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TORT LAW

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I INTRODUCTION

THE YEAR under review reveals one general trend that has been perceptible over the years, more so in the preceding past. This unfortunate trend is people's apathy towards tort law. This trend is even more relevant in view of the changing social, economic and political landscape. It goes without saying that the advent of globalisation and resultant changes in society represent another dimension of this trend. People today are more aware and informed than ever before in the history of mankind thanks to technological and societal advancement. People are right conscious in other spheres of law, and life. Therefore, it beggars description how it is possible that all this is not so well reflected in the realm of tort law as regards people's approach towards availing remedial measures for violation of their rights. In *Rattan Singh* v. *State of Punjab,*[1] The Supreme Court lamented, "the lack of citizen's tort consciousness".A searching analysis may well illumine the not-so-obvious reasons underlying the disturbing trend aforementioned. However, judicial pronouncements have contributed to the growth of tort law especially in areas such as constitutional tort. Given the judge-made law that it is, judicial decisions this year have contributed to the existing corpus of tort law.

II VICARIOUS LIABILITY

Judicial pronouncement on the employer's liability for the torts of their employees rendered during the current survey year offer further clarifications of the concept of the vicarious liability and its underlying justifications as well as complex issues related thereto which courts generally confront during adjudication process. It is noteworthy to recall here what Lord Reid had observed way back in 1956 in *Stavely Iron and Chemical Company* v. *Jones Limited:*[2] "It is a Rule of Law that an employer,

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1 (1979) 4 SCC 719 : AIR 1980 SC 84.

2 1956, 1 All England Report 403 (HL).

though guilty of no fault himself, is liable for damage done by the fault or negligence of his servant acting in the course of employment".

It is clear from the above dictum that vicarious liability stands in a direct contradiction of the fault principle, according to which a person will be liable only for his fault and not for the fault of others. For this reason, the principle of vicarious liability may appear to be harsh but as one author has correctly pointed out,[3] 'it is based on pragmatic considerations. It needs to be recognized that employers as opposed to employees, can best afford to bear the cost of compensating injured third parties, further large companies are usually in short to meet the burden of this kind of liability. Another advantage of the vicarious liability to the plaintiffs is the fact even if the particular individual who committed the tort is unidentifiable or untraceable or escapes from the jurisdiction of the court, tort action can easily be brought against the employer.

Vicarious liability is not in itself a tort. As noted above, it is a legal rule which imposes liability for someone else's tort.[4] This legal rule needs to be appreciated in view of what Lord Phillips said in *Various Claimants* v *Catholic Child Welfare Society:*[5] "the law of vicarious liability is on the move". The statement assumes great significance in view of the changes that have had sweeping impact technologically and socially, more specifically with the advent of the internet. The time-honoured principles of vicarious liability face the test of deciding new and hitherto unforeseen fact-situations.[6] For instance, in a case person discloses online the personal information of other employees saved in the form of data, can his employer be vicariously liable for the same? Whether the 'close connection test'[7] for fixing vicarious liability be applied in India?[8] Moreover, efforts should be made to explore some of the hitherto not so much explored areas such as 'economics of vicarious liability'[9] in India.

Vicarious liability of the state

One of the important areas where vicarious liability assumes great importance includes cases where the state is vicariously held liable for the acts of its servants, the courts have awarded exemplary damages in these cases. In *Shivangi Gangwar* v. *State,*[10] a deaf and dumb girl in a *Nari Niketan* was raped and followed by forcible abortion. The High Court of Uttarakhand observed that it is a fit case for awarding exemplary damages to the deaf and dumb girl, who was in the custody of the state. The 'oppressive, arbitrary or unconstitutional action' of the servants of the state has caused mental and

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3 Vivenne Harpwood, *Law of Tort* 203 (London: Cavendish Publishing Ltd. First Rep. 1995).

4 [2018] EWHC 19 (QB) at 66. Also see, *Sophocleous* v. *Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 2167.

5 [2012] UKSC 56. Also see, *A M Mohamud* v. *WM Morrison Supermarkets Plc,* [2016] UKSC 11.

6 See, Phillip Morgan, "Recasting Vicarious Liability" 71 *Cambridge L.J.* 615 (2012).

7 See, *Lister* v. *Hesley Hall Ltd*, [2001] UKHL 22; [2001] 1 AC 215.

8 So far, there are few high court pronouncements where this test has been referred or relied upon. E,g. *Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd*., (2014) 6 CTC 602 and *Chhaya Khanna* v. *State of UP* (2006) 3 ACR 3279.

9 *See generally* Alan O. Sykes, "The Economics of Vicarious Liability" 93 *Yale L.J.* (1984)

10 2018 SCC OnLine Utt 473.

physical injury to her. She, throughout the life would remain under the trauma of rape and abortion. She is deaf and dumb. The possibility of marriage is also bleak. She will fend herself throughout the life. Severe mental and physical harm has been caused to deaf and dumb girl. The court directed the state government to pay exemplary damages/compensation of Rs. 25.00 Lakh or pension @ Rs. 11,000/- per month to the deaf and dumb inmate, who was raped and forced to abort the baby. The court relied upon a plethora of precedents of the Supreme Court to home the point that in such cases compensation may be allowed where the basic fundamental rights enshrined under article 21 of the Constitution are infringed.[11] This case is also important from the perspective of constitutional tort, as discussed hereinafter. The high court reiterated that in the present case, the inmate was in fact staying in a government owned/run child care institution, and the state has vicarious liability to pay compensation for the acts of its employees. The doctrine of sovereign power is not applicable in welfare state where the functions of the state now extend to various fields. The inmate was battered and shattered due to acts of the employees of child care institution.[12]

In *Sarita Singh* v. *State*[13] a doctor working at a Combined Health Center (CHC) Parmanandpur, Nainital was shot dead on duty. Invoking the *Chandrima Das*[14] precedent, where it was held that 'Public Law remedies have also been extended to the realm of tort', the high court directed the state government to pay the compensation of Rs. 1,99,09,000/- along with interest 7.5% per annum, to the petitioner, from the date of filing of petition.

In *Mukkamula Anuradha* v. *Pl. Secy. to Govt., Minorities Welfare Department, Govt. of A.P*[15] the deceased lost his life due to the negligence on the part of the government doctor. With his death, family lost the bread earner. His death took place due to the infected needle, which was supplied by the government which points to the careless and non-standard procedure performed by the government doctor. The deceased died due to the infected needle provided by the government. Therefore, the court observed that this is a case of sheer negligence on the part of the state government-respondent. However, the court also highlighted the fact that:[16]

Though there is no specific provision in law to pay either *ex gratia* or compensation to the bereaved family, the case of the petitioner cannot be brushed aside without granting any relief. Welfare State exists not only to enable the people to eke out their livelihood but also to make it possible for them to lead good life. The

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11 In *Bodhisattwa* v. *Subhra Chakraborty* (1996) 1 SCC 490 "rape" was held to be an offence which is violative of the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Supreme Court had observed that "It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21." *Id.*, para.10.

12 2018 SCC OnLine Utt 473 at para 110.

13 2018 SCC OnLine Utt 824.

14 *Chairman, Railway Board* v. *Chandrima Das*, (2000) 2 SCC 465.

15 MANU/HY/0407/2018; 2019(1)ALD 408.

laws are made for the people, but the people are not made for the law. In the present case, the state cannot disown its responsibility towards the petitioner.

The respondents to pay a sum of Rs. 10,00,000/- to the petitioner (deceased's wife) towards compensation for the death of her husband.

Vicarious liability of vehicle owner

In *Bipin Paul* v. *Sathyadevan*[17] the High Court of Kerala observed that the driver of a vehicle, who is driving the same on consent of the registered owner, has already been held to have stepped into the shoes of the owner and hence the tort-feasor cannot be the claimant. It has to be noticed that the liability primarily is of the person, who commits the negligence. With respect to a motor vehicle, when the driver is negligent and an injury is caused to a third party, then necessarily the registered owner has to shoulder the responsibility of paying compensation, on principles of vicarious liability. It is this vicarious liability of the owner of the vehicle that has been indemnified by the issuance of a valid insurance policy. The liability being that of the driver primarily and at the first instance, when his negligence causes an accident and by reason of the accident the driver himself meets death, there cannot be any vicarious liability cast on the owner much less any liability to indemnify the same on the insurance company.

III PUBLIC LAW TORTS

In *Ruby Tour Services (P) Ltd*. v. *Union of India,*[18] writ petitions under Article 32 of the Constitution were filed by three private tour operators (PTOs) challenging the communications dated May 31, 2018 issued by the Ministry of Minority Affairs. Their applications for getting registered as PTOs for Haj 2018 were rejected by the aforesaid communications. The reason for rejection was that they did not fulfill few conditions as laid down in PTO Policy for Haj 2018. The government *vide* its circular dated December 9, 2017 had issued policy for private tour operators for Haj 2018. The applications were rejected due to non-compliance with various conditions as enumerated in as enumerated in Annexure A of the said policy. Having perused the details of the case, the Supreme Court came to the conclusion that rejection of claim of the petitioner for Haj 2018 was unfounded. Therefore, the court directed that writ petition was allowed with a direction to the respondent to pay compensation of Rs 5 lakhs within a period of two months. The Supreme Court reiterated the following observation made in *Nilabati Behera* v. *State of Orissa*:[19]

> The purpose of public law is not only to civilise public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by

16 *Id*., para. 4. Emphasis added.

17 2018 SCC OnLine Ker 17943.

18 (2018) 9 SCC 537.

19 (1993) 2 SCC 746. Also see, *Common Cause* v. *Union of India* (1999) 6 SCC 667; *N. Nagendra Rao and Co.* v. *State of A.P.* (1994) 6 SCC 205.

> way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making "monetary amends" under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of "exemplary damages" awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.'

In another similar case, reason cited for disqualification was non-compliance with the very clauses of Haj Policy, 2016 of which *exemption* had been granted to the petitioners. The court came to the conclusion that stand taken by the respondent was 'unsustainable', and it therefore resulted in the quashing of the impugned letters of rejection. In *Air Travel Services* v. *Union of India,*[20] the Supreme Court held that on a conspectus of the aforesaid facts including the number of pilgrims for whom the petitioners would have been entitled to arrange the Haj pilgrimage, an amount of Rs 5 lakhs per petitioner would be adequate compensation for the loss suffered by them and subserve the ends of justice. The court also seemed to be conscious of the fact that there is no quantification based on actual loss, but then the award by us is in the nature of damages in public law. The Supreme Court put forth the following reason for holding the government liable:[21]

> The petitioners have been deprived of their right to secure the quota on a patently wrongful order passed for reasons, which did not apply to them and for conditions, which had been specifically exempted. What could be a greater arbitrariness and illegality? Where there is such patent arbitrariness and illegality, there is consequent violation of the principles enshrined under article 14 of the Constitution of India.

In *S. Nambi Narayanan* v. *Siby Mathews,*[22] the appellant sought compensation for malicious prosecution launched against him. It was further submitted that he should be granted compensation by taking recourse to the principle of 'constitutional tort' and a committee be constituted to take appropriate action against the officers who had played with the life and liberty of a man of great reputation. In this case, two Maldivian Nationals were arrested by the police, and during interrogation, one of them made "confessions" that led to the registration of a case under sections 3 and 4 of the Official Secrets Acts, 1923, alleging that certain official secrets and documents of Indian Space Research Organisation (ISRO) had been leaked out by scientists of ISRO. A scientist at ISRO along with the appellant was arrested by the Police, and

20 (2018) 8 SCC 141.

21 *Id*. at 148.

22 (2018) 10 SCC 804.

subsequently, the investigation was transferred to the CBI. After the investigation, CBI submitted a report before the Chief Judicial Magistrate (CJM), Ernakulam, under section 173(2) CrPC stating that the evidence collected indicated that the allegations of espionage against the scientists at ISRO, including the appellant herein, were not proved and were found to be false. The Supreme Court held that[23]

> If the obtaining factual matrix is adjudged on the aforesaid principles and parameters, there can be no scintilla of doubt that the appellant, a successful scientist having national reputation, has been compelled to undergo immense humiliation. The lackadaisical attitude of the State Police to arrest anyone and put him in police custody has made the appellant to suffer the ignominy. The dignity of a person gets shocked when psycho-pathological treatment is meted out to him. A human being cries for justice when he feels that the insensible act has crucified his self-respect. That warrants grant of compensation under the public law remedy. We are absolutely conscious that a civil suit has been filed for grant of compensation. That will not debar the constitutional court to grant compensation taking recourse to public law. The Court cannot lose sight of the wrongful imprisonment, malicious prosecution, the humiliation and the defamation faced by the appellant.

IV DEFAMATION

Defamation is the jewel king of torts which have been developed to compensate for damaged reputations. It consists of publishing a defamatory statement which refers to an identifiable plaintiff, without lawful justification.[24] A defamatory statement is one which injures the reputation of the plaintiff by its tendency to 'lower him in estimation of right-thinking members of society' or to cause right-thinking members of society to 'shun or avoid' him,[25] *per* Lord Atkin, perhaps because it brings him 'into hatred contempt or ridicule', *e.g.,* because it alleges criminality, dishonesty or cruelty.[26]

Prosser defines defamation thus: "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."[27] With the passage of time, judicial interpretational gloss and legislative

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23 *Id*. at 823. The Supreme Court quoted its dictum in *Sube Singh* v. *State of Haryana* (2006) 3 SCC 178, where it was held 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 art. 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 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." *Id*. at 198-99.

24 *Supra* note 3 at 258.

25 *Sim* v. *Stretch* (1936). 2 *All England Report*. 1237 (HL)

26 Allan J Pannett, Law of Torts, 7th edn, 1995.London: Pitman Publishing. at 212

27 Quoted in Kevin Martin, "Defamation Defined", 43 *Chi.-Kent L. Rev*. 2 (1966).

enactments have enriched the defamation-jurisprudence in the Common Law world. It has evolved. It has got refined. Still, there remains space for enrichment, which continues to be done by the courts from case to case.

Law of defamation has come of age especially in view of the technological developments made in the preceding decades. Cyber defamation and the emerging challenges to the settled legal understanding of 'law of defamation' therefore may require interpretational innovation to meet such challenges. Societal transition with the flux of time has affected the dynamics of legal process. Courts face greater and unforeseen challenges in this day and age. For instance, "multijurisdictional publications over the Internet"[28] is one such challenge. However, in the year under review, there were few cases of substantial jurisprudential import and importance.

"Poetic licence" and defamation *vis-à-vis* article 19(2)

In *N. Radhakrishnan* v. *Union of India,*[29] a writ petition was filed under article 32 of the Constitution seeking issuance of an appropriate writ to ban the novel *Meesha* meaning Moustache which appeared in a popular Malayalam weekly, *Mathrubhumi*, published from Kozikhode, Kerala. Petitioners averred that the said literary work is insulting and derogatory to temple going women and it hurts the sentiments of a particular faith/community. It was further asserted that the portion of the book *Meesha* which was published in *Mathrubhumi* shows temple going women in bad light and it hada disturbing effect on the community. It was contended that *Mathrubhumi* has the proclivity and potentiality to disturb the public order, decency or morality and it defames the women community, all of which are grounds for the State to impose reasonable restrictions under article 19(2) on the fundamental right of freedom of speech and expression. The relevant part of the novel that 'impelled' that petitioner to move the court was written thus:

"Why do these girls take bath and put on their best when they go to the temple?" a friend who used to join the morning walk until six months ago once asked.

"To Pray", I said.

"No", he said. "Look carefully, why do they need to put their best clothes in the most beautiful way to pray? They are unconsciously proclaiming that they are ready to enter into sex", he said. I laughed.

"Otherwise", he continued, "why do they not come to the temple four or five days a month? They are letting people know that they are not ready for it. Especially, informing those *Thirumenis* (Brahmin priests) in the temple. Were they not the masters in these matters in the past?"

Therefore, the question before the Supreme Court was whether the aforesaid portion of the book *Meesha* which the petitioner asserts to be derogatory to the women community is an aberration of such magnitude which requires the intervention of this

28 See Canada Supreme Court judgment in *Haaretz.com, Haaretz Daily Newspaper Ltd., Haaretz Group, Haaretz.co.il, Shlomi Barzel and David Marouani* v. *Mitchell Goldhar,* 2018 SCC 28. Also see, *NT2* v. *Google llc (Information Commissioner intervening)*, [2018] EWHC 799 (QB).

29 2018 SCC OnLine SC 1349.

court on the ground that it has the potentiality to disturb the public order, decency or morality and whether it defames the women community, and, therefore, invites imposition of reasonable restriction under article 19(2) of the Constitution. Dismissing the writ petition, Dipak Misra, CJ observed:[30]

> …it is to be borne in mind that a book should not be read in a fragmented manner. It has to be read as a whole. The language used, the ideas developed, the style adopted, the manner in which the characters are portrayed, the type of imagery taken aid of for depiction, the thematic subsidiary concepts projected and the nature of delineation of situations have to be understood from an objective point of view. There may be subjective perception of a book as regards its worth and evaluation but the said subjectivity cannot be allowed to enter into the legal arena for censorship or ban of a book.

He made a pertinent observation echoing the precedential position adopted by the courts in the past thus:[31]

> If one understands the progression of character through events and situations, a keen reader will find that beneath the complex scenario, the urge is to defeat and to conquer and not to accept a denial. Both the facets are in the realm of obsession and the author allows the protagonist to rule his planet. His imagination encircles his world. A reader has the liberty to admire him or to sympathise. Either way, the dialogue to which the objection is raised is not an intrusion to create sensation. It is a facet of projection of the characters. It is, in a way, imaginative reality or as Pablo Picasso would like to put it, "Everything you can imagine is real". A pervert reader may visualise absence of decency or morality or the presence of obscenity but they are really invisible.

Civil defamation

In *P.K. Niyogi* v. *Praveen Nishi*[32] the Chhattisgarh high court elaborating upon the differences between the civil and criminal defamation, relied upon the High Court of Calcutta judgment rendered in *Asoke Kumar Sarkar* v. *Radha Kanto Pandey*[33] where the high court had drawn the definition of civil and criminal defamation. Relying

30 *Id*., para 41.

31 *Id*., para. 39. Also see, Mishra, CJ, observation in *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra* (2015) 6 SCC 1 wherein he had observed that "The Hamletian question has many a layer; each is free to confer a meaning; be it traditional or modern or individualistic. No one can stop a dramatist or a poet or a writer to write freely expressing his thoughts, and similarly none can stop the critics to give their comments whatever its worth. One may concentrate on Classical facets and one may think at a metaphysical level or concentrate on Romanticism as is understood in the poems of Keats, Byron or Shelley or one may dwell on Nature and write poems like William Wordsworth whose poems, say some, are didactic. One may also venture to compose like Alexander Pope or Dryden or get into individual modernism like Ezra Pound, T.S. Eliot or Pablo Neruda. That is fundamentally what is meant by poetic licence."

32 2018 SCC OnLine Chh 680.

33 AIR 1967 Cal 178.

upon the High Court of Calcutta judgement, the court observed that the essence of the cause of action in a civil suit for damages is the tortious liability for compensation for the damage to or loss in reputation suffered by the aggrieved party. Harm to the reputation is common threat which passes even in criminal defamation under section 499 of IPC as also under the civil defamation in criminal cases the conviction and sentence of imprisonment are essential features while in civil the damages are being granted, the court said. It held that the exceptions to the criminal defamation provided in section 499 of IPC are also indicative of the test of civil and criminal defamation. In the instant case, Chief Editor of newspaper namely *Ghoomta Darpan* published a new article captioned "the Doctors are committing dacoity with the poor", and the two doctors in the town, P.K. Niyogi who carried on Sonography Centre at Mahendragarh and C.P. Karan who carried on Nursing Home by the name Karan Nursing Home at the same place, stated because of such publication, the plaintiffs' (doctor's) image were tarnished which ultimately caused damage to reputation and reduction of their practice. They filed a a suit for defamation of damages of Rs. 1,00,000/-.

The defendant stated that the publication of the news article was in public interest and in all *bonafide* without any intention of damaging the reputation of plaintiffs. As regards the publication, defendant relied upon the "defence of good faith". Reliance was made upon the following observation made by the High Court of Bombay in *Surajmal B. Mehta* v. *B.C. Horniman*:[34]

> While a journalist is bound to comment on public questions with care, reason and judgment, he is not necessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy of statement, where those deviations do not affect the general fairness of the comment. The articles must be considered rather in their entirety than by separate insistence on isolated passages, and the Court must decide what impression would be produced on the mind of an unprejudiced reader, who knowing nothing of the matter beforehand, read the article straight through". Courts, in fact, have gone to the extent of saying that even an exaggeration will not by itself disentitle the accused or the defendant from this defence.

Interestingly, the Court conclusively found that the evidence on record showed that those facts of attributing allegation on doctors had not been established, and it was only an impression of opinion and hearsay. Foundational facts were missing. It was also held that inference of malice in law is successfully rebutted if the publisher is able to show that statement was made in the discharge of a public or private duty.

The court cautioned that in the instant case, from mere levelling the allegation against the doctor without any substance or proof, the presumption cannot be drawn that it was in the discharge of a public duty, and therefore, "The defendant if was sanguine of the fact that the incident happened with someone, it has to be proved beyond the reasonable doubt and at least some acceptable evidence should have been

34 AIR 1917 Bom 62.

on record apart from opinion of the witnesses and mere clamping charges and mud bungling will not help him to substantiate the defence." After having stated that factual and legal position, the high court held that suit was decreed for Rs. 50,000/- as against damages to be paid and shared by both appellants equally.

In *Prabir Mohan Dastidar* v. *Sadin Printers,*[35] the appellant was posted as Inspector General of Police (Communication), Assam and Director of Police (Communication), Assam. It was stated that because of his many faceted qualities including high level of integrity, he is loved and respected and has earned an impeccable reputation. However, his prestige, good name, image, reputation and respect in the society had considerably suffered loss because of false, fabricated, malicious and defamatory news article, which was prominently published in the June 27, 2003 in *Asomiya Pratidin*, which was stated to be published with *mala fide* intention to defame the appellant and to tarnish his image before the fellow officers, superiors, employees and trainees in the police department in particular and before the public in general. Therefore, claiming that the cause of action for the suit arose on the various dates as mentioned in the two suits, the appellant had prayed for a decree of Rs. 5.00 Crore in both the suits as damages and compensation for defamation and for decree of permanent injunction to restrain the respondents from publishing defamatory news, views, articles and editorials against the appellant in future, for costs, *etc.* The respondents contested by denying the claim and by *justifying* their news article, further claiming that the appellant, *being a public servant, was answerable to the public*. It was stated that certain actions on his part, as mentioned therein, were illegal. The court took into account in some detail the relevant facts of the case as averred by the rival parties before the court as well as a host of judicial precedents pertaining to defamation. Thereafter, the Court came to the conclusion that the appellant had not been able to establish that he has been defamed.

V NEGLIGENCE

The tort of negligence has grown up in various forms and manifestations since the case of *Donoghue* v. *Stevenson*[36] in which Lord Atkin defined it in terms of duty of care, thanks to expansion or contraction of the scope of duty to care by courts. In this creative process, courts have been guided by policy considerations, some of which are as follows: loss allocation, the 'flood gates' arguments, moral considerations, practical considerations such as forward-planning for manufacturers, the notion that professional people need to be protected from the threat of negligent actions, judicial reluctance to create new common law duties where none previously existed.[37]

It is useful to understand the concept of negligence by referring to stablished precedent. In *Blyth* v. *Birmingham Waterworks Co. Ltd* (1856)[38] Alderson B defined negligence in the following terms: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the

35 MANU/GH/0782/2018.

36 *Donoghue* v. *Stevenson* (1932) AC 562 (HL).

37 *Supra* note 3 at 25-26.

38 *Blyth* v. *Birmingham Waterworks Co. Ltd* (1856), 11 X781.

conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' The concept of negligence has been further explained lucidly by Lord Wright in *Lochgelly Iron and Coal Co. Ltd* v. *McMullan* (1934)[39] where he states: '… negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing'.

Tort of negligence has been one such area of tort law where more or less the number of cases reported remains substantial as the question of negligence appears in varied and varying forms in different context. It may be case of medical negligence or negligence simpliciter. It is a vital clog in the realm of tort law. Therefore, the fine line difference between negligence in tort and negligence in criminal law should be taken care of.[40] In *Ramachandran* v. *Sivaprasad,*[41] the High Court of Kerala observed that:

> Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by driver to the injured. Thus the ingredients are (1) A legal duty on the part of one driver towards injured to exercise care in such conduct of the driver as falls within the scope of the duty (2) Breach of that legal duty (3) Consequential damages to injured. Therefore, *negligence is pure mental inadvertence and it is nothing more than carelessness. Such carelessness may exist in any degree and varies directly with the risk to which other persons are exposed by the act in question. In this situation, the main question is what standard of care is required by law where duty to take care exists? The law does not demand the highest degree of care of which human nature is capable.* The law demands a reasonable care in view of the extent and possibility of the risk.

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39 *Lochgelly Iron and Coal Co. Ltd v. McMullan* (1934), AC 1149, LT526

40 To quote *in extenso* the observation of the Supreme Court in *Jacob Mathew* v. *State of Punjab* [(2005) 6 SCC 1]: ((2005) 6 SCC 1 : AIR 2005 SC 3180):

> What may be negligence in civil law may not necessarily be negligence in criminal law. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law i.e. gross of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.
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> While negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. A clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases.

41 2018 SCC OnLine Ker 22246 (emphasis added).

In *Chairman, PSPCL* v. *Dia,*[42] the plaintiff, a minor, filed a suit through her father/natural guardian for damages and compensation against the defendant - appellant (Corporation). On July 2, 2011 the plaintiff (who was about three years old then) came in contact with a wire on the parapet wall of the roof of her house through which 11000 voltage current was flowing because of which she suffered serious injuries. She was admitted to Hospital where she underwent multiple surgeries, including of the abdomen, the toe of her right foot etc. Her right hand was amputated at mid-palm level. A lot of expense was incurred for her treatment. It was also pleaded that earlier also a number of persons had sustained injuries on account of the negligent action of the Corporation in letting the 11000 volt wires lie close to the residential houses without proper protection and the repeated requests of the residents to the Corporation authorities to remove them had yielded no result. The high court made the following observation:[43]

> A public authority owes a duty to the public that its act or installations are such that they do not cause any danger to life and property of its citizens. The onus is on respondents that even an unwary or a negligent child does not come to harm by their installations in a public place. Indeed the expression of a negligent child should itself be discarded, for a child is entitled to such act as it might indulge in when it has not the age of discretion. *We apply the logic of negligence only in a situation where a person understands that there is a danger lurking in the corner and he does an act unmindful of such danger or invites upon himself through an act that could be dangerous. These aspects ought to be irrelevant for a child*. The Electricity Board's duty of care shall extend to provide for safety mechanism that will dispel harm even for an act of child. Accidents do take place involving children and in all such situations, Courts have always leaned in favour of minor children to protect their interests that are asserted on their behalf and look for proof to see whether the cause for harm could have been quelled by the person, who had control over the device which had contributed to the harm by exercise of adequate care.

The high court held that electricity board was negligent by not responding to the prayers of the petitioner's father and others by not securing a danger free electricity installation.

In *Bhupinder Kaur* v. *Chandigarh Municipal Corporation,*[44] an 18 years old boy succumbed to injury caused by a monkey who threw a big stone/concrete slab on the head of the deceased. Parents of the deceased child were the petitioners in this case, and they claimed that their son had expired due to negligence of the Chandigarh Municipal Corporation who has failed to control the monkey's menace in the city. The court found that the evidence brought on record were sufficient to hold that the

42 MANU/PH/0720/2018: IV(2018) ACC 770 (P and H): 2018 ACJ 2518: (2018)190 PLR 712.

43 *Id*., para.18. emphasis added.

44 MANU/PH/0730/2018; (2018)190 PLR 788.

son of the petitioner died because of the injury caused by the monkey. Notably, the respondents "themselves admitted about the monkey menace in the city." The respondents were directed to pay compensation to the petitioners as per the settled legal norms.

In *Maruti Shrishailya Hale* v. *Commissioner, Sangli Miraj Kupwad Corporation,*[45] a five year old boy went to see a cricket tournament within the limits of Sangli-Miraj-Kupwad Municipal Corporation duly constituted under the Maharashtra Municipal Corporations Act, 1949. While returning home, the child was attacked by five to six stray dogs. Because of the large number of serious injuries sustained by the child due to dog bite, the child succumbed to the injuries on the very day in Civil Hospital, Sangli.

The petitioners, deceased child's parents contended that there was a complete failure on the part of the municipal corporation and the state government to discharge their obligations towards the citizens, and that there are sufficient powers vesting in all the concerned Authorities under the provisions of the Animal Birth Control (Dogs) Rules 2001 (for short "the said Rules of 2001") and section 44 of the Maharashtra Police Act, 1950. They further contended that the death of the child was due to the negligence on the part of the municipal authorities and the state government in preventing menace of street dogs. It was claimed that the municipal corporation and the state government have infringed the fundamental right of the said boy under article 21 of the Constitution of India thereby causing enormous mental trauma to the petitioners who are the parents, and that the death of their only son has created emptiness in the life of the petitioners. The directed the state government and the Sangli Miraj Kupwad Municipal Corporation to jointly and severally pay to the petitioners interim compensation of Rs. 50,000/- with simple interest. It also directed a final amount of compensation to be paid as per the conclusions arrived at by the committee constituted in this respect.

Medical negligence

In *Dr. A.K. Gupta* v. *State of UP,*[46] the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. However, the patent died. From the medical opinions produced by the prosecution, the cause of death is stated to be 'not introducing a cuffed endoW-tracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage'. The court held that this act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable.

45 2018 SCC OnLine Bom 7549.

46 2018 SCC OnLine All 5547. Also see, *Kusum Sharma* v. *Batra Hospital and Medical Research Centre* (2010) 3 SCC 480.

In *S. K. Jhunjhunwala* v. *Dhanwanti Kumar*[47] the question before the Supreme Court was of the view, how and by which principle, the court should decide the issue of negligence of a professional doctor and hold him liable for his medical acts/advise given by him/her to his patient which caused him/her some monetary loss, mental and physical harassment, injury and suffering on account of doctor's medical advise/ treatment (oral or operation)? The Supreme Court held that it is no longer *res integra* and has been settled long back by the series of English decisions as well as the decisions of the court.

The appellant was a doctor by profession practising in Calcutta since 1969. He was a qualified surgeon having expertise, especially in gall bladder surgery having obtained his MBBS degree from Banaras Hindu University in 1968 and Fellowship of the Royal College of Surgeons (FRCS) degree in 1976 from England. Respondent felt pain in her abdomen and consulted a local doctor but she did not get any relief. She, the respondent, consulted S.K. Jhunjhunwala, who after her examination and also her medical test reports advised the respondent for undergoing surgery of her gall bladder. After the surgery, she filed a complaint under section 10 of the Consumer Protection Act, 1986 against the appellant claiming compensation for the loss, mental suffering and pain suffered by her throughout after the surgery on account of negligence of the appellant in performing the surgery of her gall bladder. She complained that firstly, she had never given her consent for performing general surgery of her gall bladder rather she had given consent for performing laparoscopy surgery only but the appellant performed general surgery of her gall bladder which resulted in putting several stitches and scars on her body; secondly, even the surgery performed was not successful inasmuch as she thereafter suffered for several days with various ailments, such as dysentery, loss of appetite, reduction of weight, jaundice, *etc.,* thirdly, she was, therefore, required to undergo another surgery in Ganga Ram Hospital, Delhi for removal of stones which had slipped in CBD. It was alleged that all these ailments were incurred due to the negligence of the appellant, who did not perform the surgery properly and rather performed the surgery carelessly leaving behind for respondent only mental agony, pain, harassment and money loss and hence she filed a complaint to claim the reasonable amount of compensation under various heads as mentioned above.

The court relied on the classic exposition of law on this subject first laid down in *Bolam* v. *Friern Hospital Management Committee*[48] where McNair, J had observed:[49]

> 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

47 AIR 2018 SC 4625.

48 [1957]1WLR 582: (1957) 2 All ER 118 (QBD). Also see, *Eckersley* v. *Binnie* (1988) 18 Con LR 1.

49 *Ibid.*

> 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 skill of an ordinary competent man exercising that particular art.

Tort of negligence by 'corporate entity'

In *ITC Limited* v. *JP Morgan Mutual Fund India Private Limited*.,[50] the High Court of Calcutta observed that in a complaint involving the tort of negligence, where the defendant is a corporate entity, the extent of liability would essentially depend upon the degree of mental element as decided in *Rajkot Municipal Corporation* v. *Manjulben Jayantilal Nakum.*[51] The court held that this mental element can only be assessed by a reference to the mental element of the directors and managers of such corporate entity. The court quoted the following observation made in *H.L. Bolton (Engineering) Co. Ltd.:*[52]

A company may in many ways be likened to a human body. They have also hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such.

VI COMPENSATION UNDER MOTOR VEHICLE ACT

In *National Insurance Co. Ltd* v. *Lalitha K.G.*,[53] Rajan, J while emphasising the fact that the concept of just compensation implies the application of '*equitable principle'* and '*reasonable approach'*, expounded the meaning of the word 'compensation' in the following words:[54]

> The word "compensation" means anything given to make things synonymous, a thing given to make atonement for loss or compensate for the loss. The expression "compensation" is a more comprehensive term and the claim for compensation includes a claim for damages. There is significance between compensation to be awarded and a claim for damages being allowed. Damages are given for an injury suffered.

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50 2018 AIR CC 3108 : (2018) 4 Cal LT 367 : (2019) 2 ICC 356.

51 (1997) 9 SCC 552.

52 (1956) 3 All ER 624.

53 2018 SCC OnLine Ker 14231. Earlier the Supreme Court in *Divisional Controller, KSRTC* v. *Mahadeva Shetty* (2003) 7 SCC 197, had observed that, "Compensation is an act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss; or be made whole in respect of his injury; something given or obtained as an equivalent; rendering of equivalent in value or amount; an equivalent given for property taken or for an injury done to another; a recompense in value; a recompense given for a thing received; recompense for whole injury suffered; remuneration or satisfaction for injury or damage of every description." *Id*. at 202.

54 *Ibid.*

> Compensation is by way of atonement for the injury caused with intent to put either the injured party or those who may suffer on account of the injury in a position as if the injury was not caused by making pecuniary benefits.

In the year under review, few areas of compensation under Motor Vehicle Act came for consideration, and the Supreme Court reiterated the settled principles while at the same time settled few areas of discord under the motor vehicle jurisprudence.

In *Bipin Paul* v. *Sathyadevan K.I.*,[55] the appeal before the high court pertained to liability of the Insurance Company to compensate the injury or death of the rider, other than the owner, of a motor bike, when there is no other vehicle involved in the accident and the claim is made under section 163A of the Motor Vehicles Act. Chandran, J observed that the driver of a vehicle, who is driving the same on consent of the registered owner, has already been held to have *stepped into the shoes of the owner* and hence the 'tort-feasor' *cannot be the claimant*. The liability primarily is of the person, who commits the negligence. The liability being that of the driver primarily and at the first instance, when his negligence causes an accident and by reason of the accident the driver himself meets death, there cannot be any vicarious liability cast on the owner much less any liability to indemnify the same on the Insurance company. The court did not allow the appeal. The court clarified that with respect to a motor vehicle, when the driver is negligent and an injury is caused to a third party, then necessarily the registered owner has to shoulder the responsibility of paying compensation, on principles of vicarious liability. It is this vicarious liability of the owner of the vehicle that has been indemnified by the issuance of a valid insurance policy.

While interpreting section 168 of the Motor Vehicle Act, the Supreme Court in *Sebastiani Lakra* v. *National Insurance Company Ltd,*[56] observed that any method of calculation of compensation which does not result in the award of 'just compensation' would not be in accordance with the Act. The word "just" is of very wide amplitude, and therefore the Supreme Court held that the courts must interpret the word in a manner which meets the object of the Act, which is to give adequate and just compensation to the dependents of the deceased. One must also remember that compensation can be paid only once and not time and again. Moreover, Deepak Gupta, J observed:[57]

> The law is well settled that deductions cannot be allowed from the amount of compensation either on account of insurance, or on account of pensionary benefits or gratuity or grant of employment to a kin of the deceased. The main reason is that all these amounts are earned by the deceased on account of contractual relations entered into by him with others. It cannot be said that these amounts accrued to the

55 2018 SCC OnLine Ker 17943.

56 2018 SCC OnLine SC 1924.

57 *Id*.,para.13. (Emphasis added).

> dependents or the legal heirs of the deceased on account of his death in a motor vehicle accident. The claimants/dependents are entitled to 'just compensation' under the Motor Vehicles Act as a result of the death of the deceased in a motor vehicle accident. Therefore, *the natural corollary is that the advantage which accrues to the estate of the deceased or to his dependents as a result of some contract or act which the deceased performed in his life time cannot be said to be the outcome or result of the death of the deceased even though these amounts may go into the hands of the dependents only after his death.*

Gupta, J observed that, "The tort-feasor cannot take advantage of the foresight and wise financial investments made by the deceased."[58]

VII CONCLUSION

In view of the settled past and impending future, it is incumbent upon the lawmakers and judges to usher in a new jurisprudence of tortious liability that would be in consonance with the problems and predicaments of the twenty first century. This occasions a ponderous moment having consequences of far reaching effect. There are few areas of tort law that need to be explored. Few of them have remained ignored or *underexplored*, more so in India whereas other areas would need significant attention and judicial cognizance. One such area is defamation and media, especially in the realm of social media. Some forms of legal regulation is needed as regards the social media and the resultant misuse thereof resulting in instances of defamation. Defamation jurisprudence needs to move beyond the traditional doctrinal confines and confront the emerging challenges to defamation law given the transient texture of newer forms of media in the twenty first century. Media has undergone change in the recent past, so should the *law* to be responsive and effective. The guiding light may be found in international Conventions dealing with diverse aspects of human rights, such as Universal Declaration of Human Rights 1948, European Convention on Human Rights, 1950 and so on. Lastly, the reviewer believes that in view of the growing acceptance[59] of economic analysis of law, it is necessary that judicial as well as juristic writing in India should engage with this emerging and effective discipline in a meaningful manner. There is an ample scope for an economic analysis of tort law in India, which has so far remained under- or un-explored. Richard Posner's *Economic Analysis of Law*[60] is a not-to-be-ignored guidepost for such an analysis. It is noted that a future survey of tort law would take into account the interface between law and economics, more so in the realm of tort law. Before parting, it would be apposite to say that in the years to come technological dimension of tortious liability would engage a good amount of

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58 *Id*.,para.14.

59 As Richard Posner notes, "There is a growing interest among both economists and academic lawyers in using the theories and characteristic empirical methods of economics to increase our understanding of the legal system." Richard A. Posner, "The Economic Approach to Law," 53 *Texas Law Review* 757 (1975).

60 Richard A Posner, *Economic Analysis of Law* (Aspen, 2002). Also See, Richard Posner, *Problem of Jurisprudence* (2003); William Landes and Richard Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987).

legislative and judicial attention in that technological innovations have already widened the scope of tort law from a real to a virtual space. The advent of artificial intelligence (AI) is to herald a new era of tortious liability. The arrival of "ePerson" is set to stir the settled jurisprudential waters for some time.[61]

61 See, Gerhard Wagner, "Robot Liability: How Does it Feel to be Hit by an ePerson?", *available at:* https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/robot-liability-how-does-it-feel-be-hit-by-eperson (Last visited on Oct 2, 2019). Also see, Gerhard Wagner, "Robot Liability", *available at* :https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198764(last visited on Aug. 22 2019).