21

LAW OF TORT

*B C Nirmal**

I INTRODUCTION

THERE HAS been a gradual growth in the preceding few years in torts jurisprudence with newer cases coming before courts for adjudication. This is reflective of the transformation that society has been through in recent past on account of the changes that have become a hallmark of modern life in 21st Century. There is a perceptible trend in terms of cases that have come before courts. Cases that have started coming before the courts are more intricate and demanding, requiring a cogent cognizance of the need to shape tort law for the future. The emerging trend also highlights the need to redraw the conceptual contours in view of the expanding workspace that people are getting used to, especially the cyberspace.[1] The year under review is an analysis of select cases where the basic premises of tortious liability were discussed at length or at least their application was noticeable, though there were many cases where there was a only a fleeting discussion of law of torts, which, though could have been more elaborate adding to its enrichment.

II UBI JUS IBI REMEDIUM

The maxim *ubi jus ibi remedium* basically implies that whenever a man has a right, the law should give a remedy.[2] The "*jus*" is the substantive law of fundamental rights and freedoms recognised by the law and practice of the state.[3] Chief Justice John Marshal *famously* said: "The very essence of civil liberty consists in the right of every individual to claim the *protection of the laws*, whenever he receives an injury.

* Former Vice-chancellor, National University of Study and Research in Law, Ranchi, and Former Dean, Faculty of Law, Banaras Hindu University. Research assistance rendered by Rabindra Kr. Pathak, Assistant Professor, NUSRL, Ranchi is duly acknowledged.

1 For instance, as Cayce Myers underscores the fact that "Online defamation suits present a new forum for the application of traditional defamation laws. One particular nuance of these defamation suits is frequently defendants' identities are initially unknown to the plaintiff." See, Cayce Myers, "To Reveal or Conceal?: Introducing the Anonymous Public Concern Test for US Defamation Lawsuits" 5 *Journal of Information Policy* 71-108 (2015). Also see, David Erdos, "Data Protection and the Right to Reputation: Filling the "Gaps" After the Defamation Act 2013", 73 *Cambridge Law Journal* 536-569(2014).

2 *Hill* v. *C. A. Parsons & Co. Ltd*., [1972] Ch. 305 (C.A.).

3 *Noel Riley* v. *Attorney-General of Jamaica,* [1983] 1 A.C. 719.

One of the first duties of government is to afford that protection."[4] Therefore, as Iyer, J. asseverated, "*Ubi jus ibi remedium* is basic to the credibility in the law. But when a person goes to court in search of relief and has a case to substantiate the wrong done to him, prompt remedy must issue."[5]

In *Kirpa Ram (Deceased) Through Legal Representatives* v. *Surendra Deo Gaur,*[6] Supreme Court delineating upon the scope of section 9 of the Code of Civil Procedure, reiterated the observation made in an earlier judgment[7] where it was stated that "Any person having a grievance that he had been wronged or his right has been affected can approach a civil court on the principle of '*ubi jus ibi remedium*' - where there is a right, there is a remedy."[8] In *Ashwani Kumar* v. *State of Himachal Pradesh,*[9] High Court of Himachal Pradesh observed that the principle of '*ubi jus ibi remedium*' to some extent, seeks lateral support from another settled principle of law, *viz.*, '*vigilantibus*, *nondormientibus*, *jurasubveniunt'*, which means, the law assists those that are vigilant with their rights, and not those that sleep thereupon.[10] In *National Association of Blind* v. *Bombay Municipal Corporation, Through its Commissioner,*[11] the High Court of Bombay seemed to wonder that if inhuman working conditions of workmen, who form the labour class, and deprivation of welfare amenities by an employer are brought to the notice of a high court in a public interest litigation, should the petition be thrown out on the ground that remedy is available before the Industrial Tribunal under the Industrial Disputes Act, 1947? The court said that the answers to these questions ought to be in the negative. The court observed that no doubt there were for a established to redress grievances of staff/workmen; but if the road to approach the specialized tribunals was inaccessible for them, their grievance, though real and genuine, would never be addressed. *Ubi jus ibi remedium* would always remain on paper for them, reminded the court.

III CONSTITUTIONAL REMEDY

In *G. Sendhatti kalaipandian* v. *Inspector of Police*[12] the deceased was returning home through the customary pathway running across a private land belonging to a local factory where he came in contact with a live overhanging wire, got electrocuted and died on the spot. The father of the deceased sent a petition through e-mail to the Registrar (Judicial), Madurai Bench, High Court of Madras seeking justice. The court

4 *Marbury* v. *Madison*, 5 U.S. 137 (1803). Emphasis added.

5 V.R. Krishna Iyer, "The Judicial System—has it a Functional Future in our Constitutional Order?" (1979) 3 SCC J-1.

6 2020 SCC OnLine SC 935.

7 *South Delhi Municipal Corporation* v. *Today Homes and Infrastructure Pvt. Ltd.,* 2019 SCC OnLine SC 1052.

8 *Id*., para.11.

9 2020 SCC OnLine HP 1949.

10 *Id*., para.8.

11 2020 SCC OnLine Bom 2032.

12 (2020) 6 CTC 363: (2020) 8 Mad LJ 319 : (2021) 219 AIC 307.

relied upon the judgment in *Arulmeri* v. *Superintendent of Engineer, TNEB,*[13] where it was held that when the deceased was not at fault and the death had occurred due to fall of electric wire, there is no need for the dependent to go before the civil court and that relief can be granted in writ proceedings.

In the instant case, G.R. Swaminathan, J. directed the email to be treated as writ petition. He wondered: "Did not Justice V.R. Krishna Iyer treat letters as writ petitions?". the directed the concerned public sector undertaking, being a state within the meaning of article 12, to pay compensation for the loss of life to the claimants. The high court further reiterated that a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings.

IV DEFAMATION

Defamation and free speech remain so entangled that there is always a need to draw a fine line as a reminder of the need to be cautious while exercising the constitutionally cherished right to 'freedom of speech'. Equally important is to be aware of the reasonable restrictions that have a hedging effect upon free speech. Defamation has many manifestations, and one such manifestation in recent past has appeared in the form of hate-speech aimed at maligning a particular group of people.[14] Though hate-speech is not categorised as a separate tort, increasing instances of hate-speeches requires exploring the possibility of bringing it within the fold of tortious liability.[15] Constitutional recognition and protection of freedom of speech comes along with 'reasonable restrictions',[16] and that being so, it necessitates taking stock of the prevailing and growing trends of hate-speech often aimed at *defaming* and *violating the dignity* of a group of people. One of the reasonable restrictions in article 19(2) is

13 (2013) 2 Mad LJ 302.

14 ICCPR art. 20(2) reads: calls for prohibition of hate speech in the following words: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

15 Rosenfeld defines hate speech as a "speech designed to promote hatred on the basis of race, religion, ethnicity or national origin-poses vexing and complex problems for contemporary constitutional rights to freedom of expression." See, Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis" 24 *Cardozo L. Rev*. 1523 (2003).

16 ICCPR art.19(3) reads: also acknowledges that the right to freedom of expression may "be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others."

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

'defamation'.[17] '*Freedoms'* guaranteed under the constitution must be enjoyed within '*constitutional limitations*', the element of proportionality being a prerequisite between the two. Notwithstanding the provisions under Indian Penal Code and Criminal Procedure code for dealing with instances of hate-speech in varied forms, the question of such a speech may be looked at in view of the constitutional protection of individual freedoms and dignity along with foundational principles of the law of torts.[18] In this respect that the Supreme Court judgment in *Amish Devgan* v. *Union of India*[19]merits mention. The court relying upon the observation of the United States Supreme Court in *Beauharnais* v. *State of Illinois*[20]observed thus:[21]

> [Hate]*speech should amount to group defamation which though analogous to individual defamation* has been traditionally excluded from free speech protection in America. Loss of dignity and self-worth of the targeted group members contributes to disharmony amongst groups, erodes tolerance and open-mindedness which are a must for multi-cultural society committed to the idea of equality. It affects an individual as a member of a group. It is however necessary that at least two groups or communities must be involved; merely referring to feelings of one community or group without any reference to any other community or group does not attract the "hate speech" definition.

In *Amish Devgan*, a television anchor had allegedly made defamatory remarks against Sufi saint Khwaja Moinuddin Chisti. Though the petition before the Supreme Court was based on alleged violation of articles 21 and 25 of the Constitution, certain observations made by the Court with respect to such type of speech are worth pondering upon. The Supreme Court quoting Richard Delgado described hate speech 'as language

17 Commenting upon the *import* of the word *defamation* under art. 19(2), Supreme Court in *Subramanian Swamy* v. *Union of India* (2016) 7 SCC 221, observed that "The word "defamation" has its own independent identity and it stands alone and the law relating to defamation has to be understood as it stood at the time when the Constitution came into force." *Id*. at 291. The Court had reasoned that "The said term was there at the time of commencement of the Constitution. If the word "defamation" is associated or is interpreted to take colour from the terms "incitement to an offence", it would unnecessarily make it a restricted one which even the Founding Fathers did not intend to do. Keeping in view the aid that one may take from the Constituent Assembly Debates and regard being had to the clarity of expression, we are of the considered opinion that there is no warrant to apply the principle of *noscitur a sociis*to give a restricted meaning to the term "defamation" that it only includes a criminal action if it gives rise to incitement to constitute an offence. The word "incitement" has to be understood in the context of freedom of speech and expression and reasonable restriction. The word "incitement" in criminal jurisprudence has a different meaning." *Ibid*.

18 See, Jean C. Love, "Tort Actions for Hate Speech and the First Amendment: Reconceptualising the Competing Interests" 2 *Law and Sexuality* 29-36 (1992); K Kajiwara, "Tort Liability for Hate Speech in Japan" in S. Higaki & Y. Nasu (Eds.), *Hate Speech in Japan: The Possibility of a Non-Regulatory Approach*,187-206 (Cambridge University Press,2021); Johnny Holschuh, "#civilrightscybertorts: Utilizing Torts to Combat Hate Speech in Online Social Media" 82 *University of Cincinnati Law Review* 953 (2018).

19 (2021) 1 SCC 1

20 343 US 250 (1952)

21 *Id*. at 64.

that was intended to demean a group which a reasonable person would recognise as a "racial insult"'.[22] Drawing upon the work of Marwick and Miller,[23] the court elucidated upon three distinct elements that legislatures and courts can use to define and identify "hate speech", namely — *content-based element*[24], *intent-based element*[25] and *harm-based element* (or *impact-based element*).[26]The court, nonetheless, did mention that the three elements are not watertight silos and do overlap and are interconnected and linked. Only when they are present that they produce structural continuity to constitute "hate speech".[27] As regards the content of such speech, judgment invokes what is known in English law as *Clapham Omnibus test* ("the man on the top of a Clapham omnibus") which requires that the "effect of the words must be judged from the standard of reasonable, strong-minded, firm and courageous men and not by those who are weak and ones with vacillating minds, nor of those who scent danger in every hostile point of view".[28]

There are few cases from the high courts in the year under review that add to the understanding of defamation law. In one such case, *Vijayalakshmi* v. *J. Ravi Shankar,*[29] before the Madras high court, an estranged wife wrote a complaint against her husband to the Registrar General, High Court, Madras with a copy to the police, seeking justice. According to her husband, she sent copies of her aforesaid representation to all his relatives, friends and neighbours and thereby had defamed him, by calling him impotent. The husband meanwhile remarried and begot a test tube baby. On behalf of the husband, the counsel relied upon the High Court of Bombay judgment in (Nagpur Bench) in '*X*' v. '*Y*'[30] and contended that if a wife alleges impotency against her husband, it would undoubtedly amount to defamation. In her representation, the

22 Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling", 17 *Harv CR-CLL Rev* 133 (1982). Also see, Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story", 87 *Mich L Rev* 2320 (1989).

23 Marwick, Alice E. and Miller, Ross W., "Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape" (10-6-2014) (Fordham Center on Law and Information Policy Report).

24 The content-based element involves open use of words and phrases generally considered to be offensive to a particular community and objectively offensive to the society. It can include use of certain symbols and iconography. By applying objective standards, one knows or has reasonable grounds to know that the content would allow anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender." (2021) 1 SCC 1 at 65.

25 The intent-based element of "hate speech" requires the speaker's message to intend only to promote hatred, violence or resentment against a particular class or group without communicating any legitimate message. This requires subjective intent on the part of the speaker to target the group or person associated with the class/group." *Ibid.*

26 The harm or impact-based element refers to the consequences of the "hate speech", that is, harm to the victim which can be violent or such as loss of self-esteem, economic or social subordination, physical and mental stress, silencing of the victim and effective exclusion from the political arena." *Ibid*.

27 *Ibid*.

28 *Ibid*. Also see, *Ramesh* v. *Union of India*, (1988) 1 SCC 668.

29 2020 SCC OnLine Mad 5695.

30 Criminal Application [APL] No. 774 of 2017 decided on Nov. 11, 2018.

estranged wife had stated that "people say that, only if her husband takes medical treatment for curing his impotency, they can beget a child" and that "on account of the love she had for her husband, she did not tell this to anyone, but was taking treatment." Considering the fact that the husband did not deny the allegation of marriage and begetting a test-tube child, it was held that the judgment relied upon by the husband will be application to the factual matrix of the present case.

In *Colonel A. Sridharan Managing Director, Covai Property Center (India) Pvt. Ltd* v. *Squadron Leader V.S. Subramanian (Retired),*[31] The plaintiff made certain averments in the plaint that were 'very sketchy' and that there was only a 'general statement' that the defendant had disclosed the defamatory statements made by him in the e-mail to some of the friends of the plaintiff and co-residents in the senior citizen's home. Moreover, the plaint does not disclose finer details of such communication and the effect of such communication. The high court observed that the essential requirement for suit for damages based on defamation is the fact that the defamatory statement was made, and it was published to persons known to the plaintiff, resulting in a damage to the reputation of the plaintiff in their eyes. The court held that the fact that there was 'some material' as found by the trial court in the plaint made by the plaintiff as to defamation, the essential elements required for maintaining a suit for damages on account of defamation were present in the present case. The court thereby refuted the argument that the plaintiff had not disclosed the *details* of his friends and co-occupants to whom the publication was made, and he has not stated in what manner was his reputation damaged.

In *Atul Kumar Pandey* v. *KumarAvinash,*[32] the divorce petition instituted by the defendant against his wife contained the defamatory statements against the plaintiff. The plaintiff contended that, a statement once made in a pleading filed before a court of law, amounted to publication of such statement, and that such statement did not enjoy absolute privilege. It therefore implied that if the statement was defamatory in nature, a civil proceeding for damages in respect of such defamatory statement would be maintainable. In support of his contention, he relied upon a battery of judicial pronouncements.[33] The defendant, on the other hand, contended that, the statements contained in an application made to court were absolutely privileged and that, no civil suit for damages on account of defamation would be maintainable, the suit being barred under Order VII Rule 11 of the Code of Civil Procedure, 1908. Taking note of the fact that in India, a civil action can be brought under section 9 of the Code of Civil Procedure 1908, before a civil court, where there is no codified law, on the basis of a common law right governing the field, to quote *in extenso* the court observed that:[34]

> In England, absolute privilege attaches to statements made in course of judicial proceedings and statements contained in documents made

31 2020 SCC OnLine Mad 15251.

32 2020 SCC OnLine Cal 994

33 *Dhirendra Nath Mukherjee* v. *State of West Bengal*, AIR 1967 (Cal) 178; *Asoke Kumar Sarkar* v. *Radha Kanto Pandey*, AIR 1966 (Mad) 363; *Thangavelu Chettiar* v. *Ponnammal*, AIR 1940 (Mad) 879, and so on.

34 2020 SCC OnLine Cal 994, para. 29.

> in judicial or quasi judicial proceedings. In a civil suit for defamatory statement, Courts in India have recognised and applied the principle of absolute privilege to attach to statements made in the course of judicial proceedings and statements contained in documents made in judicial or quasi-judicial proceedings on the ground that, it is a public policy that, a litigant approaching the Court enjoys absolute freedom in making a charge and contesting a charge. A litigant must not suffer from any inhibition or threat of further prosecution or labour under any apprehension of the consequences of the statements made by such litigant in the course of a judicial proceedings. Courts in India have recognised that, a litigant must be protected from further litigations for having made a statement perceived to be defamatory, in the course of a judicial proceeding.

In *Horlicks Limited* v. *Zydus Wellness Products Limited,*[35] the plaintiffs filed a suit against the defendant *inter alia* seeking prayer of permanent injunction and restraining the defendant, from telecasting or otherwise communicating to the public the impugned advertisement which, according to the plaintiff, amounted to intentional and deliberate disparagement of the plaintiffs' health food drink HORLICK by the defendant through its television commercial (TVC). The advertisement in question was thus: "One cup of Complan has the same amount of protein as two cups of Horlicks." The court made many notable observations in this respect. It said that though in law the defendant may be entitled to puff its product, but it is not allowed to denigrate the product of other parties.[36] The court, in view of the judicial pronouncements of the Supreme Court, approvingly quoted one of the major propositions that were made in *Reckitt and Colman of India Ltd*. v. *M.P. Ramchandran*[37] to the effect that:[38]

> [A tradesman] cannot, while saying that his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible. If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

All said, the high court reiterated the dictum in *Dabur India* v. *Colortek Meghalaya Pvt. Ltd.,*[39] that while hyped-up advertising may be permissible, it cannot transgress the *grey areas of permissible assertion*, and if does so, the advertiser must

35 (2020) 269 DLT 285

36 *Id*., para.4.

37 (1999) 19 PTC 741

38 2020 SCC OnLine Cal 994, para 11.

39 (2010) 167 DLT 278.

have some reasonable factual basis for the assertion made. The court further asseverated that it is not possible, therefore, for anybody to make an off-the-cuff or unsubstantiated claim that his goods are the best in the world or falsely state that his goods are better than that of a rival.

In *Elixir Fitness Pvt. Ltd.* v. *Oakland Park Co-operative Housing Society Ltd.,*[40] the High Court of Bombay observed that given the fact that an arbitrator is a creature of contract, circumscribed by that contract, he cannot travel beyond it. Therefore, it held that the arbitral tribunal has absolutely no powers to entertain a tortious dispute, reason being an allegation of defamation invokes *a cause of action rooted in tort*, an actionable civil wrong, *not a cause of action in contract*. The court clarified that any claim founded on defamation, whether for damages or injunction, is beyond the powers of this arbitral tribunal to begin with.[41]

V NUISANCE

Beyond the doctrinal premises[42]of tort of nuisance, there may be varied fact-situations where need for remedial measures may be required. In recent times, its application has widened to areas of environmental justice,[43] right to privacy[44] and so on.

In *Nagar Parishad, Ratnagiri* v. *Gangaram Narayan Ambekar,*[45] respondents had filed a suit as residents of different villages in the District Ratnagiri. Dandeadom is one such village in the district where Ratnagiri Nagar Parishad intended to set up a Solid Waste Disposal Project. The land had been allotted to the appellant by the state government. The suit land was located around 10 km away from the limits of Ratnagiri City at a hilly and sloped area. The entire area is rocky and hard. The location selected was such that it would entail serious health problems for the villagers in the locality and inevitably pollute the river flowing nearby. Besides, on this river, a Dam was located, which provided water supply to Ratnagiri City. Thus, the project was likely to pollute the dam water as well. The trial court dismissed the suit, but the first appellate court allowed (decreed) the same, which decision was upheld by the high court in the second appeal.[46] Therefore, the matter reached the Supreme Court against the judgment of the high court, which the Supreme Court set aside. However, the court in detail

40 2020 SCC OnLine Bom 5266.

41 *Id*., para.3.

42 See generally, Newark, "The Boundaries of Nuisance" 65 *Law Quarterly Review* 486-488(1949).

43 See, Mandy Garrells, "Raising Environmental Justice Claims through the Law of Public Nuisance", 20 *Villanova Environmental Law Journal* 163 (2009); Sam Porter, "Do the rules of private nuisance breach the principles of environmental justice?" 21 *Environmental Law Review* 21-37 (2019).

44 See*, Fearn* v *Board of Trustees of the Tate Gallery,* [2020] 2 WLR 1081 where the tort of nuisance as reagrds protecting the privacy of a domestic home as against another landowner was in question before the Court of Appeal. Also see, *Transco plc* v *Stockport Metropolitan Borough Council,* [2003] UKHL 61.

45 (2020) 7 SCC 275.

46 *Nagar Parishad, Ratnagiri* v. *Gangaram Narayan Ambekar*, 2016 SCC OnLine Bom 9913.

discussed the various aspects of law relating to nuisance, and took into account a concatenation of judicial precedents, which aid to understanding the true import of nuisance as regards the question of tortious liability. The Supreme Court concluded that the initial burden of proof was on the plaintiffs to substantiate their cause for actionable nuisance, which they had failed to discharge, and relied upon the ratio in *Kuldip Singh* v. *Subhash Chander Jain,*[47] where it was held that:[48]

> …a nuisance actually in existence stands on a different footing than a possibility of nuisance or a future nuisance. An actually-existing nuisance is capable of being assessed in terms of its quantum and the relief which will protect or compensate the plaintiff consistently with the injury caused to his rights is also capable of being formulated. In case of a future nuisance, a mere possibility of injury will not provide the plaintiff with a cause of action unless the threat be so certain or imminent that an injury actionable in law will arise unless prevented by an injunction. The court may not require proof of absolute certainty or a proof beyond reasonable doubt before it may interfere; but a strong case of probability that the apprehended mischief will in fact arise must be shown by the plaintiff.

VI VICARIOUS LIABILITY

An employer is responsible for damage caused by the torts of his employees acting in the course of employment. This is known as 'vicarious liability'.[49] It is a form of strict liability because it arises from the employer-employee relationship (or master-servnat) relationship, without any reference to any fault of the employer.[50]

Meaning of 'owner' and fixation of vicarious liability

In cases of road accident, it is well settled that vicarious liability will arise only when the driver of the insured vehicle was at fault.[51]Moreover, it has been held in a series of judicial pronouncements that it is the vicarious liability of the owner of the vehicle to pay compensation even if due to rash and negligent driving of the driver, the accident occurs. However, there are cases where the question of owner itself becomes a point of interpretation entailing a predicament as to fixation of vicarious

47 (2000) 4 SCC 50.

48 *Id*. at 55-56. The Supreme Court had further clarified that "a future nuisance to be actionable must be either imminent or likely to cause such damage as would be irreparable once it is allowed to occur. There may be yet another category of actionable future nuisance when the likely act of the defendant is inherently dangerous or injurious such as digging a ditch across a highway or in the vicinity of a children's school or opening a shop dealing with highly inflammable products in the midst of a residential locality." *Ibid*. Also see, *Fletcher* v. *Bealey* (1884) 28 Ch. D. 688; *London Borough of Islington* v. *Margaret Elliott* [2012] EWCA Civ. 56, *Vastint Leeds BV* v. *Persons Unknown* [2018] EWHC 2456 (Ch.) and *Fearn* v *Board of Trustees of the Tate Gallery,* [2020] 2 WLR 1081.

49 Michael A Jones, *Textbook on Torts*, 326 (London,Blackstone Press Limited,1996).

50 *Ibid.*

51 *Branch Manager, National Insurance Company Ltd*. v. *Ganesha Moorthy,* 2020 SCC OnLine Mad 5646.

liability to pay compensation. For instance, in *U.P. State Road Transport Corporation* (UPSRTC) v. *Rajenderi Devi,*[52] a 45-year-old man died in road accident, when he, while riding his bicycle, was hit by a bus. The Motor Accident Claims Tribunal found that it was because of rash and negligent driving by the driver. The bus was hired by the Uttar Pradesh State Road Transport Corporation under an agreement between it and the bus owner. That is, it was a private bus running under the control of UPSRTC, and that being so, the insurance company contended that the bus was under the control of UPSRTC, and therefore, it was the responsibility of the later to pay compensation, more so since the bus was not under the control of the owner, rather it was UPSRTC that controlled the working of the bus at the relevant time.

The ourt relied upon its previous judgment in *Uttar Pradesh State Road Transport Corporation* v. *Kulsum,*[53] and held the insurance company liable to pay compensation. The relevant observation in *Kulsum,*[54] that was relied upon by the Supreme Court in the present case read thus:[55]

> …for all practical purposes, for the relevant period, the Corporation had become the owner of the vehicle for the specific period. If the Corporation had become the owner even for the specific period and the vehicle having been insured at the instance of original owner, it will be *deemed* that the vehicle was transferred along with the insurance policy in existence to the Corporation and thus the Insurance Company would not be able to escape its liability to pay the amount of compensation.

"In the course of employment"

The expression "in the course of employment" has been a subject of interpretation in innumerable cases dealing with employer-employee relationship. This expression assumes great relevance when it comes to payment of compensation by the employer.

In *Poonam Devi* v. *Oriental Insurance Co. Ltd*.,[56] the deceased was driving a TATA 407 vehicle from Ambala to Meerut. During the journey, when he approached the bridge near Village Fatehpur, the deceased went to the Yamuna canal to fetch water and to have a bath. Unfortunately, he slipped into the canal and died. The vehicle was insured with the respondent insurance company. The high court held that the deceased may have died during the course of the employment, but death did not arise out of the employment, as bathing in the canal was not incidental to the employment but was at the peril of the workman. It further observed that there was no causal connection between the death of the workman and his employment, and that he had gone to fetch water for personal consumption. Notably, the Employee's Compensation Act, 1923 under section 3 provides thus: "If personal injury is caused to a workman

52 2020 SCC OnLine SC 544. The *ratio* in the instant case was relied upon by the High Court of Kerala in *Sabu* v. *Elias*, 2020 SCC OnLine Ker 16642.

53 (2011) 8 SCC 142.

54 *Kulsum* dealt with the interpretation of s. 2(30) of the Motor Vehicles Act, 1988.

55 (2011) 8 SCC 142, para.30.

56 (2020) 4 SCC 55.

by accident *arising out of and in the course of his employment*, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:"

The Supreme Court invoked the application of the *theory of notional extension of the employment,*[57] and set aside the order of the high court granting compensation to the legal heirs of the deceased.

Vicarious liability of hospital

In *Maharaja Agrasen Hospital* v. *Rishabh Sharma,*[58] the Supreme Court held that a hospital is vicariously liable for the acts of negligence committed by the doctors engaged or empanelled to provide medical care. The court reasoned that when a patient goes to a hospital, he/she goes there on account of the reputation of the hospital, and with the hope that due and proper care will be taken by the hospital authorities, and if the hospital fails to discharge their duties through their doctors, being employed on job basis or employed on contract basis, it is the hospital which has to justify the acts of commission or omission on behalf of their doctors. The court further stated that:[59]

> The grant of compensation to remedy the wrong of medical negligence is within the realm of law of torts. It is based on the principle of *restitutio in integrum*. The said principle provides that a person is entitled to damages which should as nearly as possible get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong.

The Supreme Court reiterated[60] the concept of medical negligence in the instant case, and held that medical negligence is the breach of a duty of care by an act of omission or commission by a medical professional of ordinary prudence, and actionable medical negligence is the neglect in exercising a reasonable degree of skill and knowledge to the patient, to whom he owes a duty of care, which has resulted in

57 See, *Leela Bai* v. *Seema Chouhan*, (2019) 4 SCC 325; *BEST Undertaking* v. *Agnes*, AIR 1964 SC 193; *Saurashtra Salt Mfg. Co.* v. *Bai Valu Raja*, AIR 1958 SC 881. In Agnes, the Supreme Court had held that: "here may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension." *Id.* at 199.

58 (2020) 6 SCC 501. Also see, *Savita Garg* v. *National Heart Institute*, (2004) 8 SCC 56; *Balram Prasad* v. *Kunal Saha*, (2014) 1 SCC 384 : (2014) 1 SCC (Civ) 327; *Achutrao Haribhau Khodwa* v. *State of Maharashtra*, (1996) 2 SCC 634; *V. Krishnakumar* v. *State of T.N.*, (2015) 9 SCC 388 : (2015) 4 SCC (Civ) 546; *Savita Garg* v. *National Heart Institute*, (2004) 8 SCC 56; *Savita Garg* v. *National Heart Institute* (2004) 8 SCC 56.

59 (2020) 6 SCC 501 at 545. Also see, *Livingstone* v. *Rawyards Coal Co.*, (1880) LR 5 AC 25 (HL); followed in *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, (2009) 9 SCC 221 : (2009) 3 SCC (Civ) 663 : (2010) 2 SCC (Cri) 299 and *V. Krishnakumar* v. *State of T.N.*, (2015) 9 SCC 388 : (2015) 4 SCC (Civ) 546; *Balram Prasad* v. *Kunal Saha*, (2014) 1 SCC 384 : (2014) 1 SCC (Civ) 327.

60 *Laxman Balkrishna Joshi* v. *Trimbak Bapu Godbole*, (1969) 1 SCR 206 : AIR 1969 SC 128; *Kusum Sharma* v. *Batra Hospital*, (2010) 3 SCC 480 : (2010) 1 SCC (Civ) 747 : (2010) 2 SCC (Cri) 1127.

injury to such person. The law requires neither the very highest nor a very low degree of care and competence to adjudge whether the medical professional has been negligent in the treatment of the patient, held the court, observed the court.

VII CONTRIBUTORY NEGLIGENCE

As Viscount Simonds, "It is not the act but the consequences on which tortious liability is founded. Just as…there is no such thing as negligence in the air, so there is no such thing as liability in the air …"[61] But, the consequence entailing liability also has to take into account the element of negligence on the part of the person who suffers damage or loss. The consequence must take into account the element of contributory negligence as well, and accordingly liability should be ascertained.

In *Rajendra Singh* v. *National Insurance Co. Ltd.,*[62] a woman and her daughter, were travelling in a horse cart along with some others to a religious congregation. The horse cart was hit by a bus resulting in their death. Motor Accident Claims Tribunal, while awarding compensation, deducted 50% thereof on ground of contributory negligence as the horse cart was stated to have been in the middle of the road when the accident took place. With respect to the question of contributory negligence, the Supreme Court observed:[63]

> The fact that the horse cart may have been in middle of the road at the time of the accident, no fault can be attributed to the deceased holding them liable to contributory negligence and denial of full compensation. We fail to understand how the deceased who were passengers in the horse cart can be held liable in any manner.

The court therefore held the deduction of 50% towards contributory negligence to be totally unjustified and unsustainable, set aside the finding regarding contributory negligence against both the deceased.

Assessment of compensation under Motor Vehicle Act

It is a well settled proposition that the expression "compensation" is a comprehensive term which includes a claim for the damages, and that compensation is by way of atonement for the injury caused.[64]

In *United India Insurance Co. Ltd* v. *Satinder Kaur*[65] deceased died in a road accident while he was overtaking a vehicle and collided with another vehicle coming from opposite side. Supreme Court reiterated the principles or criteria that should be taken into consideration while awarding compensation in cases of death from road accident. Malhotra J., held that the criteria which are to be taken into consideration for assessing compensation in the case of death, are : (i) the age of the deceased at the

61 *Overseas Tankship (UK) Ltd* v. *Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] AC 388.

62 (2020) 7 SCC 256.

63 *Id*. at 259.

64 *New India Assurance Co. Ltd.* v. *Somwati* (2020) 9 SCC 644.

65 2020 SCC OnLine SC 410. Notably, *Satinder Kaur* reaffirms the view of the two-judge Bench in *Magma General Insurance Co. Ltd.* v. *Nanu Ram* (2018) 18 SCC 130.

time of his death; (ii) the number of dependants left behind by the deceased; and (iii) the income of the deceased at the time of his death.[66] The court took into account the dicta in *Sarla Verma* v. *Delhi Transport Corporation,*[67]and in order to provide *uniformity* and *consistency* in awarding compensation, laid down three steps to be followed:[68]

> *Step 1 (Ascertaining the multiplicand)*
>
> The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependant family, constitutes the multiplicand.
>
> *Step 2 (Ascertaining the multiplier)*
>
> Having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected. This does not mean ascertaining the number of years he would have lived or worked but for the accident. Having regard to several imponderables in life and economic factors, a table of multipliers with reference to the age has been identified by this Court. The multiplier should be chosen from the said table with reference to the age of the deceased.
>
> *Step 3 (Actual calculation)*
>
> The annual contribution to the family (multiplicand) when multiplied by such multiplier gives the 'loss of dependency' to the family. Thereafter, a conventional amount in the range of Rs. 5,000/- to Rs. 10,000/- may be added as loss of estate. Where the deceased is survived by his widow, another conventional amount in the range of 5,000/- to 10,000/- should be added under the head of loss of consortium. But no amount is to be awarded under the head of pain, suffering or hardship caused to the legal heirs of the deceased. The funeral expenses, cost of transportation of the body (if incurred) and cost of any medical treatment of the deceased before death (if incurred) should also added.

The *ratio* laid down in *Satinder Kaur* was subsequently applied in *New India Assurance Co. Ltd.* v. *Somwati,*[69] where the award of compensation in favour of the claimants under two heads *i.e.,* "loss of consortium" and "loss of love and affection" was in question. In fact, three insurance companies in this respect had questioned seven high court judgments.[70] Notably, with regard to "consortium", the court had to

66 *Id*., para.34.

67 (2009)6 SCC 121.

68 *New India Assurance Co. Ltd.* v. *Somwati* (2020) 9 SCC 644., para.36.

69 (2020) 9 SCC 644.

consider the question: whether it is only the wife who is entitled for consortium or the consortium can be awarded to children and parents also? Before answering the foregoing question, the Supreme Court made the following observation with respect to the nature of the Motor Vehicles Act:[71]

> The claimant in a claim for award of compensation under Section 166 of the Motor Vehicles Act, 1988, is entitled for just compensation. The just compensation has to be equitable and fair. The loss of life and limb can never be compensated in an equal measure but the statutory provisions under the Motor Vehicles Act is a social piece of legislation which has been enacted with the intent and object to facilitate the claimants to get redress for the loss of the member of family, compensate the loss in some measure and to compensate the claimant to a reasonable extent.

The Supreme Court held that impugned judgments of the high court awarding consortium to each of the claimants in accordance with law did not warrant any interference in this appeal, though it did observe that there is no justification for award of compensation under separate head "loss of love and affection". The court also held itself to be bound by the judgment of the three-judge bench in *Satinder Kaur* where it was observed that apart from spousal consortium, parental and filial consortium is payable.

VIII CONCLUSION

A survey of cases hereinbefore reveals that there has been a lack of good number of authoritative judicial pronouncements on the various issues that arise within the sphere of law of tort. Even in cases, where there was scope to delineate upon some of the fundamental principles of tortious liability, there is often, though not always, a mechanical approach to decide the dispute. This has resulted in tort jurisprudence becoming weaker and weaker over the years compared to other major legal systems. Moreover, law of torts, as is noticeable, over the last decade or so has got more relevant in virtual space, given newer problems arising out of data protection, questions of privacy, nuisance, defamation, and vicarious liability in cyber space. This is one such development that would shape the contours of tort law in the years to come, requiring possibly newer doctrines or at least rethinking of age-old tenets of tort law.

70 *Somwati* v. *Dharmendra Kumar*, 2019 SCC OnLine All 3897; *Sangita Devi* v. *New India Assurance Ltd.*, 2019 SCC OnLine Del 10877; *New India Assurance Co. Ltd.* v. *Azmati Khatoon*, 2019 SCC OnLine Del 10530; *Cholamandalam MS General Insurance Co. Ltd.* v. *Umarani*, 2019 SCC OnLine Mad 29630; *Pinki* v. *Rajeev*, 2019 SCC OnLine Del 11882; *Nanak Chand* v. *New India Assurance Co. Ltd.*, 2020 SCC OnLine Del 62; *Oriental Insurance Co. Ltd.* v. *Rinku Devi*, 2019 SCC OnLine Del 10493.

71 *New India Assurance Co. Ltd.* v. *Somwati* (2020) 9 SCC 644 at 652.