

Tortious Liability in Water Resources in India

Introduction.

The law of torts is an instrument for making people adhere to standards of reasonable behaviour and respect the rights and interests of one another. It is a body of formal rules which are applied by the courts for balancing conflicting interests of civil nature arising between different members of the society. The term 'tort' is the French equivalent of the English word 'wrong' and Roman law term 'delict'. The word 'tort' is derived from the Latin term 'tortum' which means to twist and implies conduct which is tortious or twisted.

Tort law has grown over a long period on the concept of right and duty and the conditions on which and the manner in which the right and duty are enforced by a court of law. A tort or a wrong is said to have been committed whenever there is a violation of a right of a person or breach of duty by another person for which the appropriate remedy is civil action for unliquidated damages. Before a person can claim damages for an injury caused to his right he must first and foremost establish the existence of a legal right which has been violated and secondly a breach of duty by the person against whom damages are claimed. Thus to establish tortious liability arising on account of violation of an individual's water rights it is important to determine first the existence of right in water and secondly a duty not to violate it on the part of the offending person.

Under the Hindu Law and Muslim Law tort had a much narrower conception than the tort of English law.¹ The punishment of crimes in these systems occupied a more prominent place than compensation for wrongs.² The law of torts as administered in India in modern times is the English law as found suitable to Indian conditions and as modified by the Acts of the Indian Legislature.³ The Indian law of Torts based on English Law is continued by Article 372 of the Constitution which has been interpreted to continue also the common law principles applied in India.⁴ Therefore, tort law as regards water rights in India is much the same as in England except with a variation in regard to the use of water for irrigation purposes, e.g. section 7 of the Easement Act, 1882 lays down limitations on the exclusive rights of riparian owners to enjoy.⁵ Pollution of water is also controlled by section 28(d) of the Easement Act. The principles of law of torts in India as applied to water-related disputes are to be found principally in common law of England. Common law, which in a constitutional context means judicially developed equity, covers everything which is not covered by a statute. It knows no gaps; there can be no casus omissions.

Water is the most important common resource of the people. Because of its presence, the earth has become a habitable planet for man and other forms of life. The uses of water are multifold but so are its devastating effects when it is left unregulated and uncontrolled. India is one of the

wettest countries in the world yet it is not making use of its blessings wisely. It uses only a tenth of the rainfall it receives annually and if it does not learn to store water or distribute water equitably there will be serious water shortages in future. Besides, the misuse and arbitrary use of ground water resources is rampant and gradually depleting the water table. The practice of storing water in tanks and ponds is grossly neglected which is jeopardising not only agriculture but also the common man's right of easy access to water for the fulfilment of his basic needs. The increasing pollution of water is menacing as also to rate at which the fish produce is dying. How is this problem to be tackled? Can a well codified law of torts save our water resources from being completely annihilated? Can accountability be established through tort law towards an inequitable distribution and unwise utilisation of water and its resources? Surely, the task is gigantic and only a joint effort on the part of the government, the people and the legislature can help overcome it successfully. While law is an important instrument in bringing about social change it cannot be a solution to any problem by itself. That this is true is evident by a perusal of the various water legislations enacted in the pre and post-independent periods despite which water rights of the people continue to be harmed in some way or the other. The aim of this paper is, therefore, to make the common-man aware of the gravity of the problem and how best he can tackle it. The paper is circumscribed to focussing how the

law of tort can be used as an instrument in redressing the grievancies of the people. It attempts at making the reader conscious of his rights in water which when violated give him a cause of civil action to seek compensation in the courts.

Since the basis of the law of tort is the maxim ubi jus ibi remedium (whenever there is a right there is a remedy or as it is also sometimes expressed "there is no wrong without a remedy") it will be worthwhile appreciating how the courts of law have interpreted a particular action as constituting a tort committed against a water right of a person and what remedies, if at all, they have issued for undoing or compensating the wrong so committed. Each one of us is entitled to certain water rights irrespective of whether the water flows in natural or artificial water courses. These rights may be natural, customary or statutory such as right to drinking water, right to water for domestic purposes, right to cultivation etc. These water rights are established either by the law of nature, or by way of easement, grant or prescription (whether codified or not) or simply because they are created and protected by law. Since the last quarter of the nineteenth century to the present times various kinds of issues have been raised before the courts on matters relating to the use of water as a resource. Some of these issues have given rise to complex questions, such as, what is the extent of a person's right to dam up water or divert the course of a naturally flowing water or to provide a particular

channel for the flow of accumulated water? Is this right absolute or a restricted one? Does the person owe any duty at law to his neighbour if by his actions he causes injury to his neighbours? Would he be liable at law for damages? Does a person have a right to obstruct a regular flow of rain water or flood water to protect his own fields or does he have a duty to take care that the obstruction does not cause damage to his neighbour's fields? Does the government enjoy sovereign rights over water and if it does can it claim sovereign immunity vis-a-vis the private rights of the people? Are there any defences open to the tort-feaser? Or does law allow "reasonable selfishness" in such matters and permit "everyone (to) look out for himself and protect his own interest" first. As regards injury caused to water based - resources there is very little case law under tort and whatever there is falls under the section of Inland fisheries included in this paper.

Most of the water cases concerning damages that have been decided by the Indian judiciary whether before or after independence have been based either on the tort of negligence or on the rule of strict liability or its exceptions or on the tort of nuisance.⁷ The paper has been divided in the sections given below. The sections have further been divided into sub-sections wherever necessary.

- A. Injury to water rights by negligence
 - 1. Alterations/Improvements .
 - 2. Storage of water and other hazard causing substances.
 - 3. Customary rights

- B. The concept of non-natural user in the doctrine of strict liability.
 - 1. Constructions/alterations affecting flow of water.
 - 2. Tank water

- C. Nuisance
 - Injury to property:
 - 1. Private action for public nuisance
 - 2. Action for private nuisance.

- D. Liability for pollution of water
 - 1. Rights of riparian and non-riparian owners of lands
 - 2. The ineffectiveness of anti-pollution measures

- E. Inland Fisheries

- F. Defence of sovereign Immunity
 - 1. Rights of government vis-a-vis the irrigators.
 - 2. Statutory Immunity
 - 3. Liability for statutory duties negligently performed
 - 4. Extent of Application of the doctrine of strict liability to government action.

G. Other Defences

1. Act of God
2. Contributory Negligence
3. Limitation
4. Necessity and self-defence
5. Novus Actus Interveniens

A. Injury caused by negligence

Negligence is the breach of duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. According to Winfield, "negligence as a tort is the breach of legal duty to take care which results in damage, undesired by the defendant to the plaintiff."

The most important constituent of negligence is the legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty. A layman may very well ask what is this duty to take care all about? And who, pray! is the complaining party? According to the law of torts every person owes a certain duty towards his neighbour who when aggrieved becomes the complaining party. The law of negligence requires that every act of an individual