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TORT LAW

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I INTRODUCTION

TORT LAW has over the years touched upon new dimensions owing to newer societal and scientific changes that have influenced the lives of people like never before. The expanse of tort law has only become more illuminating with courts having to adjudicate upon complex factual matrix. However, in India, tort law is still to see the day when cases pertaining to tortious liability will assume the importance that they should ideally have. There are always fewer cases of tort compared to other areas of law when it comes to reported cases delivered by the Supreme Court and the High Courts. It has been a perpetual lament in India over the years. The year under survey had fewer cases on tort law compared the preceding year. Nonetheless, the survey tries to put together the important case laws that may prove to be instrumental in enriching the content of tort law in India.

II DEFAMATION

It goes without saying that cases of defamation over the years have increased manifold cutting across the different strata of society. The increase is remarkably perceptible. The dynamics of defamation has undergone a shift requiring us, the lawmen, to pause and ponder upon the possible repercussions that this shift is likely to bring about. We need to appreciate the essence of what defamation stands for. As Prosser said, defamation is "an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which the plaintiff is held, or to excite adverse feelings or opinions against him".[1] In recent past, there

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1 Prosser, *Torts* 756 (1964). Also see, R. C. Donnelly, "History of Defamation", 1949 *Wis. L. Rev*. 99 (1949). Faulks Committee in England (1975) defined defamation thus: "Defamation shall consist of the publication to a third party of matter which in all the circumstances would

has been a surge in the number of defamation cases, notably *by* and *against* public figures, though in the year under survey, there was hardly any notable judicial pronouncement on the point by the Supreme Court except the landmark judgement[2] by the Supreme Court on the question of right to privacy where the court dealt with the issue of defamation as well, but in a different context. Be that as it may, the case needs to be analysed from the perspective of defamation *vis-à-vis* right to privacy. It is one such important area of analysis that needs to be pondered upon, and the Supreme Court did ponder upon it. The Supreme Court referred to *Wainwright* v. *Home Office,*[3] a House of Lords judgement, where the apex court in England refused to confer general principle of "invasion of privacy" a constitutional status holding that "one could generalise certain cases on defamation, breach of copyright in unpublished letters, trade secrets and breach of confidence as all based upon the protection of a common value which they called privacy or, … "the right to be let alone".[4] Further, the House of Lords in the above case took note of the fact that "The need in the United States to break down the concept of "invasion of privacy" into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle".[5] In *Puttaswamy*, the Supreme Court reminded that:[6]

> Criminal libel actions were resorted to in the US during a part of the nineteenth century but by 1890, they had virtually ceased to be "a viable protection for individual privacy". The Sedition Act of 1789 expired in 1801. Before truth came to be accepted as a defence in defamation actions, criminal libel prosecutions flourished in the State courts. Similarly, *truth was not regarded as a valid defence to a civil libel*

be likely to affect a person adversely in the estimation of reasonable people generally". Also see, *Scot* v. *Sampson*, 1882 9 QB 491.

2 *K.S. Puttaswamy* v. *Union of India* (Privacy-9 J.), (2017) 10 SCC 1.

3 [2003] UKHL 53; [2004] 2 A.C. 406.

4 *Id*. at 419.

5 *Ibid*.

6 *Supra* note 1 at 364. John Wade who believes that "the action for invasion of the right of privacy may come to supplant the action for defamation and that this development should be welcomed by the courts and writers", says:

The history of the two torts of defamation and unwarranted invasion of the right of privacy has been greatly different. Defamation developed over a period of many centuries, with the twin torts of libel and slander having completely separate origins and historical growth….The right of privacy, on the other hand, is of quite recent development. Its origin is the remarkable law review article of Messrs. Warren and Brandeis, published in 1890 and the first decision of a court of last resort (in *Pavesich* v. *New England Life Ins. Co*., 50 S.E. 68 (1905)).

See, John W. Wade, "Defamation and the Right of Privacy", 15 *Vand. L. Rev*. 1093 (1962). Also see, Warren & Brandeis, "The Right to Privacy", 4 *Harv. L. Rev*. 193 (1890).

> *action in much of the nineteenth century. By the time Warren and Brandeis wrote their article in 1890, publication of the truth was perhaps no longer actionable under the law of defamation. It was this breach or lacuna that they sought to fill up by speaking of the right to privacy which would protect the control of the individual over her personality.* (emphasis added)

Despite the dearth of any prominent judgment of Supreme Court dealing exclusively with defamation, in *Dr. Shashi Tharoor* v. *Arnab Goswami,*[7] Delhi high court dealt with issue in some detail. In this case, a suit was filed in Delhi high court by Shashi Tharoor seeking compensation and damages from and against the defendants for making defamatory remarks against the plaintiff as well as for permanent and prohibitory injunction restraining the defendants from reporting any news or broadcasting any show related to the death of Mrs. Sunanda Pushkar till the investigation is complete and also to restrain the defendants from maligning and defaming the plaintiff in any manner. The Court held that the Constitutional guarantee of free speech does not confer a right to defame persons and harm their reputations by false and baseless allegations and by innuendoes and insinuations.[8] The Court quoted Shakespeare who summed up the importance of one's reputation and good name as under:

> "Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash….
> But he that filches from me my good name Robs me of that which
> not enriches him,
> And makes me poor indeed."

Emphasising the need to strike a balance, the court observed that "while free speech is a fundamental right, such right is neither untrammelled nor superior to other fundamental rights in the Constitution. It is hemmed in by restrictions in article 19(2). Other rights, such as the right to fair trial, may be antithetical to it in several instances".[9] To quote the observation of the Court *in extenso*:[10]

7 2017 SCC OnLine Del 12049.

8 In India, there can be criminal prosecution for defamation with imprisonment for up to two years and a fine. There is also the civil remedy of damages for defamation.

9 *Id*. at para 38.

10 *Id*. at para 40. The Court also referred to the Law Commission of India's 200th Report on *Trial By Media Free Speech and Fair Trial under Criminal Procedure Code*, 1973 (2006). The Commission in its report has observed that "The freedom of the media not being absolute, media persons, connected with the print and electronic media have to be equipped with sufficient inputs as to the width of the right under art. 19(1)(a) and about what is not permitted to be published under art. 19(2). Aspects of constitutional law, human rights, protection of life and

> …it is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence. In fact, presumption of innocence and a fair trial are at the heart of criminal jurisprudence and in a way important facets of a democratic polity that is governed by rule of law. Journalists are free to investigate but they cannot pronounce anyone guilty and/or pre judge the issue and/or prejudice the trial. The grant of the fairest of the opportunity to the accused to prove his innocence is the object of every fair trial. Conducting a fair trial is beneficial both to the accused as well as to the society. A conviction resulting from unfair trial is contrary to the concept of justice.

The Court held that for a claim of defamation to succeed, a public figure has to prove additionally that the representation was precipitated by malice. The Court relied on the Supreme Court's observation in *Kartar Singh* v. *State of Punjab,*[11] where it was observed that:[12]

> …those who fill a public position must not be too thin skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they know from the bottom of their hearts were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time…whoever fills a public position renders himself open thereto. He must accept an attack as a necessary, though unpleasant, appendage to his office….Public men in such positions may as well think it worth their while to ignore such vulgar criticisms and abuses hurled against them rather than give importance to the same by prosecuting the persons responsible for the same.

As regards granting injunction in defamation suits, the court took note of the fact that the "two-pronged *test of necessity* and *proportionality* have to be satisfied before ordering postponement of publication, namely, necessity to prevent real and substantial risk to fairness of trial and salutary effect of such an injunction outweighs deleterious effect to the free expression. This Court would like to clarify that tests like necessity, proportionality and balance of convenience are not end points but points

liberty, law relating to defamation and Contempt of Court are important from the media point of view. It is necessary that the syllabus in Journalism should cover the various aspects of law referred to above. It is also necessary to have Diploma and Degree Course in Journalism and the Law".

11 1956 SCR 476.

12 *Ibid***.**

of departure. Moreover, the injunction order should only be passed if reasonable alternative methods or measures would not prevent the said risk".[13] Be that as it may, the court cautioned that "there is need to take care that the injunction order, even if granted does not result in a "gag order" or "super-injunction" which not only anonymises the names of the parties to a case but prevents discussion of the fact that any legal proceedings are ongoing is issued in rarest of rare cases or where law mandates".[14] The Court therefore concluded that in the present case the defendants have the right to air their stories and the same cannot be curbed, but it has to be tempered and balanced. At the same time, press cannot 'convict anyone' or insinuate that he/she is guilty or make any other unsubstantiated claims. Press has to exercise care and caution while reporting about matters under investigation or pending trial.[15]

III NEGLIGENCE

The conception of negligence has been there since time immemorial as is obvious from the fact that "the *Dharmashastras* recognized negligence, not as a distinct species of wrong but as a particular mode of committing a wrongful act. It referred to the mental state of the wrongdoer at the time of the impugned action or omission and considered negligence to be an extenuating circumstance. Generally speaking, negligence did not absolve the wrongdoer of his liability but merely reduced it".[16] However, over the years, the concept of negligence has been through many a refinement through scores of judicial pronouncements. The word "negligence" is often required to be understood in the right perspective. Therefore, prior to taking into account the judgments on negligence, it is worth quoting Terry who wrote thus:[17]

> Negligence is conduct which involves an unreasonably great risk of causing damage. Due care is conduct which does not involve such a risk. Negligence is conduct, not a state of mind. It is most often caused by carelessness or heedlessness; the actor does not advert properly to the consequences that may follow his conduct, and therefore fails to realize that his conduct is unreasonably dangerous. But it may be due to other states of mind. Thus the actor may recognize the fact that his conduct is dangerous, but may not care whether he does the injury or

13 *Supra* note 7 at para 77.

14 *Id*. at para 78.

15 *Id*. at paras 96 and 97. The Court also held that before airing any story pertaining to the plaintiff, the defendants shall give the plaintiff a written notice, by electronic mode, asking for his version. If the plaintiff refuses or does not reply within a reasonable time, he will not be compelled to speak and the story will be aired with the disclosure that the plaintiff has refused to speak to the defendants. *Id*. at para 99.

16 S K Bhatia, "Some Specific Problems of Law of Torts in India" 11 *JILI* (1969) at 516.

17 Henry T. Terry, "Negligence", 29 *Harv. L. Rev*. 40, 41 (1915).

> not; or, though he would prefer not to do harm, yet for some reason of his own he may choose to take a risk which he understands to be unreasonably great. This state of mind is recklessness, which is one kind of wilfulness, and negligent conduct due to recklessness is often called wilful negligence.

Custodial death due to negligence

In Re: Inhuman Conditions in 1382 Prisons,[18] Supreme Court dealt with issue of unnatural custodial death, one of the reasons being negligence on the part of the prison authorities.[19] The Supreme Court observed:[20]

> …it is important for the Central Government and the State Governments to realise that persons who suffer an unnatural death in a prison are also victims—sometimes of a crime and sometimes of *negligence* and *apathy* or both. There is no reason at all to exclude their next of kin from receiving compensation only because the victim of an unnatural death is a criminal. Human rights are not dependent on the status of a person but are universal in nature. Once the issue is looked at from this perspective, it will be appreciated that merely because a person is accused of a crime or is the perpetrator of a crime and in prison custody, that person could nevertheless be a victim of an unnatural death. Hence, the need to compensate the next of kin.

Contributory negligence

Contributory negligence operates as a partial defence to a negligence claim. If the court decides that a claimant has contributed to his injuries by failing to take appropriate care, the damages awarded may be reduced.[21] If a case concerns the question of contributory negligence, the approach taken by the courts may be more subjective and the judges tend to consider what behaviour would have been reasonable for the *particular* claimant in the circumstances.[22]

In *Dinesh Kumar* v. *National Insurance Co. Ltd*.,[23] the appellant who was riding a motorcycle which met with an accident with a mini lorry belonging to the respondents.

18 (2017) 10 SCC 658.

19 The Supreme Court cited many reported cases where such death had taken place in jails. In one such case, death was due to carelessness, non-seriousness and negligence in not extending medical treatment.

20 *Id*. at 685.

21 Vivienne Harpwood, *Modern Tort Law*, 138 (2009). Also see, *Roberts* v. *Ramsbottom,* [1980] 1 All ER 7. See genereally, J. C. Macintosh, "Contributory Negligence", 1 *Cambridge L.J.* 185 (1922).

22 *Ibid*.

23 2017 SCC OnLine SC 1487.

The lorry was insured. As a result of the accident, the appellant suffered grievous injuries. Tribunal held that the appellant was guilty of contributory negligence, and it was also affirmed by the high court, which enhanced the compensation to Rs 10,77,775 and, after making a deduction of forty per cent towards contributory negligence, the appellant was held entitled to an amount of Rs 6,46,665. Both the Tribunal, and in appeal in the High Court, found fault with the appellant for not having produced his driving licence. Moreover, the award of the Tribunal indicates that absolutely no evidence was produced by the insurer to support the plea that there was contributory negligence on the part of the appellant. However, the Supreme Court observed "that plea of contributory negligence was accepted purely on the basis of conjecture and without any evidence. Once the finding that there was contributory negligence on the part of the appellant is held to be without any basis, the second aspect which weighed both with the Tribunal and the High Court, that the appellant had not produced the driving licence, would be of no relevance".[24] The Supreme Court relied on its judgment in *Sudhir Kumar Rana* v. *Surinder Singh*,[25] where it held:[26]

> If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that it was the driver of the mini truck who was driving rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence.

Medical negligence

As regards negligence by professionals such as doctors, it is important to quote the oft-quoted opinion of McNair, J. in *Bolam* v. *Friern Hospital Management Committee*[27] where it was held that: "Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. 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 … It is well-established law that it is sufficient if he exercises the ordinary

24 *Ibid.*
25 (2008) 12 SCC 436.
26 *Id.* at 439.
27 (1957) 2 All ER 118.

skill of an ordinary competent man exercising that particular art".[28] The dictum has been relied upon by the Supreme Court as well.[29]

In *Bijoy Sinha Roy* v. *Biswanath Das,*[30] an appeal to the Supreme Court had arisen out of order of the National Consumer Disputes Redressal Commission (NCDRC) dismissing the complaint of the appellant by reversing the order of the State Commission whereby compensation was awarded to him for medical negligence. The appellant is deceased's husband. The facts of the case were thus: the deceased had multiple fibroids of varying sizes in uterus. She was advised to undergo Hysterectomy. After about five months, she had severe bleeding and was advised emergency Hysterectomy. She was also suffering from high blood pressure and her haemoglobin was around 7 gm which indicated that she was anaemic. The treatment was given for the said problems but without much success. Finally, operation was conducted. She did not regain consciousness, and died.

The appellant's case was twofold. Firstly, the decision to perform surgery without first controlling blood pressure and haemoglobin amounted to medical negligence. The surgery was not an emergency but a planned one and conducted six months after the disease first surfaced. Secondly, having regard to the forceable complications, the decision to perform surgery at a nursing home which did not have the ICU for post-operative needs also amounted to medical negligence. The Supreme Court observed that:[31]

> Negligence in the context of medical profession calls for a treatment with a difference. Error of judgment or an accident is not proof of negligence. So long as doctor follows a practice acceptable to the medical profession of the day, he cannot be held liable for negligence merely because a better alternative course was available. A professional may be held liable for negligence if he does not possess the requisite skill which he claims or if he fails to exercise reasonable competence. Every professional may not have highest skill. The test of skill expected is not of the highest skilled person. Concept of negligence differs in civil and criminal law. What may be negligence in civil law may not be so in criminal. In criminal law, element of *mens rea* may be required. Degree of negligence has to be much higher. *Res ipsa loquitur* operates in domain of civil law but has limited application on a charge of criminal negligence.

The Supreme Court further held that:[32]

28 *Id*. at 121.

29 *Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1 at 19.

30 2017 SCC OnLine SC 1101.

31 *Id*. at para 11.

32 *Id*. at para 12. See, *Jacob Mathew* v. *State of Punjab,* (2005) 6 SCC 1, para 48. It is important to recall the observation of the Supreme Court in *Martin F. D'Souza* v. *Mohd. Ishfaq,* (2009) 3 SCC 1, where it was said that uncalled for proceedings for medical negligence can have adverse

> These principles have been laid down by a Bench of three-Judges and continue to hold the field. This Court has also held that safeguards were necessary against initiation of criminal proceedings against medical professionals and till such safeguards are incorporated by the State, direction of this Court will operate to the effect that the private complaint will not be entertained unless credible opinion of another competent doctor in support of the charge of rashness was produced. The Investigating Officer must obtain independent and competent medical opinion preferably from a doctor in Government service, qualified in the concerned field in the light of judgment in *Jacob Mathew.* A medical professional may not be arrested in a routine manner.

In *Z* v. *State of Bihar,*[33] the appellant was thirty-five years. She was a major. She alleged that she had been raped and that she wanted to terminate her pregnancy. Patna Medical College and Hospital (PMCH) was the place where pregnancy could be terminated. It was subsequently found that though termination of pregnancy may need major surgical procedure along with subsequent consequences such as bleeding, sepsis and anaesthesia hazards, there was no opinion that the termination could not be carried out and that it was risky to the life of the appellant. The appellant had gone from a women rehabilitation centre, had given consent for termination of pregnancy and had alleged about rape committed on her, but the termination was not carried out. In such a circumstance, the Court held that "there has been negligence in carrying out the statutory duty, as a result of which, the appellant has been constrained to suffer grave mental injury".[34] The Court held that "she has to be compensated so that she lives her life with dignity and the authorities of the State who were negligent would understand that truancy has no space in a situation of the present kind".[35] The Supreme Court relied upon the dictum of three-judge bench in *Sube Singh* v. *State of Haryana,*[36] where it was observed that:[37]

> It is thus now well settled that the award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person

impact on access to health. While action for negligence can certainly be maintained, there should be no harassment of doctors merely because their treatment was unsuccessful.

33 2017 SCC OnLine SC 943.

34 *Id*. at para.27.

35 *Id*. at para. 56.

36 (2006) 3 SCC 178.

37 *Id*. at 198. Also see, *Hardeep Singh* v. *State of M.P*., (2012) 1 SCC 748.

> claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of the Code of Criminal Procedure.

IV COMPENSATION UNDER MOTOR VEHICLE ACT, 1988

In *National Insurance Co. Ltd.* v. *Pranay Sethi,*[38] the Supreme Court considered at length the ambiguity surrounding the concept of just compensation under Motor Vehicle Act, 1988. The Court categorically held that:[39]

> Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non-violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the apposite multiplier to be applied.

In *Dixit Kumar* v. *Om Prakash Goel,*[40] the Supreme Court approved the findings of the tribunal setting aside the decision of the high court. The claimant had suffered 100% functional disability resulting from 50% permanent physical disability is based on evidence on record. The tribunal ad meticulously analysed all essential aspects correlated to the fallout of such physical state of the claimant and consciously awarded different sums on account of special and general damages as contemplated in law. The tribunal took the monthly income of the claimant to be Rs. 2680 on a par with the prevalent minimum wage on the date of the accident though his claim was that he had an earning of Rs. 5000 per month from his running business. The Supreme Court approvingly observed that:[41]

38 (2017) 16 SCC 680.

39 *Id.* at 711. The Court noted that the formula relating to multiplier has been clearly stated in *Sarla Verma* v. *DTC,* (2009) 6 SCC 121 and it has been approved in *Reshma Kumari* v. *Madan Mohan*, (2013) 9 SCC 65.

40 (2017) 15 SCC 546.

41 *Id.* at 549.

> In view of the totality of the facts and circumstances and the evidence on record, in our estimate, the quantum of compensation as awarded by the Tribunal, on balancing all relevant factors, was just and reasonable. The learned Tribunal not only had appreciated the materials on record in the correct perspectives, it had been realistic in its approach and was informed as well of the practical realities of life to be encountered by the claimant. Its decision-making process in our comprehension is informed with the avowed prescription of just compensation as mandated by law.

In *National Insurance Co. Ltd*. v. *Rekhaben,*[42] the Supreme Court had to decide the question whether compassionate appointment offered to the dependants of the deceased or the injured, by the employer of the deceased/injured, who is not the tortfeasor, can be deducted from the compensation receivable by him on account of the accident from the tortfeasor. It was held that "it cannot be that the one liable to compensate the claimants for the loss of income due to the accident, can have his liability reduced by the amount which the claimants earn as a result of compassionate appointment offered by another viz. the employer".[43] The Court observed that:[44]

> …compensation is claimed from the owner of the offending vehicle who is different from the employer who has offered employment on compassionate grounds to the dependants of the deceased/injured. The source from which compensation on account of the accident is claimed and the source from which the compassionate employment is offered, are completely separate and there is no co-relation between these two sources. Since the tortfeasor has not offered the compassionate appointment, we are of the view that an amount which a claimant earns by his labour or by offering his services, whether by reason of compassionate appointment or otherwise is not liable to be deducted from the compensation which the claimant is entitled to receive from a tortfeasor under the Act….the financial benefit of the compassionate employment is not liable to be deducted at all from the compensation amount which is liable to be paid either by the owner/the driver of the offending vehicle or the insurer.

In *Oriental Insurance Co. Ltd*. v. *Swapna Nayak,*[45] the Court held that when it is found that under one head, reasonable amount has been awarded and under another head, nothing has been awarded though it should have been so awarded and at the

42 (2017) 13 SCC 547.
43 *Id*. at 551.
44 *Id*. at 554.
45 (2017) 3 SCC 598.

same time, we notice that eventual figure of the award of compensation payable to the claimants appears to be just and reasonable then in such eventuality, we do not consider it proper to interfere in such award in our appellate jurisdiction under article 136 of the Constitution. In other words, if by applying the tests and guidelines, it is found that overall award of compensation is just and fair, then, such award deserves to be upheld in claimants' favour.[46]

V LIMITATION PERIOD

Part VII of the Schedule of the Limitation Act deals with the "suits relating to tort". Therefore, when a suit for compensation is filed under the Fatal Accidents Act, 1855, the same has to be filed within the period of two years as prescribed under article 82 of the Limitation Act, 1963. In the instant case, the action for damages is brought under section 1-A of the Fatal Accidents Act, 1855.[47] Article 82 under Part VII of the Limitation Act provides that period of limitation shall be two years where the suit under the Act is filed by executors, administrators or representatives under the Indian Fatal Accidents Act, 1855.

VI TORT OF INJURIOUS FALSEHOOD

In *Torrent Pharmaceuticals Ltd.* v. *Wockhardt Ltd.,*[48] the case arose out of a suit filed by the plaintiff for a perpetual order and injunction to restrain the defendants, their servants, agents, officers and all persons claiming through or under them or controlled by them from using in any manner, directly or indirectly, the impugned mark 'CHYMTRAL FORTE' and/or 'CHYMTRAL' by itself or in conjunction with any word, mark, prefix, suffix, logo, label, sign or any other similar/deceptively similar mark thereto or any mark similar/deceptively similar to the registered 'CHYMORAL Marks' so as to infringe the Plaintiffs' registered trademark. The high court observed that "when there is an action of this nature what is to be decided is, whether the tendency to mislead or confuse which forms the gist of the action posits the plaintiff to establish fraud or that anyone was actually deceived or that he actually suffered damage. This is a tort actionable *per se*. As is put succinctly, the law in passing off arose to prevent unfair trading and protects the property rights of a trader in his goodwill". The approvingly relied upon Salmond and Heuston who wrote:[49]

> The legal and economic basis of this tort is to provide protection for the right of property which exists not in a particular name, mark or

46 *Id*. at 602.

47 *Damini* v. *Jodhpur Vidyut Vitran Nigam Ltd*., (2017) 9 SCC 443.

48 2017 SCC OnLine Bom 9666.

49 *Id*. at para 69. Also see, *Laxmikant V. Patel* v. *Chetanbhai Shah,* (2002) 3 SCC 65.

> style but in an established business, commercial or professional reputation or goodwill. So to sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person. This form of injury is commonly, though awkwardly, termed that of passing off ones goods or business as the goods or business of another and is the most important example of the wrong of injurious falsehood. The gist of the conception of passing off is that the goods are in effect telling a falsehood about themselves, are saying something about themselves which is calculated to mislead. The law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders.

VII CONSTITUTIONAL TORT[50]

In *Mainuddin Sarkar* v. *The State of West Bengal,*[51] the petitioner passed BA examination from Calcutta University in 1982 and passed a one year condensed honours course from Rabindra Bharati University in 1986. He claims to have been appointed as an Assistant Teacher in a Madrasah in February, 1988 pursuant to a resolution of the then Managing Committee and claims to have taught Bengali and History in the said Madrasah. He claimed to have signed the attendance register regularly and to have acted as examiner of answer scripts of students of the said Madrasah. Pursuant to Madrasah being inspected by the District Level Inspection Team, Madrasah was granted recognition and six teachers except the petitioner were appointed and approved by the Madrasah Board. On behalf of the petitioner, it was argued that Appointment was wrongly refused to the petitioner and the petitioner spent 22 years in the litigation to get justice. The Government Officials were totally negligent and when the Court directed them to decide the matter, they took an inordinately long time to do so. By their negligence and failure to carry out their statutory duty efficiently, the officers of the State have infringed the petitioner's fundamental right under article 21 of the Constitution of India. It was contended that this amounts to a *constitutional tort* and the petitioner should be compensated for the same". In view of the plea made by the petitioner the Court observed:[52]

> The concept of constitutional tort appears to be on a nascent stage in so far Indian jurisprudence is concerned. Not that it is unknown to

50 See generally, Theodore Eisenberg & Stewart Schwab, "Reality of Constitutional Tort Litigation", 72 *Cornell L. Rev.* 641 (1986-1987); John M. Greabe, "A Better Path for Constitutional Tort Law", 25 *Const. Comment*. 189 (2008).

51 2017 SCC OnLine Cal 11758.

52 *Ibid*.

> Indian law but the principle has not been applied by the Indian Courts very often. In *MCD* v. *Uphaar Tragedy Victims Association*[53] the apex court went into the concept of negligence or breach of duty to take care in the tort law as against breach of duty in discharging statutory duty in public law with reference to developments in different jurisdictions….the archaic principle of State immunity that was based on the assumption of the State being efficient, sincere and dignified was giving way to protection of liberty, equality and rule of law. Applying the test of proximity of relationship, reasonable foreseeability and justness of claim, liability of a public authority could be fixed.

Right to work in safe environment

In *Sanjeet Singh Kaila* v. *Union of India,*[54] the Delhi high court had to decide a case where a Wing Commander in the Indian Air Force had sued the Union of India through the Ministry of Defence (Union of India) and the Hindustan Aeronautics Ltd. (HAL) under article 226 of the Constitution of India, claiming directions towards appropriate relief for infraction of his fundamental right to life under article 21 of the Constitution of India. He sustained injuries while bailing out of a fighter aircraft, whilst on duty as a fighter pilot in a MiG 21 aircraft. His primary argument was that his right to work in a safe environment, an un-enumerated but integral component of the fundamental right to life and liberty under article 21 of the Constitution had been violated by the respondents. The high court observed that:[55]

> Needless harm is defined by the nature of the employment itself. In other words, what is deemed 'safe' in a given 'environment' will have to be defined as those conditions, which are crucial to the overall accomplishment of the duties the public servant has been enlisted for. Therefore, the word 'safe' is not a term to be construed generically, but with deference to the context in which it is used. The Supreme Court in *Vishakha* first declared the constitutional imperative that citizens must be safe in the environment they work in.

While expounding the meaning of the term "risk" in the context of the case, the court remarked that:[56]

53 (2011) 14 SCC 481.

54 239 (2017) DLT 459.

55 *Id*. at para 32.

56 *Id*. at para 44. The high court referred to the celebrated case of *Smith* v. *Charles Baker and Sons,* [1891] A.C. 325; 65 L.T. 467, where it was held that "the maxim of *volenti non fit injuria* is based on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the proposition thus stated there is no difficulty in giving an assent, provided that what is meant by engaging to perform a dangerous operation, and by the risks incident thereto, be properly defined. The neglect of such definition may lead to error".

> The risk may arise from a defect in a machine which the servant has engaged to work of such a nature that his personal danger and consequent injury must be produced by his own act, If he clearly foresaw the likelihood of such a result, and, not withstanding, continued to work, I think that, according to the authorities, he ought to be regarded as *volens*. The case may be very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machine used in another department over which he has no control.

After citing a series of English case laws, the court dealt with issue before it, and observed that:[57]

> A pilot is entitled to care and protection within the tenets of what is within the control of his or her employers, and the bare minimum that his or her employers are expected to ensure, and that is that the aircraft and the machinery they operate is not seriously compromised by sub-par maintenance or substandard maintenance. That is a risk that no pilot consents to implicitly as a function of her or his job description. This is not to say that every mechanical error in an aircraft or a machine will invariably invite liability or fault. Mechanical defects in an aircraft, as in any machine, are possible….That risk of a malfunction is inherent within the operation of the aircraft, as with any machine. Neither will mere general wear and tear of a machine with age result in liability, if it is otherwise in an airworthy condition according to prescribed standards. This would rightly fall under the risk a pilot assents to. A manufacturing defect or a defect attributable to less than standard maintenance, which is avoidable and compromises the strength of an aircraft however, is altogether different; it can give rise to liability and an actionable claim to damages.

The Court emphasised that "Constitutional tort as a distinct species of liability which state agencies and officials have to shoulder, for violation of a citizen's rights, has been recognized despite laws shielding individual officials from liability for action taken in good faith, in due observance of their official acts. In the United States, this was first recognized in *Bivens* v. *Six Unknown Named Agents,*[58] where the Supreme Court agreed with an aggrieved plaintiff who complained of unlawful search of his premises without a warrant, contrary to his Fourth amendment rights. He was allowed to sue for compensation". Finally, the Union of India was held responsible to pay as compensation Rs. 5 lakhs for the trauma and agony caused.

57 *Id*. at para 47.
58 403 US 388 (1971).

VIII CONCLUSION

Notwithstanding the prefatory lament about the dwindling judicial pronouncements on tort law in the year under survey, it is appreciable that there were high court judgments that decided questions which were unique and dealt with questions that enriched the corpus of tort law in many ways. It is hoped in the subsequent year, there would be considerable growth as regards tort law jurisprudence both *qualitatively* as well as *quantitatively*. It is expected that epochal and definitive judicial pronouncements will usher in a new and enriched jurisprudence that would untangle the labyrinthine questions of tortious liability that have surfaced in recent times owing to *societal* and *scientific* shift in the twenty first century.