on its structuring and unfolding of the various provisions of the Act. There is need for rearranging the provisions of Act by rearranging the sections so that there is proper unfolding of the Act. When the Act becomes popular and effective it becomes a tool for controlling crimes against women.

The people should feel reassured that there is an effective law which curbs and controls crimes against women and gives them effective remedy in case of breach of law. There has to be prompt and confident reporting of crimes against children and women. It shall be followed by meticulous, thorough, prompt, scientific and effective investigation. It is a base for just, effective and speedy trial. Hostility and gaining over the witnesses is big challenge for the trial process. When the people realize that law provides them effective, just and useful remedy and law also provides appropriate punishments just compensation and satisfactory remedy for them the hostility is going to get reduced. With the confident participation of the witnesses success of the criminal justice system as an effective means of preventing, controlling and minimizing the crimes against women depends. Peace and order in the society depends on the effective control of crimes against women. The status of the women and the confident participation of the women in the economic, social, educational, political and other spheres of the society is inevitable for onward march of the nation. The status of the women and protection provided to the women is an indicator of the level of civilization. The level of civilization is a yardstick of the progress of the nation. With the progress of the nation people can be proud of its nation and its cultural ethos. It is a gift which we can give to future generations.

A CRITICAL STUDY – ON VICARIOUS LIABILITY OF STATE

By

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Introduction

Of late, day-in-day out, road accidents have touched a new height and as a consequence, the wearing of helmets by two wheel riders and belts has now been mandatory, as a safe guard measure of protection in the event of road accidents, the violation of which was also made punishable. More accidents assumed great importance, and deaths due to electrocution or deaths due to the negligence of Doctors, has assumed great importance, during the last few decades, and several claims pending in various Courts, and Consumer Forums, involving the question of vicarious liability of the State, which may arise for negligence strict liability, misfeasance non-fesance, nuisance and intentional torts *etc*.., and as a concomitance, payment of compensation. These factors, coupled with the failure of the State Government or Central Government to define 'sovereign' functions *vis-a-vis* non sovereign functions, and the circumstance in which the State can be made liable, by way of legislation, in spite of the report of the First Law Commission made long back in 1956, and the suggestions made by the Supreme Court, in *N. Nagendra Rao v. State of A.P.*, AIR 1994 SC 2663, recognizing the report of the First Law Commission recommending for statutory recognition of the liability of the State, as had been done in England through the Crown Proceeding

Act, 1947, and in U.S.A. through the Federal Torts Claims Act, 1946, and doing away with the rule of exemption, of liability on account of sovereign functions and change of law by necessary legislation, recognizing the liability of State, just like that of an ordinary employer and the recent trend of decisions of the Supreme Court, holding *Kasturi Lal's* case, has palled into insignificance, and awarded compensation, through a stream of cases, who suffered personal injuries, at the hands of Officers, of the Government including police officers of their tortious acts, rejecting sovereign immunity and considerable case Law developed particularly the Supreme Court elaborately discussed the meaning and concept of sovereignty in *Nagendra Rao and company v. State of A.P.,* AIR 1994 SC 2663 at 2681, in dealing with the powers of the Government under Sections 6A, 6B of Essential Commodities Act accelerated me byway of a fleeting thought to take up this important topic for my dissertation which is otherwise a very important chapter in Law of Torts, more particularly when theory "Sovereign Power" as became obsolute and despite judicial activism the Parliament or State Legislature has not so for ponder over the issue to bring in suitable legislation suitable to the needs and aspirations of the people in the welfare State, and it is high time for the Parliament and State Legislature to bring out a suitable legislation, which is long over due.

With this prefatory caveat various aspect of tortuous liability *vis-vis* sovereign-non-sovereign function and respective liabilities of the State and the award of compensation for violation of fundamental rights which is now coined as constructional Tort according to some authors for the negligence of Doctors and Hospital Authorities are dealt elaborately in order to have a hung over the matter.

'The concept of Vicariously liability of State'

means liability of State for the acts committed by its servants

The matter which is of great importance has to be studied with reference to both English Law and Indian Law relating to State liability under Law of Torts with reference sovereign functions and non-sovereign functions of the State and liability of the State for the volition of fundamental rights, which can be termed as Constitutional tort with special reference to the position existed before the commencement of the Constitution and after the commencement of Constitution.

Geneis of the concept of State liability

It is a recognized principle of both civil and criminal jurisprudence to punish any individuals who infringes, the rights of the other individual and also to award monetary compensation under certain circumstances to the victims who were adversely affected, by such infringement. Similarly the State Government which performs its assigned powers, and functions through its machinery consisting of huge number of employees, is also liable to pay monetary compensation like any other individual whenever its employees cause infringement of rights of the individual. Though, the State enjoys certain privileges, in comparison to certain individuals with ordinary citizens in some matters. It cannot escape form the basic and fundamental liabilities. This is more so in any Country governed by the rule of Law and Democracy. The State is liable for the actions of its employees, in many areas of administrative functions. With the tremendous increase in the functions of the State the extent of State liability for the acts of its employees, is becoming complex day-by-day. All over the globe now a days the aim of any Government is to establish welfare State. This has resulted in expansion of powers and functions of the State in all spheres of the administration, Not only the concept of welfare State but also other functions of the State require the officials to implement various statutory provisions, regulations *etc.* Sometimes these administrative actions may

affect the statutory and fundamental rights of the individuals and then only the question of State liability will arise in India, the Common Law, Governed by the State liability in tort during the British rule and after independence the provisions of the Constitution of India 1950 govern the State liability.

Position at Common Law

At common Law, the Crown was protected from tortuous liability under the maxim 'king can do no wrong'

It therefore follows no action can be entertained, against the Crown, though the act was committed by its servants. However after passing of the Crown Proceeding Act 1947, which came in to force 1.1.1948, the maxim "King can do no wrong' was abrogated and as a corollary, Crown is now made liable for the tortious acts committed by its servants, just like any other private individuals Section 2(1) of the Act provides.

Subject to the provision of this Act, the Crown shall be subject to all these liabilities, in tort, to which, if it were person of full age and capacity, it would be subject to

(a) in respect of torts committed by its servants and agents

(b) in respect of any breach of these duties, which a person owes to his servants or agents at common Law by reason of their being employer, and

(c) In respect of any reach of the duties attaching at common Law to the ownership, occupation, possession or control of property.

Provided that no proceeding shall lie against the Crown by virtue of paragraph (a) of this sub-section in respect of any act, or omission of a servant or agent, of the Crown unless the act, or omission would, apart from the provisions of this Act, have given rise to a cause of action in Tort against that servant or agent or his estate

The above provisions of the Act make, a revolutionary change in the Law relating to proceeding against the Crown in England an anatomy of the above section extents to torts committee by its servants or agents, and breaches of duties attached at Common Law to the ownership, occupation possession or control of property, breach of duty laid on the Crown by statute and torts committed by an Officer, of the Crown while performing or purporting to perform any functions conferred or imposed on him by common Law or statute.

The liability of the Crown is not absolute and it is only conditional on the agent or servant being liable in Tort for such conduct

There are certain exceptions

(1) It applies only to the servant or officers appointed by the Crown directly or indirectly and paid wholly out of certain funds or monies specified by the Act *i.e.*, the consolidated Fund.

(2) The provision is not applicable to police.

(3) No proceedings shall lie against the Crown for any act or omission on the part of a person discharging judicial duties or executing judicial process

(4) It is not applicable for any act or omission of its servants, or agents in relation to postal packets or telephone communication and in respect of an act or omission of a member of the armed forces causing the death of or personal injury of another member of the said Forces.

The Act provides a remedy against the Crown enforceable as of right. The Act negatives to a remarkable degree the theory of immunity of the crown for the torts of its servants and dispensed with the special procedure of Petition Rights.

The Act is nevertheless an important land mark in the history of development of rights

of the subjects against the Crown the subject got two fold benefits thereunder. The ancient rule of immunity of the Crown from the tortious liability was abrogated and the Act brought revolutionary change in the matters of procedure to the convenience of the subjects.

Tortious Liability of the State under British Rule

India was ruled by the British upto 1947 in which year independence was achieved. In England the concept of State liability for the Acts of its employees and officials is influenced by the doctrine of "King can do no wrong" as referred supra

The East India Company (hereafter referred as E.I.C) began its career in India as a commercial corporation but in course of time due to historical reason, it acquired sovereign powers and it is only after of granting of such power, a distinction is drawn between "sovereign and non-sovereign power" or functions which it exercised. In the leading case of *Bank of Bengal v. United company*, (1831) 1 Bengalls Reports 87, the Supreme Court at Calcutta rejected the plea of sovereign immunity in a matter involving the recovery of interest by the Bank of Bengal due on the promissory notes from E.I.C, for the prosecution of war. In P&O Steam Navigation Company, the Court accepted an action against the secretary of State for the negligent act of Government workers. In this case, Sir *Barnes Peacock* CJ., held that though the E.I.C is invested with "Sovereign functions" it does not make it sovereign authority and the liability of E.I.C for the negligent acts of it officers, would be same as that of an employer, for Acts of its employee. In this judgment two important legal terms were coined and were used namely "sovereign and Non-sovereign" *Peacock* CJ., clearly mentioned E.I.C is not liable in the matters involving an act done by any of it officers of or solders in carrying on hostilities, Act of Naval officers in seizing prise property on the supposition that it is the property of the enemy act done by the military or Naval Officer or by any Solider or Sailor while engaged military or naval duty and also acts done by its Officials, in the exercise of judicial functions. This Passage was interpreted in a way that immunity is available only in respect of matters involving 'acts of State' the doctrine of 'acts of State' and 'sovereign immunity' are not synonymous the former flows from the nature of power exercised by State for which no action lies in civil Court and later was developed on the theory of divine right of Kings. Under what circumstances, the E.I.C is not liable for the acts of its Officials, the Court in *Nobinchunder Dey v. Secretary State for India*, (1876) ILR 1 Cal 11, that auction of Ganja license was a method of raising revenue and it is a sovereign function which no private individual would under take, hence no action is maintainable against E.I.C in this regard.

The Madras High Court in the *Secretary of State India-in-Council v. Hartibhangji*, (1852) ILR 5 Mad. 273, dissented from the ruling in *Nobinchunder Dey* (discussed supra) and opined that the defense Sovereign immunity is available only in the matters relating where the State could not be sued its acts (war peace) in Municipal Courts. The same view was confirmed also in *Salmon v. Secretary of State-in-council for India*, 1kb 813.

Position in India

Tortious Liability of the State of the Constitution

Adverting to the position in India there is no statue exempting the liability of a State under the Law of Torts the liability of the State as mentioned is clause (1) of Article 300 of the Constitution of India is as under

'the Government of India may sued or be sue in the name of Union of India and the State Government may sued or be sue in the name of the State in the like case as the Dominion of India subject to any law,

which is made by Act of Parliament or Legislature of the State'

It therefore follows Article 300 thus provides that the Union of Indian and the States are juristic persons for the purpose of a suit or proceedings. Although the Union of Indian and the State Government can now sue or be sued but the amazing feature is the circumstances under which it can be done have not been categorically mentioned resulting the position prevailing before the commencement of the Constitution despite the fact, the Parliament and the State Legislature have been empowered to pass Laws to change the position and despite the directions of the Supreme Court and the High Court about the desirability of passing suitable loss from time to time, the Parliament and Legislature has not so for parsed the necessary Laws.

To know the present position as regards the liability of the State for tortious acts, a survey with respect to the pre-construction days has to be made, the position existed under Section 176 of the Government of India Act, 1935, Similarly the Government of the Indian Act, 1935, like under the present Constitution does not enumerate the circumstance of the Government's liability but recognized the position prevailing under Section 32 of the Government of Indian Act 1915 and Government of Indian Act, 1858.

In 1858 the Crown assumed sovereignty of India to take over the administration of India from East India Company. The Act, *inter alia* declared Secretary of State in Council to be body corporate for the purpose of suing and being sued. The same concept was reproduced in Government of India Act 1915 and 1935.

Whatever might be the historical survey that impinged on facts neither the Legislature nor Parliament has made any Law, as completed by clause (1) Article 300 of the Constitution of India. The only limited position as it stands till to-day is the State would be liable for damages.

The historical research of the Law would be incomplete. If the Law prior to the Constitution and the liability of East India Company prior to 1858 is not in surveyed, or not adverted to,

The matter came for consideration as early as in 1861.-

The landmark decision on this important matter, or aspect is *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India*, (1861) 5 Bom. HCR 1.

The facts of the case are in a narow compass.

The plaintiff's servant was traveling in a horse driven carriage and was passing by the kiddapur Dockyard in Calcutta, a Government property. Due to negligence of the defendants servants a heavy piece of iron, which they were carrying for repair of the steamer fell and its clang frightened the horse, and the horse was injured. A suit was filed claming damages against the Secretary-of-State for India in Council which was caused due to the negligence of the servants of the Government. According to *Peacock* CJ., a distinction was maintained between sovereign acts and non-sovereign acts or functions of East India company. It was held the State is not liable, taking into consideration, maintenance of Dockyard was a non-sovereign function, and as such the Government was not liable.

To a similar effect is the decision of *Noben Chandradey v. Secretary of State of India*, ILR 1 Cal 11 and the State was exempted from liability as the function was considered to be a sovereign one and the *ratio-decedendi* of the principle laid down referred supra P&U.S.N. Co case was followed, reaffirmed and reiterated. The third landmark judgment in the series is the *Secretary of State for India in Council v. Hari Dhanaji*, ILR (1852) 5 Mad. 273, where in the position was explained as follows.

> "The act of State of which the municipal Courts of the British India are debarred from talking cognizance, are acts done in the exercise of the sovereign power which do not profess to be justified by Municipal Law.... Where an act complained of is profusely done under the sanction is the Municipal Law, and in exercise of power of powers conferred by that Law, the fact that it is done by the sovereign powers is not in act which could possibly be done by a private individual, that not oust the jurisdiction of the civil Courts"

The Law Commission of the India, in its first report respect in 1956 that has discussed the whole question, and according to its view, the law laid down by *Haribhanji's* case was correct.

It is plain therefore the Government enjoyed immunity from provisions proceeding against the tortious Acts of its servants only if they were committed in the exercise of the sovereign powers *i.e.*, powers which cannot be lawfully exercised except by the sovereign authority, or the persons to whom the sovereign authority may delegate these powers. But, if the act causing the wrong was done in carrying on the ordinary business, which might be, carried on by any persons such acts being marketable operations, of the kind which the East India Company as a trading company actually engaged itself before and even before obtaining sovereignty, no immunity can be claimed. This golden thread of this rule is subsequently followed, reaffirmed and retaliated in various several subsequent decisions. Article 300 of the Constitution contemplates, no doubt a provision to be made by the Parliament or State Legislature and this provision in all probability is intended to meet the ever growing needs of the subjects in a social welfare State. However, in the absences of any such enactment the old State of Law as available in is 1858 has yet to prevail and prevails.

Even at the cost of repetition it is be Stated that there is no exclusive legislation dealing with the tortious liability of the State. The First Law Commission of India as already articulated earlier followed the views and rulings of *Harimangi's* case discussed (supra) and further the Law commission has recommended a legislation in that regard. The law commission after referring the various provisions, in the legislations of other countries had also observed that the old distinication between sovereign non sovereign functions or Governmental and non Governmental functions should be no longer invoked to determine the liability of the State (First report of the Law Commission of India, liability of the State in Tort in the year 1956) on the lines of the recommendation of the First Law Commission, "the Government of India" introduced two bills, touching. The Government liability in Tort in the year 1965 and 1967.

In the Loksabha but the bills did not emerge an Act due to the fact that the Government allowed to be lapsed, them to lapsed on the ground bills will bring rigidity in deciding the tortuous liability of the State. Because of the reasons, the liability of the Government in tort can safely be stated to be one based on tortious liability of the State that existed during the East India Company Rule (referred supra)

After Constitution, the Supreme Court in different legal ramification, interpreted the liability of the Government of India, in tort in the light of Constitutional of provisions which legal ramifications of far reaching effect are to be highlighted and are highlighted as herein after in, the land mark decision among them is *State of Rajasthan v. Vidyavathi*, AIR 1962 SC 933.

Change in the Concept of Sovereignty

A New Approach

The Supreme Court of India considered the changes which occurred in the concept of sovereignty. The Supreme Court elaborately discussed the meaning and the

concept sovereignty in *N. Nagendra Rao* company AIR 1994 SC 2663 at 2681 by dealing with the powers of the Government under Section 6A and 6A(2) of the Essential commodities Act 1955 and the Supreme Court declared that after the commencement of Constitution of India 1950 or prior to it the distinction between sovereign powers and non-sovereign powers is not relevant. The Court observed the concept sovereignty underwent a drastic change and sovereign immunity has no relevance to-day. Further in the opinion of the Supreme Court, the doctrine of sovereignty as propounded by the theorists in the medial period underwent radical changes and which doctrine in earlier days was outcome of old thought based on social setup then prevailed and at which time the monarch was omnipotent. In later days the concept sovereignty underwent gradual changes and now a days sovereignty vests in the people. Justice *Douglas* in his book 'Marshali to Mukherji' observes that India and United States both recognize that people are the basis of all sovereignty. Thus the old and the archaic concept sovereignty does not survive in this traditional four corners and now people are real sovereign in a setup where the Legislature, Executive and Judiciary have been entrusted with their respective functions to severe the people.

Liability of State for tortuous acts of servant

Sovereign functions of State Instances.

Though sovereign functions of the States have no where have been exhaustively enumerated nor is there any authoritative definition of what constitutes of sovereign function, from a review of the various authorities, certain rules of guidance, which appear to be well settled, emerge and they may be stated as follows, before the survey of land mark judgment on this branch of Law, is made.

(1) Under Article 300(1) of the Constitution, the Union of India and the States in our Republic have the same liability of being sued for the torts committed by their employees as was that of East India Company.

(2) The nature and the extent of liability is that the Union of India and State are liable for damages occasioned by the negligence of the servants in the service of the Government if the negligence is such as would render an ordinary employee liable.

(3) In view of the rule stated above the Government is not liable of the of the tortuous acts complained of has been committed in the exercise of sovereign power, by which is meant powers cannot be exercised except by a overeager, or a person by virtue of delegation of sovereigner rights.

(4) The Government is vicariously liable for the tortious act of its servants or agents which are not proved to have been committed in exercise of its sovereign powers or functions or in exercise of sovereign delegation.

(5) When the State Pleads immunity against a claim for damages resulting from injury caused by negligent act of its servants the area of its employment referable to sovereign power, must strictly be determined. Before such a plea is upheld the Court must always find that the impugned act, was committed in the course of an undertaking or an employment referable to the exercise of the delegated sovereign powers.

(6) There is a real and marked distinction between sovereign functions of the Government and that which are not sovereign and some of the functions that fall in the later category are those connected with trade, commerce or business and industrial undertakings.

(7) When the employment in the course of which the tortious act, committed is such even a private individual can engage it, cannot be considered as sovereign act, committed in the course of delegated sovereign functions of the State.

(8) The fact the vehicle was involved in an accident is owned by the Government and driven by its servants does not render the Government immune from liability from its rash and negligent driving. It must therefore be proved at the time of the accident occurred, the person driving vehicle was acting in the discharge, of sovereign function of the State.

(9) Though maintenance of the army is a sovereign function of the Union of India, is does not follow the Union is immune from all liability for any tortious, liability committed by any of the army persons.

(10) In determining whether the claim be immunity shall or shall not be allowed, the nature of the act, the transaction in course of which it is committed, the nature of the employment or the person committing it and the occasion for it have all to be considered nature of the employment of the person committing it and the occasion, for it have all to be considered.

Guidelines given by His Lordship Justice *Venkatesam* 1965 (1) An. WR 183 at 189 (*firm Kuppana Chetty v. Collector of Ananthapur*) His Lordship Justice *Venkatesam* has laid down the following principles deducible from the long catena of decisions dealing with scope of vicarious liability, which are streamlined as follows :

(1) The Government is liable for the torts of its servants in the course of the transactions which any private party can engage in (*vide Peninsular and Oriental Navigation Company v. Secretary of State for India in Council*, (1861) 5 B.H.C.R. Apex 1)

(2) The Government cannot be sued in respect of acts done by its servants in exercise of sovereign power or sovereign acts *e.g.*, maintenance of a military road, or national highway or a hospital out of State revenues as they are all acts, done in discharge of sovereign or Governmental functions. In the case of acts of State *i.e.*, acts done by the Government under the authority of the Government with respect to non-resident foreigner and which are not justifiable in the ordinary Courts of Law, also the Government would not be liable *e.g.,* making war or treaty, annexation of property belonging to enemy country or National. This is not because of the act is one committed by the public servant in the exercise of sovereign powers but because of it is in respect of non-resident foreigner who cannot invoke jurisdiction of this country, and for an act which is not justifiable in the Municipal Courts.

(3) The Government is liable for injury to any of its subjects for any act done by itself or of the servants, if such act is done under the colour of Municipal Law, *i.e.*, when it purports to be in exercise of powers conferred by statutes but is really illegal

(4) The Government is not liable for wrong done by its servants in the course of official duties, unless the wrong was expressly authorized or later ratified by it (*vide Ross v. Secretary of State for India in Council*, ILR (1913) 37 Madras

The principle rests on the ground that the act was done by the Government servant in exercise of the authority or discretion vested in him by law or statute, and not in pursuance of any implied authority of Government.

It is profitable and desirable to refer the matter from the view of Textbook, and how they are reflected, so far as the liability of Government

Law of Torts

By S. Ramaswamy Iyyer, at Page 511 Sixth Edition

The following rules are deducible from the case law on the liability of the Government

(1) The Government is liable for the torts of its servants in course of transactions which any private person can engage in (This principle was upheld by the Privy Council long ago in *Peninsular and Oriental Steam Navigation v. Secretary of State for India Council*, (1861) 5 Bom HCR Apex 1. The plaintiff sued for damages for injury to his horse caused by the negligence of some of the servants employed in the Government's dockyard. In allowing the claim *Peacock* held, that the East India Company could have been sued for the torts of its servants committed in the course of which it, as a trading company engaged in. He mentioned as instances of such transactions, the maintenance of dockyard, carrying persons or goods on railway, or conveying messages by telegraph, In all such cases the Government would be liable

(2) The Government cannot be made liable in respect of acts done by its servants in the exercise of sovereign power

(3) Maintenance of military roads or a national high way, the driving of a military truck, the management of a proprietary estate by the Courts of wards, and the maintenance of a hospital, the driving of a military truck, the management of a proprietary estate by Courts of Wards, and the maintenance of hospital are the acts in exercise of sovereign powers, or functions and the suit would not lie against the Government of India for the faults of its servants employed for the above purpose

(4) The Government is liable for injury to any of its subjects resulting from an act done by itself or by its servants if such act is done under colour of municipal law, as when it purports to be in exercise of powers, conferred by a statute. Actions have been allowed against the Government for illegal levy of customs under the customs Act, the illegal acquisition of land under the Land Acquisition Act, the improper dismissal of councilor of a Municipality. In an action for malicious prosecution against Government, the malice of its officer, will be imputed to it.

(5) The Government is liable to restore property, or money, wrongfully obtained or detained by it or its servants on its behalf. In each of such cases an action lies against the Government as a petition of right lay against the Crown in England.

(6) The Assam High Court allowed a claim against the Union of India for compensation for earth willfully taken from the plaintiffs land and laid on a railway track.

(7) The Government was held liable for illegal seizure of rice by a District Magistrate and for subsequently selling the rice, and appropriating the sale proceeds.

(8) The Government is not liable for wrong done by its servants, in the course of its official duties unless the wrong was expressly authorized or ratified by it.

(9) The Government is not liable for an improper arrest, or seizure of property by a police officer, for loss due to payment of money by Deputy Collector, to a person not entitled to it for mistaken action taken against a

public servant by its superior Officer, and for negligence in his custody of plaintiff's property resulting in theft

(10) In AIR 1952 Cal 242, it was held the Government could become liable for malicious prosecution of the plaintiff, by Railway Officials purporting to act, under their powers under the Railway Act.

Even at the cost of repetition, let us refer, the principles laid own by *R.K. Bangia* in his book Law of Torts at Page 134, which according to him are the principles emerge from the various decisions.

(1) The liability of the Government *i.e.*, the Union of India, and the States, is the same as that of East India Company.

(2) The Government is not liable for the Torts committed by the servants, in exercise of the sovereign power. The Government is liable for the torts which have been committed, in exercise of non-sovereign powers.

(3) The sovereign power means power which can law fully be exercised, only by a sovereign or by a person to whom such powers have been delegated.

(4) There are no well defined tests, to know what are sovereign powers. Functions like maintenance of defense forces, various department of the Government for maintenance of Law and Order, and proper administration of Country, and the machinery for administration of justice, can be included in the sovereign function.

(5) Functions relating to trade, business and commerce and the welfare of the activities, the are amongst the non-sovereign functions. Broadly speaking such functions, in which private individual can be engaged in, are not sovereign functions.

Considering the matter from long catena of cases dealing with the question, the following principles may be stated, which are well established.

(1) the Government is liable for the Torts of its servants in the course of its transition which may any private person can engage in (*vide Peninsular and Oriental Steam Navigation Company Secretary of State*) 5 Bom HCR App 1

(2) the Government cannot be sued in respect of acts done by its servants in the exercise of its sovereign power or sovereign acts, *e.g.*, the maintenance of military road, or a national highway or a hospital out of State revenue as they are all acts, done in discharge of sovereign or Governmental functions,

(3) In the case of 'Acts of State' *i.e.*, acts by a Government's servant under the authority of the Government, with respect to non resident foreigner, and which are not justifiable in the ordinary course of law, also, the Government would not be liable *i.e.*, making war, or treaty, an extraction of property belonging to any enemy Country of national.

It is be clarified, that it is not because the act is one that committed by the public servant in the exercise of sovereign powers, but because it is in respect of a non-resident foreigner who cannot invoke the jurisdiction of Courts, of this, Country and for an Act, which is not justifiable in the Municipal Courts.

(4) The Government is liable for injury to any of its subjects, from any act done by itself or by its servants, if such act is done under the colour of Municipal Law, *i.e.*, when it purports to be in the exercise of powers conferred by statute but in reality is illegal.

(5) The Government is not liable for a wrong done by its servants in the course of officials' duties, unless the wrong was expressly authorized or later ratified by it (AIR 1915 Mad 434)

The principle resets on the ground that the act was done by the Government Servant in exercise of the authority or discretion vested in him by law or statute and not in pursuance of any implied authority of the Government.

Having thus laid down the general principles deducible from authoritative pronouncements, it is to be clarified, what is meant by 'sovereign power' as there is no legislation so far.

Sovereign power

A bare reference to Articles 53, 73 and 162 of the Constitution, would make the position clear, that sovereign executive power can be exercised, even in sphere where there is no legislation.

It is therefore not correct, to contend that unless a function is authorized by a statute, the Governmental function of act, cannot be done, in exercise of sovereign power of the State.

Sovereign Function

(1) Maintenance of law and order is sovereign function and the State is not liable, for the excess committed by the police personal while discharging their duties.

(2) Maintenance of defence forces, is a sovereign functions, State is not liable.

(3) Collection of land revenue is a sovereign function though delegated, State is not liable.

The position was thus stated by the Supreme Court in *Kasturi Lal v. State of U.P.*, AIR 1965 SC 1039 at 1046

"If the tortuous act was committed by a public servant and it gives rise to claim for damages, the question to ask is... Was the tortuous act was committed by the public servant, in discharge of statutory functions which are referable to, and ultimately based on, the delegation of sovereign power, of the State of such of public servant. If the answer is in the affirmative, the action for damages, for loss caused by such tortuous act, will not lie. On the other hand if the tortuous act is has been committed by a public servant in the discharge of duties assigned to him, not by virtue of any delegation of sovereign power, an action for damages would lie. The act of the public servant, committed by him during the course of employment is, in the category of cases, an act of a servant who might have been employed by private individual for the same purpose".

In *Kuppana Chetty v. Collector of Ananthapur*, (D.B.), 1965 (1) An. W.R. 183, a reference is made regarding the decision of the Supreme Court in *State of Rajasthan v. Vidyavathi*, AIR 1962 SC 933, Where the following observations of the learned Chief Justice of Supreme Court may usefully be attracted :

'When the rules of immunity in favour of the Crown, based on 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. As the cause of action in this case arose, after coming into effect, of the Constitution, in our option it would only be recognizing the old established rule, going back to more than 100 years, at least, if we uphold the vicarious liability of the State. Article 300 of the Constitution itself has saves the right of Parliament or Legislature, of State, to enact such Laws, and it may think fit, and proper in this behalf. But so long as the Legislature has not expressed it its intention to the country, it must be held that the Law, is what it has been, ever since the days of East India Company. Held the State Government, or the Central Government cannot be made liable for the Tortuous Act committed by the Thasildhar

in effecting the illegal attachment. The main trust of the decision is collection of land revenue is a sovereign function of the State.

The learned Division Bench while reviewing the entire Law on the subject of vicarious liability, at Page 189, made a comparative study, of the common Law and the Law in India and it would be useful to extract the relevant portion of the judgment.

Liability of the Crown in England

At common Law, the procedure by way of petition, of right, generally provided a remedy against the Crown in cases of breach of contract, and possibly also enabled real or personal property to be recovered. But it was impossible to sue, the Crown in Tort either of wrong which it he had expressly authorized or for wrongs committed by its servants in the course of their employment. Nor was it possible to sue the heads of the department or other official superior of the wrong doer for all servants of the crown are fellow servants and do not stand to each other in the relationship of master and servant. The individual wrongdoer was, of course, liable and could not plead the command of King or State necessary as a defence. These rules became highly unsatisfactory when the crown became one of the largest employers of labour and occupiers of property in the country. Various devices were available to ensure that substantial justice was done. Thus the treasury might, as a matter of grace, undertake to satisfy any judgment awarded against the individual crown servant who had committed a tort in the course of employment. These make-shifts, became unnecessary when the Crown Proceeding Act 1947 was passed (*vide* Salmond on the Law of Torts 12th)

According to Crown Proceeding Act, subject to few exceptions, the Crown is made liable for all these liabilities, in tort, to which, if it were a private person of full-age, and capacity it would be subject.

Under Article 300 of the Constitution, of our country, the Government of India and the Government of State, my sue or be sued, in their respective affairs, in the like cases, as the Dominion of India, and the corresponding provinces, or the Indian States, might have sued or been sued, if the Constitution has not been enacted. Therefore the Law which prevailed before 26th January 1950, continues subjects to any Law that may be made by the Parliament or a State Legislature by virtue of the powers conferred by the Constitution. The law before the said date, was regulated by the provisions of the Government of India Act, beginning from the Act of 1858, These Acts made the secretary of State for India Council, and after, the First April 1937, the Government of India, and the provinces of British India, liable in the circumstances in which East India Company could have been sued before 1858.

AIR 1962 SC 933, the famous or leading case, Vidyavati = 1965 (2) An. W.R. 15

(After the Constitution)

The mere fact, the jeep car was meant for the Collector's use, was not held, to justify the conclusion, that its driver, was exercising a delegated sovereign power, when he caused the injury, end hence the State in liable.

Kasturi Lal Case, AIR 1965 SC 1039

The following principles emerge, out of the Supreme Court decision in measures *Kasturi Lal* cases, which was however subsequently palled into insignificance.

The Supreme Court also refused to hold the State liable for the act, done by its servants, in the exercise of statutory duties,. In this case a partner of the firm of jewelers, in Amritsar *Kasturi Lal* happened to go to Meerut, (U.P.) reaching there by train in midnight. He was carrying a lot of gold and silver with him. The police constable on the round in the market, through which he was passing, suspected he was in possession of stolen

property. He was taken to police station. He with his belongings was kept in the police custody, under the provision of Cr.P.C. Next day he was released on bail. And sometime there after his silver was returned to him. The gold was kept in the Police Malkhana and the same was mis-appropriated by the Head Constable who thereafter fled to Pakistan. The plaintiff brought action for compensation or in the alternative for the return of the gold. The Supreme Court held that since the negligence of the police was in exercise of sovereign powers, which can also be characterized as sovereign powers, the State was not liable for the same. According to His Lordship *Gajendragarkar*, CJ.

"In the present case, the act of negligence was committed by the police officers, while dealing with the property of *Ram* which they had seized in exercise of statutory powers. Now the power to arrest a person to search him, and seizer property found with him, are power conferred, on the specified officers, by the statute, and in the last analysis, they are powers, which can be properly characterized, as sovereign powers, an so there is no difficulty, that the act which give rise, to the present claim for damages, has been committed by the employees, of the respondents during the course of the employment but the employment in question being of the category which can claim the special characteristics of sovereign power, the claim cannot be sustained, and so we inevitably hark back to what Chief Justice, *Peacock* decided in 1861 and hold the present claims is not sustainable"

In State of M.P. v. Chironjilal, AIR 1970 MP 179

The golden thread of rule laid down in *Kasturi Lal's* case was followed and held that when a Revenue Official had ordered seizure of cut wood in exercised of statutory power and wood so seized was misappropriated, by a supratdar, who was entrusted with the wood, also in exercise of statutory powers, the State was not liable, for such wrongful act, of the supratdar.

In State of M.P. v. Chironjilal, AIR 1981 MP 65

An action was brought to recover compensation from the State for damages, to the plaintiff a Loud-speaker set, which was being used by student processionists and was damaged in course of lathi-charge by the police. It was observed that the function of the State, to regulate processions is delegated to police by Section 30 of the Police Act and the functions to maintain Law and Order including quelling of riot, is delegated to the authorities specified by Section 144 Cr.P.C. These functions being sovereign functions, the State was not held liable.

Ram Ghulam v. Govt. of U.P., AIR 1950 All. 206

The police authorities had recovered some stolen property and deposited the same in H. Malkhana. In a suit by the owner of the property against the State of U.P., it was held that the Government is not liable as its servants was performing duty in discharge of obligations imposed on him by Law.

Choddey Janakiramyya and Co. v. State of A.P., 1964 (1) An. W.R. 253

It was held the officer, seizing the food grains in exercise of powers conferred under the Madras Food Grains Intensive Tensive Procurement Order) 1948, had not acted, maliciously though the seizure was illegal and therefore he was indemnified from liability under the Act. On the general principle whether the Tort committed by the Government Servant the Government could be made vicariously liable, it was held if the injury resulted from the exercise of sovereign power under a statute by the officials, the State cannot be made vicariously liable. It was also laid down that it was only in cases, where the plaintiff complains of the injury caused by the Government officials, in

undertaking of a commercial nature, or in the matters, which could be undertaken by private individual without delegations of sovereign power, the vicarious liability of the Government arises.

The leading case on the subject is Maharani Guruchandra Kaur v. Province of Madras, (1942) 2 MLJ 14

In this case the wife and daughter of the Ex-Maharaja of Nabha were kept under wrongful detention by a Sub-Inspector and two Head Constables of the Railway Police at Kodaikanal Railway Road Station They were ordered by the Superintendent of Police, to detain the Ex-Maharaja of Nabha' but owing to the misunderstanding of the telephone message. Sent by him, the Sub-Inspector and the constables detained the wife and daughter of the Maharaja. In a suit by them for damages for wrongful detention against the province of Madras, the Superintendent of Police, and the Sub-Inspector and constables who actually effected detention, their Lordships *Abdul Rahman* and *Somyya*, JJ., held the province of Madras was not liable for the acts of the Sub-Inspector, and constables done in discharge of duties, imposed on them by the statute, *viz*., Section 54 Cr.P.C. The Government it was held, could be made liable, either when the officer, has taken action in pursuance of statutory duty, or when the act committed by him happens to be in excess of authority, unless in later case, the act is done by the Government orders, or subsequently ratified, and adopted by it nor could action be maintained against the Government for tort committed by its servant if in passing of the order, in performance of which the tort was committed by the Government was discharging its Governmental functions as a State sovereign. The learned Judges on a consideration of authorities summed up the position as follows:

"It will be supererogatory on our part to treat the same ground once again. These authorities clearly established that the Government could not be made liable if the act was done or purported to be done by the defendants in discharge of their duty imposed upon them by statute"

This decision was upheld by the Federal Court, agreeing with the High Court that the State could not be made liable, for the improper conduct of public servants unless those acts had been done under the orders of Government or had been subsequently adopted, and ratified by it (please see (1944) 1 MIJ 399 (FC) = AIR 1944 FC 41.

Rao v. Secretary of State for India in Council, ILR 37 Mad 55

The Government is not liable for a wrong done by its servants in the course of official duties, unless the wrong was expressly authorized or latter ratified by it. This principle rests on the ground that the act was done by the Government Servant in exercise of authority or discretion vested in him by law or statute and not in pursuance of any implied authority of the Government.

Kommuru Krishnamurthy v. State of A.P. by Collector, Guntur, 1960 (2) An. W.R 502

The Bench of the A.P. High Court held, that in attaching vicarious liability in torts to the State, it is necessary to ascertain whether the acts complained of are the acts. In exercise of Governmental powers, which cannot be lawfully exercised save by sovereign authority, or by the persons to whom the sovereign authority might delegate such powers or are they such acts as are done by the Government in pursuance of ventures which a private individual might undertake equally well. The acts of the latter class are mercantile operations, and the acts done in exercise of Governmental powers may fall under different categories. It was held making and maintenance of national highway is the exclusive duty of the Government and for a tort committed by the Government Servant

in the discharge of is duty in connection with the work of national highway, the Government cannot be made liable on the rule of vicarious liability. It was however held, that the remedy in tort was available against the driver, but that would have proved a poor recompense for the probable loss that he sustained. Had the employer been other than the Government the plaintiff would have recovered adequate compensation, but not against the Government. Adverting to the unsatisfactory state of Law, *Kumarayya*, J., made the following pertinent observations :

"It is a known fact, that the Union of India, and also the Government of State, have set before them the ideal of well fare State. It may be while achieving this purpose, the Government may undertake, to do many acts, which in the hands of private agency may assume the character of commerce or trade, but on that account alone, the nature of the undertaking does not cease to be a Governmental undertaking for Governmental purpose. The idea here is not profit making and the purpose is public purpose…. It is not merely the nature of the work but its relation to the duties of the Government having regard to the goal of the Government that has to be kept in view. There can be no doubt about the fact, that making maintenance of national highway is the exclusive duty of the Government. On the principle already stated the Government is not in law within the rule of vicarious liability in relation to the tortuous acts, of its servants, in the discharge of such duties. The plaintiff can have relief only as against the person whose acts of commission or omission have given rise to the cause of action. It is unfortunate a boy of tender age barely five has been disabled forever by the rash and negligent act of the driver. It would naturally rouse up feelings of deep consideration for him because rended thus disabled he has to enter the battle of life, with no resources for due equipment and no provision to fall back upon in times of need.... Had employer been other than Government, he would have hoped for adequate compensation. It is unfortunate that the Government being employer has to look in vain for some appropriate provision which may afford a just and adequate relief. Article 300 of the Constitution contemplates no doubt a provision to be made by the Parliament or State Legislature and this provision in all probability, is intended to meet the ever-growing needs of the subject in social welfare State. But in the absence of any such enactment, the old State of law as available in the year 1858 has yet to prevail.

Acts done in exercise of sovereign power with respect to maintenance of military roads

To keep and maintain military is a 'sovereign functions' which cannot be carried on by any person other than the sovereign body therefore, an injury caused, in the discharge of military functions cannot be actionable for damages for the purpose of munitions and commandeering of goods during war is as sovereign function and supplier sustain loss due goods not being taken delivery of cannot sue for damages

In *Secretary of State v. Cockraft*, AIR 1915 Mad 993, it has been held maintenance of a military road and functions is a sovereign function and the Government is not liable, for the negligence of the servants in stacking of gravel on a road which resulted in a carriage accident causing injuries to the plaintiff.

In *Union of India v. Harbansingh*, AIR 1959 Punj. 39, meals were being carried from the cantonment Delhi for being distributed to the Military Department and was being driven by a military driver. It caused an accident resulting in the death of a person. It was held the act was being done in the exercise of sovereign powers, and therefore the State could not be made liable for the same.

In *Baxi Amrik Singh v. Union of India*, (1973) 75 PLR 1, on 14th May 1967, there was an accident between a military truck and a car, on the Malla Road. In Ambala Cantt.,

due to the negligent and rash driving by the truck driver sepoy *Mansingh* who was also an army employee. *Amrik Singh*, an occupant of the car, received serious injuries. Subsequently he brought an action against Union of India, apart from pleading that there was no fault on the part of the military driver, averred that the driver was acting in exercise of sovereign power, of the Union Government at the time of the accident insofar as he was detained for checking army personnel on duty throughout that day and therefore there was no liability of the Union of India to pay compensation. The Full Bench of the Haryana High Court, after discussing in detail the various authorities on the point came to the conclusion that checking of the Army personnel on duty was a function intimately connected with the army discipline and it could only be performed by a member of the Army Force, and that to by such a member of the force who is detained on such duty and is empowered to discharge that function. It was therefore held that since the military driver was acting in discharge of a sovereign function of the State, the Union of India was not liable for injuries sustained by *Amrik Singh* because of rash and negligent driving of the military driver.

In *Thanga Rajan v. Union of India*, AIR 1975 Mad 32, a 10 year old boy was injured by a military truck carrying carbon dioxide gas to a navu ship was held having sustain injuries in discharge of sovereign function.

In *Satyawati v. Union of India*, AIR 1967 Del. 98, a military truck carrying hockey and basket ball teams to the Indian AIR Force Station to play matches against the AIR Force accidentally killed a person. The Government was held liable has is not an act of 'sovereign character'

Land Revenue

In *State of A.P. v. Ankanna*, AIR 1967 AP 41, it was held that the collection of Land Revenue was a 'sovereign function' and therefore the State could not be made liable, if the officers while collecting Land Revenue acted illegally and maliciously. Having thus stated on a conspectus of the case law indicated above the following principles are clearly discernible with respect to non-liability of the State insofar it related to sovereign functions.

The suit will not lie against the Government in regard to the following matters and the State is not liable under the caption of 'sovereign' functions.

Making war or treaty annexation of a native State common daring goods during war the use of land as a practice bombing ground by the army administering justice through its Courts, carrying on the work imposed by law, on the staff of a State treasury maintenance of military roads or of national highway, the driving of a military truck the management of property by the Courts of wards, and the maintenance of hospital are considered to be acts in exercise of sovereign function and a suit would not lie against the Government of India for the faults of its servants, employed for the above purpose. From a review of series of decided cases, of the Supreme Court arid varies High Courts, would reveal, true import, scope and ambit, the Government is not liable for the sovereign functions.

Non-sovereign Functions

Having thus laid down regarding the non-liability of the State, with respect to sovereign functions, let us consider non-sovereign functions, which make the Government or State or Union vicariously liable.

After Constitution

State of Rajasthan v. Vidyavati, AIR 1962 SC 933

This is the first case after independence involving tortuous liability of State in which the Supreme Court maintained that the State is vicariously liable for the torts committed by its officials.

In this case of Rajasthan, the Supreme Court held, that where the driver of a jeep owned and maintained by the State of Rajasthan, for the official use of the Collector of a district drove it rashly and negligently, while bringing back from the workshop after repairs, and knocked down a pedestrian and fatally injured him the State was vicariously liable for the tortuous act like any other employer. The Supreme Court considered the matter from two angles (1) act done in the course of employment but not in connection with sovereign powers of State. The Supreme Court held 'viewed' from the principle there can be no difficulty in holding that the State should be as much liable for the tort in respect of tortuous act, committed by its servants within the scope of its employment but wholly disassociated from the exercise of sovereign powers like any other employer.

The mere fact that the car was being maintained for the use of the Collector in the discharge of his official duties is not sufficient to take the case, out of the category of cases, where vicarious liability of the employer could arise, even though the car was not being used at the time of occurrence, for any purpose of the State.

Considering the scope of Article 200 of the Constitution. It was held that the second part of the Constitution defines the extent of liability of the State to be used by the use of the words 'in like cases' although the first part of it deals with only the nomenclature of the parties to a suit or proceedings and refers back for the determination of such cases to the legal position before the enactment of Constitution.

The Supreme Court has recognised and has deliberatively departed form the common law, rule that a civil servant cannot maintain a suit, against the crown.

In AIR 1954 SC 245 the right of a Government Servant, for recovery of arrears of salary, it was held '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. As the cause of action in this case arose after the coming into effect of the Constitution in, our opinion it would be only recognising the old established rule going back to more than 100 years, at least if we uphold the vicarious liability of the State. Article 300 of the Constitution itself saved the right of the Parliament or the Legislature of the State to enact such law, as it think fit and proper in this behalf. But so long as the Legislature has not expressed its intention to the country, it must be held that the law is what it has been ever since the days of the 'East India Company'

It therefore follows State is liable for the tortuous acts committed by its servants in the course of its employment just like any other employer.

In Satyavati Devi v. Union of India, AIR 1967 Del. 98

Some AIR Force personnel constitute in Hockey and Basket Ball teams, were carried by an air force vehicle, and due to the negligence of driver, death was caused to the plaintiff's husband. The Delhi High Court rejected the plea taken by the Government, that such physical exercise, were necessary to keep the army in proper shape and trim and such an act, should be considered to be a sovereign act. It was held that since the act of carrying teams to play matches, could be performed by private individual, it was not a sovereign function and, as such the Government was liable.

Union of India v. Sativa Sarma, AIR 1979 J&K 6

The Jammu and Kashmir High Court has held that the driving of military truck to railway station to bring Javans to Union

Headquarters is performing non-sovereign function and, therefore if the respondent gets. injured, while the truck is being so driven, she is entitled to compensation.

Similarly, in Nandram v. Union of India, AIR 1978 MP 209

It has been held, that the act of driving the vehicle in bringing back the military officials, from the place of exercise, to the college of combat, it was a non-sovereign function and the State was liable, for the accident caused by the negligence of the driver. Taking a truck for impairing training to new M.T recruits, cannot be considered to be an act done in exercise of sovereign powers, and as such the military driver, and the Union of India, have been held, liable for the negligence of the driver.

Union of India v. Smt. Jass, AIR 1962 Punj. 315

Carrying of coal of heating rooms has been held to be a non-sovereign function as the same could be performed, even by a private individual and the Government, has therefore been held, liable for the negligence of the driver, of a military truck which carried such coal from the depot to the Army General Headquarters building in Simla.

Union of India v. Bhagavati Prasad Mishra, AIR 1957 MP 159

An accident was caused by the driver of the delivery van of the military farm, whose duty was to supply milk. The milk used to be carried in the military truck for being supplied to the members of the military organizations at a concessional rate and to others at non-concessional rates, In an action against the Union for the negligence of the driver of the delivery van, the M.P. High Court held, that the State was liable, as the act of maintaining the farm could not be considered to be a sovereign function. It was observed "the farm run by the Government was not an undertaking which could be referred only to its sovereign powers, it was an undertaking, which any private person could take to and is indeed in the nature of a business or commercial concern .... It is, therefore, immaterial whether or not the customers belonged exclusively to military organization, but it appears, that the rate without concession was intended for persons who were not members of the military service. We are therefore not inclined to accept the contention that the injury resulted from the 'undertaking of the Government in exercise of its sovereign powers'.

In Pusha v. State of Jammu and Kashmir AIR 1977 (NOC) 277

It has been held that transporting crushed barely for the Defence Department of the Government of India, was not a sovereign function, and, therefore the State is liable for the accident caused in the process,

In Roop Lal v. Union of India, AIR 1972 J&K 22

Some military Jawans found some firewood, lying by river side and carried away the same a way for the purpose of camp fire and fuel, it turned out, that the wood belonged to the plaintiff. The plaintiff brought an action against the Union of India, for the tort of conversion which was alleged to have been committed by its servants. The State was held liable,

Union of India v. Abdul Rehaman AIR 1971 All 162

It has been held that the driving of a water tanker belonging to Border Security Force driver is a non-sovereign function and the State is liable for damages caused by the negligent driving of the tank

AIR 1978 Ker. 43

The principle of State immunity, whether of the territorial State or of the foreign - State is a survival of the period when the sovereign was considered to be above the law. This is no longer the position.

In a republican and democratic form of Government there is no justification for recognizing the archaic theory of sovereign immunity which was founded on the feudalistic notions of justice in England.

In India ever since the times of East India Company the sovereign has been held liable to be sued in tort or in contract, and the common Law immunity never operated in India. Except where special provisions have been made under Constitution (*e.g.*) Article 361, or reasonable classification is made under a statute, treating the State or certain individuals, as special class and conferring upon them special privileges, and exemptions, or immunities against a citizen the State has no right to immunity. The State is not protected from liability for the tortuous act of its servant which is either *ultra vires* statute granting powers under which they purports to have acted or is negligent exercise of such powers.

In others the State is vicariously liable to third parties if such circumstances as would render a private party employer liable. In the instant case the adviser to the Government at the material time was proceeding to Sultan Battery on a private visit after attending a private function at Calicut. The driver of the jeep car escorting the adviser was not performing any act which is referable to the exercise of the sovereign power. There is no evidence to show that the Adviser or the driver of the jeep escorting him was performing any functions which was attributable to an exercise of sovereign power. Therefore the State was vicariously liable for the tortuous act of the driver.

AIR 1976 MP Page 164

The socio-economic and welfare activities undertaken by the modern State are not included in the traditional sovereign functions. Vehicle belong to Primary Health Centre-work of bringing ailing children from a place to hospital is not sovereign functions of the State in case of accident is in negligence of driver, the State is liable vicariously liable.

Government Hospitals

The Supreme Court, in *Bangalore Water Supply Cases v. A. Rajappa*, AIR 1978 SC 548, held the activities undertaken by the Government in pursuit of welfare policies in compliance with Directive Principle of State Policy enshrined in the Constitution were not the part of sovereign functions and therefore the State would be liable for the torts of its employees, committed in the course of doing such acts.

In *Smt. Kalavathi v. State*, AIR 1988 HP 5, the Court in a writ petition for the death of the two patients by administering nitrous oxide gas instead of oxygen due to the negligent connection of pipe in nitrous oxide gas in the operation theatre awarded damages holding the State liable.

Running of Railways

Running of Railways is a commercial function and damages are awarded in case of injury is caused by railway activities.

In Mrs. Constance Jena Wells v. Governor General of India in Council, AIR 1946 Lah

An accident occurred due to the negligence of a railway driver driving it to the station despite the signal not to take there. Mr. *Duncan Wells* was a Fireman in the same engine. He sustained serious injuries due to collision with a goods train and latter on died. His wife claimed damages under the Fatal Accident Act 1885. The doctrine of common employment as pleaded by the Counsel for the Government was held not applicable as the case was covered under Section 3(d) of the Employer's Liability Act 1938. Further the railway was held to be a commercial activity of the Crown in India and no privilege on the ground of 'sovereign immunity could be claimed'.

The Assam High Court took the view that the running of railway was a commercial activity (AIR 1956 Assam 85).

The Supreme Court in *Union of India v. Ladual Jain*, AIR 1963 SC 1681, held running of the railway by the Government of India as a non-sovereign function.

In *Union of India v. Supriya Ghosh*, AIR 1973 Pat. Page 129, the deceased an Inspector in Messers Burmash Shell Oil Storage and Distributing Company of India Ltd was passing by car was hit by passing train at level crossing. The car was smashed and the deceased on his way to hospital being seriously injured, succumbed to the injuries. The gates of the level crossing were not closed and the visibility of the train was not clear due to hanging branches of the tree and headlight of the engine was not working. The damages were claimed under Fatal Accident Act 1855, for expectation of money which he was contributing to his family members. The Government was held vicariously liable for negligence and was liable as was directed to pay compensations directed by the Court.

In *Imaman v. Union of India*, AIR 1976 All. 85, the widow of the deceased was held entitled to damages when he attempted to cross the railway line in order to catch the train as a *bona fide* passenger, having a railway ticket. Since there was no bridge or no other way to reach the platform to catch the train and was killed by the train running at a speed higher than the permissible limit, and there was no warning or whistle by the train to make it know, to the public that the goods train was approaching.

Compensation for AC Failure

The Vishakapatnam District Consumer Form has directed the Railway Authorities as it published in Hindu dated 12.8.2006 under the captain of "Compensation for AC failure", to work out only non-A.C. fare for failure to provide Air coaches and repay the charges along with compensation on account of mental agony and physical hardship and cost of litigation to a consumer for deficiencies of service.

Post Office

In England, it has been held that the Post Office is a branch of revenue and there is no analogy between the common carrier and the Post Office. A person by entreating a Postal packet to the Post Office for transmission overseas does not create a contractual relation between himself and the Post Master General. In India the Law is similar and the position as settled now is that Post Office is not a common carrier.

In Commissioner of Income Tax, Delhi v. P.M. Rathod and Company, AIR 1959 SC 1394, the Supreme Court held that the Post Office as the Agent of the seller if it received the goods, and it was liable to the seller to pay the price recovered from the buyer. The payment the Post Office received is for and on behalf seller. The Post Office is liable to the seller for any damage if it failed to recover the price and deliver the goods.

The Postal Department of the Government cannot be said to be engaged in discharging sovereign functions, of the State, it is a common carrier cum-public utility. Department although the exclusive privilege of conveying postal articles is vested in the Government of India under the Indian Post Office Act 1890. The defense of sovereign immunity therefore cannot be raised if death and injury is caused by a lorry carrying the mail from one Post Office to another (AIR 1970 Mys. 13, *Government of India v. Jeevaraj*).

Vicarious liability of the Government for the act of independent contractor

The Rule of Law, requires the liability of Government for the act of independent

contractor, on the same footing as the liability of any other employer. The vicarious liability of the master extends to the acts, of its servants. A 'servant' is different from 'independent contractor'. A person is said to be a 'servant' (in a contract of service) when the following four indica as laid down by Lord *Thankerton* in short *V.J.* and *W. Henderson* are satisfied -

(1) The master's power to select his servant

(2) The payment of wages or other remuneration by the master

(3) The master's right to control the method of work

(4) The master's right of suspension or dismissal of servant

As regards first, the master and servant relationship is not affected when the employer, is not free to do work himself but he is compelled to employ an agent of particular class provided he has a practical power of selection from a class which is sufficiently large. The notion that the master can control the manner of work is only fiction. A captain of a ship, a pilot of the Air craft or the surgeon in a hospital performs such technical acts that the manner of their functions, cannot be controlled. In a contract of service the employment is part of business, and the person employed works in an integral part of business wherein contract for service the work of the person is only accessory to the business, it is not integral part it. The liability of the employer arises when the act is done by his servant acting within the authority or acting within the course of his employment or acting within the scope of his agency. A wrong is within the scope of his employment if it is expressly or impliedly authorized or done by unauthorized was in doing something it is incidental to doing of an unauthorized act.

The Supreme Court in *State of U.P. v. Avadh Narian Singh*, AIR 1965 SC 360, laid down the tests aforesaid, to determine whether there exists a relationship of master and servant. The master and servant relationship may exist, even in the absence of any one of the four aforesaid tests, provided the power to control the method of work and superintendence exist.

As regards the liability of Government for the act of an independent contractor

The Government's position in England is the same as that of ordinary employer, and therefore we may say the 'Rule of Law' exists there in this field.

The *Peoples Union for Democratic Rights v. Union of Indi*a, AIR 1982 SC 1473, is worth to be mentioned which import the 'Rule of Law' in the field of Governmental liability for the act of an independent contractor. Although this case is on the accountability of Government in the field of contract for the statutory liability as a Principal employer, for the act of independent contractor yet a careful study of the case shows a distinct advancement of judicial trend towards vicarious liability of Government for the act of the independent contractor to ensure the compliance with the fundamental rights, guaranteed to the people.

Vicarious Liability of Government for the act of the borrowed servant

In England Crown Proceeding Act declares the liability of the Crown for its agents or servants. It does not contemplate or declare the liability of that act of Crown for its servants or its agents, since the borrowed servant is not the servant or agent of the Crown the liability of the Government do not extend as a general rule to the act of the borrowed servant.

In *Smt. Kundan Kaur v. S. Shankar Singh*, AIR 1966 Punj 394, a firm gave a truck to a company on a temporary hire for transportation of goods. Due to rash and negligent driving, an employee of the company sitting by the side of the driver was killed in

an accident. It was held firm only liable because the service of the driver had been transferred to the company not the employment and control of the driver.

In *State v. Premabai*, AIR 1979 MP 85, a jeep belonging to UNICF was in possession of and administrative control of the Government for carrying out their applied nutrition programme. Due to rash negligent of the jeep by the driving in the employment, of the State Government in the Raipur Development Block, two pedestrians were killed in accident and for their death the compensations were claimed under Motor Vehicles 1939. The State Government pleaded not liable because the ownership of the vehicle vested in the UNICF and alternatively the State was immune because at the time of the accident, the jeep was engaged the sovereign functions of the State. The Claims Tribunal awarded compensation to the widows of both the deceased killed in accident.

It was held jeep was being driven for-official duty but not in discharge of sovereign functions of the State. It was also held that technically the ownership of the jeep was with the UNICF, but for tie purpose of Motor Vehicles Act, the State Government being in possession of administrative control of the jeep would be deemed to be the owner of the jeep under Section 2(19). The State filed an appeal against the award the M.P. High Court held the Government vicariously liable. The High Court referred to the Supreme Court decisions, *Sitaram v. Santanu Prasad*, AIR 1966 SC 1697 and *Pushpabai v. Ranjit G&P Company*, AIR 1977 SC 1735, in which it was held that the master was liable for a wrongful act authorized by him or a wrongful or unauthorized mode of doing some act authorized by him. The owner is not only liable for the negligence of the driver if driver is his servant acting in the course of his employment but also and driver is within the owner consent driving the car on be owner's business or of the owner's purposes. The Court in this case observed that the holding of the Claims Tribunal was the owner of the jeep for purposes of Motor Vehicles Act was not proper. The Court observed.

"Under the general law of torts, and also under the Fatal Accident Act, the driver is primarily liable for compensation for causing death or injuries by his rash and negligent driving of the vehicle. His master is also vicariously liable for the acts of his servant. Section 110-B only stipulates that the Tribunal shell specify the amount which shall be paid by the insurer of owner driver of the vehicle. His master is also vicariously liable for the act of his servant. The owners liability is not absolute. If the vehicle entrusted to an independent person, the owner cannot be made liable for the act of that independent person or his servant.

Vicarious liability of the statutory Bodies

The 'Rule of Law' requires all the public authorities forming administrative functions under the same liability as any other employer. Happily Article 300 does not apply to the statuary corporations and the companies created by the Government under the Companies Act as this Article lays down the paw of liability of Government. That is the Union of India and the States. The statuory corporations and companies perform besides others, administrative function also and the act under the direct control and supervision of the Government. For the purposes of fundamental rights the corporations and other authorities under the control of the Government or 'State' but for the purposes Article 300 the 'Union of India' and the State mean Central Government and State Governments. However in a broader perspective, the public authorities may be included within the term 'Government' since they also perform administrative functions.

The liability of public corporations for the torts of their servant has been held in a number of cases in the same way as of any

other employer. The corporation which had hired a building which was held liable for damage to building by its employees

Small Scale Industries Corporation v. Bishambar Nath, AIR 1979 All. 35

In another case (*Manohar Lal v. Madhya Pradesh Electricity Board*, AIR 1976 MP 38) a naked copper electricity on a high voltage line snapped between two poles causing the death of a person coming in contact with it. The Electricity Board was held liable for negligence and is held by the Court in such cases to duty care would be on the defendant.

State v. Altaf Ahmal Gani, AIR 2004 NOC 178

Electrocution resulting in burn injuries, negligence on the part of State authorities writ claiming compensation is maintainable. School boy playing volley ball in school ground along with his classmates came in contact with live lines of electric transformer.

Transformer placed at a place which was easily accessible and without barricades or even fence. It is the State duty to see that electric installations are properly fenced. Negligence is ultimately attributable to State cannot to claim immunity by shifting the burden on other. Stale is a liable to pay compensation.

Duty of Zoo Authorities

Nith Walta v. Union of India, AIR 2001 Del. 140

It is the duty of zoo authorities to keep and confine wild animals in zoo in such a manner, that they are incapable of causing danger or injury to visitors.

Wild Life Protection Act

A tiger inside bars suddenly grabbed the hand of a child of three years, through railing and pulled it resulting in amputation of hand and in permanent disability. Negligence of zoo authorities proved compensation of Rs.5,00,000/- was awarded in view of gravity of injury and physical pain and mental agony suffered.

The aforesaid liability of the respondent can easily be couched in legal language.

The basis is the action under torts and it can compartmentally compartmentalized in three different heads

(1) Duty to take care and negligence on the part of the respondent

(2) Liability as keepers of dangerous animals

(3) Liability as occupier of premises, *viz*., Zoological Parks

Duty to take care

Not able to take the required caution and safeguards would clearly amount to negligence and such negligence is actionable.

In *Jay Lakshmi Salt Works v. State of Guzarat*, (1943) 3 JT (SC) 492, the Supreme Court quoted the meaning of negligence as defined by *Winfield* in the following words.

'Negligence as a Tort' is the breach of legal duty, to take care which results in damage undesired by the defendant to the plaintiff.

Therefore though negligence is the duty caused by the emission 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.

C. Chinnathambi v. State of Tamil Nadu, AIR 2001 Mad. 35

The innocent students of school died during school hours by fall of water tank on them. It was held, the school being a Government School it was the duty of School authorities, to see the tank was properly

constructed, and would not be hazardous to lives of children and so the school is vicariously liable.

His Lordship *V.S. Sirupukar* held in Paragraph 5 at Page 36, 'Right' to life enunciated in Article 21, has time and again been recognized by the Supreme Court, and in various ramifications There can be least doubt that the school authorities, were not vigilant to their duties, and this being a Government School, the Government would have a liability and awarded compensation of Rs.1,50,000/- to each of the petitioners.

Assault and Battery

If a person causes assault or battery to another person, he is liable to pay damages, under the Law of Torts, or liable to penalty under criminal provision. The cases frequently happen by the State agencies, in maintaining Law and order resorting to the use of force against human body. The 'Rule of Law' requires the State liability for the wrongful acts of its servants the case of *Peoples Union for Democratic Rights v. State of Bihar*, AIR 1987 SC 355, marks a significant development wherein the Government was ordered to pay compensation to the relatives of the deceased persons at the rate of Rs.20,000/- for deceased in a ruthless firing by the police, on an assembly of poor peasants without just claim of compensation.

False imprisonment

In India, there appears to be no case prior to *Rudul Sahs*, AIR 1983 SC 1086, in which damages might have been awarded against the Government for false imprisonment and detention. The cases are in abundance challenging the legality of detention and the course setting at free the detenues. But recent judicial trend has been heading towards compensatory justice where a person is detained wrongfully or maliciously. In *Rudul Sah* case, AIR 1983 SC 1086 an accused acquitted of murder charge but released only after 14 years from jail due to indifference and negligence was awarded compensation for his rehabilitation and treatment. So in case the detention being *mala fide*, the Government in writ, for the release of the detenu was ordered to pay compensation, because to issue the writ would have been futile, the detenu having already been released (please see *Bhim Singh, MLA v. Jammu and Kashmir*, AIR 1986 SC 494).

The Supreme Court in the aforesaid cases has resorted to compensatory justice, as a means of vindication, of Fundamental Right, to personal liberty which the Court may directly do also in civil suit for damages. Any way, the result brings out the 'Rule of Law' against the malicious, callous, negligence and indifferent administration.

Malicious Prosecution

In case of malicious prosecution the master cannot be held liable vicariously for the act of the servant, bringing the false criminal with malice unless it is authorized by him or the servant has maliciously prosecuted acting within the scope of his authority.

State of Punjab v. Des Raj and others, AIR 2004 P&H 113

Plaintiff filed the suit, against the State of Punjab, for recovery of damages Rs.10,000/- as damages for malicious prosecution, launched against him, under Section 7 of the Essential Commodities Act, and the plaintiff was put under arrest. The case against the plaintiff was a false case filed by Inspector of Civil Supplies Department, who bore grudge against the plaintiff for refusing to comply with the illegal demand of one bag of rice. The plaintiff was honourably acquitted as the allegation against plaintiff accused were false.

'It was observed' it was now too late to hold the State is not vicariously liable for the illegal act, of its agent, particularly when the illegal action of its agent violates the personal liberty' in *State of A.P.*, AIR 2000 SC 2086,

the Hon'ble Supreme Court while accepting the principle of vicarious liability of the State for the illegal acts of its officers and servants as held hereunder.

'The maxim that 'King can do no wrong' or crown is not answerable in tort has no place in Indian jurisprudence where the power vests not in the crown but in the people who elect their representatives to run the Government which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof'

.....so for as fundamental rights and human rights, and human dignity are concerned law has marched ahead, like a pegasis but the Government's attitude continues to be conservative and it tried to defend its action or the tortuous acts of its officers by rising the plea of immunity for sovereign acts or acts of the State which must fail.

In *Lakshmichand v. Dominion of India,* AIR 1955 Nag. 265, the plaintiff who came on a railway station at the time of the departure of the train was maliciously prosecuted by the Asst. Station Master under Section 113 of the India Railways Act knowing that he had no power and after thought he altered the charge under Sections 121 and 122(1) at a time no platform tickets were issued nor was any practice to obtain prior permission of the A.S.M before going to the station. He handed over the plaintiff to the police, and the police prosecuted him out of sheer malice. The Court held A.S.M liable for damages but the Union of India was held not liable as the act could not be said to have been done in the execution of duty.

Trespass

The 'Rule of Law' requires a Governmental liability for trespass like any other ordinary individual's liability. The Government would be liable for trespass provided the act is not in exercise of sovereign 'power or functions' In *Narain v. Garland Norman, Collector of Bombay*, (1868) 5 Bom. HCR OCJ, the Collector prevented the plaintiff from carrying on the blastic operations in a quarry by seizing the implements believing that the property belonged to the Government. The High Court of Bombay approving the Peninsular and Oriental Navigation Company held the Government liable. In *State of M.P. v. Chironjilal*, AIR 1981 MP 65, the Court rejected the claim for the loss of property in a police lathi charge as to maintain law and order, was a sovereign function of the State. But when the injury results in the exercise of non-sovereign functions the Government would be liable to goods whether it is 'detenu' or conversion.

In *Dhian Singh Sobha Singh v. Union of India*, AIR 1958 SC 274, the truck of the plaintiffs were hired by the Government for importing training to military personal. The Government failed to deliver back the trucks and hire money. The Supreme Court held the Government liable to pay their, money value of the trucks and damages for wrongful detention of the trucks.

In *Reopal v. Union of India*, AIR 1972 J&K 23, the military jawans taking away wood of the plaintiff for camp fire caused loss to the plaintiff's property. The Government was held liable to pay damages.

Liability of Government as a Bailee

Under Section 151 of Indian Contract Act, in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence, would under similar circumstances take care of his own goods of the same bulk quality and value, as the goods bailed'

It is on the application of this principle, the Government was held liable when the I.G of Police, allowed a Co-operative Bank to keep its cash box, every evening in Malhakhana and the box was stolen from Malhakhana due to negligence. (AIR 1959 MP)

It was the duty of the Government Officers, to take such care, as every prudent manager, takes his own goods. The Government stood in the position of bailee and it is for them to prove that they had taken as much care as was possible for them and that the damage was due to the reasons beyond their control (AIR 1966 Bombay 134 at 140).

Strict Liability

The rule of strict liability is that a person who brings anything on his land for his own purposes, and collects and keeps it there, is liable if it escapes and does mischief, in *Rylands v. Flecther* the House of Lords approved the law and laid down by *Blackburn*, J., in the Exchequer Chamber *Black* J., of the Exchequer Chamber explaining the rule observed.

"We think the Rule of Law, is, that the person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief it escapes, must keep it in at his peril and if he does not do so is *prima facie* answerable for all damages, which is the natural consequences of its escape". By virtue of Section 2(1) Crown Proceeding Act, Strict liability principle as laid down in *Raylands v. Fletcher*, is applicable to the crown therefore in this respect, we may hold, that the Rule of Law is incorporated in the Act, because of the application of the strict liability principle, to the crown also. However, regarding public authorities the law is different.

It is quite anamolous that the principle of strict liability as laid down in *Rylands v. Fletcher* is applicable to the Crown by the statutory provision where as judicial decisions, exempt the other public authorities, when they act, without negligence, for public benefit. In India it is submitted that the strict liability principle as applicable to ordinary individuals, will apply to the Government, also for acts, of its servants except where the act is the results of exercise of sovereign functions of the State.

In *State of Punjab v. Modern Cultivators*, AIR 1965 SC 17, due to the breach of a canal, the plaintiff's land was in. His case was decreed by the trial Court and the appellate Court but the High Court reduced the damages, awarded by the trial Court. In an appeal the Supreme Court held the defendant liable as the case of breach of canal, the rule of *"res ipsa-loquitor"* applies unless otherwise proved. The plaintiff need not prove negligence to establish his case. The defendant could have proved that the breach was the result of the act of God or of the act of third party but it did not raise any such plea. Moreover the defendant failed to produce the relevant papers, showing the cause of breach which was an evidence of negligence on the part of tie Government the defendant.

It is to be noted, here that the High-Court based its decision on the maxim "*Res ipsaloquitor*" following *Dongue v. Stevanson*. Before Supreme Court, the rule of strict liability as laid down, in *Rylands v. Fletcher* was also sought to be relied but, the Supreme Court refused to apply the principle of that case. According to Justice *Hiadayatulla*, the Principle of *Rylands Fletcher* applies is the words of Lord *Cairns* to "no natural use of land" and in the words of *Blackburn* J. "Special use bringing with its increased dangers to others", Although there is difficulty in distinguishing between non-natural use, and natural use of land canal system was held by him as essential to the life of the nation and use of the land as canal is subject to ordinary use and not to be unnatural use.

In *Kamanatham Magireddy v. Govt. of A.P.*, AIR 1982 AP 119, deserves to be mentioned in this respect. The appellant brought a case, for damages to his orchard, due to percolation of water from a canal on evidence the Court held, the cause decay and finally withering away of the trees, the roots of the trees absorbing excess of water. However the State, was not shown to have violated any specification, for laying canals was not provided in standard specifications, for laying

canals, prescribed in *W.M. Ellis* Book which was relied on by the constrictions. The non-cemented floor, or embankment of the canal was established as negligence, as cementing was not a necessity, in canal constructed the Government did not raise, the plea of exercise of "Sovereign" rights and therefore the plea was to be considered from the general point of law. The law of negligence according to the Courts, is based on tie maxim *"Sicutere two to alinenum leaders"*. (So use your property as not to harm others). Since the Government was shown negligent in laying the canal, it was held not liable to pay the damages "The Court in this case, if instead of stressing the liability on negligence had based the liability on strict liability Principle, the justice would have been meted out to the land owner.

Union Carbides Corporation v. Union of India, (1991) 4 SCC 584

It is also called Bhopal leak case. In this case the dangerous gas methy Iso Cyanate (mis) gas was leaked from pesticides plant situated at Bhopal. It belongs to the Union Carbide Corporation a multi-national company of U.S.A. as a result of such leakage more than 3000 persons died and more than 6,00000 people suffered disability in skin, eyes, respiratory, kidney, heart systems and other complications. The Government of India sued Union Carbide Corporation in Supreme Court of India. After period of four years and as result of settlement between the parties the Supreme Court gave the judgment ordering the defendant to pay the compensation in crores of rupees to the victims and the dependants of the deceased.

In *M.C. Mehta v. Union of India*, AIR 1987 SC 1087, is a case arising out of the leakage of olem gas from a private enterprise wherein the Supreme Court held the enterprise is strictly and absolutely liable to pay compensation without any exception because of extra hazardous to the life and health of the members of the society.

Misfeasance

The tort of misfeasance is committed by a public officer, when either he knows that he has no power to do that which he has done that will injure the plaintiff or when he has acted with malice to harm the plaintiff.

In England by virtue of 2(1) of the Crown Proceeding Act, the crown is liable for the tortuous acts of its servants in course of employment. Therefore regarding misfeasance the liability of the crown would arise if the crown servant has committed misfeasance in course of employment and so we may hold the 'Rule of Law' applicable there in this field.

In India there is no much case Law on this point in *Bhimsingh v. State of J&K*, AIR 1986 SC 494, the Supreme Court did not hesitate to award against the Government an amount of 20,000 towards compensation for a malicious preventive detention of a Member of a the Legislative Assembly of the State when it was clear that in the rung of the Government malice lay although it was not known where.

In *Union of India v. Satpal*, AIR 1969 J&K 128, the plaintiff's goods were seized and disposed of by sale by tie land customs authorities. The sale was malicious it was held the plaintiff it was held could recover the money lying with the Government.

The case *A.D.M. Jabalpur v. Shivakanth Shukla*, AIR 1976 SC 1207, needs to be mentioned here which arose, out of Preventive detention under Maintenance of Internal Security Act 1971, and the rules made thereunder. A number of persons including eminent politicians belonging to opposite party were detained at the behest of the ruling party and their detention were challenged *inter alia* on the ground *mala fides*. The Supreme Court observed Article 21 was the sole repository of the Fundamental Rights and personal to life and personal liberty and when its enforcement had been suspended by the Presidential Order under Article 359

of the Constitution the detention could not be challenged any other way. Effect the judgment in this case is quite relevant to the vicarious liability of the Government as detentions under the aforesaid circumstances although *mala fide* could not have furnished the grounds for civil actions in damages. Fortunately the 44th Amendment of the Constitution taking away the power of the President to suspend the enforcement of Article 21 has removed a great inroad on the 'Rule of Law' and now all the detenues whether during emergency are not, is mollified may fall on the line of *Bhimasingh's* case.

Non-feasance

The Government has a public duty to provide education, which create interest in others. Since public duties do not recognize any right the violation of these duties is not actionable for damages and the violation of these duties by the Government cannot be said as injustice to the individuals, and therefore not anything as the decline of 'Rule of Law' If duty is owed to an individual or to particular class of individuals a right is involved and hence violation thereof is actionable.

In England and New Zealand the crown is not liable for violating public duties as the Law limits the crown liability for a breach of a statutory duty only if it binds the persons other than crown also however the liability is vicarious.

In India Chapter-IV of the Constitution contains Directive Principle of the State Policy. The State is under duty to apply these principles of the State policy the State is under a duty to apply these principles in making and administering laws, as they have been declared Fundamental in the governance of the Country but the Directive Principle are not enforceable.

(Article 37 of the Constitution) As already observed the non-suitability for breach of public duties do not derogate with this Rule of Law if the individual rights are not involved.

In *R. Gandhi v. Union of India*, AIR 1989 Mad. 205, the Madras High Court has shown a distinct advancement and probably this is the first case in India where the Government has been directed to pay compensation for inaction of its agency *i.e.*, the police to protect the properties of the riot victims.

In similar case, in *Inderpuri General Store v. Union of India*, AIR 1992 J&K 11, in a communal raid on 13th January 1989, the properties of the petitioners who were the members of the Sikh Community, were destroyed. The respondents failed to provide protection the Court held, the Government is liable to pay compensation and observed "All the citizens of the Country have the right to carry on any profession or trade within the limits of law and the State is under an obligation to protect their life and property ensuring them all the benefits fundamental rights enshrined under Part-III of the Constitution as and when property as discussed herein above is taken away by any individual or origination, a duty is cast upon the State representing the will of people to compensate the victim by granting adequate compensation. The monarchial rule has to be distinguished for democratic set-up and the State cannot shirk in its responsibility to protect life, liberty and property of citizens. On their failure to protect the life, liberty and property of the citizen State is under a constructional obligations to compensate the victim adequately.

In *Hazur Singh v. Behari Lal*, AIR 1993 Raj. 51 a vehicle taken on hire purchase was seized by the State authorities and then auctioned for some taxes due in respect of other vehicle. The owner of the vehicle brought an action against the purchaser of the vehicle and the State for value of the vehicle. The trial Court held the action is not maintainable against the State on the ground sovereign of sovereign immunity but the High Court held the doctrine of sovereign immunity

would not apply against illegal and arbitrary act. The tax could be recovered by seizing the property in respect of which tax was due or seizing some other property of the owner not of any third person. The deprivation of property was therefore not in accordance with Law. Applying Article 300 the State was therefore held liable by the High Court.

M/s. Kasturi Lal Rajia Ram Jain v. State of U.P., 1965 (2) An. W.R 15 (SC) = AIR 1965 SC 1039

This is the leading case. Laying down the principle, the State is not liable for the tortuous acts committed by its servants, though in course of time the decision had paled into insignificance, and the Supreme Court awarded compensation. In a through a stream of cases, who suffered personal injuries at the hands of officers of the Government including police officers, for their tortuous acts. The Supreme Court while following the first a decision, a leading authority in the case of *Peninsular and Oriental Steam Navigation v. Secretary of State for India* laying down the distinction between sovereign functions and non-sovereign functions, and the concomitant principle the State is not liable for sovereign functions, which principle have been consistently followed by all the judicial decisions in India and held though the act of arrest and detention by the police officers is negligent it is still a sovereign function done in exercise of sovereign power and consequently the State is not liable.

"In the present case the act of negligence was committed by the police officers while dealing with the property of *Ralia Ram* which they had seized, in exercise of statutory powers. Now the power of arrest a person to search him and to seize property found with him, are powers conferred by on the specified officers by statute, and in the last analysis, they are powers, which can be properly characterized as sovereign powers and so there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of employment but the employment in question being of the category which can claim special characteristics of sovereign power the claim cannot be sustained and so we inevitably hark back to what Chief Justice *Peacock* decided in 1861 and we hold the present claim is not sustainable.

It is already *Kasturi Lal* is bypassed and it will be dealt with how it is bypassed at the appropriate paragraphs.

It is opined among the legal circles that this case had not correctly interpreted the concept of sovereign function and it is also commented that this case wrongly interpreted the "Acts of State" as defined by Sir, *Barnes Peacock*. The Supreme Court did not use the vague concept of sovereign and non-sovereign function in deciding the ambit of Section 244(1) of Municipalities Act, and held the State is liable for the damages for illegal acts of its servants (Please see *Lala Bishambernath v. Agra Nagar, Mahapalika*). In view of the socio-economic, context in India, *K.K. Mathew*, J., pleaded for discarding the feudalistic doctrine of sovereign function (Please see *Shyamasunder v. State of Rajasthan*, AIR 1974 SC 890, a case decided under Fatal Accidents Act.)

In the absence of due care, to protect the property, the Court can order payment, of the value of property in order to meet the ends of justice (*Basava K.D. Patil v. State of Mysore*, AIR 1977 SC 1749) The scintillating Statement of *Bhagavati*, J., that as to why the Courts should not be prepared to forge new tools, and device new remedies, for the purpose of vindicating the precious fundamental rights, to life and personal liberty (*Kharti II v. State of Bihar*, AIR 1981 SC 928) has inspired the legal position though paving way for awarding compensation, and it provided compensation for illegal detention in *Rudalshah v. State of Bihar*, AIR 1983 SC 1086. The ever increasing abuse of process by the Public Authority, and arbitrary interference

with life and liberty of the citizen came to be recognized by the Court, and held, such infringements to be wrong in public law and State was held liable to compensate the victims.

Bhimsingh v. State of J&K, AIR 1986 SC 494

Sebeastain M. Hongray v. Union of India, AIR 1984 SC 1026

Saheli A Women's Recourse Centre v. Commissioner of Police, AIR 1990 SC 513

State of Maharashtra v. Ravikanth Patil, (1991) 2 SCC 373

Adverting to private hospitals, though they are not amendable to the discipline of Part-III of the Constitution, private/ Corporation, hospitals, also should be made responsible on par with the Government Hospitals in paying compensation when the right to life is meddled with. In this connection, the decision of the Supreme Court, in *Pt. Paramand Katara v. Union of India*, AIR 1989 SC 2039, is worth mentioning. In this case the Supreme Court, directed private doctors, and hospitals to extend service to protect the life of the patient. Hence they are bound by these directions under Articles 32 and 142 of the Constitution (AIR 1995 SC 922)

Negligence as Tort

Negligence is a tort which involves a personal breach of duty that is imposed on him to take care resulting in damage to the complainant. The emphasis on the negligence of doctors and Hospital Authorities making the State vicariously liable. The job of the doctor is very vita one as they deal with human beings. A lapse of the doctor may cost the patient very dearly. Therefore the doctors should discharge their responsibilities meticulously and if they do not, medical negligence litigation will result. In a doctor-patient relationship, the patient is entitled to services from the doctor in such a degree of professional skill and expertise, as would be expected from such a medical practitioner of similar qualification and standard. In case the service availed is that from one who claims to be or is qualified specialist then the degree of skill required to be exercised will be more. Hence medical negligence basically means, such negligence resulting from the failure on the part of the doctors to act in accordance with medical standers in vogue which are being practised by an ordinary and reasonably competent doctor practising the same art. When a doctor agrees to treat the patient it is implied that he possess the required skill and knowledge but he is not liable for things beyond his control, especially the un-expected developments, and inherent risks, associated with medical cases. Negligence can also occur if any Doctor attempts, to handle cases beyond his competency or training. Thus negligence is obviously the absence of minimum skill or standard of medical attention expected of a competent doctor. The negligent doctor cannot be allowed to go unpunished. He has to pay for acts of commission or omission. At present doctors are amenable under Consumer Forums.

When a doctor is negligent and as a result of such negligence, a person suffers. Injury or dependents of such person suffer pecuniary and non-pecuniary damages, due to the death of the person, due to negligence adequate compensation has to be awarded. The remedy to claim compensation in negligence by doctors is essentially common law remedy. Further after Consumer Protection Act, 1986, and in view of the judgment of the Supreme Court, in *Indian Medical Association v. P. Shantha*, (1995) 6 SCC 651 even doctors come within the ambit of Consumers Protection Act.

In cases of this nature can there be remedy in public law it is no more *res integra* that for violation of fundamental rights guaranteed under Article 21 of the Constitution of India, public authorities, officials, and State are liable to pay compensation. In a given case it is always competent to public law Courts in India exercising powers under Articles 32, 136 and 226 of the Constitution of India to

award compensation in public law. Such compensation is only by way of applying balm to injury suffered by the person or the victim. Such remedy is in addition to the remedy in tort in private law. It is also well settled that depending on the gravity of carelessness, and negligence, the Court exercising public law powers, can always award exemplary costs by way of compensation. Even in such an event such public law redressal of the grievance is not by way of supplanting leaving the persons or victims to avail remedies in private law.

Liability Government Hospitals and Breach of Right to Life

The Constitution of India envisages, the establishment of welfare State at the federal as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare and promote the propriety and well-being of the people, according to Article 38 of the Constitution which requires, the State, to secure a social order for the promotion of welfare of the people.

Article 38 of the Constitution

"(1) The State shall strive to promote the welfare of the people by securing and protecting as effective as it may a social order in which justice. Social economic and political shall inform all the institutions of the national life

(2) The State shall in particular, strive to minimized the inequalities in income and endeavour to eliminate inequalities in status, facilities, and opportunities, not only among individuals but also among groups of people residing in different areas, or engaged in different vocations."

The idea of welfare State can only be achieved if the State endeavour's to implement the directive principles with regard to the sense of moral duty. The directive principles are contained in Part-IV of the Constitution. Though they are non-enforceable and as per Article 37, they are still fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. The directive principles impose certain obligations, on the State to take positive directions in order to promote the welfare of the people. Providing adequate medical facilities for the people ensuring their sound health is an essential part of the obligations undertaken by the Government in a welfare State.

Article 47

Article 47 imposes an obligation on the State to raise the level of nutrition, standard of living and improve pubic health. The Government discharges this obligation, by running hospitals and health centers which provide medical care to persons seeking to avail of those facilities.

Emphasing the need to provide medical facilities for improving the general standards of health of workman consisting with human dignity and right to personality (Please see Article 47) the Supreme Court of India, in *I.E.S.C. Limited v. Subashchandra Bose*, AIR 1992 SC 573 at 585, observed that right to health is a fundamental and human right to the workmen. Health is thus a State complete physical, mental and social well-being. Health is wealth and strength to workmen which is an integral fact of right to life. In *Consumer Education and Research Center v. Union of India*, AIR 1995 SC 922 at 940, the apex Court went a step further by holding right to health and medical care a fundamental right under Article 21 read with Articles 39(e), 41 and 47 of the Constitution so as to make life of the workmen meaningful and purposeful. Again the Supreme Court in *Kirloskar Brothers Ltd's*, (please see AIR 1996 SC 3261 at 3264 and *State of Punjab v. Mohinfesigh*, AIR 1997 SC 1225) referred and relied on the above two cases, for reinstating the position that health and medical care is a fundamental right of a workman. Denial of the facilities denudes a workman's finer faces of life violating Article 21 of the Constitution. Article 21 of the Constitution imposes an obligation on

the State to safeguard the right to life of every citizen. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and Medical Officers employed therein are duty bound to extend medical assistance for preserving human life. In this context, it should not be forgotten that the Government hospitals, are public institutions discharging public functions and rendering noble service to the humanity. However due to the negligence and callous attitude of the doctors of Government hospitals timely medical treatment to a person in need of such treatment is not available. Consequently precious human life, is put in jeopardy. It is disheartening to note that in recent time, there is flagrant and frequent deprivation of right to life guaranteed under Article 21 of the Constitution by the State run hospital/doctor. A Four tire question arises,

(1) Are these hospitals doctors licensed to invade and take away right to life

(2) Are they not accountable: to general public for their professional negligence or to go scot free?

(3) In other words, do the persons whose right to life is infringed have no redress in terms of monetary compensation within the Constitutional Scheme ?

(4) Are the Courts under the Constitution are incompetent to award monetary relief for the breach of public duty by the State in not preserving right to life; which falls within the sphere of private law jurisdiction.

The solution for all these questions are, lies in public law jurisdiction of the Constitutional Courts, known for activist creative, and innovative interpretative skills and techniques

Right to Life : The Rule of Judicial in Evolution of compensatory Jurisdiction :

Whenever there is a question of violation of fundamental rights particularly right to life, the rule of Courts now-a-days, is no more the protector and custodian of the indefeasible rights of the citizens as they used to be previously. The Courts are now empowered to proceed further and give compensatory relief, under public law jurisdiction, with the Constitution scheme, for the wrong done due to the breach of public duty by the Stats in not preserving the life or liberty of the citizen. Award of compensation for breach of Article 21 of the Constitution is therefore not only to civilize public power, but also to assure the citizens. that they live under a legal system where in their rights and interests are protected and preserved. Further the Courts have the obligations to satisfy the social aspirations, of the citizens. Since the Courts and the law, are for the people they are expected to respond to their aspirations"

Public law proceeding serve a different purpose than the private law proceeding. The primary source of public law proceedings, stems, from the pre-rogarative writs and the order for the monetary relief is therefore to be read. Into the powers of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution. Hence the grant of compensation for the violation of Article 21 is an exercise of the Courts, under the public law. It is for penalizing the wrongdoer and fixing the liability for the public wrong on the State, which failed in the discharge of its public duty to protest fundamental human rights, of the citizen (please see *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960). Though there is no express Constitutional provision for grant of compensation when right to life is violated the Supreme Court has judiciously evolved, the Constitutional remedy by way of compulsion of judicial conscience. This is the only effective remedy to apply as balm to the wounds, and give much solace to the family members of the aggrieved or victim. It is the only practical mode of enforcement of the fundamental right, with a view to preserve and protect the rule of law.

It was in *Rudul Sah v. State of Bihar*, AIR 1983 SC 1086, the Supreme Court for the first time set up an important landmark in India Human Right jurisprudence, by articulating compensatory jurisdiction for infraction of Article 21 of the Constitution. Since then the Apex Court, in a catena of cases.

(a) *Sebastian M. Hongray v. Union of India*, AIR 1984 SC 1026,

(b) *Bhimsingh v. State of Jammu and Kashmir*, AIR 1986 SC 494

(c) *Saheli, A Women's Resources Centre v. Commissioner of Police*, AIR 1990 SC 513

(d) *State of Maharashtra v. Ravikant*, 1991 AIR SCW 871

(e) *Mrs. Sudha Rasheed v. Union of India*, 1995 (1) Scale 77

(f) *Smt. Kewal Pati v. State of U.P.*, 1995 AIR SCW 2236

(g) *Peoples Union for Civil Liberties v. Union of India*, AIR 1997 SC 1203

awarded monetary compensations as and when the conscience of the Court was shocked. However the Court in the Saheli came to the rescue of the State Government by showing a way to recover compensation so paid from the recalcitrant officials without resources, to vicarious liability. The Court in *Nilabati* made it very clear that the doctrine of sovereign immunity has application to the Constitutional system and is no defence to Constitutional remedy under Articles 32 and the 226 of the Constitution. The Court further fixed strict liability as the basis in public law in award relief when the right to life is violated, influenced by these judicial trends several High Courts, echoed the same sentiment when faced with similar situations. It is to be noted that a similar approach has been adopted by the Courts of Ireland and the privy council while interpreting the Constitution of Trindad and Tobago the Court of appeal in New Zealand Biagent case relied on the judgments of the Irish Courts and the privy council and referred to the law laid down in *Nilabati Behara* of the Supreme Court in India.

Medico Legal Cases

One can witness in a professional negligence case (AIR 1989 HP 5, *Smt. Kalavathi v. State of H.P.*) the Division of H.P. High Court observed under, Article 21 of the Constitution interim compensation to the dependants of the each deceased where the death of the patient was due to the negligence of the Government hospital staff. In the instant case two patients (petitioners) died as a result of administration of nitrous oxide instead of oxygen at the time of performance surgical operation upon them. On account of negligence on the part of the staff of the Government hospital. It is submitted that such a course of action on the part of the Court would not only help in protecting and enforcing right to life but also prevent its violation in future. Further the amount of compensation awarded by the Court is highly useful to alleviate the suffering of the families of the deceased.

In Dr. (Kumari) Tubassum Sultana v. State of UP in the Allahabad Court awarded AIR 1977 All 177

The Allahabad Court awarded compensations to a lady victim aged about 18-19 years, married only a couple of months ago operated on in voluntary tubectomy under Government sponsored planning family scheme. It was unfortunate that the lady was treated like an animal and then dragged to the operation table to get butchered her motherhood due to the negligence of the Government officials. The State Government was directed by the Court to recover the said amount from salary of otherwise of the employees if they are found guilty during departmental proceeding. The State Government also directed by the pragmatic Court, to take all necessary steps, for the re-cananlysing operation and to bear entire expenses.

Paschim Banga Kheta Mazdoor Samity v. State of Bengal, AIR 1996 SC 2426

The Supreme Court in its momentious decision was promoted to hold in the above decision, the view that denial of emergency medical aid the petitioner due to non-availability of bed by the Government hospital amounted to violation of Article 21 of the Constitution. The Supreme Court in the instant case also issued necessary directions, to the Central and State Government for ensuring availability of proper medical facilities to deal with the emergency cases. The Court further went on to the extent of saying that the Constitutional obligations, imposed on the State cannot be abdicated on the ground of financial constraints. This is a welcoming development in the medical field which would go a long way in keeping Government doctors, more responsible and accountable to the general public so that would try to live upto the expectation of the latter charge.

Settled position

The law with regard to medical negligence is settled. A doctor is not guilty of negligence if he has acted accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art. It is for the expert doctor to decide what type of treatment should be and decide or not the duty of the doctor or a hospital is expected to take responsible care in administration of treatment. They cannot be condemned in case of misadventure.

It is also to be remembered that medical negligence is a complicated subject the liability of the doctor always depends upon the circumstance, of a particular case.

In Poonam Verma v. Ashwin Patel and others, 1996 (4) ALD (SCSN) 12

The apex Court held, that negligence as a tort is the breach of duty caused by omission to do something which a reasonable man would do, or doing some thing which a prudent and reasonable man would not do.

In Achutrao Haribhau Khowda v. State of Maharashtra, 1996 (2) ALD (SCSN 15) the Apex Court held 645

"A Doctor will not be guilty of negligence if he acted in accordance with the practice accepted as proper, by a responsible body of medical men skilled in that particular art and if he has acted in accordance with such practice then merely because there is a body of opinion that takes a contrary view will not make him liable for negligence.

Government Hospitals and Doctors

Duties of Doctors

Dr. Lakman Bal Krishna Joshi v. Dr. Trimbak Bapu, AIR 1969 SC 128

The Supreme Court dealing with a case of death of the son of the claimant which was due to the shock resulting from reduction of the fracture attempted by the doctor without taking the elementary caution of giving anesthesia, laid down the following as the duties of the doctor towards the patient.

The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes, that he is possessed of skill and knowledge, for the purpose. Such a person when consulted by a patient, owes him certain duties

(1) duty of care in deciding whether to undertake the case

(2) a duty of care in deciding whether treatment is to be given

(3) or duty of care in administration of that treatment.

A breach of any of the duties, gives a right of action, for negligence to the patient. The practitioner must bring a reasonable to his task a reasonable degree of skill and knowledge, and must exercise, a reasonable degree of care. Neither the very highest nor

a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires"

These principles were again applied by the Supreme Court in the case of *A.S. Mital v. State of U.P.*, AIR 1989 SC 1570. In this case irreparable damage had been caused to the eyes of some of the patients, who were operated upon at an eye camp. The Supreme Court had observed "A mistake by a medical practitioner which no reasonably competent and a careful practitioner would have committed is a negligent one." The Court also took note that the law recognizes the dangers which are inherent in surgical operations and that mistakes will occur, on occasions, despite the exercise of reasonable skill and care.

The Court further quoted Street on Torts (1983) 7th Edition wherein it is stated that the doctrine of *lis-res ipsa lequiter* was attracted. "When an unexplained accident occurs from a thing under the control of the dependant, and medical and other expert evidence shows that such accidents would not happen if proper care were used, there is at least evidence of negligence for jury."

The skill of medical practitioner differs from doctor. The very nature of the profession is such that there may be more than one course of treatment, which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he had performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient as a doctor acts in a manner witch is acceptable to the medical profession and the Court finds that he has attended on the patient with due care, skill and if the patient still does not survive or suffers, a permanent ailment, it would be difficult to held the doctor to be guilty of negligence.

In cases where the doctors act not carelessly and in a manner which is not expected of a medical practitioner, then in such a case action torts should be maintainable. It was held in *Laxman's* case (AIR 1969 SC 128) by the Supreme Court, a medical practitioner has various duties towards his patient and he must act within a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This least which a patient expects from a doctor.

Vicarious Liability of the State

Achutarao v. State of Maharashtra, AIR 1996 SC 2377

The facts are that *Chandrkabai* was admitted to the Government Hospital where she delivered a child on 10th July 1963. She had steeliest operation on 13th July, 1963. This operation is not known to be serious in nature, and in fact was performed by under local anesthesia. Complications arose, thereafter which resulted in a second operation being performed on her on 19th July 1963. She did at survive for long died on 24.7.1963. Both the doctors Dr. *Divan* and Dr. *Purandare* have stated that the cause of death was peritonitis. In a case like this, the doctrine of *res ipsa lequiter* clearly applies. *Chandrika Bai* had a minor operation on 13th July 1963 and due to the negligence of one of the doctors, a mop (towel) when left inside her peritoneal cavity. It is true that in a number of cases the foreign bodies are left inside the body of human being either deliberately, as in the case of orthopaedics operations or accidentally no harm may befall the patient but it also happens that complications can arise, when the doctor acts without due care and caution and leaves a foreign body inside the patient after performing the operation and it suppurates. The formation of pus leads no doubt that the mop left inside the abdomen caused with it was the pus formation that caused all the subsequent difficulties. There is no escape from the conclusion that the negligence in leaving the

mop in *Chandrika's* abdomen during the first operation led, ultimately to her death But for the fact, that a mop was left inside the body the second operation on 19.7.1963 would not have taken place. It is the leaving the mop inside the abdomen of *Chandrikabai*, which led to the developments of peritonitis leading to her death. She was admitted to the hospital on 10.7.1963 for a simple case of delivery followed by sterilisation operation. But even after normal delivery she did not come out of the hospital alive under circumstances in the absence of any valid explanation by the respondents which would satisfy the Court that there was no negligence. On their part there cannot be any hesitation in holding that *Chandrikabai* died due to negligence of doctors.

It was held once death by negligence in hospital is established, the State would be liable to pay damages. The Supreme Court while considering the liability of the State vicariously reviewed the entire law and the principles established in AIR 1962 Rajasthan 933. *State of Rajasthan v. Vidyawati* and in contra-distinction to *Kasturi Lal's* case AIR 1965 SC 1039 at Page 2380 in Paragraph 10 and it is profitable to extract the same as hereunder

In *State of Rajasthan v. Vidyawati*, AIR 1962 SC 933, the question arose, with regard to the vicarious liability of the State of Rajasthan. In that case a vehicle owned by the State of Rajasthan which was being given by its driver met with the accident resulted in the death of one person, that death was caused due to the negligence of the driver. The two contentions of the State of Rajasthan were under Article 300 of the Constitution the State would not be liable as the corresponding Indian State would not have been liable. If the case had been arisen before the Constitution came in to force secondly. It was contended that the jeep which was driven rashly and negligently was being maintained by the State in exercise of sovereign powers and was not a part of the commercial activity of the State. Rejecting the said contention this Court held that "The State should be as such liable for tort in respect of a tortuous act committed by its servants, within the scope of his employee and functioning as such as any other employer".

This question again came up for consideration in *Kasturi Lal v. U.P.*, AIR 1965 SC 1039 and which has been referred to by the High Court in the present case, while coming to the conclusion that the State of Maharashtra cannot be held liable vicariously. In *Kasturi Lal's* case gold had been seized and the same had been kept in a malkhana and the applicant demanded the return of this gold but the same was not returned. It appeared the same had been misappriated by the person in charge of malkhana. The respondents therein claimed that it was not a case of negligence by the police and even if negligence was proved the State could not be held to be liable for the said loss. While holding there was negligence, on the part of the police officers. This Court denied relief, by observing, that the powers which were exercised by the police officers could be properly characterized as sovereign powers and therefore the claim could not be sustained. This Court distinguished the decision in *Vidyawati's* case by observing. In dealing with such cases, it must be borne in mind, that when the State pleads immunity against claims, for damages, resulting from injury caused by negligence, acts of its servants the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld the Court must always find that the impugned act was committed in the course of an undertaking or employment, which is referable to the exercise of sovereign power or to the exercise of delegated sovereign power.

Explaining the distinction between the two types of cases, it was observed as follows. "It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when in pursuit of their welfare ideal the Government of the

States as well as the Government of India, naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of Governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power so that if acts are committed by Government employees in relation to the other activities which may conveniently be described as non-Governmental or non-sovereign citizens who have a cause of action for damages, should not be precluded from making their claim against the State. That is the basis on which the area of State immunity against such claims must be limited and this is exactly what has been done in its decision in the case of State of Rajasthan"

Two recent decisions where the State has been made held to be vicariously liable on account of the negligent acts of its employees are those of *N. Nagendra Rao and Company v. State of A.P.*, (1994) 6 SCC 205; *State of Maharashtra v. Kanchanamala Vijiya Singh*, 1995 AIR SCW 3684.

In *Nagendra Rao* case, some goods have been confiscated pursuant to an order passed under Section 6-A of the Essential Commodities Act 1955. The said order was annulled but due to the negligence of the officers concerned goods were not found to be of the same quality and quantity which were there at the time of its confiscation. The owners of the goods refused to take delivery and filed a suit claiming value of the goods by way of compensation. The High Court of A.P. held that the State is not vicariously liable for negligence of its officers in charge of its statutory duties. Negativing this the Supreme Court while allowing the appeal observed at Page 235 as follows.

"In welfare State, functions of the State, are not only defence of the country or administration of justice or maintaining law and order but 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 in alienable functions of a Constitutional Government the State cannot claim any immunity. The determination of vicarious liability of the State being linked with the negligence of its officers, if they can be sued personally for which there is no death, of authority and the law of misfeasance in discharge of public duty having marched ahead. There is no rationale for the preposition that even if officer is liable the State cannot be sued. The liability of the officer personally was not doubted. The liability of the officer personally was not doubted even in Viscount Canterbury. But the crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated, and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally then there is no reason to held that it would not be maintainable against the State"

Kanchnamala Vijiyasingh case
1955 AIR SCW 3684

A similar view has been taken in the above case, dealing with a claim for compensation arising as a result of an accident with a jeep belonging to the State. It was observed as follows

"Traditionally before Court directed payment of tort compensation the claimant had to establish the fault of the person causing injury or damage. But of late, it shall appear, from different judicial pronouncements that the fault is being read as because of someones negligence or carelessness. Same is the approach and attitude of the Courts while judging the vicarious liability of the employer.

Negligence is the omission to do something which a reasonable man is expected to or a prudent man is expected not to do. Whether the facts and circumstance of a particular case the person causing injury to the other was negligent or not has to be examined on the materials produced before the Court. It is the rule that the employer though guilty of no fault himself is liable for the damage done by the fault or negligence of his servant acting in the course of employment. In some case it can be found that an employee, was doing an unauthorized act. In an unauthorized but not a prohibited way. The employer shall be liable for such act, because such employee was acting within the scope of his employment and in so acting done something negligent or wrongful. A master is liable even for acts which he has not authorized provided they are so connected with acts which he has been so authorized. On the other hand, if the act of the servant is not even remotely connected within the scope of employment and is an independent act, the master shall not be liable responsible because the servant is not acting in the course of his employment but has gone out-side"

Running Hospital

Running hospital is a welfare activity undertaken by the Government but it is not an exclusive or activity of the functional activity of the Government so as to be classified as one which could be regarded as being in exercise of sovereign power. In *Kasturi Lal's* case, AIR 1965 SC 1039, itself, the Supreme Court noticed that in pursuit of the welfare deal the Government may enter into many commercial and other activities within have no relation, to the traditional concept of Governmental activity in exercise of sovereign power. Just as running of passenger buses, for the benefit of general public is not a sovereign function. Similarly the running of a hospital, where the members of the public, can come forward for treatment, cannot also be regarded as being an activity having a sovereign character. This being so the State would be vicariously liable for the damage which may become, payable on account of negligence of its doctors or other employees.

Having thus stated the duties of the doctors towards the patients, and the principles laid down in AIR 1969 SC 128 and the vicarious liability of the State for the negligence of the doctors and the, Hospital Authorities, let us now survey the law that impinge on the negligence of doctors.

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The Hospital authorities were held liable vicariously for supplying the inferior quality of surgical instruments for purpose of carrying on the operation and an amount of Rs.1,50,000/- was awarded as compensation.

State of Haryana v. Santra, AIR 2000 SC 1888

This is a case, where compensation was claimed for the birth of a child, even after sterilization operation under P.P.S. Scheme dealing with the State liability, the Supreme Court held as follows

"The contention as to the vicarious liability of the State for the negligence of its officers in performing the sterilization operation, relying on the stream of case-law, AIR 1999 SC 2979 and AIR 1996 SC 2377 the theory of sovereign immunity was rejected."

Dr. L.B. Joshi v. Dr. Triambak Bapu, AIR 1969 SC 128

Explaining the nature of care, and duty, in the medical profession the SC Court observed in the above case, "The petitioner must bring to his task, a reasonable degree of skill and knowledge, and must exercise reasonable degree of care. Neither the very highest, nor a very low degree of care and competence judged in the particular circumstance of each case, is what the law requires. The doctor no doubt has a discretion in choosing treatment which he proposes to

give to the patient and such discretion is relatively ampler in cases of emergency.

In the above mentioned case, the son of the respondent aged about 20 years, met with an accident, on a beach, which resulted in the fracture of the femur of his left leg. He was taken to the appellant's Hospital for treatment, what the appellant did was to reduce the fracture and he did not give any anaesthezation to patient but contended himself with a single dose of morphi injunction. He used excessive force, in going through this treatment, using three of his attendants, for pulling the injured leg of the patient. He then put the leg in plaster of paris splints. The doctor was held guilty of negligence.

Philip India v. Kunju Punnu, AIR 1975 Bom 306 at 312

The plaintiff's son who was treated, for illness, by the defendant's company doctor, died. The plaintiff in her action contended that the doctor was negligent, and has given wrong treatment. The following observations from Lord Nathan's Medical Negligence 1957, Page 22 was quoted "The standard of care, which the law requires, is not an insurance against accidental slips. It is such degree of care, as a normally skilled, member, of the profession may reasonably be expected to exercise, in actual circumstances of the case in question. It is not every slip or mistake which imports negligence. It was held that the plaintiff could not prove that the death of her son was due to the negligence of the doctor and therefore the defendants could not be made liable.

Ram Bihari Lal v. Dr. J.N. Srivastava, AIR 1985 MP 150 (D.B)

In this case, the plaintiff-1 is the Collector at Shahdol. His wife *Kantidevi* aged 32 years, get abdomen operation. The defendant Dr. *J.N. Srivastava* who was Civil Asst Surgeon started her treatment and when the treatment did not respond, the defendant advised plaintiff-1 that it was to be operated for appendicitis, to which the latter and his wife reluctantly agreed. The patient was put under chloroform anesthesia on incision; the appendix was found to be normal and not at all inflated. The defendant made another incision and removed the gall bladder of the patient without taking the consent of the husband for the same. Although he had been waiting outside the operation theatre. The liver and the kidney of the patient which were already damaged, had been further damaged, due to the toxic effects, of the chloroform and as a consequence of the same, the patient died. On the third day of operation it was found that the operation was preformed in that ill-equipped hospital having no aesthetical and other basic facilities like oxygen and blood transfusion and without carrying on the necessary investigation like urine test, which are necessary for carrying out any major operation, and without preparing the patient, for the operation. Moreover the second operation for removing the bladder, was performed without the consent of the patient's husband, who was available, though the gall bladder, was gang senous nor was there any pus formation and therefore it was not a case of emergency and it took hours be :ore the completion of operation when the patient was under the effect of chloroform. Reversing the Single Bench decision, it was held by the Division Bench that the patient died due to rash and negligent act of the surgeon and therefore ho was liable for damages and the State too vicariously.

Dr. T.T. Thomas v. Elisar, AIR 1987 Ker. 42

It was held by the Kerala High Court that failure to perform emergency operation to save the life of a patient amount to doctor's negligence

Rajmal v. State of Rajasthan, AIR 1996 Raj. 80

There was no negligent on the part of the doctor who conducted the operation but still the *State v. Government* was made liable due

to the lack of adequate facilities in the from of proper equipment as well as qualified and trained anesthetist. State Government was made liable

Indian Medical Association v. V.P. Shanta, AIR 1996 SC 550

The Supreme Court recognized the liability of the medical profession for their negligence and held the liability to pay damages for such negligence was not affected by the fact the medical practitioner are professionals, and are subject to disciplinary control of the Medical Council.

Dr. P. Narasimharao v. G. Jayaprakasu, AIR 1990 AP 207

The plaintiff a brilliant student of 17 years, suffered irreparable damage in the brain due to the negligence of the surgeon and the anesthetists. In this case proper diagnosis was not done, and if the surgeon had not performed operation. There is very possibility of the patient being saved from the brain damage. The anesthetist was also negligent insofar as he failed to administer respiratory resuscitation by oxygenating the patient with a mask or bag which is an act *per se* negligence in the circumstance. He exposed the patient to room temperature for about 3 minutes and this coupled with his failure to administer fresh breaths of oxygen before the tube was removed from the mouth of the plaintiff had resulted in respiratory arrest, these are foreseeable factors. The plaintiff was therefore held entitled to claim compensation, State was also held liable vicariously.

NEGLIGENCE OF PUBLIC AUTHORITIES VIS-A-VIS VICARIOUS LIABILITY OF STATE

Principle regarding the liability of public authorities the public authorities are liable for positive action (misfeasance) but not for (non-feasance) and ordinarily principle of the law of negligence, applies to public authorities also

Rajkot Municipal Corporation v. Manjulben Jayantilal and others, 1997 (1) CCC 324 SC

The question fell for consideration whether the Municipal Corporation is liable in tort, for negligence, in causing death of one *Jayantilal*, due to the sudden fall of a tree, while he was passing on the road in the compound of Collectorate, on his way to attend to his duties, as a clerk in the Office of the Director of Industries?

The facts of the case are in a narrow campus

The deceased *Jayantilal* while he was walking on the foot path on way to his office, a road-side, tree suddenly fell on him as a result of which he sustained injuries, on his head and other parts of the body and later died in the hospital.

Suit was filed claiming damages and the trial Court decreed the suit for Rs.45,000/- finding that the Corporation, had failed in its statutory duty, to check the healthy condition of trees, and to protect the deceased from the tree falling on him resulting in his death.

The Division Bench has held, that the Corporation has statutory duty to plant trees, on the road sides, and also the corresponding duty, to maintain the trees, in proper condition. While the tree was still in condition. It had suddenly fallen on the deceased *Jayanthi Lal* who was passing on the foot path. The statutory duty gives rise to tortuous liability on the State and its agent the Corporation being a statutory authority was guilty of negligence on its part in taking care to protect the life of the deceased.

It is contended by the Corporation that it is difficult for the corporation to inspect every tree to find out whether it is in healthy condition or decaying condition. The standard of care is not as high as in the case of breach of statutory duty as the case where by positive acts the Corporation created a thing, which is dangerous and failed to prevent such danger which caused damage to others. The

Corporation could not foresee that a tree would fall all of sudden when *Jayanthi lal* was passing on the footpath. There is no reasonable proximity between the duty of care, and the doctrine of neighbourhood laid down by the House of Lords in *Dongue v. Stevenson.*

The Supreme Court after referring to several standard, Text Book Law on Torts and also considering the neighbourhood principle as laid down in the *Dongue v. Stevenson* has formulated the following principles or requirements must be satisfied before a duty or care is to exist.

1. foreseeability of the damage

(1) a sufficiently proximate relationship between the parties and

(2) evenwhere (i) and (ii) are satisfied it must be just and reasonable to impose such a duty *Michale A Jones* (Fourth Edition) 1995, at Page 30 was stated about the relationship of foreseeability and proximity thus:

"The concept of foreseeability *i.e.*, what a hypothetical reasonable man would have foreseen in the circumstances is ubiquitous in the tort negligence.

It was held that the corporation or tie authority is not liable to be sued for tort of negligence since the causation two remote novus actions inconvenience snaps the limit and therefore it's difficult to establish lack of care resulting in damage and forcibility of damage it is difficult to for see that a tree would fall on him in. The condition in India have not developed to such an extent that a Corporation can take constant vigil by testing the healthy condition of the trees in the public places road-side highway frequented by therein no passerby duty regular supervision thereof under though the local authority other authority owner of a properly is under a the is no duty to maintain plant and maintain the tree. There would the Causation the accident is too remote. Consequently, there would be no common Law right to file a suit for tort of negligence"

It is clear from the narrations of facts, the issue was regarding the omission on the part of the local authority to remove tree from a public road the tree latter fell on the plaintiff's husband who was passing the road resulting in his death. The High Court has decreed compensation but the Supreme Court allowed the appeal and dismissed the claim holding that no breach of statutory duty involved. In that context the Supreme Court as submitted supra and occasion on the refer to the principles laid down by Lord *Atkin* in *Donoghue v. Stevenson* (supra) as regards proximity and 'neighbourhood' and the extension of these principles by lord *Wilberforce* in *Anns v. Merton London Brought* (1978 Act 728) to cases of omission on the part of local authorities to properly building plans where such omission resulted in the cracking of walls of the buildings constructed thereby causing 'economic' losses.

Union of India v. United Insurance Co., (1997) 4 SCC 55

Liability of the Public Bodies in Tort

A three tire questions arise for consideration before the Supreme Court

(1) whether omission to perform public Law, statutory duties can or cannot give rise to an action at private Law.

(2) and liability of public bodies in tort while performing in inherently dangerous operations

The Supreme Court while considering the negligence of the railway establishment at level crossings which is unmanned laid down the following important points

(1) A public authority upon whom powers are conferred by Statute to exercise dis-creation for benefit of public can be said to be under a duty of care so that omission to exercise that power could be treated as negligent at common law giving a right to compensation.

(2) omission on the part of the Central Government to take a decision whether or not exercise powers under Section 13 of the Railways Act 1890 can amount to breach of statutory duty giving rise to a cause of action for damages, based on negligence.

(3) at level crossing, because the railways are involved in what is recognized as dangerous or perilous operations they are common law to take reasonable and necessary care on the "neighbourhood Principle" even if is provisions in Section 13(c) and (d) of the Railway Act are not attracted for want of requisition.

(4) Claim for compensation is maintainable before the Motor Accident Claims Tribunal against other persons or agencies, which are held to be guilty of composite negligence or are joint tort feasors and if arising out of motor vehicle.

Passages from the Leading Text Books

Province of Law of Torts — By Sir Percy Winfield Page 32 Chapter 1

"It is stated that tortuous liability arises from the breach of duty primarily fixed by law such duty is towards persons generally and its breach is redressable by an action unqualified damages".

Duty primarily is fixed by law which on violation fastens liability to pay damages it is personal to the injured. Tort and Contract are distinguishable. In Tort liability is primarily fixed by law while in contract, they are fixed by the parties themselves. In Tort the duty is towards their persons generally while in contract it is towards specific person or persons. If the claim depends on the proof of contract, action does not lie. In tort if the claim arises from the relationship between the parties independent of the contract an action would lie in tort at the election of the plaintiff, although he might alternatively have pleaded in contract. The law of tort prevents hunting one another. All torts consist of violation of a right in the plaintiff. Tort law is primarily evolved to compensate the injured by compelling the wrongdoer to pay for the damage done. Since distributive losses are an inevitable by product of modern living in allocating the risk, the law of torts makes less and less all allowance to punishment, admonition and deterrence found in criminal law. The purpose of law or Torts is to adjust these losses and offer compensation for injuries by one person as a result of the conduct of another. The law could not compensate all losses. Such an aim would not only be overambitious but might conflict with basic notions of social policy. Society has no interest in mear shifting of loss between individuals for its own sake. The loss by hypothesis may have already occurred and whatever benefit might be delivered from repairing the fortunes of one person is exactly offset by the harm caused through taking that amount away form another The economics assets of the community do not increase and expense is incurred in the process of realization, as stated by *Oliver Lintel Holmes* in his "COMMON LAW" AT PAGE 96 (1881 Edn). The security and stability are generally accepted as worthwhile social objects but there is no inherent reason for preferring the security and stability of plaintiffs to those of defendants. Hence shifting of laws is justified only when there exists special reason for requiring the defendant to bear rather than the plaintiff on whom it happens to have fallen (*vide* COMMON LAWS OF HOLEMS)

In "Blacks Law Dictionary" (6th edition at Page 1489, Tort is defined as violation of duty imposed by general law or otherwise upon all persons occupying the relation to each other involved in a given transaction. There must always be violation some duty owed to plaintiff and generally, such a duty must arise by operation of law and not by mere agreement parties.

"A legal wrong is committed upon the persons or property independent of contract. It may either (1) direct invasion of some legal right of individual (2) infraction of some public duty public duty by which special damage accurse to individual (3) "the violation

of some private by which like damage accurse to the individual" he by which special damage accurse to individual the violation of some private of obligation by which like damage accurse to the individual"

Negligence is failure to use such care as a reasonable and careful person would use, under similar circumstances it is the doing some act which a person of ordinary prudence would not have done under similar circumstances of failure do what a person of ordinary prudence would have done under similar circumstances.

Negligence is also an omission to do something which a reasonable man guided by those ordinary consideration which ordinarily regulate human affairs would do or the doing of something which a reasonable prudent man would not do.

Negligence and tort have been viewed without elaborately embarking upon the defecation of tort applicable to varied circumstances and the scope of negligence in its wider perspective. Let us consider the "meaning of negligence in tort context of tort liability. In every case giving rise tortuous liability torts consists injury and damage due to negligence. Claim for injury and damage may be founded on breach of contract of tort. The liability in tort may be strict liability, absolute liability or special liability. The degree of liability depends on the degree of mental element. The element of torts negligence consists in (a) a duty of care, (b) duty owned to plaintiff (c) duty has been carelessly breached. Negligence does not entail liability unless the law exacts a duty in the given circumstances to observe care. Duty is an obligation recognized by law to avoid conduct forthwith unreasonable risk of damage to others. The question whether duty exists in particular situation involves determination of law Negligence in such acts and omissions involve an unreasonable risk of harm to others. The breach of duty causes damage and how much is the damage should be comprehended by the defendant.

Negligence has been viewed in three ways (1) firstly involving a careless state of mind, secondly careless conduct thirdly a tort in itself Negligence does not give rise to liability unless the law fastens the duty of care in given circumstances. Duty is an obligation recognized by law to avoid conduct brought with unreasonable risk another. The question whether duty consists in particular situation involves determination and a question of law.

Claim for Violation of Fundamental Rights

It is no more integral that for violation of fundamental rights guaranteed under an Article 21 of the constitution of India public authorities officials and the State are liable to pay compensation in a given case, it is always competent to public law Courts India exercising power Articles 32, 136 and 226 of the Constitution of India to award compensation to public Law. Such compensation is only by way of applying balm to the injury suffered by the person or the victim. Such remedy is in addition such remedy in tort in private law. It is also well settled that depending on gravity of carelessness, and negligence the Court exercising public law powers, an always award exemplary cause, by way of compensation. Even in such event, such public law, redressal of the grievance by way of supplementing, but by way of supplanting leaving the person or victims, avail remedies in private law,

The fundamental rights in Part-III of the Constitution from the core of India Supreme Lex. Any executive or legislative or action which violates fundamental rights is declared by the Constitution itself as void. The right to enforce fundamental right is itself recognized as fundamental right under Article 32 of the Constitution any citizen, can move the Supreme Court, directly for the enforcement of fundamental rights. The Supreme Court under Article 32 of the Constitution and the High Court under Article 226 of the Constitution are empowered to resolve the disputes, between the State

and citizens when there is genuine grievance that fundamental rights are violated. In so doing the Constitutional Court exercise public law powers. High Court and Supreme Court are empowered to issue progressive writs directions and orders for the enforcement of any rights conferred by Part-III of the Constitution and also give appropriate relief. In the march from the stage of nullifying executive and legislative actions on the ground of violation of fundamental rights the Courts have evolved the theory of constructional tort brushing aside doctrine of sovereign immunity to meet certain situations where is malfeasance and misfeasance on the part of the officials and the executive.

After Constitution came into force into countries became independent with the written Constitution a new thinking developed leading to development of Law, in cases involving violation of human rights. The principle in *Kasturi Lal's* case is bypasses and palled into insignificance and Supreme Court awarded compensation through a stream of case who suffered personal injuries at the hands of the officers of the Government including police officers for their tortuous acts rejecting the theory of sovereign immunity. Although the decision of the Supreme Court in *Kasturi Lal's* case still holds good for practical purposes, its effect and the force was virtually reduced by a number of decisions of the Supreme Court. Without expressly referring to *Kasturi Lal* or distinguishing or overruling this case deviation from the decision has been made. Under the circumstance the State would have been made exempted now the State has been made liable in the same circumstance.

Present position

The State can now claim defence of sovereign immunity in the guise of discharge of sovereign functions in the Constitutional remedy. Now the present position in vocation of sovereign immunity is not permissible. *Kasturi Lal* had palled into insignificance and no longer binding value and it appears to be virtually dead.

In *Challa Ramakrishna Reddy*, AIR 2000 SC 2083, it was observed by the Supreme Court.

"So for as fundamental rights, Human rights or Human dignity is concerned the Law has marshalled a head like a pegasues but the Government's attitude continues to the conservative and raises to differ its action of or the tortuous act of its officers by raising the plea of immunity of sovereign acts of the State must fail.

It is high time the Government will make necessary legislation in this regard and exempt the State from the liability on the ground of sovereign functions.

Quandary - Position in India

"We are in quandary as to whether the Courts in India should follow *Kasturi Lal's* case regarding the non-liability of the State or the subsequent decision of the Supreme Court making the Stale vicariously liable for the tortuous act of the officers. It is interesting to note in many that cases, the Supreme Court has guaranteed compensation as an ancillary relief while exercising its writ jurisdiction under Article 32 of the Constitution. The Supreme Court has not only granted itself compensation as an interim measure but as also expressly stated the same is granted without prejudice to the right of the petitioners to claim just compensation from the State by a subsequent regular suit. This approach of the Supreme Court is wroth welcome measure which was long overdue to do away with the outmoded Law, which was being applied for historical reasons and may be perhaps due to the wrong interpretation of Law on the subject all along.

In Kasturi Lal, AIR 1965 SC 1039 at 1049

The Supreme Court even expressed its dissatisfaction

"Our only point in mentioning this act is to indicate that the doctrine of immunity which was been borrowed in India in dealing

with the question of immunity of the State regard to claims made against it for tortuous acts committed by the servants is to really based on the common Law principle while which prevailed in England that principle has now been substantially modified from the Crown Proceeding Act in dealing with the present appeal. We have been ourselves been distributed by the thought that a citizen whose property was seized by process of law has to be told when he seeks a remedy in Court of Law on the ground that is property has been returned to him that he can make no claim against the State that we think is not a very satisfactory position in Law. The remedy to cure this position however lies in the hands of the Legislature"

Kasturi Lal, AIR 1965 SC 1039

Thought the principle covered by the decision is already canvassed supra in the present contest of its being by-passed at the cost of reputation previous paragraph it is desirable to explain the Principle.

This decision explains the principle which govern the questions of State liability arising from the tortuous act committed by the public servants which are not referable exercise power sovereign powers delegated to public servants and act contents which are referable to any such the delegation to any such delegation. If the tortuous act committed by a public servant, and it gives rise to claim damage the relevant questions, was the tortuous committed by a public servant in discharge of statutory functions which are referable to and ultimately based upon the delegation of sovereign power of the State to such public servant? If the answer is in the affirmative, the action for damage not by virtue of sovereign power an action for damages would like for loss caused by such tortuous acts, does not lie. On the other hand if the tortuous act has been committed by a public servant in the discharge of the duties assigned to him for damage would lie. The act of the public servant committed by him during the course of the employment is in the category of cases, an act a servant who might have been employed by a private individual. This distinction is clear, and precise but is often overlooked.

Whatever it might be Kasturi Lal is virtually by-passed and compensation was awarded for violation of fundamental rights by the Supreme Court in a stream of case which will be adverted in the subsequent paragraphs, which was a core issue dealt under these dictions.

M/s. J.K. Traders, Ramakrishna 73 M.M. Theatre, Hyderabad. Represented by its proprietor N. Jayakrishna, 2005 (5) ALT 276

Consequent on the assassination of Sri *Rajiv Gandhi* violent indicates, erupted in the State of Andhra Pradesh, including the twin cities of Hyderabad and Secunderabad, large scale destruction of property had occurred in Ramakrishna 70 M.M. where the theatre was located in spite of request or complaint to police for protection apprehending attacking made by the hoolings healings the police did not take any action immediately. More than hundred persons gathered at the theatre and caused damage to the Ramakrishna Theatre. Even though police arrived at the spot latter on, they did not take any steps to prevent damage being caused, writ was filed directing the State Government to pay compensation for the loss suffered by them for the failure of the police, to protect the fundamental right of the petitioner, under Articles 14, 19(1) and 21 of the Constitution.

With regard to the tortuous liability of the State, consequent on the failure of discharge of severing duty, and the consequential quantification of the compensation the learned Judge Justice *G. Bhikhapati.*

J.K. Traders v. State of A.P., 2005 (5) ALD 726 at page 746,

After reviewing the entire law on the subject such as *Ranchi Bar Association v. State of Bihar*, AIR 1999 Pat 169; *Jayalakshmi Salt Works v. State of Gujarat*, (1994) 4 SCC 1; *P.A. Kulkarni v. State of Karnataka*, AIR 1999 Kar 284; *Municipal Corporation of Delhi v. Sushila*

Devi, (1999) 4 SCC 317, *State of Maharashtra v. Tapas Doneegy*, (1999) 7 SCC 683; *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1086; *Chairman, Railway Board v. Chandrimadas*, (2000) 2 SCC 465 and others, which will be dealt with at length in the subsequent paragraphs, has laid down the following propositions. A survey of the entire judgments of the Supreme Court as well as the other High Courts on the question of award of compensation for violation of fundamental rights, the following principles, can be deduced.

(1) Constitutional mandate, enjoins; upon the State, to protect the person, and property, of every citizen and if it fails to discharge, its duty, the State is liable to damage to the victims.

(2) The failure of inactions, on the part of the State, which lead to the violation of the fundamental right, more especially under Articles 14, 19, 21 of the Constitution, of India, should have direct nexus, to the damage caused/suffered.

(3) The State cannot claim defence of severing immunity in the guise of discharge of the severing functions, in the Constitutional remedy, it does not cloth the State, with right to violate the fundamental rights, guaranteed under Part-III subject to certain restrictions.

(4) The State while undertaking commercial activity cannot plead the sovereign immunity, in case of tortuous acts, done by the employees of the State. It is only vicariously liable.

(5) The Supreme Court or the High Court, is entitled to render compensatory justice by awarding reasonable monetary compensation under Article 32 or 226 of the Constitution of India, for the injury mental, physical, fiscal-suffered by the individual for violation of fundamental rights guaranteed under the Constitution. But however it must be conclusively established that the State failed to take any positive action in protecting the fundamental rights of the citizens.

(6) It is not necessary the victim should approach the civil Court by invoking common law, remedy for claming damages for violation of fundamental rights. The option is left to the victim to claim the damages by invoking either the Constitutional remedy or civil remedy. Since the Constitutional remedy is a public law remedy, the actual victim need not approach the Court. The relief can also be awarded either by exercise of *suo motu* power or in a public interest litigation case.

(7) The question of compensation varies from case to case depending upon the nature of loss, suffered by victim. There cannot be any straitjacket formula for awarding compensation under Article 226 of the Constitution of India.

Case law on the infringement of Fundamental Rights

Rudul Sah v. State of Bihar, AIR 1983 SC 1086

The petitioner was kept in jail for 14 years, after he was acquitted on the suspicious ground that he was insane. He was directed to be released by the Supreme Court, in *Habeas Corpus* petition, in addition to the release the detenu also claimed compensation on account of the deprivation of the fundamental right under Article 21. Deliberating on the question as to whether, the Supreme Court has power to award compensation on account of such deprivation of life, it observed thus;

Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured is to mulcet its violators in the payment of monitory compensation. Administrative

scoloris leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the Judiciary to adopt. The right to compensations is some palliative for the unlawful acts of instrumentalities, which act in the name of the public interest and which present for their protection the powers of the State, as a shield. The civilization is not to perish in this country as it had perished in some others, too well known to suffer mention it is necessary to educate ourselves into accepting that respect, for the rights of individuals in the true baston of democracy. Therefore the State must repair the damage done by its officers to the petitioner's rights. It may have resource against those officers and accordingly awarded a sum of Rs.35,000/-.

In *Sebastian M.H. Hondry v. Union of India*, AIR 1984 SC 1026, in a writ of *habeas corpus*, the State authorities came to be pleaded that the persons must have met with an unnatural death. It was accepted by the Supreme Court, and awarded exemplary costs of Rs.1,00,000/- each to the wives of the living persons. The basis of the said award is, however not Article 21, but wilful disobedience to the process of the Court amounting to contempt of Court.

In *Bhimsingh v. State of J&K*, AIR 1986 SC 494, where a Member of the Legislative Assembly was arrested by the police while he was on the way to Legislative Assembly Session, and in writ of *habeas corpus*, the Supreme Court observed thus;

"The police officers ..... acted deliberately and *mala fide*, and the Magistrate and the Sub-Judge aided them either by colluding with them or by their casual attitude, we do not have any doubt that Sri *Bhimsingh* was not produced either before the Magistrate on 11th or before the Sub-Judge on 13th though he was arrested in the early hours of the morning of 10th. There certainly was gross violation of Shri *Bhima Singh's* Constitutional rights under Articles 21 and 22(2).... we have no doubt that the Constitutional rights of Shri *Bhima Singh* were violated with impunity. Since he is now not in detention, there is no need to make any order to set him at liberty, but suitably and adequately compensated, he must be. That we have the right to award monetary compensation by way of exemplary costs otherwise is now established by the decision of this Court in *Rudul Sah v. State of Bihar*, AIR 1983 SC 1986 and *Sebasitain M. Hongary v. Union of India*, AIR 1984 SC 1026. When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his Constitutional and legal rights were invaded the mischief or malice and the invasion may not be washed away, by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this is an appropriate case.

In *C. Ramakrishna Reddy* case 1989 (2) ALT 1, it was a case of death of undertrial prisoner and due to the failure and negligence, on the part of the officers, to perform their duties. The Division Bench of A.P. ordered compensation in that regard. The Division Bench observed thus :

"Where a citizen has been deprived of his life or liberty otherwise than in accordance with the procedure prescribed by law it is no answer to say that the said deprivation was brought about while the officials of the State were acting in discharge of the severing functions of the State suit for compensation against the State is therefore maintainable in such case. Indeed this is the only mode in which the right to life guaranteed by Article 21 can be enforced. Negligence of the prison officials in accordance of the safety of the deceased by failing to take responsible care required of them, in spite of a specific request, would not be an action in accordance with the procedure prescribed by law. Rule 48 of the Madras Prisons Rules enjoins the prison officials to ensure the safety of the prisoner similarly there is no law, which empower

the police to apply third degree methods, or to meet out, such treatment, as results in the death of the detune in a police station. In all these cases, it must be said that the person concerned has been deprived of his life otherwise than in accordance with…… indeed, contrary to the procedure prescribed by law. The fundamental right to life guaranteed by Article 21 cannot be defeated by pleading the archaic defense of sovereign functions. The said theory of severing functions does not clothe the State with right to violate the fundamental right to life and liberty guaranteed by Article 21, it does not constitute an exception to Article 21. Article 21 does not recognize any exception, and no such exception be read, into it by reference to clause (1) Article 300.

The fundamental rights are sacrosanct they have been variously described as basic inalienable, and defeasable. The founding fathers incorporated the exceptions in the Articles themselves wherever they are found advisable or appropriate

No such exception has been incorporated in Article 21 and we are not prepared to read, the archaic concept of immunity of sovereign functions incorporated in Article 300(1) cannot be read as an exception to Article 21. True it is that the Constitution must be read as an integrated whole, but since the right guaranteed by Article 21 is too fundamental and basic to admit of any compromise, no exception can be read into Article 21 by a process of interpretation. If the founding fathers, intended to provide, any exception they would have said so specifically in Part-III itself. The Division Bench further held, that in view of the negligence on the part the police in failure to provide adequate guard to protect the life of the petitioner more so, when the deceased expressed the need of protection the invocation of the doctrine of sovereign immunity by the State was not permissible. The High Court while setting aside the decree and judgment of the lower Court, which dismissed the suit allowed the appeal and award compensation of Rs.1,44,000/-. The aforesaid judgment of the Division Bench was upheld by the Supreme Court, in a recent case, reported in *State of A.P. v. C. Ramakrishna Reddy*, (2000) 5 SCC 712. The Supreme Court holding that *Kasturi Lal* case has palled into insignificance, and no longer any binding value observed.

This Court, through a stream of cases, has already awarded compensation to the persons who suffered personal injury at the hands of the officers of the Government including police officers and personal for their tortuous acts. Though most of the cases, were decided under public law domain it would not make any difference, as in the instant case, two vital factors, namely police negligence, as also the Sub-Inspector being in conspiracy are established as a fact."

Moreover, these decisions, as for example, *Nelabati Behera v. State of Orissa*, AIR 1993 SC 1960, Death of *Sawinder Singh Grower*, 1995 Supp (4) SCC 450 and *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610, would indicate that so far as fundamental rights and human rights or human dignity are concerned the law has marched ahead, like a peagasus, but the Government attitude continued, to be conservative and it tries to defend its action, or the tortuous acts, of its officers, by raising the pie of immunity of sovereign acts, or acts of the State which must fail.

In *R. Gandhi* case, AIR 1989 Mad 205, it was a case where large scale arson, and looting took place in the wake of assassination of the former Prime Minister, Smt. *Indira Gandhi*, suits were instituted by the Lawyers, Law students claiming compensation for the victims. The Court found there is failure of on the part of the State Government, to protect the property and therefore, victims are entitled to for reasonable compensation, accordingly directions were given to pay the compensation as asserted and recommended by the Collector.

In *M.C. Metha* case, AIR 1987 SC 1086, it was held by the Supreme Court that:

"The power of the Court, is not only injunctive in ambit, that is preventing the infringement of a fundamental right but it is also remedial in scope and provided relief against breach of fundamental right, already committed. If the Court were powerless, to issue any directions, order or writ in cases where fundamental right is threatened to be violated, Article 32 would be robbed of all its efficacy because then the situation would be that if a fundamental right is threatened to be violated the Court can inject such violation but if the violation is quick enough to take action, infringing the fundamental right, he would escape from the net of Article 32. That would to a large extent emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. It must therefore be said that Article 32 is powerless, to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the Court, to grant such remedial relief may include the power to award compensation in appropriate cases, of course the infringement of the fundamental right must be gross and patient, that, is incontrovertible and *ex facie* glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons or it should appear unjust of unduly harsh or oppressive on account of their poverty or disability or sociality or economically disadvantaged position to require the person or persons affected by such infringement of a fundamental right through the ordinary process of civil Court. It is only exceptional cases, of the nature indicated above, that compensation may be awarded in a petition under Article 32.

Thus the main thrust of the case was that the infringement of the fundamental right must be gross and patient *i.e.*, incontrovertible and *ex facie* glaring and this remedial measure should be invoked in exceptional cases.

In *Charan Lal Sahu's* case AIR 1990 SC 1480, the Supreme Court upheld the validity of Bhopal Gas Disaster (Processing of Claims) Act 1985, wherein the Central Government was authorized to claim the compensation on behalf of the victims on the principal *parrens partriae*.

In *National Human Rights Commissions* case, AIR 1996 SC 1234, a public interest litigation was filed by National Human Rights Commission seeking enforcement of Article 21 of the Constitution of India, of 65 Chakmas tribals. The chakmas were being subjected to oppressive methods by the origins of Arunachal Pradesh and they are being forcibly evicted from the State. Therefore a writ of *mandamus* was sought seeking directions. The Supreme Court observed that Chakmas have a right to be protected and issued certain directions, Paras 20 and 21 of the said judgment are relevant which are extracted hereunder :

"20. We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being be a citizen or otherwise, and it cannot permit anybody or group of persons, *e.g.*, the AAPSU, to threaten the Chakmas to leave the State failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its Constitutional as well as statutory obligations. These given such threats would be liable to be dealt with in accordance with law.

The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics. Besides by

refusing to forward their applications, the Chakmas are denied rights, Constitutional and statutory to be considered for being registered as Citizens of India. In *W. Alalaulad v. M/s. Sundaradas Daulatram and Sons*, AIR 1996 All. 355, it was a case where the property of citizens was forcibly occupied by the unsocial elements by creating terror a writ was filed for restoring possession and for issue of *mandamus* for maintaining law and order. The Allahabad High Court observed as follows:

"But dispossessing a person from his property otherwise than in due course of law, is different from grabbing the property, by terrorising the person in possession. To capture the property forcibly by creating terror by applying brute force is not a simple case of dispossessing a person from property. In a county governed by rule of law no person can be deprived of his life ad liberty and property by third degree methods. Such as terrorising and manhandling the person concerned. In such a case not only the person who has been dispossessed of his property but society itself is taken to ransom by brute force. Such an act creates terror in the minds of the people and has the effect of shaking the social fabrics of the society. These acts also hit and damage the authority of the Government with the result that the public order, peace, and tranquility of the society are disturbed. In such cases it is the duty of the Government to come to the rescue of the persons who are threatened or have been dispossessed from their property by brazen act of lawlessness.

When a person who has been dispossessed from his property by the brazen acts of lawlessness, by or with the help of antisocial elements approaches, the Court, under Article 26 of the Constitution this Court does not exercise its powers, to enforce the contractual and legal obligations of the parties. It only directs the Government to enforce the Rule of Law and to protect the lives, liberty and the properties of the people and if found necessary, to restore the possession of the property to the person who has been dispossessed therefrom leaving it open to the parties to get their rights adjudicated through civil Court. To tell a person whose property has been forcibly captured and seized by or with the help of antisocial elements to file a suit for its recovery and be on the street till the suit is decided by the last Court, is nothing but slapping a person in distress. The first two preliminary objections raised by the learned Counsel for the owner are therefore rejected."

In *Ranchi Bar Association's* case AIR 1999 Pat. 169, there was a large scale destruction of property in pursuance of a call given by Jharkhand Mukki Morcha, on a representation of the District Bar Association Ranchi, the matter was taken up as a public interest litigation, and the responsibility of the Government, has been indicated in Para 15 which is extracted as follows :

"The Government, being duty bound, protect the people has to prevent unlawful activities, like Bunch Rally *etc*., which invade or threaten to invade, their life and liberty and property. It is neither open to any person, organization or political party to take the people to ransom, nor is it permissible for the Government to allow, such unlawful activities. Such activities have to be prevented at the threshold otherwise it may not be possible to protect the people's right the Prevention of Unlawful activities, ensures the protection of the rights of the people and their property. If the people who organise and support such unlawful bundh, rally *etc*, are armed they have to be disarmed and prevented from proceeding further by the State Administration, and any failure on the part of the administration to do so is negligence liable to be punished" and the Government was directed to pay compensation, to those who have suffered the loss of life, liberty and property on account of the failure of the Government to protect them and appropriate cases, against even the organizers, of the bundh, agitation, demonstration or rally can also be

directed to pay the compensation. But it has to be established that failure on the part of the administration of the police to provide adequate protection to the life, liberty, and property of the people who were left at the mercy of the antisocial elements. The Government was found to have failed to discharge its public duty to protect the people during the bundh. Therefore compensation was ordered to be paid by the Government to the victims.

In *Neelabati Bahera v. State of Orissa*, AIR 1993 SC 1960. The Supreme Court ordered compensation of Rs.1,50,0000/- each in respect of custodial death of a person aged 22 years having a monthly income between Rs.1,200/- to Rs.1,500/- the Supreme Court observed as follows :

"A claim in the public law, for compensation of human rights for contravention of human rights and fundamental freedoms, the protection of which is guaranteed, in the Constitution is an acknowledged remedy for enforcement and protection of such rights and such a claim based on strict liability made by restoring to a Constitutional remedy provided for enforcement of a fundamental right, is distinct from and in additions to the remedy in private law for damages for the tort resulting from the contravention of fundamental rights, there can be no question of such as a defence being available in the Constitutional remedy. It is this principle which justifies the award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution when that is only practicable mode of redress available for contravention made by the State or its servants in the purported exercise of their powers, and enforcement of fundamental right is claimed by resort to be remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.

The Supreme Court is not helpless, and the wide powers, given to it by Article 32, which itself is a fundamental right, imposes a Constitutional obligation on it to forge new tools, which may be necessary for doing complete justice and enforcing fundamental rights, guaranteed in the Constitution which enable the award of compensation in appropriate case where that it is the only method of redress available. The power available to the Court, under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the Court powerless and the Constitutional guarantee, a mirage, but may, in certain situation be an incentive to extinguish life if for the extreme contravention the Court is powerless, to grant any relief, against the State, except by punishment of the wrongdoer for the resulting offence and recovery of damages, under private law by the ordinary process. If the guarantee that deprivation life, and personal liberty, cannot be made, except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible. In the Constitutional scheme the mode of redress, being that which is appropriate in the facts of each case. The remedy in public law has to be more readily available when invoked by the have-nots who are not possessed, of the withdrawal for enforcement of their rights, in private law even though its exercise, is to be tempered by judicial restraint to avoid circumvention of private law remedies were more appropriate". In *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610, it was held by the Supreme Court, the High Court under Article 226 of the Constitution of India has a power, to award compensation, for the wrong done, due to the public breach, by the State, of not protecting the rights and lives of the people.

In *"Jayalakshmi" Salt Works (P) Ltd's* case (1994) 4 SCC 1, the Supreme Court elaborately dealt with the tortuous liability of the State, arising out of violation, of the public duties. The Supreme Court observed thus :

"In between strict liability and fault liability to suit there may be numerous circumstances, in which one may be entitled to sue for damages and it may be partly one or the other, or may be both. In a welfare society, construction of a dam or bundh for the sake of community is an essential function, and use of land or accumulation of water, for the benefit of the society cannot be non-natural user. But that cannot absolve, the State from its duty of being responsible to its citizens, for such violation they are actionable and result in damage, loss or injury. What is fundamental is injury and not the manner, in which it has been caused absolute liability and fault liability and neighbour proximity 'Strict liability' are all refinements and development of law by English Courts, for the benefit of society and the common man. Once the occasion for loss or damage is failure of duty, general or specific the cause of action under tort arises. It may be due to negligence nuisance, trespass, inevitable mistake *etc.* It may be even otherwise, in a developed or developing society the concept of duty keeps on changing. They may individually or even collectively give rise, to tortuous liability. Entire law of torts is founded and structured on morality that no one has a right, to injure or harm others, intentionally or even innocently. Therefore, it would be primitive to class strictly or close finally the ever-expanding and growing horizon of tortuous liability.

Even for social development, orderly growth, of the society and cultural refineness the liberal approach to tortuous liability by Courts in more conductive. Since the appellant, suffered loss, on facts found due to action of respondent's officers, both at the stage of construction of the bundh and failure to take steps even at the last moment it was liable to be compensated.

But to be actionable and get redress, from Court it must assume legal shaper, by falling in one or other statutorily, judiciously or even otherwise recognized category of wrong such as negligence. "Negligence", ordinarily means failure to do statutory duty or otherwise giving rise to damage. The axis around which the law of negligence take reasonable care. But the concept of duty its reasonableness the standard of care required cannot be put in a straightjacket. It cannot be rigidly fixed. Even improper exercise of power by the authorities giving rise to damage has been judicially developed and distinction has been drawn between power coupled with duty. "Where there is duty the exercise may not be proper if what is done was not authorized or not done in *bona fide* interest of the public. Thus negligence is only descriptive of those sum total of activities which may result in injury or damage to the other side for failure of duty both legal or due to lack of foresight and may comprise of more than one concepts known or recognized in-law, intended unintended".

In *Chandrimadas's* case, (2000) 2 SCC 465, the victim belonging to Bangladesh, who was raped by the employees of railways. On a public interest litigation, having been initiated by a practising Advocate, the Calcutta High Court, apart from other reliefs awarded a sum of Rs.10 lakhs, compensation to the victim. On appeal at the instance of the Railway Board, the Supreme Court dismissed the same. An argument was raised that the victim was a foreign national she cannot claim any compensation in India, on the ground that her fundamental right has been violated. The Supreme Court rejected the said contention referring to the Universal Declaration of Human Rights and the Constitutional Guarantees, it observed thus :

"Our Constitution guarantees, all the basic and fundamental human rights set out in the Universal Declaration of Human Rights 1984 to its citizens and other persons. The chapter dealing with the fundamental rights, is contained in Part-III of the Constitution. The purpose of Part-III is to safeguard the basic human rights, from the vicissitudes of

political controversy and to place them beyond the reach of the political parties who by virtue of their majority, may come to from the Government at the Center or in the State. The fundamental rights available to all the citizens of the country but a few of them are also available to "persons". The word "Life" has also been used prominently in the Universal Declaration of Human Rights, 1948. The fundamental rights under the Constitution are almost in consonance with the rights contained in the Universal Declaration as also the Declaration and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them that being so since "Life" is also recognized as human right in the Universal Declaration of Human Rights, 1948 it has to have the same meaning and interpretation as has been placed on that word by the Supreme Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "Life" cannot be narrowed down. According to the tenor of the language used in Article 21 it will be available not only to every citizen of this country but also to a person who may not be a citizen of this country on the principal even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives, in accordance with the Constitutional provision. They do not also have a right to "Life" in this country. Thus they have also the right to live, so long as they are here, with human dignity, just as the State is under an obligation to protect the life of every citizen in this country so also the State is under obligation to protect the life of the persons who are not citizens"

Thus the Supreme Court held that even though she is not the citizen of India, she is entitled for the relief right to the citizens so far as "right life" was concerned and therefore, she was entitled to be treated as dignity with decorum excepted on a human being and she could not be subjected to treatment, which was below, dignity nor could not be subjected to treatment which was below dignity nor could she be subjected to physical violation by the Government Employees, who outraged her modesty. Thus the judgment of the Calcutta High Court awarding compensation to the victim, who was subjected to gang rape was affirmed. One of the contentions raised was that the acts done by the employees, in their personal capacity cannot bind the Government, and that the activities, of the railway cannot be related to sovereign activity and therefore employees of the Union of India, who were deputed to run the railway and run the management including the railway station, and Yatri Niws were not essential parts of the Government machinery. Rejecting this contention, the Supreme Court held they are essential components of the Government which carries on the commercial activities. If any of such employees, commits an act of tort, the Union Government of which they are the employees, can subject to other legal requirements, being satisfied, be held vicariously liable in damage to the person wronged by those employees.

General Principles of Constitutional Tort

Of late, in the language of His Lordship, Justice *V.V.S. Rao* at the cost of repetition observed in 2004 (1) ALD 19 at Page 27 as follows.

Certain authors of public law, as well as tort have coined the term Constitutional Tort".

The learned authors by their analysis of the cases decided by the public law Courts and the Supreme Court. Where compensation was awarded in public law for violation of basic human rights and civil rights to life and liberty. It is necessary to briefly refer to the concept of tort, and Constitutional tort, to understand the public law remedy of compensation for violation of right to life and liberty.

Tort is a civil wrong that causes injury for other damages, for which the local system deems just to provide remedy for compensation the conduct may be both crime and tort in which event redress is to be sought in different fora. The criminal law aims at vindicating public law wrong there as tort law aims at vindicating private civil wrong. And as observed by "*Willian P. Statsky*" (See Footnote 52(C)) tort law aims at four purposes peace, deterrence, restoration and justice. The further question to be probed is what is Constitutional law tort and what is the relationship between tort, and public law Constitutional law embraces the law of the nation, relating to the method of choosing head of State, constitution of the Legislature, its powers, and privileges, relations, between Central Government and local authorities, the rights and duties of citizens, civil members, and their limitations, and general system of the Courts, and the method and manner, of conducting elections *etc.* The words used to the Constitutional rights Constitutional functions *etc.* used are in relation to the Constitutional law of the nation. When we use term Constitutional tort in public law it only means that conduct which is in breach of the Constitutional law giving rise to in a given case to an action in private law. *William P. Statsky* defines this as "the phrase Constitutional tort refers to a special cause of action that arises when some one is deprived of federal civil rights….. and to deprive some one of federal civil rights under colour of State law can be what is called the Constitutional Tort "Every breach of Constitutional law or every failure to discharge Constitutional obligation does not give rise to a Constitutional tort indeed. Clerk and Lindsell on Torts' observed "that the extent to which law of torts, should operate to hold public authorities accountable for their dealings". With private citizens is in a state of flux it was further observed public authorities enjoy no general immunity in tort nor or they subject to any system of law to draw it administrative in France. The problems arise when the alleged tortuous conduct arises, out of public authority conduct, of its public obligations and the exercise of statutory power enjoyed to fulfil these obligations should public authorities be liable interest for poor Government be it inadequate educations for local children incept inspections of building works or inequitable distribution of health care recourses? Claims for breach of statutory duty have generally failed. The learned author dedicated one entire chapter (Chapter 12) to public law aspects of torts, and a separate sub-chapter is devoted to Constitutional torts.

What are Constitutional Torts?

Torts like battery assault, false imprisonment by police officers and other investigating agencies, are Constitutional torts because public authorities are involved in all these torts, species of torts that is trespass to person in ratable to right to life and liberty assault false imprisonment *etc*, the Government official as well as the State are vicariously liable for damages. In view of the matter in an action for Constitutional tort the respondents can plead the same defence as are available in an action for Constitutional tort. One such defence is action taken under the law, made by Indian Legislature. The defence of official immunity in connection in common law of Torts is also available in an action for Constitutional Tort. The same, however will not be available. To an official if they did not act, on tort while performing official functions under the law during the course of employment and they acted maliciously and not in good faith.

Nowadays it has become a regular phenomenon,

They are situations where public official act, within the framework of law but still by reason of negligence in not adhering to principle of law, it gives rise to cause of action to Constitutional tort. In every case, it

is for the Court to decide whether or not the act is justified. If every violation of every fundamental right is brought under the preview of Constitutional tort and compensation awarded in public law remedy of writ jurisdiction the State and the Government would become bankrupt and the Government would itself be destroyed. In every such case the Court should balance the State interest as well as individual interest. If violations complained is complained in ordinary law which can duly be compensated elsewhere even it involves. Violation of fundamental rights public law remedy of compensating violation cannot be made available. The parties to such cases must be relegated to proper common law remedy. For example in a case of malicious prosecution against Investigating Officer the parties may be relegated to avail suit for malicious prosecution.

2004 (1) ALD 19 at Page 36

A.V. Janaki Amma and others v. Union of India His Lordship Justice *V.V.S. Rao* in Para 36 of his lucid judgment laid down the following principles of Constitutional tort.

The principles that emerge from the decided cases in India and Britain are as follows :

(1) Torts like assault battery and false imprisonment which are trespass to person police officer and investigating agencies which are not authorized under law are Constitutional Torts.

(2) Awarding of compensation is public law remedy and available in a claim for depravation of life and liberty alone. The compensation awarded is for the pecuniary and non-pecuniary loss suffered by the person due to the illegal detention imprisonment and is given to recompense for the inconvenience and distressed suffered by the person.

(3) The order of compensation is in the nature of palliative and is passed to mulct the violators of the fundamental rights in payment of monetary compensation.

(4) When a person is arrested and imprisoned with malicious intention his Constitutional and legal rights, are said to be invaded. The malice and invasion of the right is not washed away by setting the person free, and inappropriate case, the Court has jurisdiction to award compensation to the victim.

(5) In public law remedy of monetarily compensating the violation of fundamental rights is part of the Constitution of scheme based on strict liability for such contravention of rights and therefore the principle of sovereign immunity does not apply as it applies in private law.

(6) Judicially evolved right to compensation in public law is available for breach of public duty by the State of not protecting the fundamental right, but it is given for infringement for inalienable right to life and by way of applying balms to the wounds of the deceased family.

(7) For the tortuous acts of the Government officers and police officers, the State is liable to pay compensation for violation of fundamental rights to life and liberty.

(8) The order of awarding compensation need not be in the coercive form. It can by way of declaration of the right of the person to be paid by the Government certain amount, to be assessed by the Court. This is specially so in a case where fundamental right to property is breached in violation of law.

Violation of Fundamental Freedom and Human Rights

Nowadays it has become a regular phenomenon on the part of Government to invade the Fundamental and Human Rights, of the citizen in the guise of maintaining law and order, prevention of

crime *etc*. The problem will arise only when the administrative power is being used indiscriminately and arbitrarily to affect the Fundamental and Human Rights of citizen. In some cases the fundamental rights which are infringed may be resorted but it is not possible in all cases and in such circumstances the infringement may be suitably compensated by awarding monetary compensation by the Courts

Article 9(5) of the International Covenant on Civil and Political Rights 1966 states "any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". The content of this Article 9(5) is that the victim will have an enforceable right to compensation.

The ruling of the Supreme Court of India in AIR 1993 SC 960 *Nilabati Behra v. State of Orissa*, insignificant in the much debated area of State liability regarding the custodial death of a person aged 22 years for torts committed by its officials. After reviewing all the decisions in respect of State liability, the Supreme Court declared the defence of sovereign immunity is not applicable and is alien to the concept of guarantee of fundamental rights and further the Court stressed that such defence is not available in the Constitutional remedy. The Court declared that award of compensation under Articles 32 and 226 of the Constitution is a public law remedy based on the strict liability for contravention of fundamental rights for which sovereign immunity does not apply. In the words of Dr. *Anand,* J., the primary source of public law proceedings from prerogative writs and the Courts have to evolve new tools, to give relief in public law in mounling according to situation to preserve and protect the Rule of Law, and His Lordship further observed that the purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interest and preserve their rights. But this ruling (*Nilabati Bahra*) clarifies that sovereign immunity may be defence in the proceedings under private law or torts. The impact of this historic ruling is that anyone whose fundamental right is adversely affected by the State action can approach under Articles 32 and 226 of the Constitution respectively and in such a case the State is entitled to raise the plea of sovereign immunity in public law proceedings. When once the defence of sovereign immunity is made non-available in the area of public law, the Courts can effectively protect the fundamental freedoms of a person from the unauthorized infringements such rights by State action and thereby Courts upheld the Rule of Law.

Change in the concept of sovereignty - A new approach

N. Nagendra Rao v. State of A.P., AIR 1994 SC 2663

While dealing with the power of Government under Section 6-A and 6-A(2) of the Essential Commodities Act 1955, the Supreme Court elaborately discussed the meaning and the concept of sovereignty and Supreme Court declared that after the commencement of Constitution of India, 1950 or prior to it, the distinction between sovereign and non-sovereign functions is not relevant. The Court observed the concept of sovereignty underwent a drastic change and sovereign immunity has no relevance to-day. Further in the opinion of the Supreme Court, the doctrine of sovereignty as propounded by the therisists in the medieval periods, underwent radical change and which doctrine in earlier days was the outcome, of old thought based on social set up then prevailed and at which time the monarch was omnipotent. In later days the sovereignty underwent gradual changes and nowadays sovereignty vests in the people. Justice *Douglas* in his Book Marshal to Mukherji observers that India and United States both recognize that people are the basis of all sovereignty. Thus the old and archaic concept of sovereignty does not survive in this traditional four corners and now people are real sovereign in a set up where the Legislature Executive have been

created and constituted to serve the people. 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. The determination of vicarious liability of State being linked with negligence of its officers if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead there is no rationale for the proposal that even if the officer is liable the State cannot be sued. The liability of the officers personally was not doubted even in the viscount Canterbury. But the Court was held immune on doctrine of sovereign immunity. Since the doctrine has now become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer, personally then there is no reason, to hold that it would not be maintainable against the State.

The Supreme Court considered the question of vicarious liability of the Government, for the negligence if its servants, it noted the earlier Supreme Court decisions in *Vidyavathi* and *Kasturi Lal* cases, recommendations of the Law Commission in its first report for statutory recognition of the liability of the State Government as had been done in England through Crown Proceedings Act 1947 and in USA through the Federal Torts Claims Act 1946. It is therefore held that the doctrine of sovereign immunity has no relevance in the present day.

It is unfortunate the recommendation of the Law Commission made long back in 1956, and the suggestions made by the Supreme Court, have not yet been given effect to the unsatisfactory state of affairs in this regard is against social justice, in a welfare State, it is hoped that the Act regarding State liability will be passed without much further delay. In the absence of such legislation, it will be inconstance with social justice, demanded by the changed conditions, and the concept of welfare State that the Courts will follow, the recent decisions of the Supreme Court rather than *Kasturi Lal's* case (supra).

In *Sebastian M. Hongray v. Union of India*, AIR 1984 SC 1026,

Bhim Singh v. State of J&K, AIR 1986 SC 494,

Rudul Sah v. State of Bihar, AIR 1983 SC 1086,

Saheli v. Commissioner of Police, *Delhi*, AIR 1990 SC 513

The Supreme Court recognized the liability of the State, to pay compensation when the right to life and personal liberty, as guaranteed under Article 21 of the Constitution had been violated by the officials, of the State

In *Sebastian M. Hongrary*, two persons were taken in custody by the army authorities, at Manipur the army authorities failed to produce those two persons in obedience to the writ of *habeas corpus* they were supposed to have met with unnatural death, while in army custody. The wives of the two missing persons were awarded exemplary costs, of Rs.1 lakh each.

In *Bhim Singh* the petitioner who was MLA was wrongfully detained by the police, and thus prevented from attending the Assembly Session. The Supreme Court ordered the payment of Rs.50,000/- by way of compensation to the petitioner.

In *Rudul Sah*, the petitioner was acquitted by the Court of Sessions on 3.6.1968 but was released from jail more than 14 years and thereafter on 16.10.1982. In the *habeas corpus* petition, the petitioner not only sought the release but also claimed ancillary reliefs like rehabilitation, reimbursement of expenses

likely on medical treatment and compensation for unlawful detention. The State could not give any justifiable cause of detention except pleading that the detention was for medical treatment of the mental imbalance of the petitioner. The Supreme Court ordered the payment of compensation of Rs.30,000/- (as an interim measure) in addition to payment of Rs.5,000/- which had already been made by the State of Bihar. It was also stated that the said order of compensation did not preclude the petitioner, from bringing a suit to claim appropriate damages, from the State and its erring officials.

In *Saheli v. Commissioner of Police, Delhi*, AIR 1990 SC 513, the death of 9 years old boy was caused by beating and assault by a police officer, in the A writ filed by the Womens Civil Rights Organization known as Saheli, the Supreme Court allowed damages to the boy's mother.

The Supreme Court in a stream of decisions observed, Article 21 does not recognize any exception and not such exception can be read in to Article 300(1) where the citizen has been deprived of his life or liberty otherwise that in accordance with the procedure prescribed by law, the state can not escape liability The Supreme Court after refereeing to *Nilabati Behera v. State of Orissa*, AIR 1933 SC 1960 and *N.K. Basu v. State of West Bengal*, AIR 1977 SC 610, held when persons suffered injuries, at the hands of the officers, and personal compensation can be awarded for the tortuous act.

Vicarious Liability of State under Motor Vehicles Act

The law is well settled, that the State is liable for damages occasioned by the negligence of its servants, applying the principle of vicarious liability except where the tortuous act committed by its servants was in exercise of sovereign power. In *State of Orissa v. Rebati Tiwar*, (1987) CLT 78, the Orissa High Court, held thus after consideration of a number of decisions on the point.

"….. The liability of the master extends to all torts committed by the servants when purporting to act, in the course of such business as he was authorized or hold out as authorized to transact on account of his master. If the servant is acting within the scope of his authority, his master is liable whether he receives the benefit of wrongful act or not"

AIR 1968 Karn. 63

It was held giving a lift to a passenger, by the driver is an act, done by the driver, in course of his employment and the owner of the tanker is vicariously liable, to pay the compensation

The principle of vicarious liability of master, in respect of tortuous acts of the servant in the course of his employment, is now well settled.

Halsbury's Laws of England, Fourth Edition Volume 16, Paragraph 739 it has been held.

"Where the act which the employee is expressly authorized to do is lawful, the employer, is never the less responsible for the manner of which the employee executes his authority it therefore the employee does the act, in such a manner as to occasion injury to a third person, the employer cannot escape liability on the ground that he did not actually in the particular manner, in which the act was done or even on the ground, that the employee was acting on his own behalf and not on that of his employer."

Salmond's Law of Torts (Twenty Fifth Edition) 1st Page 458, it is stated thus

'On the other hand it has been held that servant who is authorized to drive a motor vehicle and who permits an unauthorized person to drive it in his place, may yet be acting within the scope of his employment. The act of permitting another to drive may

be a mode albeit is improper one of doing the authorized work. The master may even be responsible if the servant impliedly and not expressly permits an unauthorized person, to drive the vehicle as where he leaves it unattended in such a manner, that it is reasonably foreseeable that the third party will attempt to drive it, at least if the driver retains notional control of the vehicle.

In London Country v. Cattermoles (Garges) Ltd., (1953) 1 All ER 582

A workman was employed as a general garge had who is not competent to drive the vehicle and he had no licence. He got into the stationary van started the engine, drove the van and went onto the high way. While so, it collided with another van and the employers of the garge, were held liable. It was also held that a person who is a servant has always a personal independent sphere of life and at any particular time he may be acting in that sphere of life and without any particular time he maybe acting in that situations the master cannot be responsible for when he does when the act of the servant causes injury to a third party the question is not answerable by merely applying the test whether the act itself is one which the servant was ordered or forbidden to do. The employer has to shoulder the responsibility on a wider basis. In some cases situation he becomes responsible to third parties for acts within he had expressly or implicitly forbidden the servant to do"

Again in llkiw v. Samuels (1963) 1 WLR 991

It was contended that the driver to whom the vehicle had been entrusted for driving had no authority from the employer to delegate the driver of the vehicle to another person and because of that employer cannot be made liable vicariously for the negligence of some one to whom he had purported to delegate the control of the vehicle while negativing the said contention it was held.

The duty of torts of which he was in breach was in my view a duty delegated to him by the defendants under his contract of employment, and that breach the defendants are vicariously liable notwithstanding that it resulted from his breach of an express prohibition by the defendant against permitting any other person to drive, for that prohibition did not limit sphere of his employment.

In Sitaram Motilal Kalal v. Santanuprasad Santanuprasad Jaisankar Bhatt, AIR 1966 SC 1967

The owner of the vehicle entrusted it to A for plying as a taxi. B used to clean the Taxi. He was either employed by A or by owner. A trained B. to drive the vehicle and took B for obtaining the licence for driving while marking the test, B caused bodily injury to the respondent at the time of the accident, A was not present in the vehicle. On the question whether the owner was liable, it was held, in the majority judgment that the owner was not liable because the evidence that owner had employed B as-a-servant to drive the vehicle. However, *Subbarao*, J., (as he then was) held that the owner was liable because A did not exceed the authority conferred on him by the owner in employing B as a servant and permitted him to drive the vehicle in order to obtain the licence for assisting him as a driver.

After considering the various dicta laid down by the foreign Courts and the apex Courts of this country, it is clear that if the initial entrustment of the vehicle is proper then in the event of any further entrustment by the driver to other persons during the course of employment the master is held vicariously liable. This principle is based on public policy as the third party victims are not concerned with the mode or manner of execution of authority of the master by the servant cannot be deprived of compensation. It therefore, follows, the State is liable for the acts of its servant when such acts were done during the course of employment.

State of Bihar v. Renu Devi, 1990 (1) CC 497 (Pat.)

This is a case where the Executive Engineer under orders of transfer was driving the vehicle held by the Government in order to perform his official duties, and caused the accident the same cannot be said to be an unauthorized act on his part for determining the question of vicarious liability of the owner of the vehicle. In case of this nature, the dependants of the vehicle deceased may sue only the owner of the vehicle and not the driver development of law has occurred in this direction as a result whereof the Court has been leaning in favour of grant of compensation as against the owner of a vehicle and not against the driver thereof.

Reference in this connection may be made to *Pushpabai Udeshi v. Ranjit*

(1977) ACJ 243 SC

Before we conclude we would like to point out that the recent trend in law, is to make the master liable for acts which do not strictly fall within the term in the course of employment as ordinarily understood. We have referred *Sitaram Motilal v. Santanuprasad Jiashankar Bhat*

1966 ACJ 89 (SC)

Wherein this Court accepted the law, laid down by Lord *Dennin* on *Ormoud v. Cross Vile Motor Services Ltd.,* (1953) 2 All ER 753, that the owner is not only liable for the negligence of the driver, if that driver is his servant acting in the course of his employment but also when the driver is with the owner's consent, driving the car, on the owner's business, or for the owner's purpose. This extension has been accepted by this Court. The law as laid down by Lord *Denning* already referred *i.e.*, the first question is to be seen whether servant is liable and if the answer is yes, the second question is to be seen whether the employer must shoulder the servant's liability has been uniformly accepted. The scope of the course of employment has been extended.

State of Maharashtra v. Kanchanamala Vijiyasing Shrike, AIR 1995 SC 2499

The question arose before the Supreme Court, in this case, wherein one *Vijiya Singh*, who was driving the scooter, was dashed by the jeep belonging to State Government driver by a person 'X' other than the regular driver. It was alleged that 'X' was under the influence of liquor, and was driving the jeep in a rash and negligent manner, which resulted in the accident and the death of *Vijiya Singh.* The said person 'X' was driving the Jeep with the knowledge, of the regular driver, of the Jeep, as such the State was liable. The Tribunal found that the accident occurred on account of the rash and negligent driving of 'X' that he had no licence as such the State was liable. The Tribunal found that the accident occurred on account of the rash and negligent driving of 'X' and that he had no licence to drive the Jeep, that the keys were snatched away from the regular driver and that therefore, directed 'X' who drove the vehicle at the time of the accident to pay the compensation. On appeal the High Court held that the keys of the vehicle were not forcibly taken from the driver, that it was established that the Jeep was taken by the employee not for his own private purpose and it was taken on official duty. In that background it was held that the State is vicariously liable for the said accident. Thus the State Government, the driver and the respondent were jointly and severally liable for payment of compensation. Aggrieved by the said findings, the matter was carried in appeal by the State and the Supreme Court in Paragraph 9 of the judgment observed as follows :

The question of payment of compensation for motor accidents has assumed great importance during the last few decades. The road accidents have touched a new height in India as well as in other parts

of the world. Traditionally before Court directed payment of tort compensation the claimant had to establish the fault of the person causing of injury or damage. But of late it shall appear from different judicial pronouncements that the fault is being read as because of someone's negligence or carelessness. Same is the approach and the attitude of the Courts while judging the vicarious liability of the employer for the negligence of the employee. Negligence is the omission to do something which a reasonable man is expected to do or a prudent person is expected not to do. Whether in the facts and circumstances of a particular case, the person causing injury to the other was negligent or not has to be examined on the materials produced before the Court. It is the rule of law, that an employer though guilty of no fault himself, is liable for the damage done by the fault or negligence of his servant acting in the course of his employment. In some cases, it can be found that an employee was doing an unauthorized act in an unauthorized way but not a prohibited way. The employer shall be liable for such act, because such employee was acting within the scope of employment and in so acting done something negligent or wrongful. A master is liable even for acts, which he has not authorized provided they are so connected with acts which he has been so authorized on the other hand, if the act of the servant is not even remotely connected within the scope of employment and is an independent act, the master shall not be responsible because the servant is not acting in the course of his employment but has gone outside."

After referring to the *London Country Council's* case (supra) and *Likwis* case, (supra) the Supreme Court observed as follows.

"It need not be pointed out that different consideration might arise, if the servant or, some stranger was using the vehicle for purpose other than the purpose, of his master's business, and the accident occurred while the vehicle was being used for that other purposes. But once it is found and established that vehicle was being used for the business of the employer than the employer will be held vicariously liable, even for the lapse, omission and negligence of the driver to whom the vehicle had been entrusted for being driven for the business of the employer". It was pointed out that in *Pushpabai v. Ranjit Ginning Co.,* the Supreme Court accepted the unauthorized act, of the driver being within the course of employment because of his occupying high position of 'Manager' and the principle laid down in *Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt*, was sought to be process in to service in that regard the Supreme Court observed thus,

We do not think that the ratio of the case turns on the position occupied by the driver. The real thrust of the decisions acceptance of the trend to make the master liable for acts, which do not strictly fall within the term in the course of employment as ordinarily understood.

It was further observed as follows :

The crucial test is whether the initial entrustment of the employee, was expressly authorized and lawful. The employer as in the present case, the State Government, shall be never the less be responsible, for the manner in which the employee that the driver and the respondent executed the authority. This is necessary to ensure, so that the injuries caused to third parties, who are not directly involved or concerned with the nature of authority vested, by the master, to his servant are not deprived from getting compensation. If the dispute revolves around the mode, or manner of execution of authority of the master by the servant the master cannot escape the liability so far third parties are concerned on the ground that he had not been actually authorized in the particular manner, in which the act was done. In the present case, it has been established beyond doubt that the driver of the vehicle had been fully authorized to drive the jeep for a

purpose connected with the affairs of the State, and the dispute is only in respect of the manner and the mode in which the said driver performed his duties by allowing another employee, of the State Government who was going on official duty to drive the jeep when the accident took place. Once it is established that the negligent act of the driver, and respondent was in course of employment the appellant state shall be liable for the same.

This principle of law is followed by His Lordship Justice *Bikshapati* in *N. Suryanrayana v. J. China Venkataramana*, reported in 1999 (2) CCC 536 AP, where it was laid down. When the initial entrustment driver by master is proper and when the driver allows the other person to drive the vehicle during the course of employment, and if any accident takes place, the trend is to make the master liable for the acts of the servant.

In *State of Kerala v. Cheru Babu*, AIR 1976 Pat 24, the Government was held liable to pay damages when the advisor of the Governor going on by a jeep on a private visit knocked down a person, causing multiple injuries.

In *State of Orissa v. Madhurilata Ray*, AIR 1978 Ker. 43, a Government employee, and the father both were involved in an accident while travelling in a jeep, being driven by the Government driver. In an action by the widow, of the deceased father of the deceased employee, the Government was held liable notwithstanding the deceased was an unauthorized occupant.

In *Mariyam Jasab v. Hematal Ratial*, AIR 1982 Guj. 23, the appellants wife and children of the deceased claimed damages from the State for the death of the deceased, as the death resulted, where the driver of the water tanker gave him a lift, and the accident occurred, on a sharp curve, due to rash and negligent driving. The defence taken by the State was that the driver, had no authority to give lift to any person and if he did so, it was not done in discharge of his duties and therefore the State is not vicariously liable. The Court held, the driver could not have given a lift, to the deceased as it was not a passenger vehicle makes no difference. He was driving the vehicle for master's business. The Court said the presumption would always be that the vehicle was driven for the master's purpose and the driver was acting, in the course of employment unless the presumption was rebutted (The Court referred *Sitaram v. Shant Prasad*, AIR 1966 SC 1967). In this case the presumption was not rebutted.

The Court is also not concerned in such matters, whether taking of the passenger, was legal or illegal. It was the owner who had to decide to run the risk or not, If that was taken the owner would be liable for damages.

The State was vicariously liable under Sections 110-B and 116 of Motor Vehicles Act 1939.

In *Government of A.P. v. K.P. Padmarani*, AIR 1976 P 122, a vehicle proceeding to Srisailam Dam site in an accident killed an employee of PWD when he was returning from the site. The State was held liable as the construction of the dam could not be a sovereign function. The Court stated that the amendment of Section 110 of the Motor Vehicle Act, by Parliament had made the Government, as the owner of the motor vehicle liable to pay compensation to the persons entitled to claim compensation if injury was caused while driving the motor vehicle.

The Court relying on *Superintendent and Legal Remembrance*, *State of West Bengal v. Corporation of Calcutta*, AIR 1967 SC 997, said the Government was bound by the statute unless excluded expressly or by necessary implication and therefore the theory of 'sovereign' and 'non-sovereign' functions, would not apply to motor vehicles accidents although the statute had not made any explicit

provision to bring Government also within its purview yet, this was a rational and welcome holding of the Court, in conformity with the Rule of Law.

In *State of Orissa v. Mst. Amruta Dei*, AIR 1987 Ori. 217, the R.T.O. with Enforcement Inspector, and other Assistants, went on a Government jeep, being driven of the jeep while they were returning in the night after the day's duty, the Enforcement Inspector was driving the vehicle and it dashed against the tree, causing instaneous death of the Enforcement Inspector and two Office Assistance. The Claims Tribunal held the State of Orissa is not liable as the injury was caused in discharge of sovereign function of the State. The Single Judge of the High Court decided in appeal that the Enforcement Inspector was driving the jeep in a rash and negligent manner, and that the accident took place due to impact of the jeep with tree. It was said the injury was caused not by virtue of any act committed by the public servant.

Conclusions (Birds Eye View)

Need for urgent legislation

Having thus surveyed the entire matter with respect to pre and post-constitutional periods, on the 'sovereignty' which is however now become obsolete and also surveyed the law, that impinged on the subject before adverting to other chapters, such as Negligence, Motor Vehicle Act, violation of fundamental rights and the concept of constitutional tort, reflecting vicarious liability of State. It is desirable, even at the risk of repetition to consolidate entire matter and nutshell analysed in the earlier paragraphs and the succeeding paragraphs in order to have comprehensive study or approach of the matter right from start to finish so as to focus the empirical study of the sky view and ground view, of the matter, consuming considerable industry.

The legal maxim *"king can do wrong"* is the common law principle. In England source of the main Law or Judge made Law as opposed to statute law, under the common law, that which the sovereign does personally the law presume will not be wrong. That which the sovereign do does by command to his servants cannot be wrong, in the sovereign because if the command. Is unlawful it is in law no command. The crown cannot be charged with negligence, fraud or other forms of tortuous wrong doing, nor is it reaspsible for the act of its agent and servants. Similarly under common law the crown could sue but could not be sued in tort in any circumstance for the King can do no wrong and no wrong could be imputed to him. The only remedy available for a subject was of petition of right and that thereafter obtaining the fiat of the Advocate General but such remedy was not available in case of tort since the king is not liable to be sued.

The law of tort a branch in English Common Law, the law of tort as administrated in India is the English Law, as modified by the Act of Indian Legislature from time to time. In law of tort the principal is liable for the negligent acts of his agents provided the agent is within his authority. The liability is based on the principle of vicarious liability. But under common law, previously the State was immune, from any action, which is otherwise known as sovereign immunity. This rule of common law regarding immunity from liability in tort had been modified to a great extent in England by bringing the necessary enactment known as Crown Proceeding Act. The Act came into force on 1.1.1948 by which time India became independent.

As can bee seen from the above obviously two principles *viz*., (1) sovereign immunity (2) State is not liable to be sued, but it can sue. There has been a substantial change, in the law in respect above two principles brought about by various judicial pronouncements. During the pre-independence era in a classic judgment the chief *Peacock* speaking for the Calcutta Supreme Court adverted supra in the

peninsular and oriental stream navigation company (1861) 5 Bom HCR 1 held that there is great and clear distinction between act done in the conduct of what are usually termed as sovereign powers and acts done in the conduct of undertakings, which might be carried on by private individual without having such powers delegated to them. In that case the Secretary of State in Council in India was ultimately held liable for the damages occasioned by the negligence of servants in the service of the Government if the negligence is such as would render in ordinary employer liable. Thus the principle of vicarious liability of the State to some extent has been recognized.

In the post-independence days, Article 300 was incorporated in our Constitution which provides *inter alia* that the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by name of the State and may subject to any of the provisions which may be made by Act of Parliament or of State Legislature enacted by virtue of the powers conferred by the Constitution to sue or be sued in relation to their respective affairs in the like cases, as the dominion of India and the corresponding province might have sued or been sued if the Constitution had not been enacted. In other words no suit would lie in case where no suit was competent before the Constitution. It may be reiterated here that prior to Article 300 of the Constitution and the Government of India Acts 1858, 1915 and 1935 the law in vogue was the common Law principles under which the crown can sue but cannot be sued.

In *State of Bihar v. Abbul Mazid*, AIR 1954 SC 245, the Supreme Court has recognized the right of a Government Servant for recovery of arrears of salary. It has been held in the decision at Para 17 as follows.

"From the provisions it is clear that the Crown in India was liable to be sued in respect of acts which in England could be enforced only by a petition of right. As regards tort of its servants, in exercise of sovereign power the company was not the crown in India was not liable unless the act had been ordered or ratified by it. The present claim is not based on tort but is based on quantum merit or contract and the Court is entitled to give relief.

In the year 1962 again the Supreme Court in the State of Rajasthan v. Mrs. Vidyavati, AIR 1962 SC 933 held as follows:

"Viewed from first principle there can be no difficulty in holding that the State should be as much liable for tort in respect of a tortuous act committed by its servants within the scope of his employment but only associated from the exercise of sovereign powers, as any other employer"

The Bench consisting of five Judges quoted with approval the judgment of Lord *Peacock,* C.J., it was held in Para 14 as follows.

"It was impossible by reason of the maxim the 'King can do no wrong' to sue the Crown for the tortuous acts of its servants. But it was realized in United Kingdom that the rule had become outmoded in the context of modern developments in State craft, and the Parliament intervened by enacting Crown Proceeding Act 1947 which come into force on 1.1.1948. Hence the very citadel of the absolute rule of immunity of the sovereign has now been blown up"

Again in *Kasturi Lal Ralia Ram Jain v. State of U.P.*, AIR 1965 SC 1039, another Bench consisting of 5 Judges of Supreme Court reiterated the principle enunciated by Lord *Peacock,* C.J., held as follows: "There is a material distinction between acts committed by the public servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants and act committed by

public servants which are not referable to the delegation of any sovereign powers.

The earlier judgment of the Supreme Court in *Mrs. Vidyavati* case had also been quoted and explained or that the negligent act in driving the jeep car from work shop to the Collector Bungalow for the Collector's use is itself an activity which is not connected in any manner with the sovereign powers of the State at all and that is the basis on which the decision much be deemed to have passed by the Parliament or the State as completed in Article 300 of the Constitution the Supreme Court said that since under analogs provisions of the Government of India Acts 1858, 1915, and 1935 the Secretary of State in Council may sue and be sued as well in India as in England by the name of the Secretary of State. In similar way the Government of India can be sued

Till 1977 the same position continued to be invouge therefore if the torts committed by a public servant while discharging his duties are referable to delegated a statuary functions the State cannot be made liable of course the liability of the public servant has always been there as an individual liability. In the year 1977 in *Smt. Bavasa Kommodo v. Sate of Mysore,* AIR 1977 SC 1949, the Supreme Court ordered the State to pay amount of Rs.10,000/- which is in cash equivalent of the property of the appellant seized in connection with a theft case which was found to be missing whilst in the police custody given as per orders of the Court. The defence taken in that case by the State was that the property has not been placed in the custody and the Court which was not *custodia legis* could not pass any order. It is axiomatic from the fact of the case that the principle of immunity was not mooted as a defence therefore not been considered by the Court. The judgment in *Kasturi Lal* case also had not even been citied nor referred to *Basava Patil's* case directly pertains to the property. Although nothing had been said about the doctrine of the sovereign immunity in that case in a way the judgment is in sharp contrast to *Kasturi Lal* case. Nevertheless *Kasturi Lal* case being the judgment rendered by a Larger Bench consisting 5 Judges *vis-a-vis Basava Patil's* case which was decided by a Bench of 3 Judges consisting holds the field being the law declared by the Supreme Court (*vide* 1993 (3) ALT 471). Now in the year 1983 the Supreme Court in *Rudul Sah v. State of Bihar,* AIR 1983 SC 1086, ordered compensation of Rs.30,000/- to be paid to the victim who was detained illegally for nearly 14 year even after the order of the Court of release. Although it has been enunciated in so many words about the liability of the State, for the tortuous act of it officials, committed while exercising the sovereign power delegated to them and the extent of sovereign immunity, in essence the judgment reads the same.

Following the judgment there came some other judgments of the Supreme Court in *Sebastian M. Homgray v. Union of India*, AIR 1984 SC 571; *Bhim Singh v. State of J&K,* AIR 1986 SC 494, *Sahelia, A Women's Resources Center v. Commissioner of Police, Delhi,* AIR 1990 SC 513, *State of Maharashtra v. Patil*, AIR 1991 SCW 871. In all these cases, neither the earlier judgment in *Kasturi Lal's* case, has been referred to nor any principle contra thereto has been enunciated except recognizing the right of the victims to claim damage against the State for the tortuous acts of the public servants affecting the life and liberty of individual which is obvious from the conspectuses of all the judgments. In *Nilabanthi Bahera v. State Orissa*, AIR 1993 SC 1960, by an authoritative pronouncement the Supreme Court was held that if the tortuous act of the Government servants though referable to the delegated sovereign functions affect the fundamental right of citizen *i.e.*, the life and liberty the liability of State cannot be denied. This had been deviation from the law as enunciated by the Supreme Court in the year 1965 which was in vouge till 1983 by further modifying the principle and reducing the rigour of the doctrine of sovereign immunity. In the year

1989 by a classic judgment the A.P., 1989 (1) ALT 222, *S. Jaganadha Rao v. State of A.P.*, held as follows.

"The theory of sovereign power" practically became obsolete. It may legitimately be said to be in vouge in the field of declaration of war, conclusion of treaties, maintenance of peace and other functions which by their very nature cannot be performed by any private individual"

Indeed that forms the principle of law on the subject not only the judgment is identified specified areas where the doctrine of sovereign immunity can be invoked thus reconciling the individual rights within the requirements of public interest. Significantly in all the above cases of the Supreme Court its jurisdiction was clutched at by invoking the public law remedy has been resorted to by filling a suit for damages. A Bench of the High Court of A.P. decreed the suit relying upon the judgment of the Supreme Court in *Rudul Sah* case for the death of the prisoner in jail the all in the bomb attack due to the negligence of the jail authorities. The distinctions between a private law remedy and public law remedy has been succinctly pointed out by the Supreme Court in *Smt. Nilabati Behara alias Lalith Behara v. State of Orissa* (supra) it has been held in Para 7 of the judgment as follows.

"It would be however, be appropriate to spell out clearly the principle on which the liability of the State arise in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in an action of tort. It may be mentioned straight away that award of compensation in a proceeding under Article 32 by this Court or by High Court under Article 226 of the Constitution a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply even though it may be available as a defence in private law in a an action based on tort. This is a distinction between to the remedies to be borne in mind which also indicates the basis on which compensation was awarded in such proceedings.

The Supreme Court in this judgment distinguished its earlier judgment in *Kasturi Lal* case and held in Para 13 as follows

In this context it is sufficient to say that the decision of the Court in *Kasturi Lal* upholding the States pleas of sovereign immunity for tortuous acts of its servants is confined to the sphere of liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the Constitutional scheme and is no defence to the Constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only participle mode of enforcement of the fundamental rights can be the award of compensation. The decision of this Court *Rudul Sah* and others in that line relative award of compensation for contravention of fundamental rights, in the constructional remedy under Articles 32 and 226 of the Constitution. On the other hand, *Kasturi Lal* related to the value of goods ceased and not returned to the owner due to the fault of Government Servants, the claim being of damages for the tort of conversion under the ordinary process and not a claim for compensation for violation of fundamental rights. *Kasturi Lal* is therefore inapplicable in this context and distinguishable."

Thus the doctrine of 'sovereign immunity' which was absolute earlier as received set back, and has been modified from time to time by authoritative pronouncements of the Supreme Court exercising judicial activism, to meet a situation with the avowed object of rendering justice to the victims. What has been absolute has first been modified approving the vicarious liberty of the State, by limiting the doctrine to tortuous acts of the public servants committed while exercising the sovereign functions alone. This has been

further modified that even in such tortuous acts of a public servant referable to delegated powers under the statute if they affect the fundamental rights of the citizen, by making the State liable vicariously. In the year 1989 by the judgment of A.P. High Court in *S. Jagnadha Rao's* case the rigour of this doctrine has been further reduced and held to have become obsolete except in cases of war, maintenance of peace, conclusion of treaties *etc.*, which cannot be performed by private individuals. But the Supreme Court in *Nilibati Behara's* case while distinguishing between the public law remedy and private law remedy held in Para 9 as follows :

"It may be mentioned straightway the award of compensation in proceeding under "Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of 'sovereign immunity' does not apply; even though it may be available as a defence in private law in an action based on tort. This is a distraction between the two remedies to be borne in mind"

It may be reiterated here that the claim in *Challa Ramakonda Reddy's* (supra), is by means of private law remedy based on tort.

At another stage in Para 19 the above dictum of the Supreme Court has been further elucidated as follows:

"This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies were more appropriate"

In essence therefore a common man whose fundamental right has been infringed by the tortuous acts of the public servant committed while exercising his sovereign function can either invoke the public law remedy available under Article 32 or Article 226 of the Constitution by filing a writ or can avail private law remedy under the ordinary processes by filing a suit for damages. A plain reading of the above sequestered excerpts in my humble view show that defence of 'sovereign immunity' is not available in the case of public remedy based on strict liability, but it may be available as a defence in the private law remedy based on tort. But the spirit of the judgment is that, the defiance of 'sovereign immunity' is not available even in case of tortuous acts of the public servants committed while exercising delegated sovereign functions, when such acts violate the fundamental rights of a citizen and such a defence may be available in other cases were the acts complained of are committed while exercising the delegated sovereign functions not affecting the life and liberty of an individual.

What is significant is that the doctrine of sovereign immunity has not become obsolete, but it is very much available as a defence though not in the cases of public law remedy based on strict liability for contravention of fundamental rights, but in cases of other tortuous acts committed by public servants while exercising the statutory functions. Another significant factor which need be mentioned here is that the dictum of the Supreme Court *Kasturi Lal Jain's* case has not been overruled or set aside and it has only been distinguished on facts in *Nilabati Behara's* case by holding that the defence sovereign immunity is available. The Supreme Court reiterated its earlier decision in *Kasturi Lal* a case though not in that form, but in a modified form - the modification being that in the case of violation of the fundamental rights of the citizen by the tortuous acts of the public servants committed while discharging is statutory functions delegated to them under a statute, the State vicariously liable.

In view of the judgment of the Supreme Court in *Smt. Nilabati Behera's* case situation has become resuscitated, inasmuch as the defence of 'sovereign immunity' is now

available, in a case for damages to save the tortuous acts of the public servants committed while discharging their statutory functions which affected the life and liberty of the individual, but not the property. Of course the individual liability of the public servant for his tortuous acts is always there. The victim and his legal heirs can always therefore proceed against erring public servant for his tortuous act in a private action. But such remedy against the public servant well-nigh is as good as no remedy at all. It is neither practical nor efficacious remedy and is nothing but chasing a mirage. That apart the other side of the coin is also to be seen. The public servant is not acting in his individual capacity but as an agent or representative of the State. At times in his anxiety while discharging the official functions might exceed his powers and limits. Absolutely no personal motive can be attributed in such cases. Therefore it is not reasonable to mulct the official, with damages, who committed the act of negligence while discharging his officials functions in good faith. Unless motive is attributed to him, he cannot be made liable personally for his official acts. But all the same the earring official is not immune from any action, and his responsibility shall be fixed, and proceeded against, either departmentally or by initiating appropriate action including prosecution. Indeed such an action will deter the public servants and desist them from committing arbitrary and excessive acts under the garb of official duties.

It is needless to emphasis that ours is a democracy. The preamble to the Constitution reads that India is a Sovereign Socialist Secular Democratic Republic. In a democracy "Rule of Law" is the basic requirement. The purpose of the "Rule of Law" is to protect the individual against arbitrary exercise of power. The exercise of power by the administration shall therefore be in consonance with the rule and the person exercising the powers is always accountable to law. If a property is seized by the police or other authority while exercising the powers conferred under a statute (delegate statutory powers) from an individual, so soon after the purpose of such seizure ceases the police officer or the authority holds that property till it is restored to the original owner of the person entitled to the possession thereof, in trust for the benefit of such owner or person. If such a property is lost or the otherwise could not be delivered and the owner or the person were to be told tomorrow that he has no remedy-whither democracy and "Rule of Law" ? it is no doubt true that this is an attribute of sovereignty that a State cannot be sued on Courts without its contest. The immunity of the crown was based on the old feudalistic notions justice namely the king was incapable of doing a wrong, but it was realized even in the United Kingdom, that principle had become outmoded and that is the reason why the British Government passed the Crown Proceedings Act, 1947. As per the provisions of the said Act, the crown is subject to all those liabilities in tort to which a private person was subjected to, the Crown is also liable for statutory negligence in the same way as an individual. Therefore, in England the Government's privileged positions as regards the law as disappeared of torts. The irony is; the law of torts in our country which is based on the common law principles of England is nothing but the legacy left behind by the British Government and even though the British Government had brought in a suitable legislation to change the feudalistic view prevalent in the United Kingdom, that King can do no wrong, by passing the Crown Proceedings Act, still we are not in a position to bring in a similar such suitable legislation to fulfil the needs and aspirations of the people in tune with the democratic principles. It is apt here to quote the observation of the Supreme Court in *Kasturi Lal's* case thus:

"It is time that the Legislature in India seriously consider whether they should not pass legislative enactments to regulate and control their claim from immunity in cases like this on the same lines as has been done in England by the Crown Proceedings Act, 1947"

Even the A.P. High Court in Challa Ramkonda Reddy case observed in Para 14 as follows:

"We note with regret that to this day no such Act, has been made though more than 23 years have been passed by since the said observations by the Supreme Court"

It is most unfortunate that these observations could not stir either the Parliament or the State Legislature even till today.

This defence of 'sovereign immunity' takes in its sweep, not only the tortuous acts, nay, the arbitrary actions, acts committed by abusing power, and even the brazen acts, of the public servants committed under the garb of the statutory functions. Now-a-days the excess committed by the police officials are not uncommon likewise the other statutory functions exercising powers of seizure under the Customs Act, Essential Commodities Act, and a host of other special enactments. If the victim is be told in all such cases that he as no remedy under law, when he approached a Court of law seeking redressal there can be no greater injustice than that, perhaps causing more damage than what has already been caused to him by the erring public servant. The feelings expressed by the Supreme Court in *Kastrui Lal's* case are apposite here to be quoted.

"Our only point in mentioning this Act, is to indicate that the doctrine of immunity which has been borrowed in India in dealing with the question of the immunity of the State in regard to claims made against it for tortuous acts committed by its servants was really based on the common law principles which prevailed in England, and that principle has now been substantially modified by the Crown Proceeding Act. In dealing with present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law has to be told when he seeks a remedy, a Court of Law on the ground that his property has not been returned to him, that he can make no claim against, that we think is not a very satisfactory position in law. The remedy to cure this position, however lies in the hands of the Legislature"

Sovereign and Non-Sovereign functions - Distinction

Peninsular and Oriental Stream Navigation C. v. Secretary of State, (1861) 5 Bom HCR APP 1 and the case decided the by the Supreme Court of India held that the Government is not liable for the injuries caused by the Government Servants, in exercise of 'sovereign functions'. In order a clear-cut to have legal position, we must know what are sovereign functions and what are non-sovereign functions non-sovereign powers, C.J. *Peacock* in his judgment in Peninsular and Oriental Steam Navigation case said that the non-sovereign functions where those which could be carried on by all the persons and bodies including the sovereign body. The Court in course of judgment observed that the company would not be liable for any military or naval action or in seizing property as prize but the company would be liable for navigation a steamer. However it may be difficult in some cases to categorise a function as a 'sovereign function' or non sovereign function a water tight compartment lization or straightjacket of the functions of the State as a sovereign and non-sovereign functions or Governmental function is not sound (AIR 1994 SC 2663 *N. Nagendara Rao v. State*) of which is highly reminiscent of laissez-faire era. It is also antagonistic to the modern Government governed by the Rule of law. In *Sham Sunder v. State of Rajasthan*, AIR 1974 SC 890, while holding the famine relief work is a non-sovereign function. The Supreme Court said to draw a rational live between the sovereign and non-sovereign function was not possible in the cases of *Kasturi Lal* and *Vidyavathi* (AIR 1965 SC 1039 and AIR 1962 SC 933) could have been decided by holding the opposite that the custody of gold and silver would

not amount to sovereign function being in the nature of bailment and the maintenance of car for official use of Collector would be sovereign function respectively. Mention needs to be made of the case *Morisis v. Martin and Sons Ltd.* Prior to this case it was generally accepted view, that the bailee could not be made liable for the torts of its servants even if the servants himself stole the goods. However this case finally laid down the law that the bailee would be liable for the theft of his servant if the loss was occasioned in the course of his employment. In this case a firm of cleaners was held liable for the loss of goods bailed to them which was entrusted to a servant for cleaning but was stolen by him. In the same case the Court held that the master is not liable for the theft of goods by his servant not incharge of goods. On the basis of Maris Principle it can clearly be stated that in situation like *Kasturi Lal* case, holding the Government is not liable would be contrary to the principle of 'Rule of the Law, where an ordinary employer would be liable. In *Ram Ghulam v. Govt. of A.P.*, AIR 1950 All 206, the facts of which are somewhat similar to *Kasturi Lal* case the plaintiff's stolen ornaments were recovered by the police but were lost again in police custody. The plaintiff's action on the ground of bailment failed as the obligation of the bailee was held contractual "which cannot arise independently of contract. The view taken by the Court has been said not correct. In *State of Gujarat v. Memon Mahmood*, AIR 1967 SC 1885, the State under Customs Act seized certain motor vehicle, and another articles of the plaintiff but the article while in custody of the authorities remained totally uncared for. In an action for damages the State pleaded that they were not bailee and therefore not liable. Justice *Shelat* of the Supreme Court observed that the bailment would be dealt by the contract at only in case were it arose from a contract and it was not correct to say that there could be any bailment without an enforceable contract such trend if followed by the Judiciary in future, would be really full of justice and would bring the 'Rule of law'.

The distinctions between the sovereign and non-sovereign functions is a great and clear which may appear to be a dividing line between the immunity and liability of the Government but a practical difficulty arises, in bringing out the distinction between the two kinds of functions and therefore it is difficult to say where the Government would be liable and where immune as it is not rationally possible to draw a demarcating between sovereign line and non-sovereign functions. The sovereign immunity principle renders only the Government immune from liability it does not immunize the actual wrongdoer. However justice is required the Governmental accountably being in a fit position to pay the damages.

In India where the 'Rule of Law' prevailed right from the ancient period the injection on the sovereign immunity as staged the society governed by the rule of law even the Judiciary right from the *Peninsular and Oriental Stream Navigation Company's* case at the present day has been harping on the sovereign immunity principle, however the recent trend of the Supreme Court awarding compensation to the victims of the Government wrong have permeated a new dimension in the judicial thinking and can be said as a break-through towards the 'Rule of Law' by taking recur Government for the wrong arising out of the 'sovereign functions' has a very strong hold.

In recent times the Supreme Court by awarding compensation in writ petitions has excelled securing interests of victims of Governmental wrongs, AIR 1983 SC 1086; AIR 1984 SC 1026; AIR 1986 SC)

Vicarious liability of the Government may arise for negligence strict liability misfeasance, non-misfeasance and intentional torts *etc.*

Assault and Battery

In case of battery the present judicial trend in India is in favor of justice and

fairness, to the victims making the Government vicariously liable by the application of Article 21 which guarantees fundamental rights to life and personal liberty to every body. In malicious prosecution the employer does become liable unless it was authorized by him or the employee acted in course of employment, the judicial trends indicate the vicarious liability of the Government on the application of Article 21 in malicious prosecution when the malice was apparent but not known where it lay

In *false imprisonment* the judicial attitude is to award compensation as else fundamental right to life and personal liability will worthless.

It was said but the Supreme Court in AIR 1976 SC 1207 that during the emergency provisions of the Constitution being the 'Rule of Law' if any person deprived of his personal liberty even mollified, under emergency provisions, it would not be challengeable if the Presidential order under Article 359 suspended the enforcement the of Article 21 since it was the sole repository of Fundamental Right to Life and Personal Liberty the general rule cannot override the Rule of Law as provided in the Constitution. Happily the 44 amendment of the Constitution put a bar on the suspension of the enforcement of Article 21, in emergency proclamation under Article 352. It has been a step in the right direction putting an end to the draconian provision contrary to the justice and fairness and violation of personal liberty would be actionable.

In case of *'Trespass'* the Government has been held vicariously liable but the theory of the sovereign and non-sovereign functions restricts of the liability to the harms arising out of non-sovereign functions (AIR 1981 MP 65)

The public duty of Government create only interest not the rights *e.g.*, duty to provide education or to provide orderly society. Therefore, omission in such duties are not actionable. Such a position is not derogated with the Rule of Law in these duties is not involve any rights. The non-action of the State which is under a duty to act in conformity with the Directive Principle of State Policy in India is such an illustration.

A public authority is liable for non-feasance of a statutory duty even if the State is silent regarding the liability because the duty without any liability would be but a pious aspiration.

In India the Madras High Court in *R.M. Gandhi v. Union of India*, AIR 1989 Mad. 205, has awarded damages against the State Government for the failure of the police to arrive timely and to quell the riots when the news of Mrs. *Indira Gandhi's* assassination spread. Talking resource to Articles 38, 19(1)(a) to (g) and 21 of the Constitution the Court awarded damages, to the members of the sikh community, whose property has been damaged or destroyed or as the deprivation of property was illegal by virtue of Article 300. The same view on almost identical facts had been taken by the Jammu & Kashmir High Court in under *Puri General Stores v. Union India*, AIR 1992 J&K 11. Recently the High Court of A.P., in *J.K. Traders Ramakrishna 70mm Hyderabad, represented by its Proprietor v. State,* the High Court awarded damages where consequent on the assassination of *Rajiv Gandhi* violent incidents erupted in the State of Andhra Pradesh including the twin cities of Hyderabad, large scale destruction of property occurred in Ramakrishna 70mm where the theater was located in spite of request or compliant to police apprehending attack being made by the hoolings, the police did not take any action immediately. More than hundred persons gathered at the theater and caused damage to the Ramakrishna. even though police arrived later on they did not take any steps to prevent the damage being caused, writ was filed directing the State Government to pay compensation for the

loss suffered by them for the failure of the police to protect the fundamental right of the petitioner under Articles 14, 19(1) and 21 of the Constitution of India with regard to the tortuous liability of the State, consequent on the failure to discharge of sovereign duty and the consequential quantification of the compensation the learned Judge Justice *G. Bhiksapathi* after reviewing the entire case law on the matter AIR 1999 Pat 169, (1994) 4 SCC 137 and other leading cases held the State is vicariously liable for violation of fundamental rights. The sovereign liability liable was imported in India through the mechanism of differenting between the sovereign powers and non-sovereign powers-sanction of Government excluding the liability for the wrongs arising out of the exercise of sovereign functions the maxim King can do no wrong or bound by the statute also does not apply in India. The Supreme Court's view being that it should not be applicable to a democratic country governed by the 'Rule of Law' AIR 1976 SC 997. The exclusion of liability on the ground of injury in the course of the 'sovereign functions' of State derogates with the 'Rule of Law' but the recent judicial trends towards compensatory justice on the application of fundamental Rights to life and personal liberty as perforated the sovereign immunity in India, with a bend towards the Rule of Law. The Crown Proceeding Act in England exempts the crown for any injury arising out of judicial act or an act in connection with the execution for any injury of judicial process. With the term Judicial act the act of Tribunals are also comprehended. The Judges can also not be held liable for the torts in exercise of judicial functions. The Judges are servants of the crown but their security of tenure has made them impartial. The fearless Judiciary and the non-accountably for their acts gives a force to the rule of law and to the sound sense of justice. In India also the judicial acts will not attract the liability as the personal liability of the judicial officers is exempted under the statutory provisions and the Governmental immunity, as the judicial act is of a sovereign nature. It cannot be said as contrary to Rule of Law since justice is to be administrated must be never under fear of legal action.

The Crown is not liable to the injury for a member of the Army forces by another member of the Armed Forces during combat activities if the injured serviceman is entitled to the military pension.

In India due to general rule of immunity for the sovereign acts, member of the Armed forces, cannot claim damages for injury arising out of combatant activities of the fellow-members such an approach will be abreast of the 'Rule of Law'

The doctrine of *common employment* is another inroad on the vicarious liability of Government like other employees immune from liability. If injury is result of an act caused by the fellow employee engaged in the same wok under the same employer the interpretation is that the servant taking the employment agreed to run the risk caused by his fellow servant which is naturally incidental to the employment.

There is an interpretation by the Andhra Pradesh High Court AIR 1976 AP 122, and Orissa High Court AIR 1987 Ori. 217 that the theory of sovereign and non-sovereign functions does not apply to the Motor Vehicles Act as the Government is bound by the statutes, unless excluded expressly or by necessary implication and therefore immunity of the Government on the basis of 'sovereign functions' in motor vehicles accidents has been virtually abolished by the amendment of the Motor Vehicles Act 1939, in 1956.

The Indian judicial trend heading towards compensatory justice taking recourse to Fundamental Right to Life and Personal Liberty or the Constitutional Right to Property or interpreting the statutory provisions is highly commendable. Article 300 of the Constitution by constituting pre

Constitutional Law has influenced the Judiciary to cling the immunity for wrongs occasioned in course of 'sovereign functions' exercise.

Even at the cost of repletion, the following principles deducible from the concept of the study laid down hereunder.

(1) The Union India, and the States have the same liability, for being sued in tort, committed by their servants, which the East India Company had.

(2) The Union and the States are liable for damages, for injuries caused by their servants if the act was done in exercise of sovereign power.

(3) The Government is not liable for any tort committed by its servants. If the act is done in the exercise of sovereign power.

(4) Sovereign powers mean powers, which can lawfully exercised only by a sovereign or by person by virtue of delegation of sovereign powers.

(5) Government is vicariously liable for tortuous acts of its servants which have not been committed in exercise of sovereign functions.

(6) The Court is to find out, in each case, whether the impugned act was committed in exercise of delegated sovereign power.

(7) No well-defined tests as to the meaning of sovereign power have been attempted or can precisely laid down. Each case must be decided on its own facts. Functions relating trade, business and commercial undertakings and other socialistic activates by a welfare State do not come within the purview of delegated sovereign authority.

(8) The sovereign functions of the State must necessarily include the maintenance of army, various departments of the Government for maintenance of law and order and proper administration of the country which would include the Judiciary, the police and machinery for the administration of justice

(9) where the employment in the course of which a tortuous act is committed is of such a nature, that any private individuals can engage in it then such function are not in exercise of sovereign power.

(10) In determining whether immunity should be allowed or not the nature of the act of the transaction in course of which it is committed and the nature of employment of the person committing it and the occasion for it have all to be cumulatively taken into consideration.

Suggestions

From the aforesaid analysis the following suggestions are mooted

(1) The State is under Constitutional obligation to safeguard and preserve the right to life of every citizen. Health and medicinal care is fundamental and human right of citizens and integral facet of right to life.

(2) Denial of medicinal facilities by the Government hospitals to a person in need of urgent medicinal aid amounts to violation of right to life guaranteed by the Constitution.

(3) The right to compensation which is Constitutional remedy by way of judicial redress is available for invasion of life under Articles 32 and 226 of the Constitution. The relief available to the victim is in additional traditional remedy available under Civil and Criminal Law, Consumer Law and disciplinary departmental action under administrative Law.

(4) Monterey compensation is an appropriate, effective, and perhaps the only suitable remedy for redressal of the established infringement of right to life of a citizen. The claims based on the principle of

strict liability to which defence of sovereign immunity is not available is the Constitutional obligation of the State to provide adequate medicinal service to the people both Central and State Government will have to provide necessary financial assistance in the improvement of these facilities.

The Delhi High Court in *Association of Victims of Uphar Tragedy and others v. Union of India,* 2003 (3) CCC 84 Delhi, a cinema tragedy case where several persons including infants and children lost their lives because of asphyxiation sustained injuries due to the incident of fire while reviewing the entire law on the subject

Including *M.C. Metha v. Union of India*, which are reverent till date and holds the position to hold an enterprise liable to compensate all those who are affected by the accident and such liability is not subject any of the condition which operate *vis-a-vis* tortuous principle of strict liability under at the rule in *Rylands v. Fletcher* and laid down the following pinpoints:

(1) an enterprises which is engaged in a hazardous are in heartily dangerous industry which poses a potential threat to safety of persons working in premises or vicinity owes an absolute duty and non delegable duty to the patrons who visit to the same to ensure that no harm results to anyone on account of hazardous activity which is undertaken.

(2) In case of compensation under public law remedy where question of life and liberty arises merely because some disported questions of fact are sought to be raised, Court would not be justified in requiring the party to seek relief by way of lengthy dilatory and expensive process of civil suit.

Adverting to liability of Government Hospital, and breach of right to life, about which was narrated supra as a particular topic and from the afro and from the said analysis the following conclusions are to be drawn and drawn.

(1) The State is under a constructional obligation, the safeguard a persevere the right to life of every citizen and medical care is fundamental and human right of citizen and integral facet of right to life

(2) Denial of medical facilities by the Government Hospitals to a person in need of urgent medicinal aid amounts to violation of right to life guaranteed in the Constitution.

(3) The right of compensation which is a Constitutional remedy by way of judicial redress, is available to the victim is in addition to the traditional remedies available to victim under Civil Law, criminal Law departmental action under administrative law.

Sishir Ranjan Saha v. State of Tripura, AIR 2002 Gau 102

In this case the Doctor, on duty was not available as he was attending to his private patients, and cared little to attend the deceased despite repeated request over telephone, deceased succumbing to injuries, Doctor was made liable to pay compensation of Rs.1,25,000/-

In this context the Hon'ble High Court issued the following directions upgrading standards of medical services for all Govt. Hospitals.

(a) The Head/in charger of and second senior medical officer of the following departments must be provided with rent free residential accommodation in and around the G.B. Hospital/I.G.M Hospital/District Hospitals, each of them shall be provided with non-STD telephone facilities at Govt. cost. They are also be allowed to do their private practice if or otherwise permissible in their residential accommodation that to be done in order to prompt utilization of their services for the interest of indoor patients.

The law in this direction has been an interesting judicial pilgrimage in the recent past. There is significant contribution of

Judiciary in making serious endeavour and the Supreme Court has dealt with all aspects of medical profession from every angle and this dissertation will be incomplete if the law laid down by the Supreme Court and National Commission on medical negligence is not advert to.

Supreme Court on medical negligence

The Supreme Court, in the case of *Indian Medical Association v. V.P. Santha and others*, AIR 1966 SC 550, in which, the provisions of the Consumer Protection Act 1986 *vis-a-vis* the medical profession fell for consideration, has dealt with all aspects of medical profession from every angle and has come to conclusion, that the Doctors or the institutions, owe a duty to the patients, and cannot get away in lack of care, to the patients. Their lordships have gone to the extent that even if the doctors are rendering service free of charge to the patients. In the Government hospitals the provisions of the consumer protection will apply since the expenses for running the said hospitals met by apparition form the consolidated fund which is raised from the taxes paid by the tax payers The Supreme Court has elaborately considered the distinction between 'contract of service' and 'contract for service' and discussed in the above case and extended the provisions of the consumer Protection Act 1986 to the medical profession also and included in its ambit the services rendered by private Doctors as well as the Govt. institutions or the non Govt. institutions or be it free medical services provided by the Govt. hospitals.

In case of *Achutrao v. Haribhau v. State of Maharashtra,* reported in 1996 (2) SCC 634, their Lordship observe that in case, where the doctors act carelessly and in a manner which is not expected of a medical practitioner then in such cases an action on torts would be maintainable, their Lordships further observe that if the Doctor has taken proper prevention and despite that if the patient does not survive then the Court shall be slow in attributing negligence on the part the Doctor. It was held follows:

"A medical practitioner has various duties, towards his patient and he must act with a reasonable degree, of skill and knowledge, and must exercise a reasonable degree of care. This the least which a patient expects from a Doctor. The skill of a medical practitioner differed from a Doctor to Doctor. The very nature of the profession, is such that there be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient but as long as doctor acts in a manner which is acceptable to the medical profession and the Court finds he has attended on the patient with due care, skill and diligence and if the patient still does not survive, or suffers permanent ailment, it would be difficult to hold the doctor to be guilty of negligence but in case where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such case an action of tort would be maintainable.

The mere fact, that a patient dies in hospital does not lead to the presumption that the death occurred due to the negligence of doctor and in order to make a doctor liable for death of his patient it must be established, that there was negligence or incompetence, on his part which went beyond a mere matter of compensation on the basis of civil liability and he did something in disregard for the life and safety of the patient.

Very recently, the Supreme Court dealt the issues of medical negligence and laid down the principle on which liability of medical profession is determined generally. Reference may be had to *Jacob Mathew v.*

State of Punjab, (2005) 6 SCC 1. The Court as approved the tests as laid down in *Bolam v. Friend Hospital Management Committee*, 1957 (1) W.L.R, popularly known as Bolam's test in its applicability to India. The relevant principle culled out from the case of *Jacob Mathew* (supra) read as follows :-

(1) Negligence the breach of duty caused by 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 a reasonable man would not do. The definition of negligence, as given in law of Torts, *Ratnalal* referred to hereinabove, holds good. Negligence becomes actionable, on account of injury resulting from the act or omission amounting to the negligence attributable to the person sued. The essentials components of negligence are three 'duty' 'breach' and resulting damage.

(2) A simple take of care, an error of judgment, or an accident, is not proof of negligence on the part of medical professional. So long as a doctor follows a practice acceptable to the medical profession, of that day, he cannot be held liable for negligence merely because a better alternative course of method of treatment was also available or simply because, a more skilled doctor, would not have chosen to follow or resort to that practice, or procedure which the accused followed. When it comes to the failure of taking precaution what has to be seen, is whether those precautions, were taken which the ordinary experience of men has found to be sufficient, a failure to use special or extraditionary precautions, which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

(3) A professional may be held liable for negligence on one of the two findings either he was not possessed of the requisite skill which he professed, to have possessed or he did not exercise with reasonable competence, in the given case, the skill which he did dispossess. The standard to be applied for judging whether the person charged has been negligent, or not would be ordinary competent person exercising ordinary skill in that profession. It is not possible, for every professional to posses the highest level of expertise or skills, in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made, the basis, or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

Law mooted to compel doctors to treat victims of accidents.

Though this topic is not directly connected with the vicarious liability of either of the State are doctors it is felt honestly this proposed law which is inter related to the dissertation. Hence it may not felt as if it is disconnected.

As it appeared from the columns of 'Hindu' dated 2.9.2006, the 17th Law Commission as suggested to the State Government that they can enact a Law to compel hospitals and doctors to attend to accident victims, those requiring emergency medical treatment, and women in labour.

In its 21st report it referred to a Supreme Court judgment of 1989, which said the accident victims were being turned away by doctors at private hospitals as they were medico - legal cases. The Court suggested that it should be obligatory on private hospitals and doctors to provide emergency medical care.

Medical Insurance

The Commission cited the reason for the private hospitals not providing treatment - such victims were not in a position to make payments immediately or they had no medical insurance which would entitle them to reimbursement. The report said "In

difference towards victims of accidents and those in emergency in medical conditions and even women in labour, who are about to deliver is not peculiar to India but is prevalent in other countries also"

In the United Kingdom there is law making it mandatory for hospital to provide treatment to such patients, failing which that defaulter can be punishable under criminal law.

Taking note of the law, the Commission said no hospital or doctor should refuse to provide urgency medical care. If they refuse without justifiable reason it would be an offence.

Initial Screening

Hospitals and doctors would have to initially screen the persons to decide if there require emergency treatment. If they do they would have to stabilized and attended to. If the hospital did not have facilities for screening, stabilization, or emergency medical treatment the patient, should be transferred to another hospital.

The report suggested that the State should publish a scheme for reimbursement of expenditure incurred by the hospitals, medical practitioners or for ambulances and allocate separate funds for this purpose.

The duty of State in this behalf could be traced to Article 21 of the Constitution (right to life) as well as to the Directive Principles of State Policy. The report enclosed a model bill to be intruded by the States. If passed the law would also apply to medical private practitioners.

It is not necessary to multiply authorities on the topic.

Despite judicial activism striking realistic note, which reduced the magnitude of the hardship by modifying the feudalistic principles, that *king can do no wrong* and *king can sue but cannot be sued*, still much needed respite, suitable to the needs as aspirations of the people in a welfare State, has not been given yet. It is high time therefore for the Parliament and State Legislature to ponder over the matter over the issue, to bring a suitable urgent legislation after identifying the areas, and limiting the applicability of the doctrine to these fields as in the case of Crown Proceedings Act 1947 passed by the British Government.

SOCIAL RESPONSIBILITY OF CORPORATE SECTOR – ROLE OF JUDICIAL ACTIVISM

By

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"Every Company should adopt the motto ***EARN AND DONATE*** *to be socially responsible and act as means in development of the economy".*

The concept of Corporate Social Responsibility has been a matter of hot debate for the past one decade in keeping with its growing necessity, importance and its influence over the society at large.

In general parlance and understanding the word "Corporate Social Responsibility" means "accountability of corporate sector/s to the Nation or Society in the larger