while trying to get out.

On the basis of the evidence, the Delhi High Court held that the theatre owner, DVB, MCD and licensing authority are jointly and severally liable to compensate victims of the Uphaar tragedy. On appeal, the Supreme Court, speaking through Raveendran J exonerated the licensing authority and MCD from liability to pay compensation but held licensee and DVB jointly and severally liable for negligence on the basis of its finding regarding the close and direct proximity between acts of licensee and DVB on one hand, and fire accident that resulted in deaths and injuries of victims on the other hand. As regards the causes for the calamity, Raveendran J concurred with the high court's categorical finding about the negligence and the liability on the part of the licensee and the DVB and reiterated the same saying that the accident would not have occurred had the parapet wall not been raised to the roof level, had one of the exits in the balcony not been blocked by construction of an owner's box and further had the right side gangway not been closed by fixing seats. The parking of the cars in the immediate vicinity of the transformer room and the absence of an appropriate arrangement for draining of transformer oil was also responsible for the calamity, the apex court added.

The court rejected the licensee's argument that the entire liability should be placed upon the DVB and instead held both the licensee and the DVB liable and

apportioned the liability as per the formula of 85% (licensee) and 15% (DVB). While holding the licensee primarily responsible for the tragedy, the court said, "the deaths were on account of the negligence and greed on the part of the licensee in regard to installation of additional seats, in regard to closing of an exit door, parking of cars in front of transformer room, by increasing parking from 15 to 35 and other acts".[19]

In *Pratap Kumar Nayak* v. *State of Orissa,*[20] as per the writ petition filed by the father of the deceased child, his son who was a student of class IV, died due to fall of an iron grill gate in UGME School premises due to negligence on the part of the school management. Soon after the deceased sustained injuries and became unconscious, he was taken to Bhadrak Hospital. One day later, as the condition of the child became worse, he was shifted to S.C.B. Medical College and Hospital, Cuttack. But when his condition further worsened, on 18.07.2004, the petitioner took his son to Kalinga Hospital. According to the petitioner he spent huge amount of money towards his son's treatment but in vein and his son breathed his last on 27.07.2004 at that hospital. The petitioner claimed Rs.10 lakh as compensation. On the basis of records the high court concluded that the accident occurred on account of negligence on the part of the UGME School authorities by not providing safety measures and not taking precautionary measures to prevent students/public to use the grill gate for the play and accordingly gave its verdict in favour of the petitioner. For measurement of compensation to be paid by the respondent, the court followed the guidelines laid down in *Lata Wadhwa* v. *State of Bihar*,[21] and the parents were awarded compensation towards loss of dependency and conventional heads such as expenses towards funeral and obsequies ceremony including hospital expenses. The court rejected the contention of the respondent regarding maintainability of the writ petition, saying that delay in filing petition does not take away the right of a claimant to claim compensation. It also said that non-filing of the suit by the parents under the Fatal Accidents Act does not take away the right of a claimant to claim compensation, which is payable by the School's Mass Education Department of the Orissa State Government for its negligence.

Res ipsa loquitur

The decision of the Delhi High Court in *Susan Leigh Beer*,[22] is an important judicial pronouncement on the principle of *res ipsa loquitor*. As a general rule the burden of proof of negligence is on the plaintiff. This is often a very difficult, and in some cases, an impossible task. However, in some circumstances courts are prepared to draw an inference of negligence on the part of the defendant and the burden of proof shifts from the plaintiff to the defendant to disprove negligence on its part. This situation is described as *res ipsa loquitur* (the things speaks for itself), where the maxim applies, a presumption of fault is raised against the defendant. For the maxim to apply, following three criteria need to be satisfied : unknown

19 *Id*. para 34.
20 2011(II) OLR 426.
21 (2001) 8 SCC 197.
22 *Susan Leigh Beer* v. *India Tourism Development Corporation Ltd*., 178 (2011) DLT 83.

cause, lack of proper care[23] and control of the situation by the defendant. These criteria as originally set out in *Scott* v. *London and St. Katerine's Decks*,[24] have been endorsed with approval by Indian courts too. For example, the Delhi High Court in *Klaus Mittlebachert* v. *East India Hotel*,[25] identified three conditions which must be satisfied in order to attract the applicability of *res ipsa loquitur* : (i) the accident must be of a kind which does not ordinarily occur in the absence of someone's negligence; (ii) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (iii) it must not have been due to any voluntary action or contribution on the part of the plaintiff. For the application of *res ipsa loquitur* it is necessary that the facts of a given case lead to only one inference, namely, that the accident could not have occurred but for the defendant's negligence; where different inferences are possible the maxim will not apply. It is necessary to note here that the maxim is merely a rule of evidence and its effect is limited only to shift the burden of proof and instead to require the defendant to rebut the presumption of negligence by adducing contrary evidence. Once the three conditions necessary for application of the doctrine of *res ipsa loquitur* stand satisfied, the burden shifts to the defendant to rebut the evidence of negligence.[26]

Res ipsa loquitur doctrine is not without criticism. It was at one time described as a 'legal doctrine' but is currently no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. Arguably, this doctrine has the effect of effectively creating strict liability in cases when it applies because in these situations it is almost impossible for the defendant to provide an explanation as to what exactly happened; e.g. *Ward* v. *Tesco Stores*.[27] But this view is no more considered correct today because of the fact that *res ipsa loquitur* does not go so far as was originally believed. As already noted, it simply raises presumption of negligence in certain circumstances but it also gives opportunity to the defendant to explain what happened in a given situation.

In *Susan Leigh Beer,* the Delhi High Court speaking through Badar Durrez Ahmed J not only discussed *res ipsa loquitur* in detail[28] but also applied the same to the facts and circumstances of the case. In the instant case the plaintiff/appellant, who was staying in the Akbar hotel along with her parents and brother, was injured when she jumped into the swimming pool at the shallow end and her feet slipped on the tiled floor of the swimming pool. As a result of serious and grave injuries sustained by her in the said incident she became a quadriplegic. She was treated in Delhi and thereafter in the Spinal Unit of Princess Alexandra Hospital, Brisbane and then in the Special Unit of Royal Northshare Hospital, Sydney. Despite sustained treatment, the plaintiff could not recover from the spinal injuries which because of

23 *Chaproniere* v. *Mason* (1905) 21 TLR 633 and *Cassidy* v. *Minister of Health* (1951) 1 All E.R. 574.

24 *Scott* v. *London and St. Katherine Docks* (1861) All ER 246.

25 *Klaus Mittle Bachert* v. *The East India Hotels Ltd.,* 65 (1997) DLT 428.

26 *Municipal Corporation of Delhi* v. *Subhagwanti,* AIR 1966 SC 1750.

27 In *Susan Leighbeer*, *supra* note 22, the court relied upon *Klaus Mittle Bachert* case, *supra* note 25 and *Subhagwanti* case *supra* note 26.

28 *Supra* note 22, para 65.

their permanent character eventually physically incapacitated her for the rest of her life. The result is that she is now permanently confined to a wheel chair, being a quadriplegic. The plaintiff prayed for a decree of 2 crores rupees by way of damages as also interest at the rate of 18% p.a. on the said amount from the date of presentation of the plaint till actual payment. The plaintiff contended that the injury she had sustained, was caused to her on account of negligence on the part of the defendant in the maintenance of the swimming pool. The defendant refuted this contention saying that the injury was a result of the plaintiff's own negligence.

In the present case, Badar Durrez Ahmad J first rejected the defendant's contention with regard to maintainability of the present suit, holding that the suit had been filed by a duly authorized person since action of the plaintiff's father in signing, verifying and filing plaint stands fully ratified by the plaintiff, and then proceeded to consider issues relating to the nature of the injuries suffered by the plaintiff, cause of the injury (jumping or diving), absence of proper maintenance of the tiles of the floor of the swimming pool, and the alleged negligence of the plaintiff. From the evidence adduced before the court it was concluded that the nature of the injuries were such which resulted in the fracture of the 5th and 7th cervical vertebrae with slight anterior sliding of the 7th vertebra under the 6th vertebra as a result of which the plaintiff became a quadriplegic. The court attributed the cause of injury to the plaintiff's jumping into the pool at the shallow end and to the fact that her feet slipped forward on account of the bottom of the pool being slippery.

Whether the tiles were slippery and the pool was not properly maintained was certainty a tricky factual issue but the court handled that issue very comfortably by applying the principle of *res ipsa loquitur* to the facts of the instant case and concluded that it was due to defendant's negligence that floor of the swimming pool was slippery on account of which the injury was sustained by the plaintiff. After holding the defendant liable for the injuries caused to the plaintiff, the court quantified damages on account of physical pain, mental anguish and psychological anguish, education and loss of earnings for the rest of the life of the plaintiff and held the plaintiff entitled to a decree in the sum of Rs. 1,82,00,000 along with simple interest thereon at the rate of 6% annum with effect from 22.01.1982 till the date of the decree and future simple interest on the said amount at the rate of 10% per annum till its realization. The decision is welcome for two reasons: clarification of the principle of *res ipsa loquitur* and its application in the instant case; and methods applied for the measurement of damages in the present case. Some people argue that *res ipsa loquitor* should almost always apply to cases of medical negligence. But the courts in England are generally reluctant to apply the principle in medical cases.[29] As is evident from the decision in *Pushpa Devi* case the attitude and approach of Indian judges is similar to those of their English counter parts.[30]

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29 Lord Denning in *Hucks* v. *Cole* (1986) 118 New L.J 469 said that *res ipsa luquitor* should apply against a doctor in extreme cases. The Pearson Report (1978) rejected its general application in medical cases for fear of an escalation of claims and increase in doctor's insurance premiums as has occurred in America. It is interesting to note that in America *res ipsa loquitor* frequently operates to the disadvantage of doctors.

30 *Pushpa Devi (Smt.)* v. *Government of Himachal Pradesh,* 2011 (2) ShimLC 454.

Medical negligence

Prior to the crass commercialization of medical profession and the introduction of the modern sophisticated technology in the medical treatment, physicians and surgeons enjoyed enormous goodwill in the society and were both respected and revered by their patients. But today doctors, nursing homes and hospitals are merely seen as service providers and mutual trust and confidence between the doctors and patients, which until recently remained a hallmark of the medical profession is waning. No wonder, the number of cases of medical negligence is on the rise because of the insatiable profit making appetite of the medical professionals, nursing homes and hospitals and an increasing desire of the patients to vindicate their rights. There are instances of malicious prosecution against *bonafide* doctors but this fact alone should not be allowed by our courts to provide shields against cry of the suffering patients who at many times are neglected or exploited by the doctors. It should never be overlooked that due to divergence in resources and bargaining power patients always remain in a disadvantageous position when they are under the treatment of the medical professionals. And when they die or suffer other injuries because of medical negligence, many among them or their heirs never go to any court or forum for redress. In medical negligence litigation too the patients find themselves pitted as an unequal party against the resourceful party who engage good lawyers and manage needed medical testimony to his/her advantage. Since the adversarial process itself operates to the disadvantage of the poor patient vis-a-vis his powerful adversary, their expectation from the court is dispensation of equity and equality based distributive justice as opposed to what one may call technical and legalistic justice which normally gets tilted in favour of the powerful.

The *Bolam* test on the foundation of which the rules of medical negligence have been built by our courts in all these years is unfair to plaintiffs/patients and too protective of the medical professions. In *Bolam,*[31] McNair J held : "A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical personell skilled in that particular art. Putting it another way, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view". Lord Scarman in *Maynard* v. *West Midlands Regional Health Authority*[32] stated the justification for this rule in these words: "Differences of opinion exist, and continue to exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence. Merely this rule has been restated, because the doctor choose 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 professionals".

As is evident from the foregoing, the *Bolam* rule puts a claimant patient at a great disadvantage in litigation by allowing the doctor to escape liability by producing expert to testify that the course of action taken by the defendant was in keeping with a responsible body of medical practice. As doctors are well placed

31 *Bolam* v. *Friern Hospital Management Committee* [1957] 2 All ER 118.

32 [1985] 1 All ER 635.

and have every incentive to protect one another from negligence claims, except in cases of blatant negligence, patients will not get justice in most of the cases if the *Bolam* rule was applied by the court in a given case. No wonder, the *Bolam* rule is currently under a number of challenges in the courts in UK and elsewhere.

In *Pushpa Devi (Smt.)* v. *Government of Himachal Pradesh*,[33] the appellant / plaintiff claimed Rs. 1,05,000/- as damages/compensation for becoming pregnant and delivering a child due to negligent performance of sterilization operation on her, the leaned judge could have both easily and comfortably disposed of and decided the present regular second appeal filed under section 100 of the CPC by putting reliance on a plethora of judicial decisions on sterilization[34] yet his lordship deemed a discussion on rules governing medical negligence both appropriate and necessary and to that end reproduced the guidelines on medical negligence summarized by the apex court in *Kusum Sharma* v. *Batra Hospital & Medical Research Centre*[35]and some of the conclusions of the Supreme Court in *Jacob Mathew* v. *State of Punjab*[36] and concluded thus, 'a professional may be held liable for negligence on one of two findings, either he was not possessed of the requisite skill which he professed to have possessed or he did not exercise, with reasonable competence in the given case, the skill which he did possess' and citing *Malay Kumar Ganguly* v. *Sukumar Mukherjee*[37] said that all that a person approaching the medical profession could expect is that the latter possessed reasonable skill and competence and would be exercising his skill with reasonable competence.

The court after applying the above principle to the facts and circumstances of the case dismissed the appeal on the ground of lack of any negligence on the part of the respondents. The court found on record that the sterilization operation was done after the clinical examination of the appellant for determination of the pregnancy. The fact that there are accepted failure rates of the sterilization operation and that the very short duration of pregnancy on the date of operation cannot be detected despite due care and attention adopted by the doctors in view of clear cut admission by the plaintiff that she had coitus with her husband 2-3 days before the sterilization operation also went against the plaintiff's plea of negligence.

While concurring with the decision given in the above case, it is submitted that the rules of medical negligence built around *Bolam* need to be reconsidered in our country, especially in view of the recognition of right to medical treatment and care as a fundamental right implicit in article 21 of the Indian Constitution.[38] Cases of medical negligence will be substantially reduced if the system of medical audit is

33 *Supra* note 30.

34 *State of Haryana* v. *Smt. Santra*, AIR 2000 SC 1888; *Javed* v. *State of Haryana*, 2003 (10) AJC 256 (SC); *State of Haryana* v. *Raj Rani*, AIR 2005 SC 3279; *State of Punjab* v. *Shiv Ram*, 2005 ACJ 2084 and *Archana Paul* v. *State of Tripura*, 2005 ACJ 158 (Gau). In most of the sterilization failure cases, claims relating to compensation were dismissed. For contrary decision see: *Laxmi Devi* v. *Union of India*, AIR 2005 NOC 260 (Del) and *Fulla Devi* v. *State of Haryana*, 2005 ACJ 51 (P&H).

35 JT 2010 (2) SC 7.

36 (2005) 6 SCC 1.

37 (2009) 9 SCC 221.

38 *V. Kishan Rao* v. *Nikhil Super Specialty Hospital* (2010) 5 SCC 513.

encouraged and promoted and guidelines or protocols setting out 'best medical practice' are produced.

Bolam test is under a scathing attack in its country of origin and is today considered merely a rule of evidence or of practice and not a rule of law. In *Hucks* v. *Cole,*[39] the Court of Appeal said that it would not accept that there could be two schools of thought about a particular treatment. Sachs L J said, the test should not depend on a head-count of witnesses for the defence. But the most authoritative challenge came to *Bolam* in *Sideway* v. *Governor of Bethlam Royal Hospital,*[40] in which Lord Donaldson took the view that only practices 'rightly accepted as proper by a responsible body of medical opinion should discharge the standard of care. In *Bolitho* v. *City and Hackney Health Authority,*[41] Lord Wilkinson went beyond *Bolam* and laid down a new test which seems to be more logical than the former in relation to cases involving the weighing of risks against benefits. As per Lord Wilkinson, in such cases, 'the Judge before accepting a body of opinion as being responsible, reasonable and respectable, will need to be satisfied that in informing 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'. In India, S. B. Sinha J in *Malay Kumar Ganguly* v. *Sukumar Mukherjee,*[42] preferred *Bolitho* to *Bolam* and extended the scope of medical negligence to include overdose of medicines, not informing patient about the side effects of drugs, not taking extra care in case of diseases having high mortality. The court went further and said that the quality of care to be expected of a medical establishment should be in sync with its reputation. It is humbly submitted that while adjudicating a case of medical negligence court should give due consideration to patients' legitimate expectations from the hospital or the concerned specialist doctor.

III NO FAULT, STRICT AND ABSOLUTE LIABILITY

According to Salmond, tortious liability is essentially a fault-based liability. Although this broad proposition has been criticized by scholars and the principle of 'no-fault liability' of which strict liability and absolute liability are the prime examples, has been recognized in tort situations, there is conceptual confusion about the true scope of this principle. There are also strong arguments against creating strict liability in order to benefit only a narrow class of plaintiffs. The problem with the strict liability principle is that not only it is unfair to other injured people but it also requires the plaintiff to prove even in strict liability situations that the damage was caused by the defendant. The confusion about the true intent and content of strict liability also persist (i) because of the fact that it covers a wide variety of circumstances and its indeterminate nature (ii) because of the absence of general underlying rationale. According to some authorities, strict liability is merely another form of loss distribution. For others, in cases of hazardous activities, the defendant

39 *Supra* note 29.
40 [1985] AC 871.
41 [1997] 4 All ER 771.
42 2009 (10) SCALE 675.

bears some initial burden for being prepared to impose hazards on others and the imposing burden on plaintiff to prove fault in such cases would offend justice and morality. Be that as it may, the principle of strict liability originated in response of the demand of the society to protect potential plaintiffs in certain situations and its emphasis is more on the type of activity rather than on the defendants conduct in carrying it out.

Some of the instances of strict liability are of ancient origin, whereas others are the new instances of strict liability, which have been recognized by judges in particular circumstances of the cases before them, as in *Rylands* v. *Fletcher*,[43] and *M. C. Mehta* v. *Union of India*,[44] or by Parliament to the demands of pressure groups, as in the cases of the Consumer Protection Act, the Motor Vehicles Act (MVA Act), the Electricity Act, and the Railways Rules. Strict liability is also imposed to varying degrees in the following circumstances; liability for dangerous wild animals, liability for defective goods and services under the Consumer Protection Act, 1986, liability under the *Rylands* v. *Fletcher* rule, vicarious liability, liability for defamation, liability for livestock straying onto neighbouring land, liability for manmade objects causing damage on the highway; liability for breach of statutory duty, if the statute in question imposes strict liability. In almost all of these torts, strict liability is subject to exceptions and defences. The absolute liability principle enunciated by Bhagwati J in *M. C. Mehta* case by way of *obiter* does not admit of any exception at all but this principle has been applied in a very few cases and after its becoming a corollary of the 'polluter pays principle', it is no longer an independent principle. Still our courts frequently refer to the absolute liability enunciated in *M. C. Mehta* case as if it is a biblical injunction which they cannot ignore or disregard.

But if the 'strict liability' principle is not without criticism, so is the case with the 'fault liability' principle, also. Perhaps, the only justification for this is imposition of some kind of punishment on the defendant and the possible deterrent effect on tortfeasors. At this juncture it needs to be recognized that the 'fault principle' is unfair on plaintiffs, on defendants and also on society as a whole. It is unfair on plaintiffs because in many situations, they may not have the means, financial or otherwise of establishing the fault of the defendant. It is unfair on defendant because the law does not distinguish between different degrees of culpability. But this does not mean that courts should apply the strict liability or absolute liability rule to accident cases in a routine and mechanical manner regardless of the facts and circumstances of the case and considerations of justice. Driving, arguably is one of the most hazardous activities in modern life and hence does not attract strict liability but courts seem to be more than willing to apply the strict liability principles to the situations referred to above in general and accident cases in particular. In the absence of any uniform, consistent and coherent policy, the search for a general underlying rationale in tort cases is ill-conceived and misguided. Consequently, if the decisions considered below seem to be haphazard or suffer from contradictions, it should not surprise all. For this state of affairs, it is not the judges but the very nature of the law of torts alone which is to be blamed.

43 (1868) LR 3 HL 330.

44 *Supra* note 9.

Motor accidents

Road accidents are one of the deadliest killers in India. What is more disturbing is that despite the existence of a good number of legislations on motor transport and concerns expressed by the apex court and the high courts over the increasing number of motor accidents between 2004 and 2008, more than 500,000 people lost their lives and about 22,60,000 people were injured. Further, according to the report titled 'Accidental Deaths and Suicides in India, 2008' published by the National Records Bureau there has been a steady increase in the number of road accidents from 361.3 thousands in 2004 to 415.8 thousands in 2008. These figures do not include the accidents which are not reported.

Arnold Tynbee once said: '(T)here are always two parties to a death, the person who dies and the survivors who are bereaved'. This equally holds true for the deceased in a motor accident and his survivors, when a motor accident takes place, the legal representatives of the deceased and the victim who suffers injuries and disabilities of various types. When a person is injured as a result of motor accident, he has not only to suffer mental agony and physical pain caused due to amputation of the leg and other injuries, and to incur medical expenses (in some cases for the remaining life but also to bear the loss of earnings due to accident).

Under the common law, a victim of an accident is allowed to claim compensation for pecuniary as well as special damages. Pecuniary damages may include expenses incurred by the claimant: (i) medical attendance (ii) loss of earning of profit up to the date of trial and (iii) other material loss. Non-pecuniary damages may include damages for mental shock, pain and suffering already suffered or likely to be suffered in future, damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; and inconvenience hardship, discomfort, disappointment, frustration and mental stress in life.

Compensatory jurisprudence in cases of motor accident claims in India veers around the provisions of the MVA Act, which is a social welfare and benevolent legislation, and decided cases of the Supreme Court and the high courts. To provide compensation to the victims of motor accidents without any unreasonable delay and difficulty, section 140 of the Act provides for the award of statutory compensation to the victim of a motor accident and makes the owner of the vehicle liable. But this liability which is a 'no fault' one should not be confused with strict liability. Compensation for damage caused by the use of motor vehicles can also be used under the common law even without invocation of the provisions of any statute. The MVA Act allows deduction of the amount of statutory compensation from the final amount awarded by the MVA claims tribunals.

The claims tribunal constituted under the MVA Act can entertain claims for compensation in respect of accidents arising out of use of motor vehicles and involving the death of, or bodily injury, to persons, or damage to any property of third party so arising, or both. Section 166 of the MVA Act mentions the persons who can apply for compensation and the tribunals to whom an application is to be made. The term 'compensation' used in section 166 would include not only the expenses incurred for immediate treatment, but also the amount likely to be incurred

for future medical treatment / care necessary for a particular injury or disability caused by an accident. Experience shows that a very large number of people involved in motor accidents are pedestrians, children, women and illiterate persons. Due to sheer ignorance, poverty and other disabilities majority of them cannot engage competent lawyers for proving negligence of the wrongdoers in adequate measure. By contrast, the insurance companies usually engage a battery of lawyers to defeat the compensation of claims of the victims of motor accident who in turn raise all possible technical objections for ensuring that their clients are either completely exonerated or their liabilities minimized.

In consequence, proceedings before the tribunals get unnecessarily prolonged. Because of the delay and litigation expenses, in some cases the award passed by the tribunal and even by the high court (in appeal) becomes meaningless. It is, therefore, imperative that a pro-active approach is adopted by the officers who preside over the tribunals when they adjudicate claims under section 166 to ensure that they are disposed of with requisite urgency and the amount of compensation payable to the victims of the accident and for that legal representatives is adequate and/or measure. The apex court made these prescriptions in a recent decision in *Govind Yadav* v. *The New India Insurance Company Ltd.*,[45] a case related to grievous injuries caused by an accident which occurred when the mini bus in which the victim was working as helper overturned due to a rash and negligent driving by the driver. On account of amputation of leg due to said injuries, the victim lost the job and his future became bleak. He also contended that at the time of accident his age was about 24 years and he was drawing monthly salary of Rs. 4000.

In *Govind Yadav*, the high court had enhanced the amount of compensation awarded by the tribunal but not fully satisfied with that enhancement, the appellant approached the apex court which after relying on the earlier judgments on the subject and keeping in view the facts and circumstances of the case allowed the appeal and enhanced the total amount of compensation to be payable to the victim / appellant to Rs. 9,53,6000/- with interest @ 7% per annum from the date of filing the claim petition till the date of realization (as against Rs. 2,56,800/- with 6% per annum interest awarded by the tribunal and Rs. 30600/- with interest at the rate of 7 per cent per annum from the date of application). To this end, the learned judge relied on the principles laid down in *Arvind Kumar Mishra*,[46] and *Raj Kumar*,[47] for assessment of all damages for personal injury and observed that the same must be followed by all the tribunals and the high courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily.

Railway accidents

Introduced by the British in 1853 in this country, the Indian railways have made a long journey and emerged as the principle mode of transport in India. With a network spread over 63,000 route kms. and 7000 stations through the length and

45 *Govind Yadav* v. *New India Insurance Co. Ltd*. (2011) 10 SCC 683.
46 *Arvind Kumar Mishra* v. *New India Assurance Co. Ltd.* (2010) 10 SCC 254.
47 *Raj Kumar* v. *Ajay Kumar* (2011) 1 SCC 343.

breadth of the country, the Indian railways play a prominent role in the Indian economy by meeting the transport requirements of the core sectors and by carrying 12 million passengers and more than 1.2 million tons of freight daily. Yet despite all the achievements of the Indian railways in terms of growth of physical output, as regards improvements in efficiency indices they have miles to go to make the railway operations safe and riskless and railway journey accident free. Under section 11 of the Railways Act, 1989, the central government is empowered to execute all necessary works for the safe and convenient running of the trains in the country.[48] Under section 18 of the Act for the safe and convenient running of the trains the authorities may construct suitable gates, chains, bars at the level crossing. The aim and object of the legislation is to protect the living beings, who are supposed to be affected by the running of the trains and for that Parliament has authorized the railway authorities to work in a responsible manner with a view to see that the persons who will be crossing the railway crossings either to reach residences or other places shall not be affected. The railways would work in crossing a footway on level, as to the mode of working their railway, as to the rate of speed, and signaling and whistling and other precautions in the working of a railway to do everything which is reasonably necessary to secure the safety of persons who have to cross the railways by means of the footway. As has been held by the Gauhati High Court in *Swarnlata Barua* v. *Union of India*,[49] there is an obligation on the part of the railway administration to ensure that whenever a train passes over a thoroughfare adequate warning should be given to the public of the passing of the train at the time they pass, so that accident may be avoided. It is true that fencing the railway line including the level-crossing is almost impossible and arguably doing so is not a statutory obligation on the part of the railway administration. Nevertheless, the railway administration is undoubtedly under an obligation to take precautionary measures to ensure that persons who will be crossing the railway crossings are not affected.

The decision in *Jayalakshmi* v. *Union of India*,[50] is important for many reasons. After noting a significant change in approach of the law from the Anglo-Saxon jurisprudence groomed in the tradition of the law with entrenched and adversial procedure to the modern socialist jurisprudence whose focus is on concerns for the weak, compassion for the deprived, commitment to the less fortunate and the empathy for the sufferer and noting the impacts of this change in the statutory recognition of the 'no-fault liability' of the railways to pay compensation to the

48 The other relevant legislation on railways are : the Railways Act, 1993; the Railways Act, 2005; the Railways and other Guided Transport Systems (Safety) Regulations, 2006; the Level Crossing Act, 1983; the Railways (Interoperability) Regulations, 2006; the Competition Act, 2002; the Right to Information Act, 2005; the Enterprise Act, 2002, the Health & Safety (Enforcing Authority for Railways & Other Guided Transport Systems) Regulations, 2006; Railways (Access and Management) Regulations, 2005; Railways (Licensing of Railway Undertaking) Regulations, the Railways Safety Levy Regulations, 2006; the Railway and Transport Safety Act, 2003; Reporting of Injuries, Diseases and Dangerous Occurrence Regulations, 1995 and the Transport Act, 2005.

49 *Swarnalata Barua* v. *Union of India,* AIR 1963 Assam 117.

50 *Jaylakshmi* v. *Union of India* (2011) 2 KLT 1001.

victim of an untoward incident, the decision in the instant case reminds the law makers, the law enforcers or the adjudicator that it is for the benefit of the common man, for the poor and the humble that the Constitution was enacted and tries to impress upon them that constitutional functionaries and creatures of the State attuned to the constitutional vision cannot afford to ignore, forget or overlook this fundamental commitment. Going one step further, the decision notes that our jurisprudence has covered major distance now and the journey from fault to suffering though long and tiresome, has been real. The shift from the 'fault-based liability' to 'suffering based liability' is clearly discernible in sections 140 and 163A of the MVA Act and chapter XIII of the Railways Act pointing out that chapter XIII of the Railways Act accepts 'no fault liability' of railway administration to pay compensation to victims of railway accident or untoward incidents, the court directed the claims tribunal to perceive the legislative compassion to victims and transfer such compassion to the order passed by it.

Guri Behera v. *D.R.M., East Coast Railways, Khurda*,[51] illustrates how due to negligence on the part of the railway administration in not putting gates, bars and not appointing watchman on the unmanned level crossings is taking away the lives of a number of innocent persons in different parts of the country and above all how the railway authorities react and respond to such accidents and deal with the injured persons or the survivors of the deceased. In the instant case, three minor children expired and one minor survived with severe injuries causing 85 per cent permanent physical disability at an unmanned level crossing in Khurda district when they all were crushed by Puri-Ahmedabad Express which was on the other track. Inquiry conducted by the railway police and other railway authorities disclosed that the said children were standing on the railway line and were looking at the goods train. Guri Behera along with his brother Ram Behera, filed a joint petition before the divisional railway manager claiming suitable compensation, but did not get any reply from the latter. What is most surprising that no enquiry was conducted under section 114 or 115 of the Railways Act. The opposite party contended that the accident occurred not at the unmanned level-crossing but at a distance of 100 meters, that level crossing was equipped with all the safety measures as per the railway norms, that given the facts being disputed, the writ petition was not maintainable in law and also barred by limitation as the same had been filed in the year, 2010 whereas the alleged incident took place in the year 2006. The court rejected these contentions and held that jurisdiction under article 226 of the Constitution can be invoked and direction for payment of compensation can be given if there is a deliberate act of negligence on the part of the railway administration. It also held that the accident occurred on account of negligence on the part of the railway administration by not providing sufficient protection at the level crossing and without deploying guard or putting check gate as required under section 18 of the Railway Act. While deciding the case in favour of the petitioners the court passed orders awarding compensation of Rs. 3.50 lakh to each one of the petitioners whose child had died and Rs. 5,00,000/- to the injured claimant with 7% interest per annum to be paid by the railway administration.

51 AIR 2012 Ori 62, decided on 10.02.2011.

The Railways Act does not make any provision for the grant of compensation to non-passenger victims of a railway accident. To overcome this glaring omission in the existing law, the court treated passenger and non-passenger victims of railway accident at par and after invoking the provisions of the section 124 of the Railways Act read with the Railway Accident and Untoward Incidents Compensation Rules, 1996 which provides for a compensation for no fault liability of a passenger who expired in a railway accident awarded Rs. 3.50 lakh in this case and keeping in view the future prospect of the deceased children and prospective loss of future earnings which would have benefitted the parents, it worked out the amount of compensation to the tune of Rs. 3.50 lakh to be payable to the legal representatives of each one of the deceased children. So far as determination of compensation for personal injury both for pecuniary and non-pecuniary losses caused to the injured petitioners, the court relied on the decisions of the English and Indian courts. In particular, it took into account the fact that having 85% permanent physical disability, the injured petitioner would require continuous medical treatment and would have to suffer throughout her life, when it fixed Rs. 5.00 lakhs as compensation in favour of the injured claimant.

Electrocution

The Karnataka High Court's decision in the *Section Officer, HESOM Ltd.* v. *Smt. Parawwas*,[52] a case on the death of a line man employed with the opposite party on account of electrocution, reaffirms the following propositions of law. Firstly, a civil court is empowered to try all suits of civil nature except the suits, the cognizance of which are expressly or impliedly barred. But a bar on exclusive jurisdiction of civil court should not be readily inferred. Secondly, a workman has option to claim compensation either under Workmen's Compensation Act or can take recourse before civil court for damages. Where death occurs and it gives a right to claim compensation by legal heirs under either of the laws such party would be entitled to claim compensation either under Workmen's Compensation Act or under the CPC but not under both. Thirdly, embargo on the exercise of jurisdiction by civil court will arise when a claim petition has already been instituted or when there is agreement between, 'employer and employee' to go before workmen's commissioner. Fourthly, the word 'instituted' appearing in section 3(i) of the Workmen's Compensation Act means initiating something or causing it to begin or its commencement. Receiving the money deposited by the employer through workmen commissioner will not be held or construed to mean that the claimants had elected the forum under Workmen's Compensation Act. Fifthly, an unscrupulous employer by paying a paltry sum to a gullible employee can not claim that claim of a workman has been satisfied. Even where the claimant receives such payment, his

52 ILR 2011 Kar 2763. For earlier decisions on electrocution, see *H.S.E.B.* v. *Ram Nath* (2004) 5 SCC 793; *The Managing Director, Western Electricity Supply Co. of Orissa Ltd.* v. *Kunti*, AIR 2005 Ori 188; *Nirmala Thirunavakkarasu* v. *Tamil Nadu Electricity Board*, AIR 1984 Mad 201; *Chairman, MPEB, Rampur, Jabalpur* v. *Bhajan Gond*, AIR 1999 MP 17; *R.S.E.B.* v. *Jai Singh*, AIR 1997 Raj 141 and *Asa Ram* v. *MCD*, AIR 1995 Delhi 164.

right is not scuttled by virtue of section 10 of Workmen's Compensation Act and workmen or the legal heirs of deceased workmen would be entitled to lodge a claim petition and thereby initiate proceedings by electing the forum.

What makes the judgment in the instant case remarkable is the application of the principle of construction *'ut res-magis veleat-quam- pereat'* and an attempt on the part of the judge to reconcile the provisions of section 9 of the CPC and section 3 read with section 19(2) of the Workmen's Compensation Act by interpreting the word 'instituted' appearing in section 3 of the Workmen's Compensation Act in a sense best harmonized with its purpose.

In the instant case, one Hanamanth Sontanavar along with three of his colleagues had gone to Beeragaddi area to the land of Karigar to disconnect the cut point and to reconnect it to a new line. On reaching the spot they first stopped electric supply from Gokak section office and then Sontanavar climbed the electric pole. When he had cut two jumps and while he was cutting a third jump he suddenly screamed a loud and fell to the ground on account of receiving several electrical shocks to his hand and he suffered grievous injuries all over the body and became unconscious. Immediately, he was shifted to Dr. M. G. Umarani Hospital at Gokak and later on shifted for further treatment to K.L.E. Hospital, Belgaum where he succumbed to the injuries. On verification it was found that cause of accident was on account of electrical motor functioning in the lands of defendants 4 and 5 which was engaged in the process of lifting water from Ghatprabha river. The court held the electricity board liable by applying the strict liability principle to the facts of the case.

Carrier's liability

Liability of the common/public carriers of goods are governed by the Carriers Act, 1865. Where any suit is brought against a common carrier for loss or damage or non delivery of goods entrusted to him for carriage, the claimant is not required to prove that such loss or damage or non-delivery was caused due to negligence of the carrier. In such cases, the carrier has no fault liabilities yet he can absolve himself form liability by proving that loss to the goods occurred due to 'act of God' or 'act of enemies of state'.

In India liability of international carriers is governed by the Warsaw Convention, 1929, the Hague Protocol, 1955 and the Montreal Convention, 1999. India is a signatory to the Warsaw Convention and the other international instruments and by the Indian Carriage Act, 1934 it gave effect to the provisions of the Warsaw Convention. The Carriage by Air Act, 1972 which replaced the earlier legislations was enacted to give effect to the Warsaw Convention as amended by the Hague and the Montreal Conventions. Under the Warsaw Convention, 'international carriage' means a carriage in which according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or transshipment are situated either within the territories of a single high contracting party if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to the Convention. The Convention provides that when an accident occurring during international carriage by air causes damage to a passenger or a shipper cargo, there is a presumption of liability of the carrier. A carrier, however,

will not be liable if it proves that it or its agent had taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. There is no limitation of liability if the damages caused by the willful misconduct of the carrier, or by such default, on its part as in accordance will the law of the court ceased of the case, is equivalent to willful misconduct.

Coming to the Carriage by Air Act (CA Act), as per section 3 of the Warsaw Convention, it is applicable to India. It says that the rules contained in the first schedule being the provisions of the Warsaw Convention relating to the rights and liabilities of couriers, passengers, consignors, consignees and other persons, shall have the force of law in India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage, subject to the provisions of the Act. Section 4 provides for application of amended convention to India and also provides for second schedule in consonance with the amended convention section 4A provides for the application of the Montreal Convention in India.

The second schedule to the CA Act provides rules for the purpose of the Act. Chapter III of the second schedule is of considerable importance since it enumerates the provisions regarding the liability of the carrier with regard to the acts which the carrier will be held liable for, the jurisdiction of the court at which the carrier can be sued, the limit of the liability and the limitation for bringing a suit. In particular, rule 29(1) states: 'An action for damages must be brought, at the option of the plaintiff, in the territory of the one of the high contracting parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination. As per sub-section (2) of the same provision, 'questions of procedure shall be governed by the court seized of the case. According to rule 30(1) the right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped; under clause (2) the method of calculating the period of limitation is to be determined by the law of the court seized of the case.

Section 3 CA Act read with rules 29 and 30 raises a number of complex issues. Whether liability of an international carrier is governed exclusively by these provisions? If the answer is in the negative then which law will override these previews of law? Assuming that the Consumer Protection Act, 1986 (CP Act), which is *lex generalis* in nature also covers international carriage, will the limitation period still be governed by rule 30 of the CA Act or by the rules governing limitation under the CP Act?

Answers to these questions will in the ultimate analysis hinge upon whether a consumer forum established under the CP Act is a competent court under rule 29(1) of CA Rules. This begs the question of the characterization of a consumer forum, which is a quasi-juridical tribunal and not a court in the real sense of the term. Assuming that this question is answered in the affirmative will this not be tantamount to excessive overstretching of the term 'court' in disregard of the legislative intent, object and purpose of the CA Act and its express mandatory stipulations regarding

the jurisdiction of the court? Given the fact that as per section 3 of the CP Act provisions of the Act are in addition to and not in derogation of any other law, will the exercise of jurisdiction by a consumer forum in a case of international carriage, not be 'in derogation of the' provisions of the CA Act?

The Supreme Court had an occasion to consider and pronounce its verdict on some of the above enumerated issues in *Trans Mediterranean Airways* v. *Universal Exports*.[53] Two important complex issues of law that arose from the facts of the instant case were : (i) whether the National Commission under the Consumer Protection Act, 1986 has the jurisdiction to entertain and decide a complaint filed by the consignor (Universal Experts) for deficiency of service by the carrier (in this case Trans Mediterranean Airways, an international cargo carrier, with its principal place of business at Beirut, Lebanon) in view of the provisions of the Carriage by Air Act and Warsaw Conventions, and (ii) whether the appellant/carrier can be directed to compensate the consignor for deficiency of service in the facts and circumstances of the case. In this case, the consignor alleged that by delivering the consignment to address in the 'block column' instead of routing through Barclays Bank, the carrier committed deficiency in service under section 2(o) of the Consumer Protection Act, 1986 and hence the carrier and its agent were liable to pay compensation. In response, the carrier put the blame on the consignor, saying that the address given by the consignor was incorrect and incomplete, and that the only address properly given was that of the notified party to which the said consignment was delivered. The carrier also argued that at no point, it was made known that the 'BBE SAE, MADRID, SPAIN' stood for Railways Bank Madrid and moreover, the suit not being instituted within 120 days as per requirement of rule 12 was barred by limitation. Other contentions of the carrier were as follows : If there was any damage caused to the consignor, it was on account of negligence of the agent. In the normal circumstances the suit should have been instituted under Carriage by Air Act, but the fact that the complaint was filed before the National Commission for redressal of consumer grievances, which not only asserted its jurisdiction in the matter but also passed the impugned order concluded that the agent was not only the agent of the consignor, but also the agent of the carrier and, therefore, any mistake committed by the agent would make the carrier liable, it got converted into a consumer protection case under the CP Act. As a consequence, the plea of limitation crashed on the ground because it was rule 30 of the second schedule to Consumer Protection Act, rather than rule 12 of the Carrier by Air Act which became the applicable law in the instant case.

Although the instant case had a transnational dimension and an international law focus, confronted with a situation of an apparent conflict between the provisions of two domestic statutes – CP Act and CA Act, the Supreme Court through Dattu J sought to effect a harmonious balancing between these statutes and to this end it even went extra-mile to hold that even a quasi-judicial body like the National Commission is a court for the purposes of the CA Act and further said that the word 'court' used in rule 29 of the second schedule of the CA Act, which has been borrowed from the Warsaw Convention has not been used in the strict sense of the Convention

53 2011(10) SCALE 524.

but rather in the sense of a body that adjudicates a dispute arising under the provisions of the CP Act and in the process.

On the face of it the decision in the instant case is likely to be welcomed by consumer protection activists because it furthers the cause of CP Act. Students of judicial process know that sometimes a judge decides the outcome of the case in hand and then marshals arguments to support it. Although it is difficult to say whether in the instant case the court assumed what it was to prove and then it proved what it had assumed in the first instance, there should not be any hesitation in saying that the decision in the present case is a goal-oriented, policy-based and forward-looking one, the purpose of which has been to synchronise the relevant provisions of two legislations which cover the same area, namely, carriage by air. In the beginning the court examined the relationship of the CP Act to the CA Act and after considering a plethora of its own decisions on section 3 of the CP Act[54] concluded that the protection provided under the legislation is in addition to the remedies available under other statutes and that it does not extinguish remedies under another statute (in the instant case CA Act). While this ruling sounds correct, its application to the facts of the instant case in effect not only apparently disregards the object and purpose of the CA Act and the Warsaw Convention but also renders rule 29 cited above redundant. The court found support for its finding that a case can be filed against a foreign carrier in an Indian court, in the case of *Ethiopian Airlines* v. *Ganesh Narain Saboo*,[55] but that case is on modification and restriction of the principle of sovereign immunity by section 86 of the CPC and does not lend direct support to the supremacy of the CP Act over the CA Act or to its main finding that the National Commission is a court within the meaning of rule 29 of the second schedule to the CA Act. Actually, given the fact that even rule 29 allows the institution of a suit against an international carrier even in India, the jurisdiction of an Indian court to entertain a suit was never in dispute.

Reverting to the question of whether the National Commission is a 'court,' the apex court has consistently taken the position that the fora created under the CP Act are quasi judicial tribunals[56] and not courts, cases cited by the court in the present

54 Cases on scope of s. 3 of CP Act considered by the court in the instant case are: *Proprietor, Jabalpur Tractors* v. *Sedmal Jainrain,* 1995 Supp. (4) SCC 107; *Fair Air Engineers Pvt. Ltd.* v. *N.K. Modi* (1996) 6 SCC 385; *State of Karnataka* v. *Vishwa Bharathi House Building Co-operative Society* (2003) 2 SCC 412; Secy., *Thirumurugan Coop. Agricultural Credit Society* v. *Ma. Lalitha* (2004) 1 SCC 305; *Kishore Lal* v. *Chairman, Employees' State Insurance Corporation* (2007) 4 SCC 579; *Skypak Couriers Ltd*. v. *Tata Chemicals Ltd*. (2000) 5 SCC 294*; Patel Roadways Limited* v. *Birla Yamaha Ltd.* (2000) 4 SCC 91 and *Ethiopian Airlines* v. *Ganesh Narain Saboo,* AIR 2011 SC 3495.

55 AIR 2011 SC 3495.

56 On the point that National Commission is a quasi-judicial tribunal and not a court see: *Laxmi Engineering Works* v. *P.S.G. Industrial Institute* (1995) 3 SCC 583; *Charan Singh* v. *Healing Touch Hospital* (2000) 7 SCC 668 and *State of Karnataka* v. *Vishwa Bharathi House Building Co-operative Society* (2003) 2 SCC 412.

case also make a neat distinction between a court and a tribunal[57] and suggest that all courts are tribunals but a tribunal is not necessarily a court in the strict sense. It is true that a consumer forum or commission partakes some of the characteristics of a court but to assert on the basis of that it is a court seems to be a far-fetched proposition. It is important to note in this context that the court observed that by virtue of section 25 an order made by district forum/state commission or National Commission will be deemed to be a decree or order[58] made by a civil court in a suit or that a complaint before the consumer forum is within the meaning of the term 'suit' as employed in section 9 of the CA Act, 1865.[59]

IV BREACH OF STATUTORY DUTY AND NEGLIGENCE

As aptly and correctly noted by K. S. Radhakrishnan J in *Uphaar Tragedy* case, private law causes of action, generally enforced by the claimants against public bodies and individuals are negligence, breach of statutory duty, misfeasance in public office etc. Breach of statutory duty is conceptually separate and independent from other related torts such as negligence through the action for negligence.[60] Breach of statutory duty is a well recognized tort but the action for breach of statutory duty is a complex one and the statutory provisions giving rise to tortious liability for breach of statutory duty are relatively few. In cases where the breach of statutory duty gives rise to civil liability and an action is brought for it, it may be advantageous to the plaintiff because the burden of proof is reversed, and in some cases, liability will be strict. The action may also be advantageous to the defendant because of the availability of the defences of contributory negligence and *volenti non fit injuria* (in limited cases). Be that as it may, in an action for the breach of duty created in a statute, the plaintiff is required to prove the following : (i) the statute was intended

57 Cases distinguishing a court from a tribunal considered in *Trans Mediterranean Airways* case are: *Union of India* v. *R. Gandhi, President, Madras Bar Association* (2010) 11 SCC 1; *Bharat Bank Ltd.* v. *Employees*, 1950 SCR 459; *State of Bombay* v. *Narottamdas Jethabhai,* 1951 SCR 51; *Brajnandan Sinha* v. *Jyoti Narain* (1955) 2 SCR 955; *Baradakanta Mishra* v. *Registrar of Orissa High Court* (1974) 1 SCC 374; *Isbill* v. *Stovall,* Rex. Civ. App. 92 SW 2d 1057; *State of Tamil Nadu* v. *G.N. Venkataswamy* (1994) 5 SCC 314 and *Canara Bank* v. *Nuclear Power Corporation of India* (1995) Supp 3 SCC 81. Cases relied upon by the court in support of the proposition that all tribunals may not be court, but all courts are tribunals, see: *P. Sarathy* v. *State Bank of India*, 2000 (5) SCC 355 and *Kihoto Hollohon* v. *Zachillhu* (1992) Supp (2) SCC 651.

58 In *State of Karnataka* v. *Vishwa Bharathi House Building Co-operative Society* (2003) 2 SCC 412 it was held that an order by district forum/ state commission or National Commission will be deemed to be a decree or order made by a civil court.

59 In the instant case his lordship relied upon *Patel Roadways Limited* v. *Birla Yamaha Ltd*. (2000) 4 SCC 91 to buttress his view that the national commission is a court. But all that the Supreme Court in *Patel* said is that a complaint before the forum is in the meaning of the term 'suit' as employed by s. 9 of the Carriers Act, 1965. It has no where stated that a consumer forum is also a court despite fundamental differences between a court and a tribunal.

60 *Uphaar Tragedy* case, *supra* note 17, para 47.

to create civil liability; (ii) the statutory duty was owned to the individual plaintiff; (iii) the statute imposed a duty on the defendant; (iii) the defendant was in breach of the duty, and (iv) the damage was of a type contemplated by the statute.[61]

Municipal corporations and local authorities may be held liable for their negligent acts. In appropriate cases even the state will be vicariously liable for the negligent acts of such bodies. But the question is whether mere breach of a statutory duty does constitute negligence. The apex court discussed this question in detail in *Uphaar Tragedy* case[62] where it considered the liability of MCD and licensing authority to pay compensation to the victims of the tragedy and after consideration of the English, Canadian and Indian cases answered it in the negative. In order to appreciate this important ruling, it is necessary to have a brief look at judicial decisions the court considered in this case. Thus, in *Geddis* v. *Proprietors of Bonn Reservoir*,[63] the House of Lords held: 'For I take it, without citing cases, that is now thoroughly established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone, but an action does i.e. for doing that which the legislature has authorized, if it be done 'negligently'". Mention should also be made here of the observations of the Canadian Supreme Court in *Roger Holland* v. *Governor of Saskatchewan*,[64] which makes clear that 'the law to date has not recognized an action for negligent breach of duty and that the proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity'. Further, as stated by Lord Romer, "(w)here a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of its failure to exercise that power".[65]

Legislative intent is of crucial importance in determination of the liability for a breach of statutory duty. Thus where, under a prison legislation the legislature intended the prison authorities to manage and administer prisons but did not intend to confer on prisoners a cause of action in damages, they would not be liable if loss or damage is caused to prisoners.[66] A clear parliamentary intention that those responsible for carrying out duties under the enactment in question should be liable in damages if they fail to fulfill their statutory obligations is a *sine qua non* for making the public authorities or public officers liable for breach of statutory duties. The House of Lords while giving this ruling in *X (Minors)* v. *Bedfordshire County Council*,[67] further held: "... a common law duty of care cannot be imposed on a statutory duty if the observance of such a common law duty of care would be inconsistent with or have a tendency to discourage the due performance of the statutory duties by the local authority".

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61 Vivienne Harpword, *Law of Tort* 101 (Cavendish Publishing Ltd., 1994).
62 *Uphaar Tragedy* case, *supra* note 17.
63 (1878) 3 AC 430.
64 (2008) 2 SCR 551.
65 *East Suffock Rivers Catchment Board* v. *Kent*, 1941 AC 74.
66 *R.* v. *Dy. Governor of Parkurst Prison (Ex. P. Hague)* (1991) 3 AII ER 733.
67 [1995] 3 All ER 353.

To say that mere breach of statutory duty does not constitute negligence does not imply that public authorities will not be liable for the breach of statutory obligations in any circumstance. To the contrary, there is case law to suggest that municipality may be held liable to pay damages under law of torts for its negligence. In *Anns* v. *Merton London Borough*,[68] wherein the plaintiff had sued for losses to flats in a new block which had been damaged by subsidence caused by inadequate foundations, his contention that the council was negligent in the exercise of statutory powers to inspect foundations of new buildings giving rise to a claim for economic damage suffered was upheld. Although *Anns* was overruled in *Murphy Brentwood District Council*,[69] as per Lord Hoffman it was done only in respect of economic loss resulting from omission to exercise statutory powers and not in respect of physical injury occasioned by such omission. A public law duty cannot by itself give rise to a duty of care although a public body almost always has a duty in public law to give proper consideration to the question whether to exercise power or not. The English court has taken the view that 'one simply cannot derive a common law "ought" from a statutory "may".[70] The distinction made by Lord Wilberforce in *Anns* between "policy" and "operations" is an inadequate tool. But leaving that distinction apart, it does not always follow that the law should superimpose a common law duty of care upon a discretionary statutory power.[71] Apart from exceptions relating to individual or societal reliance on exercise of statutory power, it is not reasonable to expect a service to be provided at public expense and also a duty to pay compensation for loss occasioned by failure to provide the service. An absolute rule to provide compensation would increase the burden on public funds.[72]

Reference may also be made to House of Lord's decision in *Barrett* v. *Enfield London Borough Council*,[73] wherein it was held that where a plaintiff claims damages for personal injuries which he allegedly caused by decisions negligently taken in the exercise of a statutory discretion, and provided that the decisions do not involve issues or policy which the courts are ill equipped to adjudicate upon, a preferable course of action of the courts is to decide the validity of the plaintiff's claim by applying directly the common law concept of negligence than by applying as a preliminary test the public concept of Wednesbury unreasonableness to determine if the decision fell outside the ambit of the stability discretion. Subsequently, the House of Lords speaking through Lord Slynn stated thus: 'the House decided in *Barett* v. *Enfield London Borough Council*, that the fact that acts which are claimed to be negligent are carried out within the ambit of a statutory discretion is not in itself a reason why it should be held that no claim for negligence can be brought in respect of them; it is only where what is done has involved the weighing of competing public interests or has been dictated by considerations on which Parliament could not have intended that the courts would substitute their views for the views of

68 *Supra* note 13.
69 1990 (2) All ER 908.
70 *Ibid*.
71 *Ibid.*
72 *Ibid.*
73 (2001) 2 AC 550.

ministers or officials that the courts will hold the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory discretion'. It is clear from this observation that a public body may be liable for acts done which fell within its ambit of discretion without the claimant also having to show that the act done was unlawful in the public law sense, so long as the decision taken or act done was justiciable.[74]

Turning to Indian decisions, in *Ravindra Nath Ghoshal* v. *University of Calcutta*,[75] the Supreme Court held that 'it would not be correct to assume that every minor infraction of public duty by every public office would commend the court to grant compensation in a petition under articles 226 and 32 by applying the principle of public law proceeding'. The Supreme Court in *Rajkot Municipal Corporation* v. *M. J. Nakudu*,[76] dealing with a case seeking damages under law of torts for negligence by municipality held that there is no duty to maintain regular supervision of the trees in the public places, though the local authority or other authority/owner of a property is under a duty to plant and maintain the tree.

After considering all these cases, the apex court speaking through Raveendran J concluded thus: 'it is not proper to award damages against public authorities merely because there has been some inaction in the performance of their statutory duties or because the action taken by them is ultimately found to be without authority of law'. In regard to performance of statutory functionaries and duties, the court will not award damages unless there is malice or conscious abuse, Raveendran J said.

It is clear from the foregoing that even in England there is a lot of uncertainty in respect of the liability of the public bodies for negligence or violation of statutory duties. To overcome the gaps in existing law, the Law Commission (UK), in its consultation paper on 'Administrative Redress' suggested a 'principle of modified corrective justice in respect of adjudication of negligence claims against public bodies'. The Law Commission consequently proposed the introduction of a new touchstone of liability, namely, serious fault. In what appears to be proposal of far-reaching importance the Law Commission, UK has recommended court based redress which suggests 'the creation of a specific regime for public bodies' based around a number of common elements. One such element is that judges would apply a standard of 'serious fault' in both judicial review and negligence.[77]

74 As per Radhakrishnan J in *Uphaar Tragedy* case, *supra* note 17, para 53.
75 (2002) 7 SCC 478.
76 (1997) 9 SCC 552.
77 *Uphaar Tragedy* case, *supra* note 17, para 54 (Radhakrishnan J's separate opinion).

V CONSTITUTIONAL TORT

When despite some initial judicial pronouncements which challenged the feudalistic notion of sovereign immunity,[78] the law relating to tortious liability of the state for the negligent acts of its servants failed to make a take off and after its forced landing on the ground, it found itself placed in the hanger (parking place at an airport) because of legislative inertia on the part of Parliament to put in place an appropriate legislation on the subject,[79] in a conscious and wise decision the apex court moved on to evolve and develop an effective compensatory regime to redress the sufferings of victims of violations of fundamental rights under the rubric of what has come to be known as 'constitutional torts'. On the first sight, the expression 'constitutional tort' may appear to be a misnomer because being a legal wrong no tort could be described as constitutional and also because it does not smugly fall within the common law notion of tort. Notwithstanding this fact 'constitutional tort' is not only well entrenched in the jurisprudence of India but has also made its way into the laws of the United States, United Kingdom and Canada. In India the concept of constitutional tort found its expression in *Devki Nandan Prasad* v. *State of Bihar*,[80] where petitioner's claim for pension was delayed for over twelve years

78 *The State of Rajasthan* v. *Mst. Vidhyawati*, AIR 1962 SC 933. To the same affect are: *Baxi Amrik Singh* v. *The Union of India* (1973) ILR 1 P& H163 and *The State of Kerala* v. *K. Cheru Babu*, AIR 1978 Ker 43. *Kasturilal Ralia Ram Jain* v. *State of Uttar Pradesh*, AIR 1965 SC 1039 is a retrograde decision and could be seen as a classic example of little done, vast undone. *N. Nagendra Rao & Co.* v. *State of Andhra Pradesh*, AIR 1994 SC 2663 pushed the law in the right direction. For the earlier cases on the vicarious liability of the state, see: *Peninsular and Oriental Steamship Navigation Co*. v. *Secretary of State for India*, 1868-69 Bombay HC Reports Vol. V. Appendix-A at 1; *Nobin Chunder Dey* v. *Secretary of State for India*, ILR 1875 Cal. 11; *Secretary of State for Indian Council* v. *Hari Bhanji,* ILR (1982) 5 Mad 273; *P.V. Rao* v. *Khushaldas S. Advani*, AIR 1949 Bom 227 and *Rup Ram* v. *The Punjab State*, AIR 1961 Punjab 336. In the following cases the state was not held vicariously liable on the grounds of performance of sovereign function: *Pagadala Narasimham* v. *The Commissioner and Special Officer, Nellore Municipality, Nellore*, AIR 1994 AP 21; *State of Orissa* v. *Padmalochan Panda,* AIR 1975 Ori 41; *State of Assam* v. *Md. Nizamuddin Ahmed*, AIR 1999 Gau 62; *State of Madhya Pradesh* v. *Chironji Lal,* AIR 1981 MP 65. Compare these decision with the following decision in which the state was held vicariously liable: *Satya Wati Devi* v. *Union of India through Secy., Govt. of India, Ministry of Defence, New Delhi,* AIR 1967 Delhi 98; *Nandram Heeralal* v. *Union of India,* AIR 1978 MP 209; *Union of India* v. *Jasso,* AIR 1962 P&H 315*; Union of India* v. *Sugrabai,* AIR 1969 Bom 13; *Union of India* v. *Bhagwatiprasad Mishra*, AIR 1957 MP 159; *Pushpa* v. *The State of J&K*, AIR 1977 NOC 277 J&K; *Roop Lal* v. *Union of India*, AIR 1972 J&K 22 and *Union of India* v. *Abdul Rehman*, AIR 1981 J&K 6.

79 In *Kasturilal Ralia Ram Jain* v. *State of Uttar Pradesh*, AIR 1965 SC 1039, Gajendragadkar J suggested the enactment of legislation on the subject of state liability. The law commission, in its first report on the liability of state in torts, suggested legislations on the lines of Crown Proceedings Act, 1947 of England. The USA has dealt with the issues relating to state liability through the Federal Torts Claims Act, 1946.

80 1983 (4) SCC 20.

and the apex court awarded him Rs. 25,000/- as against authorities after finding that the harassment was intentional, deliberate and motivated. In *Rudal Shah* v. *State of Bihar*,[81] the apex court ordered that to prevent violation of the right to safe and personal liberty and to secure due compliance with the mandate of article 21, it has to mulct its violators in the payment of monetary compensation. The court made it clear that the right to compensation is some palliative for the unlawful acts of instrumentalities of the state. *Sebestian Hongary* v. *Union of India*,[82] and *Bhim Singh* v. *State of Jammu & Kashmir*,[83] were later cases, in the same direction. In the United States of America a constitutional tort is redressed in two ways: (i) statutory cause of action under the Civil Rights Act, 1871, for a violation of the constitutional rights and (ii) other rights based on common law principles. As noted above, compensation for constitutional torts has been awarded in Canada also and the ground is now set for the Canadian Charter of Rights and freedoms, to become a source for the Canadian Court to grant compensation for the infringement and denial of constitutional guarantees. It is also being awarded in Ireland.

While it is now well established that a constitutional court has power to award monetary compensation against state and its officials for their failure to safeguard fundamental rights of citizens, jurisprudence on the subject suffers from lack of consistency, predictability and uniformity. Thus, at the general level courts have defined violation of fundamental rights as constitutional torts, but as Radhakrishnan J has aptly and rightly stated, "(M)ost of the cases in which courts have exercised their constitutional powers are when there is intense serious violation of personal liberty, right to life or violation of human rights".[84] The award of compensation under the public law remedy is, according to his Lordship, a special remedy and 'constitutional courts, of course shall invoke their jurisdiction, only in extraordinary circumstances when serious injury has been caused due to violation of fundamental rights especially under article 21 of the Constitution'. What follows from this absolutely correct characterization of this remedy is that it will not be available in all and sundry cases of violation of the right to life and personal liberty. Adjectives like 'extraordinary circumstances' and 'serious injury to the victim', condition the award of compensation under articles 32 or 226 of the Constitution. Case law on the subject suggests that this relief is in addition to award of damages in a private law action, or compensation ordered by the criminal court under section 357 of Cr PC. It has also been said by the apex court that the award of compensation for the enforcement and protection of fundamental rights should be understood in the broader sense than one provided in a civil action for damages under the private law; what is required to trigger action under articles 32 or 226 of the Indian Constitution is not only an extraordinary circumstance which justifies constitutional court's exercise of power under these provisions when serious injury has been caused to the victim of a violation of his right to life or personal liberty, but such violation must also be an established fact. It means that if facts are disputed, the constitutional

81 AIR 1983 SC 1086.
82 AIR 1984 SC 571.
83 AIR 1986 SC 494.
84 *Uphaar Tragedy case*, *supra* note 17, para 49.

court will not award compensation. But a writ court is hardly in a position to establish facts, as it is generally done by a civil court on the basis of oral and documentary evidence. For obtaining established fact, it can rely on an enquiry report conducted and submitted by the district judge under section 175 of Cr PC. This is what the high court did in *Battelanka Satyanarayana* v. *The Government of A.P.*[85] In this case, the father of the deceased Battelanka Yesubabu, claimed a declaration that the action of the police in detaining, torturing and bexling the deceased from 08.07.1990 till 11.07.1998 and not paying compensation for the loss of life of the deceased was illegal, arbitrary and violative of articles 14 and 21 of the Constitution of India and claimed compensation. In response to the direction of the high court, the then learned district judge in his report opined that there was absolutely no basis to accept the allegations of the writ petitions that the death of the son was on account of custodial violence. The high court found on the basis of evidence and records that the cause of death could not be ascertained, and after referring to the decision in *Sube Singh*,[86] concluded that it was not a fit case for award of compensation saying that there it is not established that the death of Yeshbabu was on account of custodial violence. Further, as it is not even established that the deceased had injuries on his body soon after he came out from the police custody, it could not be considered to be a case of custodial violence.

Even prior to the above decision, the High Court of Punjab and Haryana reiterated in *Jogindra* v. *State of Haryana,*[87] that the remedy in public law can not be availed of if the facts regarding the liability of the state or its instrumentality are disputed. But as the decision of the Gauhati High Court suggests high courts are not consistent with their approach towards the issue of disputed facts. Another factor which diminishes the possibility of availability of the public remedy of award of compensation for violation of the right to life and personal liberty is the availability of an alternative and efficacious remedy under private law.[88]

While constitutional courts have been awarding compensation for violation of the fundamental rights enshrined in article 21 of the Constitution, in addition to the private law remedy under the law of torts for more than three decades, they have yet to take a final and definite position on the measure of damages and evolve appropriate methods for compensation of damages. As the matter stands now, there is no strait jacket formula for compensation of damages and as the apex court has said in *D.K. Basu* v. *Union of India,*[89] there is no uniformity or yardstick followed in awarding damages for violation of fundamental rights. The apex court has used different expressions to describe 'compensation' it awards in cases of constitutional torts. These vary from 'palliative' to 'exemplary' to 'compensation'. This *ad hocism* is also discernible in methods adopted for computation of damage in such cases

85 2012(1) ALT 148.
86 *Sube Singh* v. *State of Haryana*, 2006 (3) SCC 178.
87 (2008) 3 PLR 26.
88 *Rakesh Vij S/o R.K. Vij* v. *The Vice Chancellor, Banaras Hindu University through Registrar and Dr. Chandana Haldar Reader in Dept. of Zoology, Banaras Hindu University* (2008) 6 AWC 5714.
89 (1997) 1 SCC 416.

which range from the formula of *ad hoc* to 'punitive formula' to 'tortious formula' and 'case to case' method. One can understand the concern and anxiety of the Supreme Court, which finds expression in the following observation of Radhakrishnan J "Constitutional Courts all over the world have to overcome these hurdles. Failure to precisely articulate and carefully evaluate a uniform policy as against state and its officials would at times tend the court to adopt rules which are applicable in private law remedy...'.[90] 'Adoption of those methods as such in computing the damages for violation of constitutional torts may not be proper', his lordship adds. But what he suggests by way of a solution to the problem is mere reiteration of the case to case formula. In his own words, 'in such circumstances the court can invoke its own methods depending upon the facts and circumstances of each case'.[91]

Custodial death is one of the worst crimes in a civilized society governed by the rule of law. For this reason no civilized nation can permit or condone custodial death/custodial violence in any circumstance. What aggravates custodial violence is that it is committed by persons who are supposed to be the protectors of the citizens in the four walls of a police station or lockup where the victim is helpless during investigation, interrogation or otherwise. The police commit this grave and reprehensible crimes with a view to secure evidence or confession and often resorts to third degree methods including torture and adopt techniques of screening arrest by either not recording the arrest or described the deprivation of liberty merely as a prolonged interrogation. Needless to say, dehumanizing torture, assault, rape and death of an arrestee in the custody of police or other governmental agencies are not only depressing, disturbing, disgusting and outrageous but also constitute a serious violation of the rights to life, liberty and dignity and thereby affect the credibility of the rule of law and the administration of criminal justice system. As the apex court had correctly said more than a decade ago, "(I)f the functionaries of the government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism".[92]

Freedom from torture is an internationally recognized human right and dealt with detail in the Anti-Torture Convention of 1984. Although India has not ratified, but only signed this convention, jurisprudence of the apex court forbids any form of torture or cruel, inhuman or degrading treatment, saying that it falls within the inhibition of article 21 of the Indian Constitution. Yet it is quite distressing that despite the constitutional as well as statutory provisions and judicial pronouncements aimed at safeguarding the personal liberty and life of a citizen, the incidence of torture and death in custody is steadily increasing and causing alarms for the government and the human rights institutions. It appears that either the directions given by the apex court have not percolated down to the lowest rank of police administration or even if they are in their knowledge, they seldom care for them in the name of efficiency and performance of the police force and directions coming

90 *Uphaar* case, *supra* note 17, para 62.
91 *Ibid.*
92 *D K Basu*, *supra* note 89, para 22.

from the state government through senior police officials. A sense of impunity with which the police operates and confidence of some of them that with the support of their superiors they will be able to either hush up any complaint regarding custodial violence/death or win the case in case they are dragged to a court of law are responsible for this state of affairs. Experience shows that when custodial violence/death takes place and an FIR is lodged against the policemen, they put pressure on the complainant to retract from their statement, influence doctors to doctor the post mortem report and perhaps even the outcome of a judicial enquiry.

Against this background it is depressing to note that, as in the past, during the survey period also, the apex court had to handover its judgments on custodial deaths and gang rape on the wife of a helpless and hopeless person who succumbed to injuries he suffered at the hands of the police in the police custody. *Mahboob Batcha* v. *State Rep. by Supdt. of Police*,[93] gives an account of the horrendous manner in which the police treat poor and helpless citizens in the police lock ups. In the instant case one Nandgopal dies of an asphyxial death due to a typical hanging. Padmini, the wife of the deceased was raped, in the presence of her husband, by four policemen who also beat him with sticks and kicked with boots on his chest. At the time there were bleeding injuries on the back, leg and shoulder of Nandgopal and blood was oozing out and he was found in strip form. If police brutalities heaped on the deceased and his wife are deeply shocking, mentally agonizing and dehumanizing what is most baffling is that the accuseds were not charged under section 302, a fact which prevents the apex court from awarding death sentence, as murder by policemen in police custody is in the opinion of the apex court falls in the category of rarest of rare cases deserving death sentence. What is most unfortunate in this regard is the failure of both the trial court and the high court in respect of framing of charges under section 302, IPC.

In *Satya Narain Tiwari alias Jolly* v. *State of U.P*.[94] *and in Sukhdeo Singh* v. *State of Punjab*,[95] the apex court said that crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment. It is hoped that the ruling will deter the prospecting perpetrators of crimes against women, especially policemen who in same cases are reported to have committed rape on women in the police lock up. As noted above, in *Mahboob Batcha,* Padmini, wife of the deceased was raped by a sub-inspector and other policemen. Yet what is most disturbing is that the most unfortunate woman, Padmini, could not get any monetary compensation from the apex court despite its clear finding that the police personnel were guilty and that her most precious fundamental right, namely, right to dignity had been violated by the police perhaps the reason being that the matter was 'brought before the court by way of criminal appeal'. This raises the question whether procedure should be allowed as a basis to deny some palliative by way of compensation in a case where violation of the right to life and personal liberty is found to be firmly established by the apex court/high court.

93 2011 (4) SCALE 20.
94 (2010) 13 SCC 689.
95 SLP (Criminal) No. 8917 of 2010.

Considering that with several caveats, reservations and limitations mentioned above, public law remedy in cases of constitutional torts can provide redress to only a handful of victims of the right to life and liberty guaranteed under article 21 of the Constitution and its deterrent value has been minimal; there is an urgent need to put in place a comprehensive legislation on prevention of torture. It is humbly submitted that judicial creativity cannot be an effective substitute for an effective legislation so far as combating the impunity of the perpetrations of custodial deaths, custodial torture and police atrocities are concerned.

VI TRESPASS TO THE PERSON

Trespass to the person may consist of assault, battery and false imprisonment. Battery involves the unlawful application of force to the person of another, while assault involves doing something which induces in another reasonable fear and apprehension of immediate violence. These two distinct torts are inter-linked and inter-related in the sense in practical situations they are often both committed by the same act or series of acts.

In *S. I. Jai Bhagwan* v. *Smt. Suman Devi*[96] the respondents/plaintiffs alleged in the plaint that the appellants/police officials, while endeavouring to evict the respondent/plaintiffs from the land belonging to one Ramjas foundation used excessive force and thereby, caused them injuries. The respondents/plaintiffs claimed that the appellants/police officials trespassed into the house, dragged plaintiff no.1/ respondent no. 1 outside and threw on her a stone whereby she started bleeding. They also alleged that the defendant no. 3/ appellants no. 2 gave a blow with an iron rod to the plaintiff. When the respondent no. 2 tried to save the plaintiff no. 1/ respondent no.1, the appellants threw her and thereby the plaintiff no.2 also received injuries on the head and started bleeding. They further alleged that the plaintiffs/ respondents were beaten and the police officials ran away when the crowd gathered. The trial court in its decision found on evidence that both parties had tried to distort truth, that there were certain injuries but the same were not so grave as was pleaded by the respondents/plaintiffs. The trial court also found that the appellants/ police officials used unnecessary force, i.e., force more than which was necessary and which did result in injuries to the persons of the respondents/plaintiff. The high court upheld the judgment of the trial court, saying that there was no justification for interfering with the same. The high court also held that the trial court in passing a decree of Rs. 23,000/- had committed no illegality.

VII ENCROACHMENT

In *Hari Ram* v. *Jyoti Prasad*[97] the main question for consideration before the court related to applicability of section 22 of the Limitation Act to an encroachment over a public or private road by the tortfeasor not having the right to possession. In the instant case the civil court having held that the defendant had made illegal/

96 185 (2011) DLT 29.
97 AIR 2011 SC 952.

unauthorized construction over the public street by way of illegal encroachment, decreed the suit and issued a permanent injunction directing the removal of unauthorized construction from the ground. In compliance of the judgment the defendant no.1, removed his portion of illegal construction but the present appellant did not do so within given one month's time to remove all such constructions. Subsequently, an appeal was moved before the additional district judge which was dismissed. On appeal, it was pleaded that the act of enroachment is a continuing cause of action and, therefore, it cannot be barred by limitation. However, the high court dismissed the appeal holding that there is no specific question of law. Being aggrieved appeal before the Supreme Court was filed which rejected the plea of limitation, saying that any act of encroachment when made to a public road is a case of continuing tort in which case cause of action continues as long as such injury continues, and as long as the doer is responsible for causing such injury. The court relied on *Sankar Dastidar* v. *Srimati Banjula Dastidar*,[98] in which the Supreme Court has held that when a right of way is claimed, whether public or private, over a certain land which the tort-feasor has no right of possession, the breaches would be continuing to which the provisions of section 22 of the Limitation Act, 1963 would apply. The court also rejected the appellant's plea that the suit was bad for non-compliance of the provisions of order I rule 8 of the CPC, saying that since apart from being a representative suit, the suit was filed by an aggrieved person, the ground of alleged non-compliance of the provisions of order I rule 8 of the CPC was without any merit. The court found support for this conclusion in *Kalyan Singh, London Trained Cutter Johri Bazar, Jaipur* v. *Smt. Chhote*,[99] where the Supreme Court laid down two important propositions of law: (i) Any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachment there from and that in such a suit he need not comply with the requirements of order I rule 8 CPC. (ii) the suit against alleged trespass even if it was not a representative suit falls in this category.

VIII ACT OF GOD

Act of God is a good defence but of very limited use in tort action. It is available only when the accident was the result of the operation of natural forces like exceptionally heavy rainfall, storms, tempests, tides and volcanic eruptions and was such that no human care or forethought could have avoided and in which there was no human intervention. As explained in Halsbury's laws of England, 'An act of God, in the legal sense may be defined as an extraordinary occurrence of circumstance, which could not have been guarded against, or more accurately and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it'.[100]

98 AIR 2007 SC 514.
99 AIR 1990 SC 396.
100 Halsbury's Laws of England (VIII) 83 (Lexis Nexis, London, 3rd edn.).

It follows that an accident falling under the rubric of 'act of God' is also an 'inevitable accident', but without the intervention of any human agency. In *Ramalinga Nadar* v. *Narayan Reddiar*,[101] the Kerala High Court stressed on this distinguishing feature of act of God when it observed thus: "Accidents may happen by reason of the play of natural forces or by intervention of human agency or by both. It may be that in either of these cases, accident may be inevitable. But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency could be said to be an Act of God".

As is evident from the foregoing, an accident is not an act of God unless it is the direct result of human intervention. This, however, does not mean the complete absence of human activity (e.g. destruction of an aeroplane in the air by the act of God although plane is there because of human action). It is equally important to note that to be an act of God, the act need not necessarily be violent or exceptional. To illustrate the point, where an accident is caused by the sudden death of a lorry driver from a disease he did not know he had or against the efforts of which could not have guarded, the defence of 'act of God' will apply. Act of God is a defence of very limited application and imposes a heavy onus on the defendant. Indeed, there are dicta in number of cases suggesting that heavy rainfall and violent snowstorms were not act of God.

In *A. Murugan* v. *The Government of Tamil Nadu*, *rep. by Secretary to Government Electricity Department*,[102] the petitioner's son M. Barathkumar, who was studying in the 4th standard died of electrocution due to the snapping of the live wire of L.T. 3 phase maintained by the respondents. The petitioner filed the present writ petition, seeking a direction to the respondents to pay a compensation for a sum of Rs. 30,000/-. Respondents admitted that the death was caused due to snapping of the live wire and also agreed to pay sum of Rs. 25,000/- by way of *ex-gratia* payment as provided under the board proceedings (FB) no. 4 (administration branch), dated 29.01.1998 but denied their liability to pay beyond the permissible limits of the said amount, contending that there was no negligence on their part since the incident took place as result of heavy wind and the falling of the coconut leaf. Respondents also contended that the claim sought from the writ petition could not be sustained and that the only course that was open to the petitioner was to approach the jurisdictional civil court. The court rejected the plea of act of God saying that assuming the reasons assigned by the respondents are correct it can not be termed as an act of God. The court said that, 'when it is not in dispute that there was coconut trees standing, the respondents being the public authority ought to have foreseen a situation in which the leaves of the said trees would fall on the overhead line'. It is also not the case of the respondents that blowing of wind was unnatural. The court found on records that there was negligence on the part of the respondents. The court after relying on previous decisions not only re-affirmed its jurisdiction to entertain and decide the writ petition under article 226 of the Constitution but also directed the respondents to pay Rs. 2.00 lakh as compensation to the petitioner and

101 AIR 1971 Ker 197.

102 MANU/TN/0964/2011: (W.P. No. 38175 of 2003 decided on 28.03.2011).

computed this amount by adopting the guidelines provided under the Motor Vehicles Act for fixing just compensation.

IX PUNITIVE OR EXEMPLARY DAMAGES

There are various kind of damages which are payable in a tort action, namely, nominal damages, compensation damages (general damages and special damages), contemptuous damages, aggravated damages and punitive or exemplary damages. Special damages are quantifiable pecuniary losses up to the date of trial and include reasonable expenses to the date of trial, while general damages include loss of future earnings of young plaintiffs, medical fees and nursing financial aid arrangement, cost of bringing up children, pain and suffering loss of amenity, damages for the injury itself, damages for bereavement, interference with consortium etc. Then there are established rules for calculation of damages in a tort case.

Punitive damages are distinguishable from aggravated damages; while in the former, the intention of the court is to punish the wrong doer by an additional award on top of the compensatory damages, and perhaps to deter others, aggravated damages, are awarded when the court wishes to express disapproval of the defendant's behaviour as a result of which the claimant has suffered more than would normally be expected in the situation. Punitive damages are awarded in specific cases and are very rare because awarding such damages would have the effect of usurping the function of the criminal law. Specific situations in which punitive damages may be awarded are: (i) where servants of the government behave in an oppressive, arbitrary or unconstitutional way, (ii) where statutes expressly permit payment of exemplary damages, and (iii) where the conduct of the defendant was calculated to make profit for himself.[103] *Uphaar Tragedy* case, according to the Delhi High Court, fall in the last category. The high court, therefore, calculated the amount of damages to be payable to injured persons and the heirs of the dead persons by applying the principle that the licensee is liable to pay punitive damages to the extent of profit which it would have earned by selling tickets in regard to extra seats unauthorisedly and illegally not sanctioned by the authorities and installed by the licensee. The high court did not indicate the arithmetical calculation of arriving at Rs. 2,50,000,000/- but indicated that the said sum had been assessed as the income earned by them by selling the ill-gotten profits benefits.

To check for additional 250 seats between 1979 and 1996, the high court apparently calculated the ticket revenue at the rate of Rs. 50 per ticket for 52 additional seats for three shows a day to arrive at a sum of Rs. 7800/- per day. For 17 years, this works out to Rs. 4,83,99,000/-. Presumably, the high court deducted Rs. 2,33,99,000/- towards entertainment to arrive at Rs. 2.5 crores as profits from these additional seats. Initially, the seats were 250. Forty three additional seats were sanctioned on 30.09.1976. But the high court permitted the continuance of such number of seats which were permissible as per rules.

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103 The courts award punitive damages sparingly and that too in very extraordinary situations. For more, see *Rooks* v. *Barnard* [(1964) All ER 367] and *Attorney General* v. *Blake* [(2001) AC 268].

The apex court found wrong the above calculation of profit from additional seats made by the high court, stating that if at all the theatre owner were to be made liable to reimburse the profits earned from illegal seats, it should be only in regard to 15 seats that were added by securing an order dated 4.10.1980 and the 8 seats in the box which was the cause for closing one of the exists. The apex court further stated that the high court wrongly assumed the ticket value to be Rs. 50/- from 1979-1996, because it was Rs. 50/- in the year 1997 for a balcony seat. Another erroneous assumption, the high court made was for all shows on all these days, whether all these seats would be fully occupied. The apex court factored all three things in the calculation of profits from illegal additional seats and concluded thus: 'on a realistic assessment, (at a net average income of Rs. 12/- per seat with average 50 per cent occupancy for 23 seats) the profits earned from these seats for 17 years would at best be Rs. 25,00,000/-.

After having reduced the amount from Rs. 2.5 crore to Rs. 25 lakhs as profits/ benefits that the licensee derived from their illegal acts, Raveendran J relied on the decision in *M. C. Mehta* case in support of the appropriateness and legality of award of punitive damages in this context and concluded that licensee is not only liable to pay compensation for the death and injuries, but should, in the least be denied the profits/benefits out of their illegal acts.

Raveendran J also distinguished the instant case from *Nilabati Behera* case,[104] and said that the ruling in the later case could not be of any assistance as that case relates to a single individual and there was sufficient evidence. And accordingly, his lordship assessed the amount of compensation keeping in view the principle relating to award of compensation in public remedy law cases giving liberty to the legal heirs of deceased victims to claim additional amount whenever they were not satisfied with the amount of compensation.

In practice it is not really punitive but a kind of negative restitution, the judge added: The award of the said sum, as additional punitive damages, according to his Lordship, covers two aspects, the first is because the wrong doing is outrageous in utter disregard of the safety of the patrons of the theatre, and the second is the gravity of the breach requiring a deterrent to prevent it in future'. Given the fact that power of the Supreme Court or the high court to award compensation as a public law remedy for the violation of the right to life and personal liberty, enshrined in article 21 of the Indian Constitution is well entrenched in the constitutional jurisprudence and the amount to be awarded may be even punitive or exemplary in extreme cases, the decision of his Lordship to award on exemplary or punitive damage in the instant case is in accord with previous decisions of the apex court. Yet, we find ourselves unable to agree with reliance placed by his Lordship on *Mehta* case for arriving at this finding. Leaving apart the legal status of *M. C. Mehta* rule and its little use by the judiciary, the fact that the apex court enunciated this rule in response to the Oleam gas leak in *Sriram Fertilizers* and in the context of an extremely dangerous situation like the *Union Carbide*, which posed a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, make it perhaps inapplicable to the present case.

104 1993 (2) SCC 746.

Constitutional tort is the latest addition to the circumstances in which punitive damages may be awarded by the court. While there is nothing wrong with this broad proposition, there are still many issues arising from it, answers to which have yet to emerge. For instance, what is the appropriate rule and measure of the punitive damages? Whether the ratio of 10 to 1 or higher between punitive and compensatory damages will not be arbitrary, oppressive or unconstitutional? Since damages awarded in a case of constitutional tort are in addition to civil or criminal remedies available to the victim, whether the award of punitive damages should not be limited to very few cases. Further, what factors a court need to take into account when it determines punitive damages? Contumacious conduct of the wrongdoer, the nature of the statute, gravity of the fault committed may be relevant circumstances in this regard. Further, as aptly stated by Radhakrishnan J, "(P)unitive damage can be awarded when the wrongdoers conduct 'shocks the conscience' or is 'outrageous' or there is a willful and 'wanton disregard' for safety requirements".

X MISCELLANEOUS

Though *Indian Council for Enviro-Legal Action* v. *Union of India*,[105] does not comfortably fall within the purview of the present survey, it deserves a brief mention here for two reasons. Firstly, the polluter pays' principle on which the original decision was based is only a refined and fine-tuned version of the absolute liability principle laid down in the famous *Mehta* case.[106] Secondly, this is a classic case of non-compliance of the judgment and orders of the apex court even after fifteen years of the final judgment despite dismissal of the writ petition, the review petition and the curative petition by the Supreme Court. This is certainly a very unusual and extraordinary litigation where the erring industry seems to be successful in circumventing the judgment of the apex court by deliberately keeping the case alive by filing one interlocutory application after the other. This case clearly shows how men with means can be successful in evading and avoiding compliance of the orders of even the highest judiciary. This is indeed a very serious matter concerning the sanctity and credibility of the judicial system in this country. When this can happen in the case of an environment related case to deal with which the state is armed with necessary powers under a plethora of environmental legislations, what would happen if a rich and resourceful defendant adopts all sorts of methods to defeat the claim of a poor plaintiff for compensation under a private/public law remedy. Surely and certainly, as the court stated in this case unscrupulous litigants must not only be prevented from taking undue advantage by invoking jurisdiction of the court but they should also not be allowed to take advantage of their own wrongs. In no case the institution of litigation could be permitted to confer any advantage on a party by delayed action the court added. But what is the most important aspect of the decision in this case is the courts clear, and straightforward observation that "(J)udgment of the apex court has great sanctity and unless there were extremely compelling overriding and exceptional circumstances the judgment

105 (2011) 8 SCC 161.
106 *Supra* note 9.

of the apex court should not be disturbed, particularly in a case where review and curative petitions have already been dismissed". This holds true not only for environmental litigations but also for all sorts of litigations including tort litigations.

In *Sunil Bagai* v. *GNCT of Delhi*,[107] the appellant had sought a direction that the 'collector of stamps' should refund Rs. 18, 277/- together with interest at the rate of 24 per cent per annum with effect from 11.08.2001 to the appellant and that the appellant be paid damages in sum of Rs. 1,00,000/- on account of malafide, oppressive acts of the respondent. In the instant case, appellant's father was issued an unexecuted conveyance deed by DDA and was asked to be stamped by Collector of Stamps who took the position that the stamp duty be paid as sale consideration. The appellant's father subsequently, filed a writ petition stating that collector of stamps cannot adjudicate on stamp duty payable with reference to price paid to the original allottee. The Delhi High Court dismissed the writ stating that the petition suffered from the defect of non-joinder of parties, that writ petition filed in the year 2008 was impaired by delay and laches as pleaded in writ petition and above all claim for damages for tort of having acted oppressive or capricious could not be enforced under a writ jurisdiction. The court also said that the writ petition was not even maintainable.

Two appeals *Gian Singh* v. *State of H. P.* and *State of H.P.* v. *Gian Singh*,[108] raised the question of applicability of the principle of mitigation of damages in a tort action. In the instant case, the Gharat belonging to the appellant/plaintiff was damaged when a road passing above the Gharat was being constructed by the respondent and big boulders and debts were thrown below the road. As a result of that damage the gharat stopped working since the month of January, 1987. The trial court fixed Rs. 15,000/- as compensation for the repair of the gherat and removal of the debris which was subsequently endorsed by the district judge. The trial court also held the plaintiff entitled to recover damages to the tune of Rs. 21,600/- for a period of three years prior to the filing of the suit. The district judge, however, applied the principle of mitigation of damages claimed by the plaintiff and held that after the gherat got damaged in 1987 the plaintiff was under a delay to mitigate his loss. The court assessed the loss of income for a period of one year only and modified the decree passed by the trial court. It was also held that it is well established that it is for the plaintiff to mitigate his loss and it is not necessary for the defendants to have taken a specific plea, which is legal and could be considered by the court.

XI CONCLUSION

It has been aptly noted by the distinguished jurist, Munroe Smith, 'the rules and principles of case law have never been treated as final truths, but as working hypothesis, continually retested in those great laboratories of the law, the courts of justice'.[109] The process of retesting and reformulating has also been at work in torts

107 MANU/DE/2790/2011 : LPA 640/2009 decided on 08.07.2011.

108 MANU/HP/2098/2011: RSA Nos. 222 and 598 of 2011 decided on 05.08.2011.

109 Munroe Smith, *Jurisprudence* 21 (Columbia University Press) in B.N.Cardozo, *The Nature of the Judicial Process* 23 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2008).

cases decided during the current survey year. The survey of cases decided during 2011 reveals the dynamism of the tort law in this country. These cases make significant value-addition to existing tort jurisprudence in India. *Uphaar* case is a *locus classicus* decision on negligence and liability for breach of statutory duty, while *Trans Mediterranean* is a goal-oriented, policy-based and forward-looking judgment on carriage by air. *Govind Yadav* is another landmark judgment for underscoring the need to provide speedy redress to victims of motor accidents while *Susan Leigh Beer* and *Pushpa Devi* are other important judgments in as much as they attempt to re-orient the existing rules and principles of tort law to meet the ends of justice. The other judgments considered in this survey are no less important, they add clarity to existing law by way of its application to the concrete fact situations involved therein.