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TORT LAW

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I INTRODUCTION

TORT LAW has in recent times witnessed imperceptible growth with judicial pronouncements adding to the existing corpus which consists of normative rules regarding what attracts tortious liability under varied circumstances demanding fixation of liabilities and awarding of damages.[1] In recent times, a need is being felt to look at tort law from the perspective of human rights as well.[2] With the advent of globalisation and technological advancement, there is a pressing need to move beyond the confines of the traditionally settled boundaries of tort laws. As the newer challenges emerge, so should the remedial responses under tort law. Cyber space, for instance, continues to churn out unique and unforeseen questions demanding legal innovation and activism. The year under review offers an admixture of case laws that cover traditionally hardcore tort law as well as new emerging problems.

II DEFAMATION

The common law tort of defamation reflects the long-standing interest in protecting reputation.[3] The interest that everyone has to protect their reputation "reflects no more than our basic concept of the essential dignity and worth of every human being a concept at the root of any decent system of ordered liberty."[4] In the year under survey, one of the landmark judgments on law of defamation was penned by Deepak

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1 See Percy H. Winfield, "The Foundation of Liability in Tort" 27 *Columbia Law Review* 1(1927).

2 See George P Fletcher, *Tort Liability for Human Rights Abuses* (Hart Publishing, 2008); also see, H. Gerald Chapin, *Illustrative Cases on Torts* (St. Paul West Publishing Co., 1916).

3 Gerald R. Smith, "Of Malice and Men: The Law of Defamation" ,27 *Val. U. L. Rev*. 39 (1992).

4 *Rosenblatt* v. *Baer* 383 U.S. 75 (1966) at 92. (*per* Stewart J).

Mishra, J in *Subramanian Swamy* v. *Union of India,*[5] where quoting Salmond, Mishra, J reminded that, "The wrong [of defamation] has always been regarded as one in which the court should have the advantage of the personal presence of the parties if justice is to be done. Hence, not only does an action of defamation not survive for or against the estate of a deceased person, but a statement about a deceased person is not actionable at the suit of his relative."[6] The present case is important because the court had to "dwell upon the concepts of "defamation" and "reputation", delve into the glorious idea of "freedom of speech and expression" and conception of "reasonable restrictions" under the constitutional scheme and x-ray the perception of the court as regards reputation…."[7]

'Defamation' under article 19(2): Civil or criminal defamation

Moreover, one of the interesting arguments that the court had to grapple with was: whether the word "defamation" occurring in article 19(2) is confined only to civil defamation or it included criminal defamation as well. To put it otherwise, in the words of the *amicus curiae* in the case, the question for determination was whether the word "defamation" used in article 19(2) has reference to the Indian Penal Code, 1860 (IPC) (statutory law) as an indictment, or merely the tort of defamation, as it appears after "contempt of court" (which includes criminal contempt) and before the phrase "incitement to an offence" both being penal in nature.[8]

Before deciding the question before the court, Mishra J observed that, "…it is beyond any trace of doubt that civil action for which there is no codified law in India, a Common Law right can be taken recourse to under Section 9 of the Code of Civil Procedure, 1908, unless there is specific statutory bar in that regard…."[9] He also reminded that "while construing the provision of Article 19(2), it is the duty of the Court to keep in view the exalted spirit, essential aspects, the value and philosophy of the Constitution."[10] As the question whether doctrine of *noscitur a sociis* should be applied to the expression "incitement of an offence" used in article 19(2) of the Constitution so that it gets associated with the term "defamation", Mishra J observed that:[11]

> (T)he term "defamation" as used is absolutely clear and unambiguous. The meaning is beyond doubt. The said term was there at the time of commencement of the Constitution. If the word "defamation" is

5 (2016) 7 SCC 221; See, Eric Descheemaeker, "Protecting Reputation: Defamation and Negligence" 603-641, 29 *Oxford Journal of Legal Studies* (2009); Also see, Andrew T. Kenyon, "What Conversation? Free Speech and Defamation Law" 73 *The Modern Law Review* 697-720 (2010).

6 *Id*. at 271.

7 *Id*. at 249

8 *Id*. at 268

9 *Id*. at 291.

10 *Ibid*.

11 *Id*. at 293. Emphasis added.

> associated or is interpreted to take colour from the terms "incitement to an offence", it would unnecessarily make it a restricted one which even the Founding Fathers did not intend to do. Keeping in view the aid that one may take from the Constituent Assembly Debates and regard being had to the clarity of expression, we are of the considered opinion that there is no warrant to apply the principle of *noscitur a sociis* to give a restricted meaning to the term "defamation" that it only includes a criminal action if it gives rise to incitement to constitute an offence. The word "incitement" has to be understood in the context of freedom of speech and expression and reasonable restriction. The word "incitement" in criminal jurisprudence has a different meaning. It is difficult to accede to the submission that defamation can only get criminality if it incites to make an offence. *The word "defamation" has its own independent identity and it stands alone and the law relating to defamation has to be understood as it stood at the time when the Constitution came into force. (emphasis added)*

Cyber defamation: Gatekeeper theory

In *Google India Private Limited* v. *M/s. Visaka Industries Limited,*[12] High Court of Andhra Pradesh had the occasion to deal with the gatekeeper theory as regards the responsibility of intermediaries such as Facebook, Gmail, Google in cases of something defamatory being posted online. It was observed that "In view of the law declared by the apex court in *Shreya Singhal* v. *Union of India*,[13] it is for the intermediary to prove that it had exercised due diligence in allowing posting of any content on the web-blog….the Gate keeping theory is applicable to the Internet…."[14] The court concluded that:[15]

> …[T]he theory of gatekeeper attached more responsibility to the intermediary and it is only an effort to control online content by leveraging the position of the gatekeepers to flow of information online. The reasoning here is that since online intermediaries such as …Facebook, Gmail, Google … host and facilitate access to vast amounts of Internet content, and since internet service providers such as Airtel or BSNL physically connect users to the Internet, they are the gatekeepers presiding over the flow of information. Therefore, making these gatekeepers liable for blocking, filtering and removing illegal content, is seen as an effective way to put a stop to the sharing of illegal content. This is particularly appealing in contexts in which the

12 2016 SCC OnLine Hyd 393.

13 (2015) 5 SCC 1.

14 *Id*., para 79.

> author of illegal content is difficult to identify, or is based in another country, and cannot be located, much less prosecuted, in India. (emphasis added) In these contexts, it is very difficult for the government to raise the expected penalties applicable to the wrongdoers. Therefore, direct deterrence becomes ineffective, creating the need to explore third party liability.

It was clearly held that "Various theories of liability like strict liability standard cannot be applied to the provisions of Information Technology Act."[16]

In *Manish Vyas* v. *Brahm Singh Parihar*,[17] Manish Vyas, chief editor of '*Sandhya Danik Teesra Prahar'* allegedly published unsubstantiated allegation against the plaintiff. The news published in the newspaper averred that the plaintiff had grabbed lands misusing his power. The court came to the conclusion that the news was not published after making proper and genuine enquiry. And therefore, it was held that the news item containing charges of wrongful possession were published without any proper enquiry by the defendant and therefore baseless. The appeal filed against the judgment of the lower court was rejected, and therefore, the order of lower court requiring the editor to pay damages was upheld.

III NEGLIGENCE

Negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do.[18] "Negligence arises from doing an act that a reasonable person would not do under the circumstances, or from failing to do an act that a reasonable

15 *Id.*, para 80.

16 *Id.*, para 82.

17 2016 (3) WLN 488 (Raj.)

18 See*: Blyth* v. *Birmingham Waterworks Co.* (1856) 11 Exch78: (1843-60) All ER Rep 478; *Bridges* v. *Directors of North London Rly*. (1874) LR 7 HL 213: 43 LJQB 151; *Governor General in Council* v. *Saliman* ILR (1948) 27 Pat 207; In *Bolam* v. *Friern Hospital Management Committee* (1957) 2 All ER 118, McNair J observed thus : "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent." Quoted in *Poonam Verma* v. *Ashwin Patel* (1996) 4 SCC 332 at 343; also see, Robert E. Keeton, "Is There a Place for Negligence in Modern Tort Law?", 53 *Virginia Law Review* 886 (1967).

person would do. The same test is applied to determine whether a plaintiff was contributorily negligent."[19] Negligence under tort law appears in different forms, each form covering a distinct aspect of liability arising from failure to an act that a reasonable man would have otherwise done in similar circumstances. Negligence may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or negligence *per se*.[20]

Act of God *vis-à-vis* strict liability

In *Vohra Sadikbhai Rajakbhai* v. *State of Gujarat*,[21] the court had to deal with the question: "Whether gross negligence in not maintaining particular level of water in the dam by the respondents; that has resulted into damage and destruction to the plantation of the appellants, causing loss of livelihood, could be said to be an "Act of God?". In present case, the respondents had constructed and maintained a dam. 60,000 cusecs of water from this dam was released, which flooded the land of the appellants and destroyed the plantation therein. As per the respondents, the water had to be released from the dam as it reached an alarming level because of heavy rains and non-release would have breached the dam. The action was, thus, taken in public interest and it was occasioned because of the rains, which was an act of God. The appellants, on the other hand, contended that it was sheer negligence on the part of the respondents in not maintaining low level of the water keeping in mind the ensuing monsoon season and, therefore, the damage which the appellants have suffered has direct nexus or causal connection with the aforesaid act of negligence and it could not be attributed to the rains. It was, thus, pleaded that the respondents could not term it as an act of God and excuse themselves from the tortious liability Sikri J observed that:[22]

> Since the dam is constructed and maintained by the respondents and the appellants suffered losses as a result of release of water from the said dam, onus was on the respondents to prove that they had taken proper care in maintaining appropriate level of water in the dam taking into account the provision for the water that can get accumulated in the said dam due to the forthcoming rainy season. The respondents are the owners of the dam in question. They are expected to keep the said dam in such a condition which avoids any loss or damage of any nature to the neighbours or passers-by. The doctrine of strict liability, which

19 Alan D. Miller and Ronen Perry, "The Reasonable Man", 87 *New York University Law Review*, 323-392 (2012); also see, Ernest J. Weinrib, "Toward a Moral Theory of Negligence Law", 2 *L. & Phil.* 37 (1983).

20 *Poonam Verma* v. *Ashwin Patel* (1996) 4 SCC 332 at 348.

21 (2016) 12 SCC 1.

22 *Id*. at 10.

> has its origin in *Rylands* v. *Fletcher*,[23] will have application in the instant case.

As it is well known, there are two exceptions to the aforesaid rule of strict liability. First, where it can be shown that the escape was owing to the plaintiff's default, and second, the escape was the consequence of *vis major* or the act of God. Therefore, as regards the question of Act of God being applicable in the present case Sikri J in the above case reminded that:[24]

> An act of God is that which is a direct, violent, sudden and irresistible act of nature as could not, by any amount of ability, have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. Generally, those acts which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause will come under the category of acts of God. Examples are: storm, tempest, lightning, extraordinary fall of rain, extraordinary high tide, extraordinary severe frost, or a tidal bore which sweeps a ship in mid-water. What is important here is that it is not necessary that it should be unique or that it should happen for the first time. It is enough that it is extraordinary and such as could not reasonably be anticipated.

In the instant case, the Supreme Court exercising its power under article 142 of the Constitution, awarded damages to the tune of Rs. 5,00,000 to the plaintiffs.

Contributory negligence

In *Anil Kumar Gupta* v. *Union of India*,[25] a petition under article 32 of the Constitution was filed and the petitioner prayed for directions, *inter alia*, for finding out reasons for loss of lives, for assessment of damage to property and for grant of compensation or financial assistance to victims. He has also prayed for directions for laying down guidelines for necessary precautions and care to be taken so that such tragedy is not repeated again.

The tragedy in question was an outcome of a recruitment drive aimed at filling up 416 posts of class IV employees, Indo-Tibetan Border Police (ITBP) which had called candidates from eleven states at its headquarters located at Bareilly, a small

23 (1868) LR 3 HL 330; Blackburn, J stated the principle of strict liability thus : "…the true rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape." *Supra* note 21 at 14.

24 *Supra* note 21 at 14.

25 (2016) 14 SCC 58.

town in Uttar Pradesh. As the gathering was swelled and increased in number, the officers of ITBP found themselves incapable of managing the situation because of such large gathering and as such they suspended and postponed the drive. This resulted into a consequent resentment and shouting of slogans in protest by aspirants provoking the higher officers of ITBP to use *lathi* charge to push the crowd. This resulted in a chaotic situation with some aspirants resorting to violence. The armed police then had to use tear gas shells to disperse the crowd. Massive disturbance and lawlessness prevailed all over the town causing law and order problem. Some buses were burnt and damage was caused to public and private property. In the backdrop of such situation the crowd of aspiring candidates rushed to rail and road terminals to return back to their homes. Because of congestion and crowd in large numbers, the train coaches were all jam-packed. Hundreds of young men then climbed atop Himgiri Express that was on its way to Eastern Uttar Pradesh and Bihar from where large number of aspirants had come.

When Himgiri Express left Shahjahanpur railway station with hundreds of men on rooftop and headed towards Rosa Town, an accident took place at Hathaurda Railway Overbridge near Mohammadabad Crossing in Shahjahanpur. The railway over bridge was not tall enough and the gap between the roof of the coach and the bottom of the overbridge was hardly three feet. The train was speeding fast and by the time the young men on rooftop saw the approaching bridge it was too late. At least 14 young men were crushed there and then with 20 others seriously injured having been hit by the over-bridge and fallen from rooftop. At this time, some high tension wire broke and fell over the train as a result of which some received electric shocks. Despite this mishap, the train continued running for a while and it finally stopped some 3 km from the place of the incident. The court held that:[26]

> …[I]t must be expected of the persons concerned to be aware of the inherent danger in allowing the train to run with such speed having large number of persons travelling on rooftop. Though the people who travelled on rooftop also contributed to the mishap, the Railway Administration, in our view, was not free from blame.

The court directed that the next of kin of those who died in the incident and those who sustained injuries must be duly compensated by the railway administration. Those who died were obviously very young in age for they had come to compete for the jobs. Moreover, the railway administration was directed to pay compensation of Rs. 5 lakhs to the next of kin in case of every death; compensation of Rs. 1.5 lakhs in every case of permanent disability suffered by anyone in the incident; compensation of Rs 75,000 in case of any grievous injury suffered by anyone; and compensation of Rs. 25,000 in case of simple injury suffered by anyone.

26 *Id*. at 70.

Medical negligence

In *Manorama Tiwari* v. *Surendra Nath Rai,*[27] one Ms Tapsi Rai, aged 14 years, daughter of respondent Surendra Nath Rai, underwent surgery on August 8, 1997 in Maharani Government Hospital, Jagdalpur, Bastar. The operation necessitated due to pain developed by the patient in the abdomen, was performed by the appellants, namely, Manorama Tiwari, B.R. Kawdo and Pradeep Pandey. Before conducting the surgery, consent to operate was taken from the respondent. However, even after surgery, the condition of the patient did not improve, and she died on the same day. A First Information Report (FIR) was filed against the doctor by the respondent more than five months after the incident levelling charges under section 304-A of the Penal Code, 1860. The Supreme Court held that:[28]

> … [I]t is a clear case where the appellants were discharging their public duties, as they were performing surgery on the patient in the Government Hospital. It is not disputed that the appellants were the medical officers in the Government Hospital. As such, the criminal prosecution of the appellants initiated by the respondent (complainant) is not maintainable without the sanction from the State Government.

The court relied on an earlier judgment of the Supreme Court in *Jacob Mathew* v. *State of Punjab,*[29] where the Supreme Court had laid down guidelines for prosecution of medical professionals.[30] In another case before the High Court of Madras, the deceased while undergoing vasectomy operation was administered nitrous oxide instead of oxygen negligently by the hospital authorities. The state was held vicariously liable for the act of the hospital employees that resulted into the death of the deceased. The hospital in question was a governmental hospital. The high court took into account

27 (2016) 1 SCC 594. Also see, *Asit Baran Mondal* v. *RitaSinha* (2016) 9 SCC 364.

28 *Id.* at 599.

29 (2005) 6 SCC 1.

30 Laying down the guidelines, the Supreme Court in *Jacob Mathew* observed that : "A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam [*Bolam* v. *Friern Hospital Management Committee*, (1957) 1 WLR 582: (1957) 2 All ER 118] test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld." *Id.* at 34-35; Also see, s. 197, Criminal Procedure Code, 1973.

the dictum of the Supreme Court in *Achutrao Haribhau Khodwa* v. *State of Maharashtra,*[31] where the court while considering the doctrine of *res ipsa loquitur* and the vicarious liability of the government for the negligent act of its employees, had observed that running a hospital was an exercise of the state's sovereign power and as such, the state is vicariously liable in tort for the tortious acts committed by its servants.[32]

Negligence of the state: Fixation of the liability

In *T. Noktang, G.B.* v. *State of Nagaland,*[33] the petitioner, being accompanied by other workers engaged in the work of construction of a residential building of the one of the respondents, was taking rest on the ground by the side of the brick boundary wall fencing of the office of the respondent. A portion of the wall suddenly collapsed and fell upon the petitioner and another person causing grievous injury to both the persons. The petitioner claimed that the accident has resulted into permanent physical disablement to the extent of 30%. It was contended by the petitioner that the brick wall constructed by the respondent no.4 had collapsed upon the petitioner and other person solely due to lack of maintenance of the same by the concerned authorities. As such proper maintenance of the wall was the duty and responsibility of the respondent no. 4. As such, according to the petitioner the present is a clear case of negligence on the part of the official respondent in failing to maintain the boundary wall in a proper manner. Therefore, the petitioner claimed an amount of Rs. 7,26,000/- as total compensation. The high court observed that:[34]

> The present is not a case of infringement of fundamental right of the petitioner guaranteed under Article 21 of the Constitution. The claim of the petitioner for payment of compensation is in the nature of a tortious action on account of injury allegedly suffered by him due the act of negligence on the part of the respondents. The petitioner has not been able to show infringement of any fundamental right. Therefore,

31 (1996) 2 SCC 634.

32 The Supreme Court in *Achutrao Haribhau* clarified the position in this respect thus : "Running a hospital is a welfare activity undertaken by the Government but it is not an exclusive function or activity of the Government so as to be classified as one which could be regarded as being in exercise of its sovereign power. In *KasturiLal Case* itself…this Court noticed that in pursuit of the welfare ideal the Government may enter into many commercial and other activities which have no relation to the traditional concept of governmental activity in exercise of sovereign power. Just as running of passenger buses for the benefit of general public is not a sovereign function, similarly the running of a hospital, where the members of the general public can come for treatment, cannot also be regarded as being an activity having a sovereign character. This being so, the State would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees." *Ibid*.

33 2016 (2) GLT 1106.

34 *Id*., para.8

> even if negligence on the part of the respondents is established, award of compensation under the public law would not be proper in the absence of any proof of infringement of his fundamental right under Article 21 of the Constitution.

Therefore, the court held that this writ petition is not maintainable. The court however held that the petitioner would be at liberty to seek appropriate remedy before the civil court.

IV COMPENSATION UNDER MOTOR VEHICLE ACT, 1988

In *Reliance General Insurance Co. Ltd.* v. *Shashi Sharma,*[35] the Supreme Court dealing with the question of compensation under Motor Vehicles Act, 1988 held that, "Two cardinal principles run through the provisions of the Motor Vehicles Act of 1988 in the matter of determination of compensation. Firstly, the measure of compensation must be just and adequate; and secondly, no double benefit should be passed on to the claimants in the matter of award of compensation. Section 168 of the 1988 Act makes the first principle explicit. Sub-section (1) of that provision makes it clear that the amount of compensation must be just."[36] And, as regards the import of the word "just", the court observed that, "The word "just" means—fair, adequate, and reasonable. It has been derived from the Latin word "justus", connoting right and fair."[37] The court remained relying upon previous judgments that "the compensation "is not intended to be a bonanza, largesse or source of profit". That, however, may depend upon the facts and circumstances of each case, as to what amount would be a just compensation."[38]

In the above case, an appeal was filed by the respondents against the award of the Motor Accidents Claims Tribunal, Jind. The respondents had filed a claim petition after the death of Ashwini Sharma caused due to a motor accident on October 24, 2010. He succumbed to the injuries sustained in that accident. The Tribunal partly allowed the claim petition. A sum of Rs. 4,50,000 was awarded as compensation to the claimants being the dependants of deceased Ashwini Sharma; with interest @ 7.5% p.a. from the date of filing of the claim petition till realisation. The tribunal directed the appellant insurance company to pay the compensation amount as determined in the award to the claimants.

The claimants, being aggrieved by the quantum of compensation fixed by the tribunal and in particular deduction of compensation amount received by them from other source, preferred appeal before the high court, which acceded to the contention

35 (2016) 9 SCC 627.

36 *Id*. at 642.

37 *Ibid*.

38 *Ibid*. See *Sarla Verma* v. *DTC* (2009) 6 SCC 121; *State of Haryana* v. *Jasbir Kaur* (2003) 7 SCC 484.

of the claimants that the amount receivable by the dependants of the deceased under the Haryana Compassionate Assistance to the dependants of the Deceased Government Employees Rules, 2006 cannot be deducted from the quantum of compensation fixed by the tribunal. The court concluded that:[39]

> The claimants are legitimately entitled to claim for the loss of "pay and wages" of the deceased government employee against the tort feasor or insurance company, as the case may be, covered by the first part of Rule 5 under the 1988 Act. The claimants or dependants of the deceased government employee (employed by the State of Haryana), however, cannot set up a claim for the same subject falling under the first part of Rule 5—"pay and allowances", which are receivable by them from employer (the State) under Rule 5(1) of the 2006 Rules. In that, if the deceased employee was to survive the motor accident injury, he would have remained in employment and earned his regular pay and allowances. Any other interpretation of the said Rules would inevitably result in double payment towards the same head of loss of "pay and wages" of the deceased government employee entailing in grant of bonanza, largesse or source of profit to the dependants/claimants.

V SOVEREIGN AND NON SOVEREIGN FUNCTIONS OF THE STATE

In *Sujan Singh* v. *State of H.P*,[40] the petitioner had applied for licence to open a beer bar. Petitioner argued that it was on account of the competitor who was already running a Beer Bar that some frivolous objections were being submitted by the Mahila Mandal, women and youth of the area and also on account of the recommendations made by the MLA-cum-Chief Parliamentary Secretary not to grant licence in favour of the petitioner that he was not being granted the licence.The high court reasoned that "The subjective satisfaction had to be reached on an objective consideration of the objections raised by Mahila Mandal, youth etc., that too without being influenced by the recommendations made either by the MLA-cum-Chief Parliamentary Secretary or the Additional Excise and Taxation Commissioner (SZ), Shimla, as it was the MLA-cum-Chief Parliamentary Secretary, who at earlier stage had himself granted no objection certificate in favour of the petitioner. It was only thereafter that a decision ought to have been taken after reasoning out as to why the objectors have only chosen to target the petitioner without objecting to the Beer Bar, which was allegedly already running in the vicinity of the petitioner's restaurant."[41] The court observed that "arbitrariness in the State action can be demonstrated by existence of different circumstances, whenever both the decision making process and the decision taken

39 *Supra* note 35 at 645.
40 2016 SCC OnLine HP 2877.
41 *Id*., para 8.

are based on irrelevant facts, while ignoring the relevant facts, such action can normally be termed as arbitrary. Rationality, reasonableness, objectivity and application of mind are some of the pre-requisites of proper decision making. The concept of transparency in the decision making process has also become essential part of our administrative law."[42] The matter was remitted back to the respondent to consider whether these so-called objections are in fact genuine or not and further find out as to why no objections have been preferred against the existing Beer Bar. However, before passing the order, the court reiterated the observation of the Supreme Court in *N. Nagendra Rao & Co.* v. *State of Andhra Pradesh*[43] where the Supreme Court laid down the principle in this respect thus:[44]

> The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any water tight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking…The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable.

In *State of Rajasthan* v. *Amrit Bai*,[45] a boat having passengers far in excess of its loading capacity sunk in the middle of a dam which was under *the supervision and control* of the irrigation department of State of Rajasthan. Further, the boat was not having any fitness certificate from the transport department of the State of Rajasthan nor operation of boat in the abovementioned area of the dam was authorised by the state government. The high court noted that "it is the duty of the State and the instrumentalities of the State and the officers of the concerned department to keep awatch and check and maintain a check-post to ensure that no boat operates illegally. The citizens of this country pay tax and in return, the government has an obligation

42 *Id.*, para 10,11.
43 AIR 1994 SC 2663.
44 *Id.*, para.24.
45 2017 (1) WLN 122 (Raj.)

towards the citizens to provide them facilities which include safe transport. In the present case, the State has miserably failed to discharge their duty."[46] The high court concluded that "the State was aware that the boats were being used by 100 of the passengers' everyday to go to the temple situated in the back water of the Dam. It was the duty of the State to provide safe and proper transport to the public in the aforesaid dam."[47]

VI NUISANCE

"Nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. It may be public or private nuisance… It is the quantum of annoyance or discomfort in contra distinction to private nuisance which affects an individual is the decisive factor."[48] As regards law of tort, "Even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort."[49]

In *Anita Thakur* v. *State of Jammu and Kashmir*,[50] a writ petition filed by the petitioners under article 32 of the Constitution of India. The petitioners are migrants of the State of Jammu and Kashmir. According to the petitioners, they had planned to take out a peaceful protest march up to Delhi for ventilating their grievances. However, when they reached near Katra in Jammu and Kashmir, the respondent authorities through their police personnel had beaten up and manhandled these migrants in a most brutal and barbaric manner. It was contended that this incident has violated their rights guaranteed to them under articles 14, 19, 21 and 22 of the Constitution and prayers are made in the petition for taking criminal action against the erring officials and also to pay compensation to each of the petitioners and other Jammu migrants who suffered serious injuries, in the sum of Rs. 10 lakhs. There were counter narrative by the respondent. However, the Supreme Court inferred, initially it was the petitioners/ protestors who took the law into their hands by turning their peaceful agitation into a violent one and in the process becoming unruly and pelting stones at the police. On the other hand, even the police personnel continued the use of force beyond limits

46 *Id.*, para.10. The court relied upon the Supreme Court judgment in *N. Nagendra Rao* v. *State of A.P.*, AIR 1994 SC 2663 where it was held that no legal or political system today can place the state above "Law"… Needs of the State; duty of its officials and right of the citizens are required to be reconciled, so that the rule of law in a Welfare State is not shaken."

47 *Id.*, para 15. "A strict liability in torts, private or constitutional do not call for a finding of intent or negligence. In such a case highest degree of care is expected from private and public bodies especially when the conduct causes physical injury or harm to persons."See *Municipal Corporation of Delhi, Delhi* v. *Association of Victims of Uphaar Tragedy* decided by the Supreme Court on Oct. 13, 2011.

48 *Vasant Manga Nikumba* v. *Baburao Bhikanna Naidu* (1996) SCC (Cri) 27.

49 *Ibid.*

50 (2016) 15 SCC 525.

after they had controlled the mob. In the process, they continued their lathi-charge. They continued to beat up all the three petitioners even after overpowering them. They had virtually apprehended these petitioners making them immobile. However, their attack on these petitioners continued even thereafter when it was not at all needed. As far as injuries suffered by these petitioners are concerned, such a situation could clearly be avoided. It is apparent that the respondents misused their power. To that extent, fundamental right of the petitioners, due to police excess, has been violated. In such circumstances, the court held that in exercise of its power under article 32 of the Constitution, compensation can be awarded to the petitioners. Sikri J in view of the ratio of relevant precedents in this context laid down succinctly the principles applicable in such case thus:[51]

> *First*, it is clear that a violation of fundamental rights due to police misconduct can give rise to a liability under public law, apart from criminal and tort law. *Secondly*, that pecuniary compensation can be awarded for such a violation of fundamental rights. *Thirdly*, it is the State that is held liable and, therefore, the compensation is borne by the State and not the individual police officers found guilty of misconduct. *Fourthly*, this Court has held that the standard of proof required for proving police misconduct such as brutality, torture and custodial violence and for holding the State accountable for the same, is high. It is only for patent and incontrovertible violation of fundamental rights that such remedy can be made available. *Fifthly*, the doctrine of sovereign immunity does not apply to cases of fundamental rights violation and hence, cannot be used as a defence in public law.

In the present case, the Supreme Court held that "even the petitioners are to be blamed to some extent, as pointed out above, the only relief we grant is to award compensation of Rs. 2,00,000 (Rupees two lakhs only) to petitioner 1 and Rs 1,00,000 (Rupees one lakh only) each to petitioners 2 and 3, which shall be paid to these petitioners within a period of two months."[52]

51 *Id.* at 537; Also see, *Saheli* v. *Commr. of Police* (1990) 1 SCC 422 : 1990 SCC (Cri) 145 *Joginder Kaur* v. *Punjab State,* 1969 ACJ 28, *State of Rajasthan* v. *Vidhyawati [State of Rajasthan* v. *Vidhyawati,* 1962 Supp (2) SCR 989 : AIR 1962 SC 933 *and Nilabati Behera* v. *State of Orissa [Nilabati Behera* v. *State of Orissa* (1993) 2 SCC 746 : 1993 SCC (Cri) 527.

52 *Id.* at 537; Also see, *Karam Singh* v. *Hardayal Singh*, 1979 Cri LJ 1211, wherein the high court held that three prerequisites must be satisfied before a magistrate can order use of force to disperse a crowd : *First*, there should be an unlawful assembly with the object of committing violence or an assembly of five or more persons likely to cause a disturbance of the public peace. *Second*, an executive magistrate should order the assembly to disperse. *Third*, in spite of such orders, the people do not move away.

In *M.S Malliga* v. *The District Collector, Ootacamund, The Nilgiris,*[53] the petitioner has filed a writ petition seeking a direction to close the TASMAC Retail Vending Shop and the bar belonging to the respondents. It was averred by the petitioner that the existence of the shop is causing great nuisance to the public. It is further stated that the shop is situated very near to the Vinayagar temple which is situated within 60 to 70 feet and in the light of the nuisance caused in the said locality, the petitioner sent several representations and since the representations were not considered, the petitioner moved writ petition before the high court. The court observed that, "the larger aspect that has to be seen is as to whether the location of the shop causes nuisance in the locality, since it is the allegation of the petitioner that the people, after consuming liquor in the bar attached to the shop, have created very ugly scenes and that the women and children, who are coming to the market in the evening, are unable to go through the said area."[54] The court relied upon the division bench judgment in *G. Vetrivel* v. *Golden Enclave Owners' Association,*[55] where it was observed that:[56]

> …it is within every prudent man's knowledge that drunken man will be flying somewhere and he will be out of his own control and therefore, even though there are different entries to the building, the nuisance factor claimed by the occupants of the building cannot be ruled out as a drunken man is susceptible to claim anything and everything, even the globe for himself and no barricades will prevent him from indulging in any sort of nuisance.

The court held that though a lawful owner is entitled to let out his property to profitable use, it would deem fit to remind him the basic principle of law of tort that 'one's liberty ends, where other man's nose starts'. He may be owner of the flat that does not mean that only with a view to generate income, he can do whatever he likes, particularly at the cost of safety and security of others.[57]

VII DOCTRINE OF STRICT LIABILITY

In *The Chief Executive Officer, CESU, Electrical Division, IDCO Tower, Bhubaneswar* v. *Pabani Barik (dead) represented through his LR,*[58] the deceased succumbed to injury when he came into contact with live electric wire which was hanging at a low height. It was stated that the defendants were guilty of non-maintenance of electric wire and the accident took place due to negligence on the part

53 2016 SCC OnLine Mad 20456.
54 *Id.*, para 5.
55 2012 (6) CTC 661.
56 *Id.* at 666-667.
57 *Ibid.*
58 2016 SCC OnLine Ori 871.

of the defendants, who in response denied the charges levelled against them and stated that they have no knowledge about the death of the victim due to electrocution. The court relied upon the observation of the same high court in *Bimala* v. *Cuttack Municipal Corporation, Cuttack*,[59] where it was held that "A person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability"."[60] In the present case, the high court observed that:[61]

> …a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps. The opposite parties cannot shirk their responsibility on trivial grounds. For the lackadaisical attitude exhibited by the opposite parties, a valuable life was lost.

In *Executive Engineer East Electrical Division*,[62] where death was caused because of electrocution, the high court upheld the claim of compensation made by the plaintiffs.

VIII CONCLUSION

To conclude, the year under survey does not offer substantial output as regards the growth of tort law. However, there were cases that did touch upon the grey areas of law of tort because of the change that society has undergone in recent times on account of the technological transition in the preceding years. The Supreme Court and the high courts continue to add to the exiting rich corpus that forms the bedrock of law of tort in India. It is hoped that in times to come, the courts will engage with the niceties of newer problems that are likely to surface because of the imperceptible paradigm shift that is being experienced owing to various factors operative in the society.

59 2015 (I) CLR-885.

60 *Id.*, para 13.

61 *Supra* note 59.

62 *Executive Engineer East Electrical Division (WESCO)* v. *Sesha Bag*, 2016 SCC OnLine Ori 805.