various agencies do indicate that all the companies, big or small, are interested in paying fines, in lieu of imprisonment or any other penalty. Therefore the imposition of monetary penalty alone has lost its credibility so far as the compliance of law is concerned. The imposition of imprisonment in such cases will also not serve any fruitful purpose because basically it will be a waste of valuable human resource and his productive potential. In such a situation the application of probation, as a middle approach, may serve the goods.

VI. Liability of Government Departments

In India the liability of Government is governed by the doctrine of sovereign immunity, which was based on the English rule of sovereign immunity. The sovereign immunity rule at common law had its roots in two maxims - first, the king by his writ cannot command himself, and second the king can do no wrong. "As the King can do no wrong it follows that he cannot authorise a wrong; for to authorise a wrong to be done is to do a wrong. As he cannot authorise a wrong, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown."[85]

Because of this reason no remedy was available against the crown for torts committed by public servants.[86] Similarly the public officials or government departments were not liable in their public capacity for wrongs committed by subordinate officials.[87] However the public servant was personally held liable on the logic that "the civil irresponsibility of supreme power to tortious acts could not be maintained with any show of justice if its agents were not personally responsible for them."[88] This was a very unsatisfactory situation. Because, as Wade has pointed out, it is fundamental to the rule of law that the Crown, like other public authorities, should bear its share of legal liability and be answerable for wrongs done to its subjects. The immense expansion of governmental activity from the later part of the 19th century onwards made it intolerable for the government, in the name of the Crown, to enjoy exemption from the ordinary law.[89]

In England the scope of the doctrine of sovereign immunity was much reduced by legislative intervention with the passage of the Crown Proceedings Act, 1947. The Act makes the Crown liable for the torts of its officers in the same way as a private employer. Previously the defence of sovereign

immunity was also available in cases where injury was caused in the performance of a function imposed upon an officer himself by the statute. The Crown Proceedings Act reversed the position in this regard. Now section 2(6) of the Act provides that "where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, liabilities of the Crown in respect of the tort shall be such as they would have been as those functions had been conferred or imposed solely by virtue of instructions lawfully given by the crown. This rule was followed by the House of Lords in National Coal Board v. England.[98] In that case the question was whether the common law liability for negligence subsisted where a duty to take care had been imposed by a statute upon particular employee and not to the employer. The House of Lords answered the question in affirmative and held that the employer was liable though the duty to take particular care was imposed by the law upon the employee, because the negligence took place in course of employment.

> In the performance of his work he was required by the regulations which

> parliament has prescribed for the safety of those employed in coal mines. But it is not correct to say that he was not acting for his master .... His failure to take the precautions ... did not take him out of the scope of his employment . Accordingly his acts are still within the areas in which the vicarious liability of a master operates.

By virtue of section 2(3) of the Act though the officer who exercises the statutory authority might take the plea that he is immune from action on the ground that the act is authorised by the legislature, the Crown shall have no immunity from action under the Act for the damage caused and its liability shall be the same as that of a master who has directly authorised such act to be done by his servant. Proviso to section 2(1), however, says that there is no liability of the Crown under the Act where the crown servant or agent would not be personally liable in tort, apart from the provisons of this Act.

In India article 300 of the Constitution empowers the Union and the Government of a state to sue or be sued. But it does not lay down substantive law relating to liability or the circumstances in which

such actions lie. This determining power is given to the legislature and subject to such legislation the existing law relating to this matter will continue "as if this constitution had not been enacted".[91]

The principle of liability of the Government for tortious acts of its servants was enunciated in P and O Steam Navigation Company v. Secretary of State.[92] In this case the question involved was whether the Government was liable in tort for injury caused to the plaintiff by the negligence of workman employed in the government dockyard. Peacock, C.J., differentiating the distinction between sovereign and non-sovereign functions held that the maintenance of the dockyard was an undertaking which could have been undertaken by any private individual without any delegation of powers from the sovereign and that, accordingly, the East India Company would have been held liable for the wrong complained of and, hence, the plaintiff should succeed against the government. Explaining the difference between sovereign and non-sovereign functions he observed:-

> "... where an act is done ... in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised

except by a sovereign, or a private individual delegated by a sovereign to exercise them, no action will lie.

In India all subsequent cases were decided on the principle of P and O case. The Supreme Court reiterating the principle of P. and O. case held that in order to claim immunity for a tortious act committed by its servants, the state must show that the particular act which caused the injury was done in the course of the exercise of sovereign functions[93] or in the exercise of sovereign power delegated to a public servant.[94]

However Article 300 is merely procedural and the P. and O. navigation case is confined to determining liability of Government for torts only.[95]

In the field of water law there are two special enactments which specifically provide for the liability of government departments. These are Water (Prevention and Control of Pollution) Act, 1974 and Environment Protection Act, 1986.

Section 17 of the Environment Protection Act and section 48 of the Water Pollution Act create liability for offences by any Government departments. Both sections provide that if any offence under the Act is committed by a department of Government, the

Head of the Department shall be deemed to be guilty of the offence. However he may be exonerated from any liability if he can prove that the offence was committed without his knowledge or he had exercised all due deligence to prevent the commission of such offence. If the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any officer other than the Head of the department, such officer shall also be deemed to be guilty of the offence.

A perusal of the above provision indicates that where the offence has been committed by a department of government, the first liability to be attached is to the Head of the Department even where the commission of such offence could not be attributable to any neglect or consent of any officer of the department. This is in contrast with the offences committed by companies, where the person directly responsible for the conduct of business of the company as well as the company is responsible. Under sections 48 and 17 of the Water Pollution Act and Environment ProtectionAct respectively only Head of the Department and not the Department is responsible. Therefore an anomalous situation may arise when it is proved that the offence was committed by the

Department but under the proviso Head of the Department or any other officer may prove that the offence was committed without his knowledge or that he exercised all due deligence to prevent the commission of such offence. Under these circumstances the Department/ Government will be exonerated from any liability along with the Head of the Department. In such situation the injured will lose his right even for compensation to which he would have been entitled had the offence been committed by a company rather than by a department of Government. In the case of companies and since the liability is absolute, the officer concerned along with the company, would have been personally responsible to the extent of his annual salary with allowances, for payment of compensation for any death or injury and if he could have shown that such injury was a result of act of God or vis major or sabotage or that he had exercised all due deligence to prevent the damage, he would have been indemnified by the company.[96]

Though the provision of atleast holding the Head of the Department liable may be a very singular innovation[97] in water law, the desired result cannot be achieved without holding Government Departments liable for the acts of their officers. The

reason for not doing so lies in the recognition of the out dated doctrine of sovereign immunity. As the Supreme Court in Vidyavati's case[98] observed that "when the rule of immunity in favour of the Crown, based on common law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution". Rationalizing this approach the Court further said:

> Now that we have, by our constitution, established a republican form of Government, and one of the objects is to establish a socialist state with its varied industrial and other activities, employing a large number of servants, there is no justification <u>in principle, or in public interest</u>, that the state should not be held liable vicariously for the tortious acts of its servants."[99]

Similar reasoning was given by the Rajasthan High Court when it observed:

> ..,the State is no longer a mere police state .... Ours is now a welfare state .... Everyday it is engaging itself in numerous

> activities in which any ordinary person or group of persons can engage himself or themselves. Under the circumstances there is all the more reason that it should not be treated differently from other ordinary employers when it is engaging itself in activities in which any private person could engage himself."[100]

Other High Courts are also of the same view. The Allahabad High Court in Prem Lal v. U.P.Government[101] opined that:

> Judicial authority and public policy demand that the state today cannot claim immunity from the tortious liability in respect of the tortious acts of its servants and agents.

The principle of Government liability could be the one suggested in Secretary of State v. Hari,[102] i.e., the state should be liable for all acts which are purported to be done under sanction of municipal law. Though it may not be more extensive than the liability of a private individual.

However, despite all the judicial thinking and the requirement of a policy shift in this regard, in the absence of a legislative intervention, the dictum of P and O. Steam Navigation case is still the law to be followed in India.[103]