

CHAPTER XXXVIII

TORTIOUS LIABILITY OF THE GOVERNMENT

SYNOPSIS

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A. SOVEREIGN IMMUNITY

(a) P&O CASE

An important question which occurs frequently concerns governmental liability for torts of its servants.¹ As noted above, Art. 300 of the Constitution maintains the pre-Constitution *status quo* in this regard. This means that the liability of the present government is *pari passu* with the liability of the East India Company.² This means that the law regarding the tortious liability of the Government was frozen at the 1858 stage in India. The position was reminiscent of the days when the East India Company ruled India. The Company had a dual capacity—commercial and sovereign. The Company was exempt from any tortious liability in its sovereign capacity.

The leading case in the area is *P & O Steam Navigation Co. v. Secretary of State*.³ The P & O Co. made a claim for damages for injury caused to its horse by the negligence of some workmen in the Government Kidarpur Dockyard. The Bombay High Court ruled that where an act was done in the exercise of sovereign powers, which could not be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action would lie. On the other hand, the Secretary of State would be liable for damages occasioned by the negligence of servants of the Government if the negligence was such as would render an ordinary employer liable.

Two principles thus emerged from the case:

- (1) Apart from special statutory provisions, suits could have been brought against the East India Company, and, consequently, against the Sec-

1. For a detailed discussion of the topic see, JAIN, A *TREATISE ON ADMINISTRATIVE LAW*, II.
 2. *Supra*, Ch. XXXVII, Sec. G.
 3. 5 Bom HCR App. 1.

retary of State as successor to the Company, in respect of acts done in the conduct of undertakings which might be carried on by private individuals without sovereign powers.

- (2) The Secretary of State was not liable for any thing done in exercise of sovereign powers.

The first rule has been accepted without dissent since it was laid down, but there has been a conflict of judicial opinion as regards the second rule. In some cases, this rule has been followed literally while in others it has been treated as an *obiter dicta* and has been departed from.

First, a few examples may be mentioned here where the above mentioned rules have been followed :

In *Secretary of State v. Cockraft*,⁴ the plaintiff was injured by the negligent leaving of a heap of gravel on a military road over which he was walking. The suit brought by the plaintiff for damages against the government was held not maintainable because the military and the maintenance of military roads was a sovereign, and not a private, function.

In *Secretary of State v. Moment*,⁵ the Privy Council held that a suit for damages for wrongful interference with the plaintiff's property could be brought against the government, as such a suit would have lain against the East India Company under the ruling of the *P & O*. case.

The plaintiff was convicted for the offence of embezzlement. Later, it transpired that he had not committed the offence with which he was charged. He brought a suit for damages against the Secretary of State. The suit was dismissed because it was a sovereign function of the government to take cognisance of offences and try them.⁶

In *Gurucharan*,⁷ it was held that no suit would lie against the government for wrongful confinement, as it was discharging a sovereign function.

The Secretary of State was held not liable for torts of the servants employed in a government hospital as maintenance of hospitals for public benefit out of public revenue was regarded as a sovereign function.⁸

The Forest Range Officer wrongfully interfered with the removal of timber by the purchaser of the forest. The Secretary of State was held to be liable for the officer's wrongful acts as these arose out of the exercise of commercial, and not sovereign, functions.⁹

Under the Defence of India Act, 1915, certain classes of goods could be commandeered by the government, the price of such goods being settled by arbitration. Some of the goods commandeered were not taken delivery of by the government as the war came to an end. The claim for damages by the supplier was rejected for a commandeering order was held to be a sovereign act.¹⁰

4. AIR 1915 Mad 993.

5. 40 IA 48.

6. *Mata Pd. v. Secretary of State*, AIR 1931 Oudh 29.

7. *Gurucharan v. State of Madras*, AIR 1942 Mad 539.

8. *Etti C. v. Secretary of State*, AIR 1939 Mad 663.

9. *Secretary of State v. Sheoramjee*, AIR 1952 Nag 213.

10. *Kessoram Poddar v. Secretary of State*, ILR 54 Cal 969; *Purnendu Deb v. India*, AIR 1956 Cal 66.

No cause of action arose when a person was killed by rash and negligent driving of a military truck by a military driver while engaged on military duty because it was held to be a sovereign function.¹¹ A military truck was carrying carbon dioxide gas from the factory to a Navy ship. Due to rash driving, a ten year old boy was injured. The court refused to award any damage on the ground that he was injured during the discharge of a sovereign function.¹²

The government was held not responsible for damages for injury caused to a person by a road roller which was engaged in maintaining roads as this was held to be a sovereign function.¹³

To this strict rule of government liability, an exception was, however, made, viz., where the government detained any land, goods and chattels belonging to a subject, the government was held liable to pay compensation.¹⁴ Thus, the government was held liable to pay damages for trespass over, and injury to, the plaintiff's property by troops during the Second World War,¹⁵ or for removing earth from the plaintiff's land and placing it on the railway track under construction.¹⁶

(b) HARI BHANJI

In another line of cases, a broader view of government liability, and a narrower view of the *P&O* ruling, was adopted by the High Courts, insofar as these cases accepted the first, but not the second, proposition laid down therein and which have been stated above.

These cases propounded the view that the *P & O*. case was an authority for the proposition that the government was responsible for injuries in the course of transactions of a commercial or private character, but that it did not exclude liability in other respects. Accordingly, these cases held that the government was liable for all acts other than an 'act of state',¹⁷ and that the distinction based on, 'sovereign' and 'non-sovereign' functions was not well founded. The view was taken that the acts of the government fell either outside, or within, the municipal law and that it was only the former of which the courts could not take cognizance.

The leading case in this category was *Secretary of State v. Hari Bhanji*.¹⁸ The fact, however, remains that the decisions accepting the second proposition of the *P. & O.* case, and excluding the government from liability for sovereign functions, far outnumbered the cases following the *Hari Bhanji* ruling.

11. *Union of India v. Harbans Singh*, AIR 1959 Punj 39.

12. *Thangarajan v. Union of India*, AIR 1975 Mad 32.

13. *Krishnamurthy v. State of Andhra Pradesh*, AIR 1961 AP 283.

14. *State of Bihar v. Sonabati*, AIR 1954 Pat 513; *Uday Chand v. Province of Bengal*, 51 CWN 537.

15. *Union of India v. Ram Kamal*, AIR 1953 Ass 116.

16. *Union of India v. Muralidhar*, AIR 1952 Ass 141.

17. *Supra*, Ch. XXXVII.

18. ILR 5 Mad 273.

Also see, *Ross v. Secretary of State*, AIR 1915 Mad. 434; *P.V. Rao v. Khushaldas*, AIR 1949 Bom 277; *Wyllie v. Secretary of State*, AIR 1928 Lah 346; *Union of India v. Muralidhar*, *supra*, footnote 16.

In *State of Bihar v. Sonabati*, *supra*, footnote 14, the state was held guilty of committing contempt of court.

B. VIDYAWATI CASE

In 1962, the Supreme Court was for the first time since the constitution came into force called upon to consider the question of state liability for the tortious acts of its servants in *State of Rajasthan v. Vidyawati*.¹⁹ The driver of a jeep, owned and maintained by the State of Rajasthan for the official use of the collector, drove it rashly and negligently, while bringing it back from the workshop after repairs, and fatally injured a pedestrian. The Court held that the State was vicariously liable for the negligence of the driver.

Referring to the *P. & O.* case, the Court derived the proposition that the government would be liable for damages occasioned by negligence of its servants if the negligence was such as would render an ordinary employer liable. At another place, the Court observed that to uphold the vicarious liability of the State would be only to recognise the old established rule going back to more than 100 years at least.

Along with this, the Court also made certain general observations underlining the need to hold the State liable vicariously. "Viewing the case from the point of view of first principles", observed the Court, "there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer." At another place, the Court stated, "Now that we have, by our Constitution, established a Republican form of government, and one of the objectives is to establish a socialistic state with its varied industrial and other activities, employing a large army of servants, there is no justification in principle, or in public interest, that the state should not be held liable vicariously for the tortious act of its servant."

A careful reading of the Court's opinion in *Vidyawati* suggests that while the Court did make some observations justifying a broader view of the state's liability for torts of its servants than what the *P. & O.* case had laid down, in effect, neither did it overrule the test of sovereign functions to determine government's liability nor did it refer to it, nor did it specifically say that the function in the instant case out of which the liability arose was non-sovereign.

There was a possibility that the *Vidhyawati* case, in course of time, might have been the precursor of a new trend in the area of state liability, but this process got arrested by the Court's subsequent pronouncement in *Kasturi Lal Ralia Ram Jain v. State of Uttar Pradesh*.²⁰ In the instant case, the police seized some gold from Ralia Ram on suspicion that it was stolen property. It was kept in the government malkhana but was misappropriated by a constable who fled to Pakistan. Ralia Ram was acquitted of the charge. The question arose whether the State was liable to compensate Ralia Ram for the loss caused to him by the police officers employed by the State.

The Supreme Court held on the basis of the *P & O* case that no claim lay for compensation if the tortious act was committed in the course of an undertaking or employment which was referable to the exercise of sovereign power. The Court explained away the *Vidhyawati* ruling by saying that when the government

19. AIR 1962 SC 933 : 1962 Supp (2) SCR 989. For comments on the case, see, 4 *JILI* 279, 287 (1962).

20. AIR 1965 SC 1039 : (1965) 1 SCR 375. For comments on the case, see, 7 *JILI* 246 (1965).

employee was driving the car from the workshop to the collector's residence, he was not employed on a task referable to the State's sovereign power, for the employment of a driver to drive the jeep for the use of a civil servant was an activity not connected in any manner with the State's sovereign power.

In the instant case, the act giving rise to damages had been committed by the State's employee during the course of his employment which fell within the concept of sovereign power and so the claim for damages could not be entertained. The power to arrest a person, seize him, search him, and seize property found with him were powers conferred on the specified officers by statute and, in the ultimate analysis, these were powers which could be properly characterised as sovereign powers.

The Court, however, noted that the position regarding the scope of tortious liability of the state in India was very unsatisfactory and suggested that a law be enacted to deal with the problem on the lines of the Crown Proceedings Act of England.

The law regarding government's tortious liability was extremely outmoded and antiquated and unjust to the people. The distinction between sovereign and non-sovereign functions, which the Supreme Court perpetuated through the *Kasturilal* ruling, was irrational in the modern context. In effect, the proposition that the state was exempt from liability for a sovereign act amounted to applying the doctrine of 'act of state' to the relationship between the state and the citizen, although, according to the theory of English law, there can be no 'act of state' between the state and its subjects.²¹

On this reasoning, it appeared to be necessary that the view of the *P. & O.* case should be discarded, as whatever justification there might have been for this ruling during the British period, there was hardly any justification for the same in Independent India. The state today embarks on so many varied activities, and state activities have made a deep impact on all facets of an individual's life. It was, therefore, necessary that the liability of the state should match its present-day role and not be confined to the *laissez-faire* era which *P. & O.* represented.

In the modern context, it is extremely difficult to distinguish between sovereign and non-sovereign functions. For example, it could plausibly be argued, on the facts of the *Vidhyawati* case, that administration, and, accordingly, maintenance of transport for an administrative officer, is a sovereign function. On the other hand, on the facts of the *Kasturilal* case, it could plausibly be argued that keeping of gold in the malkhana amounted to bailment—an activity which can be undertaken by a private person as well.²²

The difficulty of characterising a governmental activity as 'sovereign' or 'non-sovereign' can be highlighted by some judicial pronouncements. For example, running of railways was regarded as a sovereign function by one High Court,²³ but non-sovereign by another,²⁴ and the Supreme Court held it to be a non-sovereign function.²⁵

21. *Supra*, Ch. XXXVII, Sec. B.

22. *State of Gujarat v. Memon Mahomed Haji Hasan*, AIR 1967 SC 1885 : (1967) 3 SCR 938.

23. *Bata Shoe Co. v. Union of India*, AIR 1954 Bom 129.

24. *Maharaja Bose v. Governor Gen. in Council*, AIR 1952 Cal 242.

25. *Union of India v. Ladulal Jain*, AIR 1963 SC 1681 : (1964) 3 SCR 624.

In all democratic countries, a wider view of state liability has now come to be accepted than was the case in India. Before 1947, in Britain, the Crown was immune from any liability for torts committed by its servants because of the common law maxim that the King can do no wrong which implies that neither the King can authorise a wrong nor any wrong be imputed to him. The position was changed by the Crown Proceedings Act, 1947, which made the Crown, within certain exceptions, liable in torts like a private person of full age and capacity. The exceptions, *inter alia*, are defence of the realm, maintenance of armed forces and postal service.²⁶

A similar result had been achieved in the U.S.A. as early as 1946 by the Federal Tort Claims Act. The law in India as laid down in *Kasturi Lal* did not compare favourably with these enactments in other democracies and time appears to have come when the Indian law should also be brought in line with modern democratic thinking on the subject.

As the Supreme Court had suggested in *Kasturilal*, the situation could be redeemed by a legislative enactment and not by judicial process.²⁷ As early as 1956, the Law Commission of India had adversely commented upon the state of law in India.

The Law Commission referred to the expanding scope of functions of a welfare state. "While the responsibilities of the State have increased, the increase in its activities has led to a greater impact on the citizens". Therefore, the Commission recommended:

"The old distinction between sovereign and non-sovereign functions or governmental and non-governmental functions should no longer be invoked to determine the liability of the state."

The Commission even drafted a Bill to define the scope of the state's tortious liability,²⁸ but no law has yet been enacted for the purpose.²⁹

C. JUDICIAL PRONOUNCEMENTS

Failure of Parliament to do anything to ameliorate the situation in the area of government's tortious liability, has led the courts to show activism in this area and improve the situation through their pronouncements. For sometime, the courts have been alleviating the situation by restricting the concept of 'sovereign' function, and holding many modern functions performed by the government as 'non-sovereign'.

To identify a non-sovereign function, the courts adopt a simple test: Is the function such which can be performed by an ordinary person? To take an example, in *Union of India v. Savita Sharma*,³⁰ a military truck going to the railway station to bring military personnel to the unit headquarters dashed against a vehicle and injured its occupants. The High Court ruled that the driver of the truck

26. WADE, *Administrative Law*, 698 (1982).

27. Also see, *Thangarajan v. Union of India*, AIR 1975 Mad 32, *supra*, footnote 12, where the High Court adversely commented upon the prevailing state of law in India.

28. *First Report*, 6.

29. BLACKSHIELD, *Tortious Liability of Government* : Jurisprudential Case Note, 8 *JILI* 643 (1966). Also see, 12 *JILI* 333.

30. AIR 1979 J&K 6.

was not engaged in performing any sovereign function as transportation of military personnel from one place to another could be performed by any one.

A sovereign function is one which can be performed only by the state and not by private individuals. Thus, the function is sovereign when to maintain law and order, police uses lathicharge on an unruly procession. Such an action is not justiciable.³¹

Accordingly, the following functions *inter alia* have been held to be non-sovereign:

- (i) Running of bus service by the state;³²
- (ii) Banking business run by the state;³³
- (iii) Activities of the public works department of the state;³⁴
- (iv) Construction of a reservoir for facilitating supply of drinking water to the residents of a town;³⁵
- (v) Use of a military vehicle to carry hockey and basketball teams to an Indian Air Force Station to play matches against the Indian Air Force;³⁶
- (vi) Transportation of records, ranging machines and other equipment in a military truck from the workshop to the School of Artillery.³⁷
- (vii) In *Shyam Sunder v. State of Rajasthan*,³⁸ famine relief work by a State has been held to be a non-sovereign function. It is a function which can be undertaken by private individuals as well and there is nothing peculiar about it so that it might be predicated that the state alone can legitimately undertake such a work.

In the instant case, a truck belonging to the Public Works Department was engaged in famine relief Work. The truck met with an accident because of the negligence of the driver. The State was held liable to pay compensation for the person who died in the accident. The Supreme Court rejected the plea of the State that famine relief was a sovereign function.

- (viii) Running of railways has been held to be a commercial activity.
- (ix) Establishing *Yatri Niwas* at various Railway Stations to provide lodging and boarding facilities to passengers on payment of charges is regarded as a part of the commercial activity of the Union of India. This activity cannot be equated with the exercise of sovereign power.³⁹

Over time, due to various judicial pronouncements, the area of “sovereign” function of the state has shrunk very much. The area of “non-sovereign” functions has correspondingly expanded over time.

31. *State of Madhya Pradesh v. Chironjilal*, AIR 1981 MP 65; *State of Orissa v. Padmalochan*, AIR 1975 Ori 41.

32. *Amulya Patnaik v. State of Orissa*, AIR 1967 Ori 116; *Satya Narain v. Distt. Engineer*, AIR 1962 SC 1161 : 1962 Supp (3) SCR 105; *State of Madras v. ESI Corp.*, AIR 1967 Mad 372.

33. *State of U.P. v. Hindustan Lever*, AIR 1972 All 488.

34. *State of Madhya Pradesh v. Ram Pratap*, AIR 1972 MP 219.

35. *State of Mysore v. Ramchandra*, AIR 1972 Bom 93.

36. *Satya Wati v. Union of India*, AIR 1967 Del 98.

37. *Union of India v. Sugrabai*, AIR 1969 Bom 13.

38. AIR 1974 SC 890.

39. *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988 : (2000) 2 SCC 465.

The Supreme Court has expressly dissented with its earlier ruling in *Kasturi Lal Rallia Ram v. State of Uttar Pradesh*⁴⁰ and it has not been followed in subsequent cases. The Supreme Court has recently observed⁴¹:

“The theory of sovereign power which was propounded in *Kasturi Lal’s* case has yielded to new theories and is no longer available in a welfare state. It may be pointed out that functions of the Government in a welfare state are manifold, all of which cannot be said to be the activities relating to exercise of sovereign powers. The functions of the state not only relate to the defence of the country or the administration of justice, but they extend to many other spheres as, for example, education, commercial, social, economic, political and even marital. These activities cannot be said to be related to sovereign power”.

In the non-sovereign area, the principle of vicarious liability operates between the government and its servants while acting within the scope of their employment. This means that the government has to pay damages if a person is injured by any tortious act of any of its servants. As the ‘sovereign’ area is shrinking, and the ‘non-sovereign’ area expanding through judicial activism, it means that the government is increasingly becoming liable to pay damages if any of its employees commits a tortious act against a private person. A few examples of this judicial approach are given below.

A person was killed in an accident with a jeep driven by a government employee during the scope and course of his employment. The government was held liable to pay damages to the widow of the deceased on the principle of vicarious liability for its servant’s tortious act,⁴² as driving a jeep is a non-sovereign function. Any person can drive a jeep.

The driver of a military vehicle while driving to the railway station to bring *jawans* of the army from there to the unit headquarters, injured some persons on the way by his rash and negligent driving. The High Court held the government liable to pay compensation as the act of transportation (even of *jawans*) was not a sovereign function. Such an act could be performed even by a private transporter.⁴³

A cyclist was knocked down while a crane belonging to the defence department was being towed away for repairs by army personnel. Holding the Central Government liable, the High Court said that the function of towing away bore no imprint of any sovereign function. The court even suggested that the government should not plead sovereign immunity in such cases but seek to defend the suit on merits.⁴⁴

Similarly, the government was held liable when an accident occurred because of the negligence of the driver of a missile carrier.⁴⁵

Plying of buses by government by way of commercial activity does not amount to running the buses on public service. Thus, the state is liable to pay compensation for injuries caused by negligent driving of such buses.⁴⁶

40. *Supra*, footnote 20.

41. *Chairman, Rly Board, infra*, footnote 71.

42. *Annamalai v. Abithakujambal*, AIR 1979 Mad 276.

43. *Union of India v. Savita Sharma*, AIR 1979 J & K 6.

44. *Union of India v. Sadashiv*, AIR 1985 Bom 345.

45. *Pushpinder Kaur Sekhon v. Corporal Sharma*, AIR 1985 P&H 81.

46. *Satya Narain v. District Engineer, P.W.D.*, AIR 1962 SC 1161 : 1964 Supp (3) SCR 105.

The employees of the Government of India who run the railway, manage railway stations and *Yatri Niwas* constitute a component of the government machinery which carries on the commercial activity. If any of such employees commits a tortious act, the Central Government of which they are employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees.⁴⁷

The state has been held liable for acts of negligence committed by hospital employees in the course of their employment in the state run hospitals.⁴⁸

In an earlier case,⁴⁹ the Bombay High Court had ruled that running of hospitals was part of the sovereign function of the government and so the state could not be held liable for the tortious acts of the hospital employees. But this view has now been overruled. The court has now held that the running of hospitals is not a sovereign function. It is neither a 'primary and inalienable' function of a constitutional government nor it is such that 'no private citizen can undertake the same'. So, the state is liable for the negligence of the hospital staff. The Supreme Court has reiterated this ruling.⁵⁰

A poor lady having a number of children got herself operated at a government hospital for complete sterilisation. Thereafter, she gave birth to a child. For the negligence of the hospital staff, the Supreme Court awarded damages to the lady, equal to the cost of bringing up the 'unwanted' child upto the age of 18.⁵¹ This establishes the principle of vicarious liability of the state for the negligence of its medical officers.⁵²

Damages were awarded against the State for negligence of its prison staff which resulted in the death of a prisoner.⁵³ The Court rejected the contention that the State was not liable as the establishment and maintenance of the prison is part of the sovereign functions of the State. The Court ruled that there was violation of Art. 21 of the Constitution. The Court observed:⁵⁴ "Thus, fundamental rights, which also include basic human rights, continue to be available to a prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts....."

The above cases show that the area of "sovereign immunity" has been very much restricted by the courts over a period of time.

The present-day liberal judicial approach as regards the liability of the state for the tortious acts of its servants has been described by the Supreme Court in *Nagendra Rao* as follows:⁵⁵

47. *Chairman, Rly Board, supra*, footnote 41.

48. *Mohd. Shafi Suleman Kazi v. Dr. Vilas Dhondur Kavishwar*, AIR 1982 Bom 27.

49. *State of Maharashtra v. A.H. Khodwe*, ILR 1980 Bom 660.

Also see, footnote 8, *supra*.

50. *Achut Rao Haribhau Khodwa v. State of Maharashtra*, (1996) 2 SCC 634.

51. *State of Haryana v. Santra*, (2000) 5 SCC 182 : AIR 2000 SC 1888.

52. *Legal Aid Committee v. State of Bihar*, (1991) 3 SCC 482; *Dr. Jacob George v. State of Kerala*, (1994) 3 SCC 430 : 1994 SCC (Cri) 774; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, AIR 1996 SC 2426 : (1996) 4 SCC 37.

53. *State of Andhra Pradesh v. Challa Ramakrishna Reddy*, (2000) 5 SCC 712 : AIR 2000 SC 2083.

54. *Ibid*, 726.

For a detailed discussion on Art. 21, see, *supra* Ch. XXVI

55. *N. Nagendra Rao & Co. v. State of Andhra Pradesh*, AIR 1994 SC 2663 : (1994) 6 SCC 205.

Also see, *Common Cause, Registered Society v. Union of India*, AIR 1999 SC 2979 : (1999) 6 SCC 667.

“The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government par with any other juristic legal entity. Any watertight compartmentalisation of the functions of the State as “sovereign” and “non-sovereign” or “governmental” and “non-governmental” is not sound. It is contrary to modern judicial thinking... In welfare state, functions of the state are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional government, the State cannot claim any immunity”.⁵⁶

In *Nagendra Rao*, the appellant carried on the business in fertilizer and foodgrains. Huge stocks of foodgrains, fertilizers and other commodities were seized by police authorities. The appellant represented to the state authorities several times that fertilizer be sold otherwise it would become useless. No steps were taken by the authorities to do the needful. At last, the stock seized was released as the appellant was found to be not guilty of any breach of law. But the appellant refused to take delivery of the stock because of deterioration in quality. He filed a suit to recover the price of the stock by way of compensation.

After reviewing the case-law, the Supreme Court held the state liable to make good the loss to the appellant. Criticizing the doctrine of “sovereign immunity”, the Supreme Court stated :

“No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign : No legal or political system today can place the state above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy.”

The Supreme Court has thus given short shrift to the argument of “sovereign immunity”.

In *Nagendra Rao*, the Supreme Court propounded two basic propositions, viz. (1) In modern state, the distinction between sovereign or non-sovereign functions does not exist, (2) Barring such functions as administration of justice, maintenance of law and order and repression of crime etc., which are among the “primary and inalienable” functions of a constitutional government, the state cannot claim any immunity.

The court went on to say that “barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the state cannot claim any immunity”.

In retrospect, one can say that non-enactment of a law defining the scope of tortious liability of the state has proved to be a blessing in disguise in the long run. Had such a law been enacted, the law in the area would have been circumscribed within the narrow confines of the statutory provisions of the enacted law. Absence of legislation, on the other hand, gave an opportunity for the full play of

56. *Nagendra Rao v. State of Andhra Pradesh*, AIR 1994 SC 2663 at 2683 : (1994) 6 SCC 205.

judicial creativity and the Supreme Court has thus been able to transform an archaic law concerning state tortious liability in to a very liberal law favouring the citizen *vis-à-vis* the state.

D. STATUTORY FUNCTIONS

A restriction on the state liability for tortious acts of its servants arising out of the maxim of 'respondent superior' is that a master is not liable for the acts of its servants performed in the discharge of a duty imposed on them by law.⁵⁷ This principle of the English law has been followed in numerous cases in India. It has thus been ruled in several cases that where an official perform an act in exercise of statutory powers, then the aggrieved person has no remedy against the state, as such the rationale underlying this judicial approach is that since the official acts under the statute, his action is not subject to the control of the state. Hence the principle of vicarious liability does not apply.

Following are some of the cases which illustrate the above approach.

In *Shivabhajan v. Secretary of State*,⁵⁸ certain bundles of hay were attached by the chief constable of Mahim because they were believed to be stolen property. The person from whose possession hay was attached was prosecuted but acquitted. The hay was lost in the meantime. The person concerned sued the Secretary of State for compensation for negligence of the chief constable. The High Court held that the Secretary of State was not liable as the chief constable had acted under powers conferred on him by the Criminal Procedure Code.

In *Ross v. Secretary of State*,⁵⁹ the Secretary of State was held not liable for the wrongful acts of the district magistrate done by him in the exercise of statutory authority.

In *Secretary of State v. Srigobinda Chaudhuri*,⁶⁰ a suit for damages against the Secretary of State for misfeasance, wrongs, negligence or omissions of duties of managers appointed by the court of wards was rejected because these officers of the government acted in exercise of statutory powers.

In *Secretary of State v. Ramnath*,⁶¹ the deputy collector by mistake paid some money to a person who was not entitled to it. The Secretary of State was held not liable for the mistake of the deputy collector as it was committed in exercise of his statutory duties.

The police recovered some stolen property which was deposited in *malkhana*. The property was stolen from there. The High Court ruled that the State was not liable to pay damages as its servant was performing a statutory obligation.⁶²

57. *Tobin v. The Queen*, 143 ER 1148; *Nireaha v. Baker*, 1901 AC 561.

58. ILR 28 Bom 314.

59. AIR 1915 Mad 434.

60. AIR 1932 Cal 834.

Also see, *Ram Shankar v. Secretary of State*, AIR 1932 All 575.

61. AIR 1934 Cal 128.

Also, *Uday Chand v. Province of Bengal*, 51 CWN 537.

62. *Ram Ghulam v. State of Uttar Pradesh*, AIR 1950 All 206.

Also see, *Mohd. Murad v. State of Uttar Pradesh*, AIR 1956 All 75.

A certain quantity of non-duty-paid tobacco was seized from the plaintiff's shop and the Collector of Central Excise, acting under S. 33 of the Central Excise and Salt Act, confiscated the seized tobacco which could be released on payment of duty and fine. The plaintiff paid the duty and the fine, but, thereafter, the tobacco was sold by the Department and the sale proceeds deposited in the government treasury. The plaintiff brought a suit against the Union of India for damages for the tort of conversion. The Union of India was held not liable, for the Department acted under statutory power. But, to the extent the sale proceeds were deposited in the treasury, the Government was benefited and the plaintiff was entitled to the refund of this money.⁶³

Hard coke supplied by the plaintiff to a jute mill belonging to the Military Department was rejected as it was not up to the specification. The Deputy Coal Commissioner then gave directions for its disposal by sale and for payment of the price thus realised to the plaintiff. This was done under the statutory powers conferred on the Commissioner by the Coal Control Order. The plaintiff brought a suit against the Government of India to recover the price stipulated, but it was dismissed and the Government was held not liable. The court ruled that assuming that the Commissioner exceeded his statutory authority, the plaintiff should have sued him and not the Government for the doctrine of respondent superior could not be applied so as to make the Government responsible when the Commissioner was acting in exercise of his statutory powers, and not under the control or order of the Government.⁶⁴

Under the Rajasthan Public Safety Act, the Rajasthan Government conferred power on the Commissioner to make arrests. The Commissioner arrested the plaintiff and the State Government approved the action. The order of the Commissioner was found not to have been made in good faith. The plaintiff's suit for damages against the State Government was rejected on the ground that the Commissioner was exercising a statutory power; that the delegation did not make him an agent of the Government for he had to exercise his own discretion in the matter; in the circumstances, the maxim 'respondent superior' did not apply. Where a Government officer purports to act under a statutory power conferred upon him, he cannot be said to be acting as an ordinary agent of the State, and whatever wrong he does is his own and not that of his employer.⁶⁵

The above rule to immunize the state from liability does not, however, apply in a situation where the impugned act has been expressly authorised by the state or the state has been profited by its performance.⁶⁶ In such a case, the state is liable for the wrongful acts of the servants even though performed under their statutory duties. In *Saurashtra v. Vallabhdas*,⁶⁷ confiscation of grams, their detention and release, were expressly authorised by the Saurashtra Government and no discretion was left to its officers. The State Government was, therefore, held liable for the loss occasioned to the importers.

63. *Union of India v. Ayed Ram*, AIR 1958 Pat 439.

64. *Union of India v. Dhansar Coal Co.*, AIR 1959 Pat 347.

65. *State of Rajasthan v. Rikhabchand*, AIR 1961 Raj 64.

Also, *State of Uttar Pradesh v. Chhotey Lal*, AIR 1967 All 327.

66. *Uday Chand v. Prov. of Bengal*, *supra*, footnote 61; *Ross v. Secy. of State of Madras*, AIR 1915 Mad 434; *Bihar v. Sonabati*, AIR 1954 Pat 513; *Abdul Kadir v. Saurashtra*, AIR 1956 Sau 62.

67. AIR 1956 Sau 65.

The principle laid down in the above cases is not rational. An official of the government always remains its agent whether he functions under an order of the government or under powers conferred on him by a statute, for the Legislature confers powers on him only because he is an agent of the government.

The principle mentioned above boils down to this: if the power is conferred by a statute on the government, and the government directs an officer to do something in pursuance of this power, the government is liable for the acts of the officer. But, if the power is conferred directly on the officer by a statutory provision, then the government is not liable. It means that if the officer acts under the direction of the Executive, the government is liable. But if the officer acts under the direction of the Legislature, the government is not liable.

This dichotomy between the Executive and the Legislature is irrational as both constitute parts of the same government and each and every act of the government is carried on within the framework of law. Powers are conferred on public servants by the Legislature because they are government servants. Had they not been government servants powers would not have been conferred on them.

Also, for an ordinary citizen, it makes little difference whether the act which injures him has been done by a public servant under direct authority of a statute, or under the instructions of the government. Further, it can be argued that legislative authorisation to an officer to perform a duty only extends to performing it in good faith and not negligently.

The rule is unjust in the modern administrative age when more and more statutory powers are being conferred on government servants. It is, therefore, necessary that by suitable legislation the government should be made liable for all wrongful acts of its servants, whether performed in discharge of a statutory function or otherwise during the course of their employment.⁶⁸

The validity of the above-mentioned rulings seems to have been shaken by the Supreme Court decision in *N. Nagendra Rao & Co. v. State of Andhra Pradesh*⁶⁹. Fertilizer belonging to the appellants was seized by the district revenue officer in exercise of statutory powers under s. 6A of the Essential Commodities Act. No steps were taken, as required by the statutory provision, to dispose of the fertilizer with the result that it deteriorated in quality in course of time. The collector released the stock of fertilizer as no violation of any law by the appellants could be established. The appellants filed a suit for compensation against the State of Andhra Pradesh for negligence of its officers. The Court held the State liable to pay the value of the damaged fertilizer to the appellants along with interest thereon even though it could be argued that the concerned official was acting in pursuance of statutory powers.

The Supreme Court has ruled in *Nagendra* that the vicarious liability of the State is linked with the negligence of its officers. If the officer can be sued personally, there is no reason or rationale for the proposition that the State cannot be sued. "If a suit is maintainable against the officer personally, then there is no reason to doubt that it would not be maintainable against the State".⁷⁰

⁶⁸. Law Comm. of India, *First Report*, 33.

⁶⁹. AIR 1994 SC 2663 : (1994) 6 SCC 205, *supra*, footnote 55.

⁷⁰. *Ibid.*, at p. 2683.

E. DAMAGES AND WRITS

Ordinarily, a person has to file a civil suit against the government to claim damages as it raises questions of fact for which the court has to take oral evidence. This is a protracted process for civil litigation in India is an extremely slow and tardy process.

However, lately, a new judicial trend has emerged. Damages have been awarded against the government by the Supreme Court and the High Courts through writ petitions under Arts. 32 and 226,⁷¹ for infringement of Fundamental Rights, especially of Art 21. The matter has already been discussed earlier.⁷² A detailed discussion on this topic falls more appropriately within the compass of Administrative Law.⁷³ Here the matter is referred to only in an outline.

The Supreme Court has observed on this point⁷⁴ :

“However it cannot be understood as laying a law that in every case of tortious liability recourse must be had to a suit. When there is negligence on the face of it and infringement of Art. 21 is there it cannot be said that there will be any bar to proceed under Art. 226 of the Constitution. Right to life is one of the basic human rights guaranteed under Art. 21 of the Constitution.”

In *Rudul Sah v. State of Bihar*,⁷⁵ the Supreme Court awarded compensation for illegal detention. Reference, has already been made to *Chairman, Rly. Board v. Chandrima Das*.⁷⁶

In a number of cases,⁷⁷ compensation has been awarded on account of police atrocities,⁷⁸ or custodial deaths.⁷⁹

Compensation has also been awarded for medical negligence in government hospitals.⁸⁰ In the instant case, the Supreme Court has ruled that Art. 21 imposes on the state an obligation to safeguard the life of every person. The state-run hospitals and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Violation of this duty amounts to violation of Art. 21. Adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Art. 32 or Art. 226.

71. See, Ch. XXIII, Sec. A(q); Ch. VIII, Sec. D(r), *supra*. See the following cases : *Nilabati Behera v. Orissa*, AIR 1993 SC 1960 : (1993) 2 SCC 746; *supra*; *Kumari (Smt.) v. Tamil Nadu*, AIR 1992 SC 2069 : (1992) 2 SCC 223; *D.K. Basu v. West Bengal*, AIR 1997 SC 610 : (1997) 1 SCC 416, *supra*; *Chairman, Rly Board v. Mrs. Chandrima*, AIR 2000 SC 988 : (2000) 2 SCC 465.

72. See, *supra*, Ch. XXXIII, under Art. 32; *supra*, Ch. VIII, under Art. 226; *supra*, Ch. XXVI, Sec. H under Art. 21.

73. See, JAIN, A *TREATISE ON ADMINISTRATIVE LAW*, II.

74. *Rudul Shah v. Union of India*, AIR 1983 SC 1086 : (1983) 4 SCC 141.

Also, *Bhim Singh v. Jammu and Kashmir*, AIR 1986 SC 494; *supra*; *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610 : (1997) 1 SCC 416.

75. *Supra*, footnote 74.

76. AIR 2000 SC 988; *supra*, Ch. XXVI, Sec. J(l).

77. See for example, *People's Union for Democratic Rights v. State of Bihar*, AIR 1987 SC 355; *D.K. Basu v. Ashok K. Johri*, AIR 1997 SC 610 : (1997) 1 SCC 416.

78. *D.K. Basu v. Ashok K. Johri*, *supra*.

79. *Nilabati Behara v. State of Orissa*, AIR 1993 SC 1960 : (1993) 2 SCC 746; *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 1203; *supra*.

80. *Dr. Jacob George v. State of Kerala*, (1994) 3 SCC 430.

Also see, *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, AIR 1996 SC 2426, *Marri Yadamma v. State of Andhra Pradesh*, AIR 2002 AP 164.

HIV infected blood was transfused in a woman patient in a hospital maintained by a government corporation. The Andhra Pradesh High Court in *M. Vijaya v. Chairman and Managing* that the writ petition was maintainable. The court referred to Art. 21 of the Constitution which guarantees a dignified human existence to the Indians and not a mere animal existence. Art. 21 confers a right to enjoy all facilities of life. Accordingly, the High Court directed payment of Rs. one lac to the petitioner by way of compensation as a public law remedy. This was in addition to whatever compensation may be granted to her in a civil suit.

A child of seven years studying in a municipal school was crushed to death by a vehicle while crossing road in front of the school. The child had gone out during school hours to fetch drinking water, as water was not available within the school premises. The Court treated it as a matter of negligence to discharge the duty of care by the school authorities and awarded damages on a writ petition filed under Art. 226.⁸¹

When a prisoner was killed in a bomb attack on him while lodged in the prison, the Supreme Court awarded compensation for breach of his right to life guaranteed by Art. 21. The court asserted that even a prisoner has Fundamental Rights including other human rights.⁸²

The court may however refuse to issue a writ to pay compensation when disputed questions of fact arise and the tortious liability is clearly denied by the state.⁸³ In such a situation recourse ought to be had to a civil suit. On the other hand, when there is negligence on the face of it on the part of the state and Art. 21 is infringed, Right to life is one of the basic human rights guaranteed under Art. 21.⁸⁴

The above discussion shows that over time, the Supreme Court and the High Courts have transformed the archaic concept of no state liability in the area of tortious liability into that of state liability.

When breach of a Fundamental Right is not involved, the courts are very selective in avoiding damages in writ jurisdiction. The Calcutta University delayed inordinately declaration of result of a candidate. He filed a writ petition in the High Court under Art. 226 for compensation for the negligence of the University. Holding that the matter ought to be agitated in a civil court and not through a writ petition, the Supreme Court observed that in its writ jurisdiction, the Supreme Court or a High Court “would not award damages against public authorities merely because they have made some order which turns out to be *ultra vires*, or there has been some inaction in the performance of the duties unless there is malice or conscious abuse. Before exemplary damages can be awarded it must be shown that some fundamental right under Art. 21 has been infringed by arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act.”⁸⁵

81. *All India Lawyers Union v. Union of India*, AIR 1999 Del 120.

82. *State of Andhra Pradesh v. Challa Ramkrishna Reddy*, AIR 2000 SC 2083 : (2000) 5 SCC 712.

83. *Grid Corporation of Orissa Ltd. v. Sukamani Das*, AIR 1999 SC 3412 : (1999) 7 SCC 298; *Tamil Nadu Electricity Board v. Sumathi*, AIR 2000 SC 1603 : (2000) 4 SCC 543.

84. See, Ch. XXI, Sec. D(iv); Ch. XXVI, Secs. H and J; Ch. VIII, Sec. D(r); Ch. XXXIII, Sec. A(q), *supra*.

85. *Rabindra Nath Ghosal v. University of Calcutta*, (2002) 7 SCALE 137 : AIR 2002 SC 3560 : (2002) 7 SCC 478.