International Environmental
Law Research Centre

TORT LAW IN INDIA 1994

Published in
Annual Survey of Indian Law 1994, pp. 485-512 (1994)

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I. INTRODUCTION

THE CASES reported in 1994 cover a range of issues: the restrictive interpretation of the defence of sovereign immunity, constitutional tort and compensation of victims, negligence of the state; privacy; development of motor vehicle accident law. The emergence of the concept of culpable inaction is of particular interest. Amendment of the Motor Vehicles Act, 1988 has significantly altered the scope of the discretion vested in tribunals and courts in determining compensation, while the amendment to the Railways Act, 1989 has widened the definition of a victim-causing event and recognised the right to compensation accordingly. The establishment of the National Human Rights Commission (NHRC) has added a dimension to tort law, particularly where the tort is committed by state officials and functionaries.

II. SOVEREIGN IMMUNITY

A giant stride towards infusing accountability into administration was taken in *Lucknow Development Authority* v. *M.K. Gupta*.[1] Arising out of proceedings taken under the Consumer Protection Act, 1986, it is a fitting prelude to the court's later decision in *N. Nagendra Rao & Co.* v. *State of A.P.*,[2] wherein the defence of sovereign immunity was revisited and reinterpreted. *Lucknow Development Authority* raised, and answered, questions concerning the accountability of statutory authorities, the meaning of compensation, the power to award compensation for acting in violation of the statute, and the increasingly significant issue of who pays—the official concerned, or the tax payer.

The case arose out of delay in construction of houses, and in the delivery of possession to an allottee, even after the entire amount to be paid had been paid as required. The Lucknow Development Authority (LDA), which was challenged before the State Commission, constituted under the Consumer Protection Act, 1986, was called upon to make good the cost of deficiency in service, and to hand over possession. The LDA, instead, appealed. Where the commission found deficiency in service, but no misfeasance, it awarded compensation to the extent of the loss suffered. But where it found the existence of "harassment, mental torture and agony", it awarded compensation to the extent of Rs. 10,000. The LDA went in further appeal before the Supreme Court.

Having decided that a government or semi-government body or a local authority is amenable to the Consumer Protection Act just as is any other private body rendering similar service, the Supreme Court addressed the issue of the award of compensation by the commission for harassment and agony to a consumer, contextualised in the doctrine of sovereign immunity.

The Supreme Court, acknowledging the evolution of the law of accountability of public authorities for their arbitrary and *ultra vires* actions, referred to the observation of the First Law Commission that the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine liability of the state. Adverting to the case of *Kasturi Lal Ralia Ram Jain v. State of U.P.*[3] a Constitution Bench decision which reinforces the doctrine of sovereign immunity, the court held:[4]

> Even *Kasturi Lal Ralia Ram Jain* v. *State of U.P.* did not provide any immunity for tortious acts of public servants committed in discharge of statutory function if it was not referable to sovereign power. Since house construction or for that matter any service hired by a consumer or facility availed by him is not a sovereign function of the state, the ratio *of Kasturi Lal* could not stand in way of the Commission awarding compensation.

It may be observed here that the limiting of *Kasturi Lal* in consonance with changing notions of accountability and sovereignty was further effected in *N. Nagendra Rao & Co.* case.

Explaining further, the court said:[5]

> Under our Constitution sovereignty vests in the people. Every unit of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to

1 (1994) 1 SCC 243.
2 (1994) 6 SCC 205.
3 AIR 1965 SC 1039.
4 *Supra* note 1 at 259.
5 *Id.* at 260.

the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created by the statute like the Commission or the courts entrusted with responsibility of maintaining the rule of law.

With this, the protection to statutory authority for acts done in the guise of statutory power, but performed in excess of such power, has been peeled off.

The attention of the court then turned to what would constitute compensation under the Act. It is interesting that the Consumer Protection Act provides a forum, as well as a right, to recover compensation, carving out areas of tort for a relatively inexpensive and accessible remedy. Compensation in this Act, which could influence the notion of compensation in tort law generally, has been interpreted by the court thus: "In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss."[6]

The definition of compensation has been construed widely, redressal of 'injustice' has been included as a purpose in providing for compensation, a remedy that goes beyond restitution or the replacing of loss. The court, therefore, concluded that "the Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him."[7]

The court, pursuing the theme of deterrence as a desired effect of compensation, has addressed the issue of "who pays" accordingly. As the court frames the question: "Should the society or the tax payer be burdened for oppressive and capricious act of the public officers or it be paid by those responsible for it."[8]

Compensation, as the court explains it, includes both the just equivalent for loss of goods or services and also for the suffering of injustice. Where the loss arose in the discharge of duties, and there was no misfeasance, the court was content to award compensation for the exact loss suffered, and the loss was to be made good by the authority itself. But, when the suffering was caused by "mala fide, oppressive or capricious acts etc. of a public servant, then the nature of liability changes."

Attributing injury to society and legal impermissibility to the "harassment of a common man by public authorities" the court saw a dimension to compensation where it acts additionally as a factor in helping "(cure) social evil" and in "improving the work culture."

The burden then ought not to be passed on to the tax payer where the exercise of discretion results in mental and physical harassment. Where the commission is satisfied, after careful consideration, that a complainant is entitled to compensation for harassment or mental agony or oppression, "then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries."[9]

This aspect of personal liability of a public authority could well influence the development of the law of compensation for constitutional tort and executive excesses, where the court has thus far, generally, left it to the government to decide if they will proceed against the offending officials.

Following close upon the heels of the *Lucknow Development Authority* case, the whittling down, and narrowing, of the concept of sovereign immunity has been effected in *N. Nagendra Rao & Co.* v. *State of A.P.*[10] In this case, the Supreme Court traced the emergence and development of the concept in India, to hold that "the old and archaic concept of sovereignty ... does not survive."

This was a case arising out of seizure of huge stocks of fertilizers, foodgrains and other, non-essential, goods under the Essential Commodities Act, 1955. In the absence of any material to prove that the appellant was guilty of any serious infringement of the control orders made under the Essential Commodities Act, the collector directed the confiscation of a nominal part of the stock, and the release of the rest, in favour of the appellant. The seizure was effected on 11.8.1975 and it was March 1977 before notice was issued to the appellant to take delivery of the

6 *Ibid.*
7 *Ibid.*
8 *Id.* at 258.
9 *Id.* at 264.
10 *Supra* note 2.

released stock. The authority made no effort in the interregnum to dispose of the stocks, despite the appellant having made application that the stock would deteriorate, and that it should be diverted for sale to places mentioned by the appellant or be handed over to the appellant for disposal and sale. When the appellant went to take delivery, it found the stock had been spoilt both in quantity and quality. The appellant therefore raised a demand that it be compensated for the deterioration in the value of the stocks released. While the trial court held for the appellant, the High Court of Andhra Pradesh, relying on the ratio *Kasturi Lal Ralia Ram Jain*[11] denied the claim for damages, and negatived the vicarious liability of the state for negligence of its officers in the performance of statutory duties.

The issues to be determined in the case included the extent and applicability of the doctrine of sovereign immunity; the liability of the state where its officers were acting under statutory authority; the vicarious liability of the state where its officers were found to have been negligent in the performance of their statutory duties; and whether a right to compensation existed where a statute provided for the return of the stock, especially where a part of the seized goods had in fact been liable to be confiscated.

The judgment undertook a detailed exploration of the doctrine of sovereign immunity, effectively reinterpreting and limiting its scope.[12] Tracing the doctrine to the Government of India Act 1858, and to the liability of the East India Co. prior to 1858, the court found that Indian law never did acknowledge the principle of sovereign immunity. In stating that, since 1965 when *Kasturi Lal Ralia Ram* was decided, the law on vicarious liability has marched ahead, the court adverted to the "pragmatic approach" that increasingly characterises its responses to violations of life and liberty, and the abuse of power by public authorities, citing the cases of *Rudul Sah,*[13] *Sebastian Hongray,*[14] *Saheli,*[15] *Ravikant Patil*[16] and *Nilabati Behera.*[17]

It observed that sovereign immunity as a defence was "never available where the state was involved in commercial or private undertaking nor is it available where its officers are guilty of interfering with life and liberty of a citizen not warranted by law. In both such infringements, the state is vicariously liable and bound, constitutionally, legally and morally, to compensate and indemnify the wronged person."[18]

Asserting that the old and archaic concept of sovereignty does not survive, and that "sovereignty now vests in the people", the court suggested that one of the tests to determine if a legislative or executive function is sovereign in nature is whether the state is answerable for such actions in courts of law.[19]

Narrowing down the defence of sovereign immunity, the court held that "barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional government, the state cannot claim any immunity."[20]

Limiting the Constitution Bench decision in *Kasturi Lal,* the court explained that the earlier case had involved property seized by police officers in the exercise of their powers of arrest under section 54 (1) (iv) of the Criminal Procedure Code 1973, (Cr PC) and that the power to search and apprehend a suspect under the Cr PC was one of the inalienable powers of the state. It was, the court conjectured, probably why the principle of sovereign immunity had been extended by the court to cover that case. "But the same principle would not be available in large number of other activities carried on by the state by enacting a law in its legislative competence."[21]

Addressing the other issues arising in the case, the court laid down that when a statute gives a power and requires the authority to exercise it in the public interest, then the person exercising the power must be vigilant and should take it as a duty to discharge the obligation in such a manner that the object of the enactment is carried into effect. The powers prescribed under the Essential Commodities Act, including seizure, confiscation and disposal or distribution of the seized goods also ought to have been so exercised. Since the commodity that had been seized

11 *Supra note 3.*
12 *Supra* note 2 at 228-32.
13 *Rudul Sah* v. *State of Bihar,* (1983) 4 SCC 141.
14 *Sebastian M. Hongray* v. *Union of India,* (1984) 3 SCC 82.
15 *Saheli, A Women's Resources Centre* v. *Commissioner of Police,* (1990) 1 SCC 422.
16 *State of Maharashtra* v. *Ravikant S. Patil,* (1991) 2 SCC 373.
17 *Nilabati Behera* v. *State of Orissa,* (1993) *2* SCC 746.
18 *Supra* note 2 at 226.
19 See *id.* at 235.
20 *Ibid.*
21 *Id.* at 236.

had become useless due to negligence of the officers, the state was liable to pay the price of the commodity to the appellant, with interest, as had been directed by the trial court. The determination of vicarious liability of the state being linked with the negligence of its officers, the court held that, since the officers can be sued in their personal capacity, 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 proposition that even if the officer is liable the state cannot be sued.

In a show of exasperation, the court lashed out at the state of the law which required citizens of an independent nation to hark back to the liability of the East India Co. while seeking redress against negligence of officers of state. The court renewed its appeal for the enactment of a law which would settle the question of sovereign immunity.

III. CONFISCATION

Gajanan Visheshwar Birjur v. *Union of India*[22] was a case of confiscation of books by the customs authorities. In 1978, the petitioner, who was a distributor and publisher of Marxist literature, imported books comprising mainly the writings of Mao Zedong. The books were imported by sea through the Bombay and Calcutta ports, and there they were seized and confiscated under authority of a general notification which declared that books containing words which have the effect of inciting or encouraging any person to do any of the acts specified therein are banned. The petitioner challenged the notification and the seizure as violative of his fundamental right under article 19 (1) (a) and 19 (1) (g). The Supreme Court found the confiscation orders "totally bald and devoid of any findings." Also, "the casual manner in which the matter has been dealt with is self-evident."[23] The court, therefore, found the confiscation to be vitiated.

Thereupon, the petitioner claimed damages/compensation for the illegal seizure and confiscation of the said publications. It was submitted that he had been disabled from selling the books which he had purchased at a substantial cost, and that they had lost their value due to passage of time and were no longer saleable. While admitting to finding some force in this submission, the court found itself unable to compute the damages on the available data—either regarding the value of the books, or their saleability. The court resorted to the device of "substantial costs" which was quantified at Rs. 10,000/- to alleviate the losses sustained by the petitioner, while leaving the petitioner to work out his remedies at law in a separate proceeding.

This case may be contrasted with *Nagendra Rao and Co.*[24] where the quantification had been precise, and the remedy had been by way of a suit, pursued through the hierarchy of courts.[25]

IV. RIGHT TO PRIVACY

R. Rajagopal v. *State of T.N.*[26] is a significant pronouncement of the Supreme Court concerning prior restraint on publication, and raised questions relating to the right to privacy of public officials. In this case, an autobiographical account purportedly written by a convict, implicating several IAS, IPS and other officers in his crime, was being published in serial form in a weekly magazine. The prison authorities of the state attempted to prevent its publication, urging that the assertion that the convict had written his autobiography in jail was false, and that the continued publication would tarnish the reputation of the officials concerned.

The Supreme Court, opposing prior restraint on free speech and expression, qualified the right to privacy in this context. While recognising the right to privacy of an individual as being implicit in article 21, the court carved out an exception where the publication is based on public records. This right, however, was held not to extend to public officials so as to permit prior restraint. Also, "the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge *of their official duties*. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication

22 (1994) 5 SCC 550.
23 *Id.* at 555.
24 *Supra* note 2.
25 See also the Survey on Constitutional Law-I.
26 (1994) 6 SCC 632. See also *Abdul Wahab Galadari* v. *Indian Express Newspapers (Bombay) Ltd.*, AIR 1994 Bom 69.

was made...with reckless disregard for truth". It is only where the publication "is proved to be false *and* actuated by malice or personal animosity" that the liability for damages would arise.[27]

Further, it was asserted that the government, local authority and other organs and institutions exercising governmental power cannot maintain a suit for damages for defaming them. The extent of the Official Secrets Act, 1923 would, however, remain unaffected by these qualifications. It was held: "There is no law empowering the state or its officials to prohibit, or to impose a prior restraint upon the press/ media."[28]

In deciding this case, the court has observed that the right to privacy, which originated in the field of tort, under which a cause of action for damages arises resulting from unlawful invasion of privacy has acquired a constitutional status. While the law of torts provides for damages for invasion of the right to privacy and defamation, sections 499/ 500 of the Indian Penal Code (IPC) is its criminal law counterpart. There are reasonable restrictions permissible on the freedom of speech and expression, under article 19 (2). The court's decision re-aligns the right to privacy of the individual and that of public officials in their official capacity, positioning them differently in matters of privacy, defamation and the right to recover damages. The court's denial of state power to impose a prior restraint is unequivocal (though this position may have to be qualified upon a reading of Cinematograph Act, 1956, for instance).

V. CULPABLE INACTION

The aspects of *culpable action* and *culpable inaction*, located within the broader doctrine of sovereign immunity, were applied by a Single Judge of the Andhra Pradesh High Court in *Sri Lakshmi Agencies* v. *Govt. of A.P.*[29] In the eruption of violence which followed the murder of a sitting member of the Andhra Pradesh Legislative Assembly (MLA), acts of arson and looting were committed by private individuals/miscreants. Curfew was immediately imposed, and the situation was brought under control by the police, but the violence had taken its toll and there was loss of life, injury, destruction and loss of property, and disruption of livelihood.

The petitioners approached the court under article 226, seeking compensation for the heavy damages they had suffered to their properties, and in their business, and alleged that this had occurred because of the negligence of the state and its officers, resulting in violation of their fundamental rights under articles 14, 19(e) and (g) and 21 and of the constitutional guarantee under article 300A. They contended that the deceased MLA had been fasting unto death for some time before his death demanding police protection for his life, and that the state could have visualised the tense situation that was bound to ensue, and ought to have taken preventive measures.

The state controverted the plea of negligence, and averred that the miscreants had all been private persons, and that the state had taken all possible steps to prevent the damage caused, had imposed curfew, and had brought the situation under control.

It was further contended that there could be no vicarious liability of the state where private individuals had indulged in arson and looting, resulting in damage and losses. Also, the government adverted to a scheme it had formulated for immediate relief and rehabilitation of the affected persons, including *ex gratia* payments, interest waiver on loans, relief to damaged houses, petty traders and cattle sheds, tax exemptions and terminal benefits to persons rendered jobless because of the riots.

It was on article 21 that the arguments turned. The court referred to a range of decisions of the High Court and the Supreme Court, including *Kasturi Lal* v. *State of U.P.*[30] and the later decision in *Shyam Sunder* v. *State of Rajasthan*[31] where the defence of sovereign immunity upheld in *Kasturi Lal* was repelled, holding that the state could not be absolved of the liability for the negligence of its servants. The court also drew upon the views of the Supreme Court in *Nilabati Behera v. State of Orissa*[32] to hold that "no distinction can be drawn between an act of servant of the government in discharge of statutory functions or otherwise and if the servant of the state in the

27 *Id.* at 650, (emphasis in original).
28 *Id.* at 651.
29 (1994) 1 APLT Rep 341.
30 *Supra note 3.*
31 AIR 1974 SC 890.
32 *Supra* note 17.

course of his duties has committed any act infringing the fundamental right of the citizen, the state is not immune from the liability."[33]

The question before the court was whether there had been any culpable inaction by the servants of the state resulting in violation of the fundamental right guaranteed under article 21.[34] Distinguishing this case on facts from earlier cases where compensation had been awarded,[35] the court found that the violence had not been at the instance of the respondents, nor were they silent spectators. It is hypothetical to suggest that the state should have visualised the violence following possible murderous acts, and the court held that no negligence can be attributed on that count, nor any liability fastened on the state:[36]

> Undoubtedly, in a welfare state, the tackling of law and order problem by the state is a primary duty. It is only when the said duty is not performed, the state will be liable. *If no action was taken by the concerned officials in tackling the law and order problem after eruption of violence by private individuals, then the state is liable to pay compensation for their wilful inaction*, but the state cannot be made liable in not anticipating the eruption of violence.

Stated otherwise:[37]

> Article 21 comes into play only against the positive state action violating the fundamental right to life and liberty and, even stretching any farther, it can only be up to mulcting the state for the wilful negligence of the servants of the state in discharge of their functions.

The court however differed from the decision of the J & K High Court[38] where the state's attempt to deny responsibility for compensating the victims of communal riots was negatived by the court. In that case, the court questioned the necessity for the state to make provision for *ex gratia* grants and lump sum amounts if it was not responsible, and added:[39] "As and when the life and liberty of any person is taken away, a presumption arises of the failure of the state machinery to protect the life and property of the individuals involved."

The court in the instant case was unwilling to see a necessary connection between *ex gratia* payments and the negligence or guilt of the state, either directly or indirectly.

It also held:[40]

> No presumption arises of the failure of the state machinery to protect life and property of the individuals involved in each and every case of loss of life or property. Such a sweeping principle of law can never be laid. ...For any action committed by private individuals, it cannot be said that there is a failure of the state machinery to protect the life and property of other individuals and the state cannot be made liable to pay any damages on that account. It is only when the officers of the state does any act positively or failed to act as contemplated under law leading to culpable inaction, that the state is liable to pay the damages. There should be a direct nexus for the damage suffered on account of state action and if that is absent, article 21 of the Indian Constitution is totally inapplicable.

Finding that the district authority had acted swiftly in this case, the court held that there had been no culpable inaction, and that the remedy had to be sought in private law remedies against the miscreants.

A contrary note was struck by the Rajasthan High Court in *Nathulal Jain* v. *State of Rajasthan.*[41] A communal riot broke out on 24.10.1990 during a *bandh* sponsored by a national party. Widespread violence erupted in different

33 *Supra* note 29 at 348.
34 The premise of culpable inaction had been invoked in a case before the Madras High Court, where it was found that the damage and loss to the properties of members of the Sikh community in Coimbatore following the assassination of Mrs. Indira Gandhi could have been averted if the police had acted in time. The efforts of the police, in that case, were found to have been "half-hearted" and "lethargic and inefficient". Compensation was awarded: *R. Gandhi* v. *Union of India* AIR 1989 Mad 205 referred to in *id.* at 350.
35 Eg. *Rudul Sah, supra* note 13; *Kishen Pattanayak v. State of Orissa,* AIR 1989 SC 677; *M.C. Mehta* v. *Union of India,* AIR 1987 SC 1086 and *State of H.P.* v. *Umed Ram,* AIR 1986 SC 847.
36 *Supra* note 29 at 349 (emphasis added).
37 *Id.* at 349 (emphasis in original).
38 *Inder Puri General Stores* v. *Union of India,* AIR 1992 J & K 11.
39 Quoted at *supra* note 29 at 351.
40 *Id.* at 351.
41 (1994) 2 ACJ 1271.

parts of Jaipur and, according to the petitioner, 19 persons lost their lives, 150 persons were seriously injured, over 200 shops were looted or burnt, and about 30 residential houses were partially burnt. Newspaper reports attributed the arson, looting, injuries and deaths to total failure of the administration to deploy adequate forces, and to prevent the outbreak of communal violence. *Ex gratia* amounts were paid by the state to the kin of the deceased and to the injured. The petitioner contended that the affected persons should be paid compensation in consonance with the rules framed by the Railways Act, 1989, and urged that the principle of absolute liability be invoked.

The court saw two issues as emerging from the petition: whether a public interest petition could be entertained to award damages to victims of riots; and, whether a *mandamus* could issue to the state to pay compensation in cases such as the one before the court. The culpability of the administration was, therefore, not judged. The court's categorical denial of a right to the petitioner, who was not a victim but an advocate practising in the High Court, to agitate the matter of compensation to victims deflected the case from victim-recognition and compensation. Significantly, the court drew upon the contextually incompatible settlement in the matter of the Bhopal Gas Disaster[42] to state:[43]

> "The petitioner cannot claim any compensation from the government qua the parties from whom he holds no brief and right to realise on their behalf. The parties may wriggle out and may at any time say that the petitioner was no one to espouse their case. It is by now very commonly known that even in a compromise made by the government in Bhopal Gas Tragedy case the compromise was challenged though later it was upheld by the Hon'ble Supreme Court but still some part of the compromise relating to the criminal offence committed by the Union Carbide was taken out of the performance of the compromise.

Despite this statement of the court, it may be recalled that among the petitioners challenging the settlement were representative groups of victims of the disaster. Also, with *Sheela Barse,*[44] the focus of public interest litigation has shifted from the locus, and interest, of the petitioner to the responsibility and right of the court to consider matters in the public interest. It may, however, be observed that *Nathulal Jain* does not deny the possibility of liability in tort in the event of riots; it merely leaves the question unanswered.

R. Gandhi, Inder Puri General Stores and *Lakshmi General Agencies* represent the evolving law of torts in the event of riots. The victimising potential of riots, the helplessness of the victims to protect themselves in increasing incidence of riots and the dependence on state power to control riot situations lend an urgency to the development of this branch of law.

VI. NEGLIGENCE

Jay Laxmi Salt Works (P) Ltd. v. *State of Gujarat*[45] considered the question of limitation in the matter of claims in tort based on negligence of the state. Strict liability, fault liability, the duty to take care and the territory of tort, generally, were within the court's concern. In 1954 the State of Saurashtra (now part of Gujarat) planned a "reclamation bundh" to reclaim vast areas of land from the salt water of the sea. It was completed in 1955. In the monsoon of 1956, the change in the natural course of the streams in the reclaimed area diverted the increased flow of water on to the appellant's land and factory. The appellant had resisted the construction of the *bundh,* and had sought intervention as the water level rose in the river, but the inundation was not prevented. The loss suffered by the appellant was quantified, at the instance of the state, and, when the state did not pay the assessed loss, the appellant filed a suit for damages.

The defence was mainly on two grounds: that there had been no negligence, and that the suit was barred by limitation under article 36 of the Limitation Act, 1908. Article 36 prescribes a limitation period of two years in cases where compensation is sought "for any malfeasance, misfeasance or non-feasance independent of contract..." The time for computing limitation, under this article, begins to run when the "malfeasance, misfeasance of non-feasance takes place." The Supreme Court was called upon to decide whether this was a residuary article, extending to all kinds of torts. Examining the meaning of the clause in article 36, the court, acknowledging that they are of wide import held that the law of tort "is not confined and cannot be strictly categorised." It held that the terms

42 *UCC* v. *Union of India,* (1989) 1 SCC 674 and (1991) 4 SCC 584.
43 *Supra* note 41 at 1280.
44 *Sheela Barse* v. *Union of India,* (1988) 4 SCC 226.
45 (1994) 4 SCC 1.

'malfeasance', 'misfeasance' and 'non-feasance' do not extend to cover every tortious liability. "The defective planning in construction of a *bundh*, therefore, may be negligence, mistake, omission but to say that it can only be either malfeasance, misfeasance and non-feasance is not correct."[46] It was held that it was article 120 of the 1908 Act which was the relevant provision to compute the period of limitation.

In determining when the tort had occurred, the court suggested that it was not the construction or completion of the *bundh* which was the relevant date, since at that time there was no occasion to claim any damage. When there is a single wrong, time may start running immediately. There may be other instances where, even though injury may have been caused, the cause of action may not arise till something more happens. For instance, if one were to accumulate something hazardous on one's own premises and it leaks, then the cause of action will arise not by accumulation or the leakage, but where damage or injury is caused. "In wrongs like negligence, strict liability or violation of public duty time begins to run not before the damage takes place."[47] In this case, since the authorities refused to pay damages, even after it was assessed at their instance, the computation of the period of limitation could commence even from that date.

Commenting on the bounds of tort, the court observed that injury and damage are two basic ingredients of tort. "An action for tort is usually a claim for pecuniary compensation in respect of damages suffered as a result of the invasion of a legally protected interest. But law of torts being a developing law its frontiers are incapable of being strictly barricaded. Liability in tort which in course of time has become known as 'strict liability', 'absolute liability', 'fault liability' have all gradually grown and with passage of time have become firmly entrenched."[48]

Citing the 'mental element' as the distinguishing feature of fault liability and strict liability, the court said: "Since duty is the primary yardstick to determine the tortious liability its ambit keeps on widening on the touchstone of fairness, practicality of the situation etc."[49]

The continuing concern of the court to recognise tort, and the consequent right to damages/compensation, was reiterated in this case. Detailing the ingredients of negligence to be[50]

> "(a) a legal duty on the part of A towards C to exercise care in such conduct of A as falls within the scope of the duty;
>
> (b) breach of that duty;
>
> (c) consequential damage to B"
>
> it was held:[51]
>
> If construction of *bundh* is a common law or public duty then any loss or damage arising out of it gives rise to tortious liability not in conservative sense but certainly in the modern and developing sense. A common man, a man in the street cannot be left high and dry because wrongdoer is state...Since construction *of bundh* was a common law duty any injury suffered by a common man was public tort liable to be compensated.

This decision is significant for its assertion of the expanding nature of tort law.

VII. CONSTITUTIONAL TORT

Nilabati Behera,[52] *Bhim Singh*[53] and *Rudul Sah*[54] have established the norm of compensation for the violation of fundamental rights, and the cases of custodial violence, deaths in custody, illegal detention and handcuffing reported

46 *Id.* at 14.
47 *Id.* at 17.
48 *Id.* at 10.
49 *Ibid.*
50 *Id.* at 11.
51 *Id.* at 14.
52 *Supra* note 17.
53 *Bhim Singh v. State of J & K*, 1984 Supp SCC 504.
54 *Supra* note 13.

in 1994 have seen courts rely on, and follow, these precedents. The cases arise in the terrain of writ jurisdiction of the courts. While judicial discretion has been exercised to award compensation, the basis of compensation is often not explained; occasionally, criteria that are considered relevant in other jurisdictions, including motor vehicle accident cases, have been broadly applied. Generally, the compensation is awarded as a lump sum payment, with liberty to move the civil courts for more particular assessment of damages. Interest does not usually constitute a part of the order directing compensation. Compensation has been awarded in cases where the facts leave little doubt as to the culpability of the state.

The cases reported in 1994 include cases of illegal detention, deaths in police/army custody and handcuffing.

Illegal detention

Hukam Singh v. *State (Delhi Admn.)*[55] was a case of mistaken identity that landed the wrong person in custody. Residents of the same locality, Hukam Singh, s/o Ram Chander was mistaken to be Hukam Singh s/o Ram Singh, a proclaimed offender, and arrested. He protested his innocence. Consequent to an enquiry conducted by the metropolitan magistrate, he was released after being in illegal detention for one month and nine days. The facts of this case were not refuted by the state. The High Court found that the petitioner had been deprived of his liberty because of "casual, irresponsible and negligent acts of the police officers." The court further said: "The awareness that how important and sacrosanct the liberty of a citizen is, has to come to the members of the police force, which we feel is lacking. Had this awareness been there the arrest of this Hukam Singh for that of the real Hukam Singh could have been avoided."[56]

In arriving at the compensation to be paid to the wronged Hukam Singh, the court took into consideration his mental and physical agony, the mental agony and humiliation of his family and the amounts he must have spent in making his applications for bail. The court acknowledged the humiliation and stigma that are likely to continue even after release. Commenting that "(i) these matters the payment of monetary compensation may not be a complete solace, but the way life is, it is some solace"[57] the Court awarded Rs. 20,000/-.

Two additional issues generally arise in such cases of compensation for the violation of fundamental rights: the liability of the concerned officers, and the question of compensation that may be recovered by the petitioner in other proceedings initiated in a civil court. Adopting the approach that is commonly adopted by courts, the High Court left it open to the state to fix responsibility and recover the compensation from the officers found to be at fault. It also held that in case the petitioner initiates any other action for recovery of damages, the compensation awarded in this case would be kept in view while deciding that action.

Pramod Kr. Garg v. Union of India,[58] was a case of an interpretation of executive power defying constitutional norms. The petitioner in this case was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) on 3.1.1994. The court issued notice on a petition he filed on 1.2.1994 for his release from detention. After several adjournments, the Deputy Secretary (Home) of the Government of the National Capital Territory of Delhi appeared on 22.3.1994 and stated that the advisory board constituted under section 8 of the Act had opined on 22.2.1994 that there was no sufficient case for the detention of the petitioner. The petitioner was thereafter released on 22.3.1994.

When the court challenged the counsel for the state on the delay in releasing the petitioner despite the opinion of the advisory board having been recorded on 22.2.1994, two constitutionally bewildering explanations were offered: that of shortage of staff in the COFEPOSA branch; and that the COFEPOSA Act provided that a detenu could be held for a maximum of up to three months without referring the matter to the advisory board, and since he had been released within the maximum period, the detention was legal. Repeated questioning by the court continued to elicit the reply from the counsel for Delhi Administration that it is not illegal to detain a detenu for the period of three months even where the advisory board has earlier declared his detention to be on insufficient grounds.

55 (1994) 1 ACJ 437.
56 *Id.* at 440.
57 *Ibid*.
58 1994 Cri LJ 3121 (Del).

Declaring such an interpretation to be "unthinkable" that the personal liberty of a person cannot be dependent on the presence or absence of a clerk, and that "there has been a failure at all levels", the court awarded compensation at the rate of Rs. 1000/- for each day of illegal detention. Allowing some time for administrative exigencies preceding release, the court awarded Rs. 25,000/- to the petitioner. Asking the question, "why should state suffer and compensation (be) paid out of the public revenue for the negligence shown by the functionaries of the state", it left it to the Lt. Governor "to recover the compensation, or any part of it, from the officers who were negligent..."[59]

In *Prof. S, Seshaiah* v. *State of AP*,[60] a *habeas corpus* petition was filed for the release of a person illegally held in police custody. The court found reason to believe that a criminal case had been registered against him after the writ petition had been filed, and that it was *mala fide* and intended to cover up the illegal detention. In the circumstances, while quashing the criminal case, in question, it directed the State of Andhra Pradesh to pay the detenu Rs. 5,000/-.

The allegation of involvement of the detenu in a large scale racket in arms with a view to facilitating terrorist activities in the state appears to have dissuaded the court in *Omprakash Mishra* v. *State*[61] from awarding compensation. The court, while it accepted the evidence of beating and ill-treatment, and the probability of illegal detention, declined to award compensation, and held:[62]

> Essentially grant of compensation for the wrong done to a person is within the domain of a civil court in a civil suit to be filed for the purpose...We are alive to the fact that as observed by the Supreme Court, the court in writ jurisdiction has powers to award compensation. But that, we understand from *Rudul Sah* and *Bhim Singh*, has to be resorted to only in exceptional type of cases, and this Court should not be allowed to be converted into a civil court trying civil suits for compensation.

In *P. C. Kakar* v. *Commandant, Military Hospital, Trimalgiri*,[63] the detenu was a captain in the army. She was detained by the army authorities on the ground of mental illness. Enquiry by the court revealing that her detention as mentally ill had been effected for collateral purposes, it ordered the payment of Rs. 25,000/- as compensation after taking into consideration "the official rank of Captain..., the extent of mental torture suffered by her and the duration of deprivation of her constitutional right."[64] While protecting her right to initiate civil action for damages, the court also held that the Union of India represented by the Secretary to Government, Ministry of Defence, was vicariously liable for payment of compensation.

Where the police detained and tortured a woman to pressurise her to repudiate her marriage, and the police also effected the illegal arrest of her husband and other persons, the Supreme Court directed payment of compensation of Rs. 10,000/- to the woman and her husband, and Rs. 5,000/- to each of the other persons illegally detained and humiliated.[65] The court also ordered the State of Uttar Pradesh to "take immediate steps to launch prosecution against all the police officers involved in this sordid affair."[66]

Commenting on what constitutes torture, the court observed:[67] "[T]orture is not merely physical but may even consist of mental and psychological torture calculated to create fright to make her submit to the demands of the police."

Death in custody

The death of an army officer in mysterious circumstances, the absence of proper investigation into the cause of his death, and the "culpable negligence and cynical indifference" with which the case was handled was the concern of the Supreme Court in *Smt. Charanjit Kaur* v. *Union of India*.[68] Tracing the responsibility for the death to the "criminal omissions and commissions on the part of the authorities concerned", the court ordered Rs. 6 lakhs to be

59 *Id.* at 3128.
60 1994 Cri LJ 1469 (AP).
61 (1994) 1 Guj LR 812.
62 *Id.* at 822.
63 1994 Cri LJ 1025.
64 *Id.* at 1035.
65 *Arvinder Singh Bagga* v. *State of U.P.*, (1994) 6 SCC 565.
66 *Id.* at 568.
67 *Id.* at 567.
68 (1994) 2 SCC 1.

paid as compensation, and directed the payment of arrears of the special family pension and children allowance with interest at 12 per cent per annum.

In *Geet Sangma v. State of Nagaland*,[69] a case of death in police custody, the court ordered the Government of Nagaland to pay the petitioner-wife Rs. 1,50,000/- "in the nature of a palliative", with interest at 12 per cent per annum if it was not paid within three months of the order. Leaving it to the government to realise the compensation amount from the erring police officers, the court observed that it would be in the interests of justice to institute an enquiry into the matter.

The death in police lock-up caused by infliction of custodial violence was compensated by the court in *Christian Community Welfare Council of India* v. *Government of Maharashtra*.[70] Awarding Rs. 1,50,000/- to the wife of the deceased, the court found that: "Junious Adam was done to death on account of beatings by the police personnel, an agency of sovereign power acting in violation and excess of power vested in such agency."[71]

Observing that: "Time has come that the state government rises to the occasion by striking the balance between the life of a person in police custody and the power of law enforcing agencies to bring the criminals to book by appropriate rules or providing guidelines to the police personnel in such matters"[72] the court directed, inter alia, that the State Government constitute a committee consisting of its Home Secretary, Law Secretary and Director-General of Police within 15 days and that the committee submit its report to the state government within three months. The court also directed the state government to issue necessary instructions to all police officials that every detainee shall be medically examined before being taken to a magistrate, and every third day thereafter, and the medical reports be entered in the station house diary.

The escalating incidence of custodial violence and deaths in police custody appears to have prompted the court to urge the government to act.

Handcuffing

In *Ajmar Singh Laknowal* v. *State of Punjab*,[73] the High Court reasserted the dictum of the Supreme Court in *Prem Shankar Shukla* v. *Delhi Administration*,[74] and awarded Rs. 10,000/- to a detenu under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) who had been handcuffed. No explanation for the handcuffing was offered by the state to the court. In a significant statement on tolerance of illegalities committed by the police in the Punjab, the court said: "The Punjab of 1994 is not the same as that of 1992. Earlier, on account of the peculiar situation that prevailed in the State, the highhandedness of the police may have been socially accepted or otherwise overlooked. However, the police aberrations must not be allowed to become a habitual conduct. It has dangerous portents..."[75]

VIII. ACCIDENT LAW

Motor Vehicles (Amendment) Act, 1994

The Motor Vehicles (Amendment) Act is another attempt at streamlining the administration of compensation to victims of motor vehicular accidents, even as it limits the area of exercise of discretion of the tribunal and the courts. In this context, its main features are (i) the provision of a table for computing compensation; (ii) the extension of the no-fault principle, and doing away with the requirement of establishing negligence; and (iii) the devising of a procedure which places the onus of reporting accidents on the police, and does away with the aspect of limitation.[76]

69 1994 ACJ 792 (Gau).
70 1994 Mah LJ 1769.
71 *Id.* at 1779.
72 *Id.* at 1781.
73 1994 Cri LJ 2430.
74 AIR 1980 SC 1535.
75 *Supra* note 73 at 2431.
76 For further aspects of the amendment see Survey of Central Legislation, *infra*.

The table of compensation[77] is evidently an attempt to accommodate the various heads of compensation which have been dominant in judicial decisions. The factors considered relevant for computing compensation are, therefore, the age of the victim, the annual income, the multiplier which is linked with age, and a deduction of a lump sum of one-third of the computed compensation where the accident results in death, in consideration of the expenses the victim would have incurred on oneself.

As is inevitable when there are attempts to capture complex, individual conditions on a legislative canvas, there is a paring away of factors which have been found relevant in judicial decisions but which cannot be generalised into a legislation. So, the earning *potential* becomes irrelevant, the expectation of life and its connection with familial longevity, for instance, is ignored, the deductions implicit in the multiplier are unexplained, and the variations in contribution to the family which is reflected in judicial decisions while computing deductions from a lump sum is ignored.

The minimum compensation in the case of fatal accidents is, in consonance with the no-fault liability compensation under section 140, Rs. 50,000/-. In case of death, the general damages have been specified: funeral damages—Rs. 2000/-; loss of consortium (where the claimant is a spouse)—Rs. 5,000/-; loss to estate— Rs. 2500/-; and inexplicably, there is a limit on medical expenses— "actual expenses incurred before death supported by bills/ vouchers (but not exceeding) Rs. 15,000/-. This ceiling on recovery of medical expenses is extended to cases of injuries and disabilities also, "as one-time payment."

The Workmen's Compensation Act, 1923 has been called into aid in determining the loss of earning capacity in cases of permanent total disability and permanent partial disability. General damages in cases of injuries and disabilities includes, other than medical expenses, such categories as "pain and suffering": in the case of grievous injuries at Rs. 1000/-. The table is also applied in cases of victims of non-fetal accidents; "other injuries" are compensated under the relevant head of general damage, as applicable.

An innovation is witnessed in the provision of a "notional income for compensation to those who had no income prior to accident."[78] "Non-earning persons" are deemed to be earning Rs. 15,000/- per annum for purposes of computation of compensation. There is no mention of the minimum age of the victim which would activate this deeming clause, and it may be presumed to cover all ages. A quick search within the table, however, reveals that the minimum annual income from which the tabulation commences is Rs. 3000/-. This would presumably mean that a child worker earning upto Rs. 3000/- (or even upto Rs. 11,999/-)[79] - would be entitled to a *lower* rate of compensation than a person with no income. Since there is no deeming provision regarding the minimum income, the anomaly can be seen definitely to exist.

The notional income of the non-earning spouse has answered, simply, the questions of matrimonial property and the economic quantification of contributions made in the home, positioned particularly within the debate on women's right to property. The Motor Vehicles (Amendment) Act quantifies the notional income of the spouse at "l/3rd of income of the earning spouse". Judicial decision-making which involves the translation of a woman's work into monetary terms, and the resultant reductionist exercises which view her as a cook, an *ayah* or a housekeeper will perhaps be obviated by this statutory change. It is not inconceivable either that this could influence attempts aimed at acquiring legislative recognition for the concept of matrimonial property.

It may, however, be observed that the table is flawed in many particulars. The computing done in the columns is arithmetically inaccurate.[79a] Compensation in case of death has been provided, only to be reduced further by a lump sum in case of death. There is no indication as to the manner of computation of compensation where the annual income exceeds Rs. 40,000/- which is the last figure provided in the table. With the compensation envisaged for a person earning Rs. 40,000/-annually is Rs. 7.20 lakhs (minus l/3rd in the event of death) for a person between 20 and 25 years of age, and with the escalating wage structures particularly with the entry of multinationals into the Indian job markets, extrapolating from this table could result in sky high figures; one is prone to wonder if this was within legislative conception. The table needs further elucidation.

Alongwith providing for graded compensation without having to establish fault or negligence, the quantum payable as compensation based on no fault in section 140 of the Motor Vehicles Act, 1988 has been enhanced: from Rs. 25,000/- to Rs. 50,000/- in the case of death, and from Rs. 12,500/- to Rs. 25,000/- in cases of permanent disablement.

77 Second schedule, inserted by Motor Vehicles (Amendment) Act, 1994.
78 *Ibid*.
79 Victims earning between Rs. 12,000/- and Rs. 17,999/- constitute one category, placing Rs.15,000/- in their midst.
79a The author is grateful to Ms. Manju Goel for having first drawn her attention to these inaccuracies.

The victim/claimant may opt to claim either under section 163A or under section 140. The increase in amount of compensation has also been effected in the case of hit and run accidents,[80] from Rs. 8500/- and Rs. 2,000/- to Rs. 25,000/- and Rs. 12,500/- for death and grievous hurt respectively. It may be considered that periodic revisions of the quantum of compensation may be more practical if it were to be effected through subordinate legislation, rather than by amendment to the parent statute.[81]

Towards further relieving the onus on the motor accident victim, and removing the ground of limitation to deny the victim compensation, section 158 of the 1988 Act has been amended. As it now stands, it requires the police officer in charge of the police station where the accident occurs to forward to the claims tribunal, within 30 days, a copy of the information received relating to a motor vehicle accident where death or bodily injury occurs. The claims tribunal is to treat such report of accident as an application for compensation by the Act.[82]

To deal with the reduction of the secondary effects of the accident, the person driving the vehicle or otherwise in charge of the vehicle is required to convey the victim to the nearest hospital, and "it shall be the duty of every registered medical practitioner or the doctor on duty in the hospital immediately to attend to the injured person and render medical aid or treatment without waiting for any procedural formalities".[83] This is a statutory endorsement of the directions of the Supreme Court in *Parmanand Katara v. Union of India*.[84]

These amendments to the Motor Vehicles Act are indicative of a statutory acceptance of what it perceives as the inevitability of motor vehicle accidents, and of their escalating occurrence. The emphasis is on limiting transaction costs, and reducing the secondary costs of accidents.[85] It also appears that, by and large, causation is not a matter of central concern nor is it among the more contentious issues, in motor vehicle compensation litigation.

Multiplier

Cases reported in 1994 represent the complexity inherent in the computation of compensation. The courts have been explicit in their acknowledgement of the difficulties that beset the assessment of damages.[86] The Gujarat High Court has, expressly, admitted that "at times, we have to make an estimate, often very rough estimate, and the assessment may be based on the speculative guess..."[87] The Supreme Court has conceded that "(m)uch of the calculation necessarily remains in the realm of hypothesis" and that "there are so often many imponderables".[88]

The response of the courts has been to seek "settled principles" which may help in introducing rationality, and reduce the differences that come with discretion. However, this circumscription of discretion by judicial fiat has not been uniformly endorsed by the courts.[89]

In *General Manager, KSRTC v. Susamma Thomas*[90] the Supreme Court asserted the validity of the multiplier method in the computation of compensation. It "reiterate(d) that the multiplier method is logically sound and legally well-established."[91] Declaring as unscientific and impermissible the aggregating of the entire future earnings for the period of the life expectancy lost and deducting a percentage therefrom, the court held: "The proper method of computation is the multiplier method. Any departure, except in exceptional and extraordinary cases, would introduce inconsistency of principle, lack of uniformity and an element of unpredictability for the assessment of compensation."[92] Overruling the judgments of High Courts which have departed from the multiplier method on the ground that the quest for 'just' compensation prescribed in section 110B of the Motor Vehicles Act, 1939

80 S.161, Motor Vehicles Act, 1988.
81 See for eg. the Railways Act, 1989. *Cf.* Public Liability Insurance Act, 1991.
82 S.166(4), Motor Vehicles Act, 1988 as amended in 1994.
83 S.134, *ibid*.
84 (1989) 4 SCC 286.
85 Eg, the costs of not getting immediate treatment; or having to get into litigation or compensation neurosis. See generally, Calabresi, Guido, *The Cost of Accidents* (1970).
86 Eg, *General Manager, KSRTC* v. *Susamma Thomas*, (1994) 2 SCC 176 at 182 and 183; *Jai Bhagwan* v. *Laxman Singh*, (1994) 5 SCC 5 at 7.
87 *Mohanbhai Gemabhai* v. *Balubhai Savjibhai*, (1994) 1 ACJ 260 at 269.
88 *Susamma Thomas*, *supra* note 86 at 182.
89 See for eg, *Superintendent of Police* v. *Dwarapudi Rami Reddy*, (1994) 2 ACJ 752 at 755.
90 *Supra* note 86.
91 *Id.* at 185.
92 *Ibid*.

unshackles the court from any rigid formula, it said: "It must be borne in mind that the multiplier method is the accepted method of ensuring a 'just' compensation which will make for uniformity and certainty of the awards."[93]

Detailing the multiplier method, the court explained that it involves the ascertainment of the loss of dependency or the multiplicand and capitalising the multiplicand by an appropriate multiplier. It continued:[94]

> The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed up over the period for which the dependency is expected to last.

With the enforcement of the Motor Vehicles (Amendment) Act, the second schedule it introduces to the Motor Vehicles Act, 1988 lays down, even if imperfectly, the multiplier determined solely on the basis of the age of the victim.

Among the attempts to rationalise the process of determining compensation was the table set out by M. Jagannatha Rao, J in *APSRTC* v. *R. Dayanand Naidu*.[95] A Bench of the Andhra Pradesh High Court in *Supdt. of Police* v. *Dwarapudi Rami Reddy*[96] rejected the table, while it reiterated the position that the judge could not have so limited the discretion of the tribunal—a discretion given by statute. It also opined that the table did not reflect a position which could be applied in every case. It further said: "Fixing up of Table for all purposes of an omnibus type cannot be said to be a correct guideline for the Tribunals. The compensation differs from place to place, region to region and man to man."[97]

This is a criticism that may have to be addressed by advocates of the statutory tabulation of compensation, too.

Susamma Thomas[98] was a fatal accident action, where the court was of opinion that "the accepted measure of damages awarded to the dependants is the pecuniary loss suffered by them as a result of the death."

Where the injuries sustained in the accident resulted in amputation of the left leg of the victim leaving him permanently impaired, the court reiterated the "basic rule" that the award of damages for non-pecuniary losses "should be reasonable, (and) they should also be assessed with moderation having regard to the awards in comparable cases."[99] The compensation was thereafter enhanced from Rs. 45,000/- to Rs. 80,000/- to meet the ends of justice..."

A Single Judge of the Orissa High Court, however, held that there "is no litmus test for assessment of compensation for injuries received in a motor accident", and went on to state: "The amount of damages may vary from case to case depending upon the gravity of the injury...while considering deprivation, the Court should have due regard to the gravity and degree of the deprivation, duration of the deprivation and the degree or awareness of the deprivation. Besides this, there may be special or additional circumstances depending on the facts of a case for entitlement of extra damages. It is always open to the court to take them into account in assessing the compensation."[100]

Quantum of compensation

In *Mulla Md. Abdul Wahid* v. *Abdul Rahim*[101] the tribunal computed the total loss to the victim to be around Rs. 80,000/-. But, since the claimant had claimed only Rs. 40,000/- the tribunal confined the award to the lesser amount. In appeal before the High Court, the question was whether the tribunal was constrained to restrict the compensation awarded to the amount claimed. The court, drawing upon the decision of the Bombay High Court in *Municipal Corporation of Greater Bombay* v. *Kisan Gangaram Hire*[102] held that section 110B (of the 1939 Act)

93 *Ibid.*
94 *Id.* at 183.
95 1989 ACJ 119 (AP).
96 *Supra* note 89.
97 *Id.* at 756.
98 *Supra* note 86 at 181. See also *supra* note 87 at 265.
99 *Jai Bhagwan*, *supra* note 86 at 7.
100 *Kiran Kumar Misra* v. *Ramesh Chandra Biswal*, AIR 1994 Ori 244 at 246-47.
101 (1994) 1 ACJ 348 (Ori).
102 1987 ACJ 311 (Bom).

vests a wide discretion in the tribunal in the matter of determination of compensation. While the determination cannot be arbitrary, must be based on certain data and establish a reasonable nexus between the loss incurred and the compensation to be awarded, the tribunal has the duty to determine the amount of compensation which appears to it to be just. Examining sections 110A to 100F of the Motor Vehicles Act 1939, the court in fact found that nowhere did the statute require that the amount of claim should be mentioned, and held "that there are no fetters on the power of the tribunal to award compensation in excess of the amount which is claimed in the application."[103]

The perception that the compensation awarded was low appears to have influenced the Supreme Court to enhance the award to the extent of the amount claimed. In *S. Chandra's* case,[104] the accident occurred in 1979; in Urmilla Pandey[105] it happened in 1970. The decisions of the final court were delivered in 1994—a time lag which may explain the falling value of the Rs. 48,680/- and Rs. 40,600/- awarded respectively, by the High Courts. The multiplier method advocated by the court in *Susamma Thomas*[106] has not been adopted in either case, perhaps because the earlier case had not been reported thus far.[107]

The problem of assessing, in pecuniary terms, the loss of a child was witnessed in *Krishna Kapoor* v. *Himachal Road Transport Corporation*.[108] Among the victims of the accident in this case were two children—a girl and a boy of 2 $^{1}/_{2}$ years. The tribunal awarded Rs. 10,000/- for the death of the girl child and Rs. 15,000/- as compensation for death of the boy child. The corporation assailed the awards as being excessive. The High Court, confirming the award of the tribunal, stated in relation to the award of Rs. 15,000/-: "It may be very specifically pointed out here that even on no-fault basis this amount at that time was minimum to be awarded for the death of the passenger."[109]

Since there was no cross appeal filed for enhancement of the amount awarded to the girl child, it was not considered by the court.

The inadequacy of income replacement as the standard for computation of compensation is evident in cases such as these. The introduction of 'notional income' into the law, while it does not address the issues raised by this recognition of inadequacy, provides a basis for courts to compute compensation.

Dismissing a claim for damages for mental shock, agony, pain or suffering of the mother of the victim, the Gauhati High Court[110] distinguished it from nervous shock which it defined as "any recognisable psychiatric illness manifested on account of having witnessed the accident." Commenting on the unsatisfactory state of the pleadings, evidence and judgments in some claim cases, the court set out the framework to be followed in such cases.

Deductions

In *Suki* v. *Hem Singh*[111] it was held that family pension received by the claimants is not deductible. In *T. Balaiah* v. *Abdul Majeed*[112] the amount paid by the driver to the injured victim was held to be *ex gratia* and, therefore, not deductible.

Disbursal of compensation

Courts have adopted a range of devices to ensure that the compensation amount is not "frittered away by the beneficiaries owing to ignorance, illiteracy and susceptibility to exploitation."[113] In *Susamma Thomas* the Supreme Court reiterated the principles of disbursement enunciated in *Union Carbide Corporation* v. *Union of India*[114] and held that these guidelines be borne in mind by tribunals deciding accident claims cases.

103 *Supra* note 101 at 351.
104 *S. Chandra* v. *Pallavan Transport Corporation*, (1994) 2 SCC 189.
105 *Urmilla Pandey* v. *Khalil Ahmad*, (1994) 4 SCC 207.
106 Supra note 86.
107 See Editor's Note in *S. Chandra*, supra note 104.
108 (1994) 2 ACJ 1183 (HP).
109 *Id.* at 1208.
110 *Jhulan Rani Saha* v. *National Insurance Co.*, AIR 1994 Gau 41 (DB) at 44.
111 AIR 1994 Raj 101.
112 AIR 1994 AP 354.
113 *Susamma Thomas*, supra note 86 at 187.
114 (1991) 4 SCC 584.

A Full Bench of the Gujarat High Court[115] was confronted with a conflict between the guidelines laid down by the Supreme Court in *Susamma Thomas* and an earlier Full Bench decision of the High Court in *New India Assurance Co. Ltd.* v. *Karilaben*.[116] Referring to article 141 of the Constitution, it was held that the directions in the Supreme Court judgment would prevail. It was noticed that the Bench in *New India Assurance Co. Ltd.* case had not had its attention drawn to the decisions in *Susamma Thomas* and *Union Carbide Corporation*. It was observed that, in any event, an appeal from the High Court decision was pending in the Supreme Court, and if the Supreme Court thinks it fit, it may modify the guidelines.[117]

In *Urmilla Pandey* v. *Khalil Ahmad*,[118] however, the Supreme Court directed that "the total amount shall be paid by the insurance company to Urmilla Pandey, the widow, on her behalf and on behalf of her two children within three months..."[119] Again, in *Haji Zaimullah Khan* v. *Nagar Mahapalika*,[120] the court ordered that the entire amount of compensation be paid in the name of the mother of the victim. Further, it left it "open to her to distribute the amount in any manner she likes amongst the claimants, if she so desires.[121]

It has been held by the Andhra Pradesh High Court[122] that, in the distribution of the amount of compensation awarded by the claims tribunal to the legal representatives of a victim, the Hindu Succession Act, 1956 is not applicable. It is not only the relationship of the claimants with the victim, but also the extent of their dependency, their future requirements, age and other related circumstances which would be relevant.

In determining who are the "legal representatives" of a victim of a motor vehicle accident, the Gauhati High Court[123] has restricted it to heirs of the victim. It has further held that "brothers or other relations of the deceased who are not the heirs of the deceased, not being his legal representatives, cannot claim compensation. *This is so even if as a matter of fact they were dependent on the deceased for financial help*. "[124]

Tracing the rise of no-fault liability in motor vehicles law, the Madhya Pradesh High Court[125] has held that there is no provision in the law requiring the recipient of compensation of no-fault liability to refund any part of the amount received at any stage. The legislative intent is to provide some succour for the victims or the dependants, regardless of questions of negligence or contributory negligence. It was further held that in the first instance, the insurance company would have to pay compensation on the basis of no fault liability. If while passing the final award the insurer was found to have no liability with regard to the persons who sustained injuries, the tribunal could issue appropriate directions for reimbursement from the owner of the vehicle.

Lok Adalat

The inordinately large number of motor vehicle accidents, and the threat of docket explosion and the delay it poses, have provided the justification for transferring cases from courts to lok adalats for resolution. The finality of compromise decrees effected through the intervention of *lok adalats*, was the issue before the Court in *Sakamma* v. *Divisional Controller*.[126] This case involved two claims—one by the mother of the victim for the death of her son, for a sum of Rs. 3 lakhs, and the other for the injuries sustained by the appellant, wherein she claimed Rs. 1 lakh. The accident occurred in January 1989. In a *lok adalat* held thereafter, the advocates for the respective parties signed compromise decrees, settling the claims for Rs. 29,000/- and Rs. 10,500/- respectively and, in August 1990, the tribunal made awards accordingly.

115 *Jayantilal Ambalal Parmar* v. *Gujarat State Road Transport Corporation* 1994 ACJ 1159 (Guj) (FB).
116 1993 ACJ 673.
117 See also *Supdt. of Police* v. *Dwarapudi Rami Reddy*, supra note 113 at 757, para 9; *Jai Bhagwan*, supra note 86 at 8, para 12; *Mohanbhai*, supra note 87 at 273, para 34 where the direction to invest, and not to pay the entire amount to the claimant was justified, among other reasons, on the ground that "the larger amount of the... award of compensation is under the head of prospective economic loss." See also *Thota Veera Raghavaiah* v. *National Insurance Co. Ltd.* 1994 ACJ 476 at 479, para 12; *Seemu* v. *HPSEB*, (1994) 1 ACJ 623.
118 *Supra* note 105.
119 *Id.* at 211.
120 (1994) 5 SCC 667.
121 *Id.* at 672.
122 *Thota Veera Raghavaiah*, *supra* note 117.
123 *Smt. Muhini Thakuria* v. *Dhiraj Kalita*, AIR 1994 Gau 22 (DB).
124 *Id.* at 24 (emphasis added).
125 *National Insurance Co.* v. *Thaglu Singh*, AIR 1994 MP 177 (DB).
126 1994 ACJ 1266 (Kar).

The validity of these awards was challenged. The High Court relied on the *vakalatnama* filed in the lower court to hold that the advocates were authorised to compromise the 'matter'. It was contended that the provisions of the Motor Vehicles Act, 1988 are meant to protect the interests of victims of motor vehicle accidents, and that the tribunal cannot pass an award on the basis of a compromise petition, without applying its mind to what constitutes 'just compensation' in each case. The court, however, held that since the amount of compensation to be awarded had been accepted by both the parties to be proper, it must necessarily follow that it is just. Unless non-application of mind is apparent on the face of the record, the tribunal could be presumed to have been satisfied that the agreement is lawful. The claim had been filed beyond six months after the accident, and was pending in court with an application for condonation of delay. This, the court believed, could have been a persuasive factor. In refusing to interfere with these awards, the court reinforced the logic of the lok adalat and said:[127]

"The receipt of the compensation amount immediately and the avoidance of time-consuming and expensive litigation may be factors which weigh with the claimants for accepting an amount less than that which may be awarded after a long drawn-out litigation."

In *Manju Gupta* v. *National Insurance Co.*,[128] where the claim was on behalf of a minor girl who lost both her legs as a consequence of the accident, and a claim for Rs. 2,20,000/- was settled for a mere Rs. 30,000/- the court intervened to protect the interests of the minor. Acknowledging that the compromise amount was "grossly inadequate", the court invoked Order XXXII, Rules 6 and 7 of the Code of Civil Procedure, 1908 to hold that no settlement or compromise could have been arrived at without leave of the court. Evincing concern for claimants who may feel impelled to compromise claims even where it is inadequate, the court observed:[129]

> The purpose of the lok adalat no doubt is to settle claims and disputes between the parties expeditiously, but at the same time the court should not forget its obligation under law to protect the interest of the parties, specially the claims of minors and persons of unsound mind. In fact, the court should keep a watch while making settlement of claims in lok adalats. It cannot be lost sight of that a litigant under pressure of time and money spent in courts easily succumbs to the pressure and agrees to the small amounts which may not be adequate to compensate that actual loss suffered. The court should keep a watch that no such pressure prevails on a litigant...In lok adalats in the name of speedy justice the court should not sacrifice the real cause of justice for which confidence has been reposed on them by the society.

In revising the award, the court awarded Rs. 1,10,000/- in place of Rs. 30,000/- including in it medical expenses to the extent of Rs. 10,000/-; an indication of the wide variance between "just compensation" that may be awarded by courts and the compromise that claimants may find themselves constrained to accept before *lok adalats*.

Interest

Section 171 of the Motor Vehicles Act 1988 provides that where any claims tribunal allows the claim for compensation under the Act, such tribunal may direct that, in addition to the amount of compensation, simple interest shall also be paid at such rate and from such date, not earlier than the date of making the claim, as it may specify in this behalf.

In *Mohanbhai Gemabhai*'s case[130] the Gujarat High Court observed that, before the enactment of the Motor Vehicles Act in 1939, courts or tribunals had inherent power to award interest. The statutory prescription has, however, limited this power to award interest from the time the claim is made. There is no jurisdiction to award interest between the accident and the date of making the application. The court has, therefore, recommended that the law be amended "to make a suitable provision whereby the Tribunal could be empowered to grant interest not only from the date of the application, but also from the date of happening of the unfortunate accident or road mishap, as loss commences from the very moment of the occurrence of the accident."[131]

127 *Id.* at 1270.
128 (1994) 2 ACJ 1036 (All).
129 *Id.* at 1038.
130 *Supra* note 87.
131 *Id.* at 270.

The rate of interest has been judicially pegged, generally, at 12 per cent per annum.[132] The Supreme Court has varied this norm and enhanced the interest to 18 per cent for the period that the compensation amount remains unpaid beyond a period specified in the order.[133]

Selection of forum

Where a workman doing road rolling work died on account of a road accident, and a claim petition was preferred under the Motor Vehicles Act, based on fault liability, it was held that the contractor could not be held liable to pay compensation.[134] It was held that where two remedies were open to the legal representatives of the deceased—one under the Workmen's Compensation Act, 1923 and the other under the Motor Vehicles Act, 1939—the death occurred on account of and by use of a motor vehicle, and the claimants selected the forum by the Motor Vehicles Act, the contractor-employer cannot be held liable where he was neither the owner nor the driver of the vehicle.

Railways (Amendment) Act, 1994

A significant change has been effected by the 1994 amendment to the Railways Act, 1989 by the inclusion of a category of compensatable injury occasioned by "untoward incidents". Its distinctiveness lies in the expanded liability imposed statutorily on the railways, covering events that are not within its control.

Section 123(c), therefore, defines an untoward incident to mean the commission of terrorist acts within the meaning of section 3 of the TADA Act, 1987; or the making of a violent attack on the commission of robbery or dacoity; or the indulging in rioting, shoot-out or arson "by any person in or on any train carrying passengers, or in a waiting hall, cloak room, or reservation or booking office or in any other place within the precincts of a railway station" or also includes the accidental falling of any passenger from a train carrying passengers.

Section 124A provides for compensation on account of untoward incidents. A passenger or the dependant of a passenger would be entitled to the compensation. A passenger includes a railway servant on duty, and "a person who has purchased a valid ticket for travelling, by a train carrying passengers, on any date or valid platform ticket and becomes a victim of an untoward incident." The liability arises "whether or not there has been any wrongful act, neglect or default on the part of the railway administration.

The exceptions carved out of this general rule of eligibility for compensation are in the event of suicide or attempted suicide, self-inflicted injury, one's own criminal act, an act committed in a state of intoxication or insanity, or where the death or injury is due to any natural cause or disease or treatment unconnected with the untoward incident.

The logic of liability as an impetus for increased safety is plainly not the motive force behind this amendment. The focus appears to be on the victim-creating effect of these incidents. The amendment ensures a statutory right to compensation, and makes the alternative forum of the railway claims tribunal accessible to this wider range of victims.

The amendment act would also serve to obviate the problem that arose in *Ratnakar Tanbaji Itankar* v. *Union of India*,[135] for instance. In this case, passengers were required, hurriedly, to leave one bogie and get into another. A passenger fell down and was caught in the space between the train and the platform, as a result of which she died. Her husband's claim for compensation made before the railways claims tribunal was rejected as being not maintainable, since the accident did not fall within the contours of an accident as defined in section 82A of the old Railways Act, 1897 (which corresponds to section 124 of the Railways Act, 1989). The remedy, therefore, lay in approaching a civil court.

The statutory assumption of liability, the access to a tribunal constituted specifically for victims of defined accidents, the shift away from fault to victim-creation are characteristics which, following the amendment, extend to a broader reach of victim-creating incidents.

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132 See *Mohanbhai*, *ibid.*; *Krishna Kapoor*, *supra* note 108; *Thota Veera Raghavaiah*, *supra* note 117; *Supdt. of Police* v. *Dwarapudi Rami Reddy*, *supra* note 89.

133 See *Urmilla Pandey*, *supra* note 105.

134 *Mavjibhai Rudabhai Dafda* v. *Manji Soma Dangar*, (1994) 1 Guj LR 21.

135 1994 Mah LJ 634.

IX. NATIONAL HUMAN RIGHTS COMMISSION

The National Human Rights Commission (NHRC) has been established under the Protection of Human Rights Act, 1993. Its first *Annual Report* covering the period from October 1993 to March 1994 indicates the commission's priority areas, the procedure adopted in investigating incidents of human rights violations, the remedial action initiated by the commission, and the steps taken to ensure reporting and redressal particularly in the context of custodial crime. The instruction issued by the NHRC to all the state governments and union territory administrations asking for reports from district magistrates/superintendents of police within 24 hours of the occurrence of custodial deaths and custodial rape is issued with a caution that failure to send reports would raise a presumption of an effort to suppress knowledge of the incident.

The NHRC is limited by the statute to recommend action, to intervene in court cases and to recommend compensation. Among the cases reported is the Bijbehara incident in J & K where about 60 persons died as a result of firing by security forces. The NHRC recommended graded, interim compensation. The *Report* states that the J & K Government had disbursed *ex gratia* relief of Rs. 1 lakh to the next of kin of the 31 civilians found by the investigating magistrate to have been killed in the incident; Rs. 25,000/- each was paid to 44 injured persons; Rs. 5,000/- each to 26 persons (as against the NHRC's recommended sum of Rs. 10,000/-); and Rs. 1,000/- each to five persons. The *Report* adds:[136] "Since this is by way of an interim measure and an adjustment is to be made in due course, no further action at this stage need be taken."

In the "Jeb Katri" case, where it was alleged that Amritsar police persons had tattooed the words on the forehead of four women, the NHRC intervened in proceedings pending in the High Court. In its intervention it suggested, *inter alia*, that the victims' foreheads be operated by competent plastic surgeons of their choice at state cost, and that interim compensation be disbursed to them. It is reported that the Punjab and Haryana High Court accepted the suggestions of the NHRC.[137]

Concern over disappearances, jail conditions and the use and abuse of TADA are voiced in the *Report*. The effect that the establishment of the NHRC has on acknowledgement of the commission of tort by the state and its functionaries, investigation of culpability, determination of liability and the quantum and payment of interim and final compensation is yet to unravel.

X. MISCELLANEOUS

In *Mohan Lal* v. *State of HP*,[138] the Himachal Pradesh High Court entertained a petition for compensation where a government vehicle caught fire due to negligence of its employees causing severe burn injuries to a passer-by. While exercising its writ jurisdiction under article 226 of the Constitution, the court applied the norms which govern the determination of compensation under the Motor Vehicles Act. In consonance with the trend of decision-making in the writ jurisdiction, interest was not awarded.

In a case where a 11 year-old girl sustained severe burn injuries when she suffered an electric shock and her arm had to be amputated due to the negligence of the officials of the electricity board, the court, in its writ jurisdiction awarded Rs. one lakh.[139] The court relied on a series of decisions, including *Nilabati Behera* and *Mohan Lal* in exercising the power to award compensation in its writ jurisdiction.

Defining negligence as "conduct falling below the standard demanded for the protection of others against unreasonable risk of harm", a Division Bench of the Orissa High Court[140] awarded Rs. 15,000/- for injuries sustained when a wall collapsed on the victim-claimant.

136 Annexure V at 48.
137 See *Report*, at 22-23.
138 (1994) 1 ACJ 325 (HP).
139 *Seemu* v. *HPSEB*, supra note 117. See also *Xavier* v. *State of Tamil Nadu*, AIR 1994 Mad 306.
140 *Ramesh Kumar Nayak* v. *Union of India*, AIR 1994 Ori 279 at 281.

Where a 24-year-old woman died following a post-partum sterilisation operation, and the doctor had performed the operation under crude and primitive conditions, the Kerala High Court[141] awarded Rs. 1,60,000/- as compensation with interest at 12 per cent.

A subordinate sued his superior officer for recovery of damages for causing mental harassment. The officer raised a preliminary objection that the matter could only be heard by the administrative tribunal, since the act complained of is covered by the term "service matter" in section 3(q) of the Administrative Tribunals Act, 1985. A Single Judge of the High Court negatived this contention, and held: "The officer who takes upon himself to work in an atrocious manner or with ill-intention might be under the guise of discharge of official duties cannot be said to have affected any matter incidental to the condition of service."[142]

XI. CONCLUSION

The codification of tort law, as has occurred in the field of motor vehicle and railway accidents, has seen the emphasis shift from negligence to no-fault liability. Structuring of compensation, accompanied by a simplification of the procedure, is intended to ease the pressure on courts and tribunals, even as it is expected to reduce the secondary costs on the victim or dependants of the victim. The impact this shift from fault to no-fault has on liability, risk and safety, and consequently on victim-creation will require empirical analysis.

The acknowledgement of constitutional tort, including instances of abuse of power, and the decline of the defence of sovereign immunity, have begun to alter the context of state accountability in tort. The liability of the state for negligence, and abuse of power, has taken root in the law, while the law moves steadily towards the personal liability of the offending officer.

141 *Joseph* v. *Dr. George Moonjely*, AIR 1994 Ker 289.
142 *Dr. H. Mukherji* v. *Swadesh Kumar Bhargava*, 1994 Mah LJ 1212 at 1214.