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# TORT LAW IN INDIA 2001

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Usha Ramanathan

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## I. INTRODUCTION

The development of constitutional tort which began in the early eighties and was cemented into judicial precedent in *Nilabati Behera*<sup>1</sup> has profoundly influenced the direction tort law has taken in the past decade. It is in recognising state liability, and in denuding the defence of sovereign immunity, that constitutional tort has taken wide arcs around previously established practices in tort law. Its influence on the recognition of wrongs, and of the vicarious liability of the state, is in evidence in the cases under survey.

The toehold that culpable inaction has acquired over the years appears to be getting firmer, as a case from the Andhra Pradesh High Court bears witness.

Covering cases reported in 2000 and 2001, negligence, especially in cases of medical negligence, presents striking studies of perceptions and priorities which are most evident in the area of family planning and population control.

The test of duty of care presents itself with increased frequency than it has in years recently past.

The quantum of compensation has acquired a centrality in accident law. The connected aspect of the growing importance of the Second Schedule to the Motor Vehicles Act 1988 in determining the amount, and boundaries, of compensation is well represented.

An exploration into an area of pre-emptive action in tort law, found in a case concerning the tort of nuisance presents a potential for the legal imagination.

## II. CONSTITUTIONAL TORT

### Custody death

The incidence of custodial violence, and custody death, continues unabated. Delhi and Gauhati High Courts recur with a disturbing frequency in this section, but cases from Rajasthan, Karnataka, Maharashtra, Uttar Pradesh, West Bengal and Andhra Pradesh testify to the prevalence of custodial violence across a spectrum of states.

The experience of courts with cases of custodial violence appears to have moved them to regard complaints with reduced suspicion, and enhanced credulity. In the 18 cases that were located within this arena of custodial violence, compensation was not denied in any case. The link between custodial violence and compensation is direct<sup>2</sup> and *Nilabati Behera*,<sup>3</sup> *D.K.Basu*<sup>4</sup> and *Rudul Sah*<sup>5</sup> have evidently set at rest any questions there might have been on the payment of compensation for violation of Article 21 rights.

There is an increasing regularity in referring cases of custody death to the CBI, since it is not seen as realistic to expect that the police will carry out an unbiased investigation in a matter where the police are themselves in the dock.<sup>6</sup> The prosecution of errant officers is not unknown in law;<sup>7</sup> courts too may suggest prosecution where it is not already underway<sup>8</sup> or to leave it “open for the state authorities to proceed against the erring officers both departmentally and criminally...”<sup>9</sup>

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1 *Nilabati Behera v. State of Orissa* (1993) 2 SCC 373.

2 See, for e.g., *Tarulata Devi v. State of Assam* (2000) 1 Gau LJ 419, para 9.

3 *Supra* n.1.

4 *D.K.Basu v. State of West Bengal* (1997) 1 SCC 416.

5 (1983) 4 SCC 141.

6 *Moheela Moran v. State of Assam* (2000) 2 Gau LT 504; *Phoolwati v. NCT of Delhi* 2000 Cri LJ 1613; (2000) 84 DLT 177; *Ajab Singh v. State of U.P.* (2000) 3 SCC 521; *Tarulata Devi supra* n.2; *Laxman v. State of Rajasthan* (2000) 3 Raj LW 1469.

7 *Mst. Madina v. State of Rajasthan* (2000) 1 Raj LW 266; *Iqbal Begum v. State of Delhi* 2001 ACJ 2033 : (2001) 89 DLT 504. See also *State of U.P. v. Mundrikar* (2001) 9 SCC 346, case under S.302 and S.302/34.

8 *Notle v. Union of India* 2000 ACJ 786.

9 *Gopal Ch. Sarmah v. State of Assam* (2000) 1 Gau LT 643 at 657. See also *Kamla Devi v. Govt. of NCT of Delhi* 2000 Cri. LJ 4867: (2000) 84 DLT 348.

The regularity with which cases of custodial violence and death have reached the courts has been one reason for the increasing credulity, and lessening disbelief, when complaints are made of police violence. The doctrine of *res ipsa loquitur* has been imported into this arena.<sup>10</sup> And, in *Kamla Devi v. NCT of Delhi*<sup>11</sup> the Delhi High Court has said: “When a person dies in police custody and the dead body bears telltale marks of violence or the circumstances are such that indicate foul play, the court acting under Article 226 of the Constitution will be justified in granting monetary relief to the relatives of the victim...”<sup>12</sup> While courts have generally ordered compensation to victims or their families or dependants, it has not yet become routine to direct recovery of the compensation amounts from the offending persons. In *Mst. Madina v. State of Rajasthan*,<sup>13</sup> however, the Rajasthan High Court did order that “the respondent 1 shall recover the amount of Rs. 3 lakhs proportionately from respondents 3 to 7 (the offending policemen).” In *Kamla Devi*<sup>14</sup> the court left it “open to the state to recover the abovesaid amount from the persons who are ultimately held responsible for the death of Madan Lal”.

The remedy of compensation as a “palliative”<sup>15</sup> or, as it is more frequently being characterized, as an “interim” measure<sup>16</sup> is now firmly rooted in the law. Any doubts that might have persisted about the state’s responsibility for the safety of persons in its custody has now been laid at rest by the decision of the Supreme Court in *State of A.P. v. Challa Ramkrishna Reddy*.<sup>17</sup> This affirms the decision of the Andhra Pradesh High Court in *Challa Ram Konda Reddy v. State of A.P.*,<sup>18</sup> an early decision that went beyond situations of custodial violence perpetrated by instrumentalities of the state, to the responsibility of the state when persons are held in its custody, even where injury or death is caused by third persons. The remedy of compensation has been extended to these situations and, as later cases have shown,<sup>19</sup> it has begun to be used in a range of other cases of death in custody where the state or its instrumentalities may not have been directly the cause of the harm caused.

In *Challa Ramkrishna Reddy*, a father and son accused in a criminal case were apprehended and remanded to judicial custody. About 10 days into their custody, a bomb was hurled into the cell where they were housed, and the father died in the explosion. It transpired that they had received threats to their lives, which they had communicated to the Circle Inspector who, however, did not treat the threats with any seriousness. In fact, on the night of the attack, only 2 police personnel were on duty in the sub-jail premises, although 9 members were required to stay on guard. They had also made representations to the Collector and the Home Minister, to little effect. The incident occurred in 1977. The sons of the dead man sued the state for damages. The state resisted the suit on two grounds: limitation, and sovereign immunity. The ground of limitation was overcome by locating the case within Article 113 (the residuary article) of the Limitation Act 1963 and not within Art. 72, which provides for limitation of one year from the time the act or omission takes place. The court explained this, saying: “In order to attract Article 72, it is necessary that the suit must be for compensation for doing or for omitting to do an act in pursuance of any enactment in force at the relevant time... [W]here a public officer acting bona fide under or in pursuance of an Act of the legislature commits a “tort”, the action complained of would be governed by this article which, however, would not protect a public officer acting mala fide under colour of his office.”<sup>20</sup> Finding that “the Police Sub-Inspector was also in the conspiracy and it was for this reason that in spite of their requests, adequate security guards were not provided,”<sup>21</sup> the court took away the “protection of shorter period of limitation” from the state.

10 *Government of NCT of Delhi v. Nasiruddin* (2001) 89 DLT 91 at 105.

11 *Supra* n. 9 at 4873. The judgment, condemning the use of third degree methods to extract information as a violation of Art. 21, also says: “A comparison between a criminal and a policeman committing brutality will end where the latter violates the law of the land and tramples upon the human rights of a citizen... By using third degree methods the police gets the information or statement from the person who suffers its brutality according to its liking. By adopting such methods an investigation cannot arrive at the truth...”

12 See also, *Mst. Madina v. State of Rajasthan* (2001) 1 Raj LW 266 at 268.

13 *Id.* at 270.

14 *Supra* n.9 at 4874.

15 *Rudul Sah v. State of Bihar supra* n.5.

16 See *Mst. Madina v. State of Rajasthan supra* n.12; *Laxman v. State of Rajasthan supra* n.6; *Shiv Dev Singh v. Senior Supdt. of Police, Batala* (2000) 9 SCC 426, where the Supreme Court termed it a “provisional amount”. See also, *Tarulata Devi v. State of Assam supra* n. 2; *Smt. Kamla Devi v. Govt. of NCT of Delhi supra* n.9.

17 (2000) 5 SCC 712.

18 AIR 1989 AP 235.

19 E.g., *Murti Devi v. State of Delhi* (1998) 9 SCC 604, where an undertrial prisoner died after alleged assault by convicts in the jail; *Muktaram Sitaram Shinde v. State of Maharashtra* 1997 Cri LJ 3458, compensation for death in prison due to lack of medical facilities.

20 *Supra* n.17 at 719.

21 *Id.* at 722.

In 1977, when the custodial death occurred, and in 1980, when the suit for compensation was filed, the notion of constitutional tort was still in its early stirrings. By 1989, when the Andhra Pradesh High Court decided the matter and directed that Rs.1,44,000 be paid at 6% interest, it was entrenched, and human rights discourse had entered constitutional law. In 2000, the Supreme Court had precedential backing to hold: “Thus, fundamental rights, which also include basic human rights, continue to be available to a prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which has been rejected several times by this court.”<sup>22</sup> *N.Nagendra & Co. v. State of A.P.*<sup>23</sup> and *Common Cause v. Union of India*<sup>24</sup> were cited to explain the piling into insignificance of the doctrine of sovereign immunity. *Nilabati Behera*,<sup>25</sup> *In re the Death of Sawinder Singh Grover*<sup>26</sup> and *D.K.Basu*<sup>27</sup> were invoked to support the position that “so far as fundamental rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of the state, which must fail”.<sup>28</sup>

Interestingly, the court also held that, given the stream of cases in which compensation had been awarded to persons who had suffered injury at the hands of the officers of the government, “(t)hough most of these 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 fact”.<sup>29</sup>

While compensation as a public law remedy has developed as a direct response to custodial violence, the determination of the quantum is still uncertain ground. In *Amitadyuti Kumar v. State of West Bengal*,<sup>30</sup> the Supreme Court enhanced the Calcutta High Court’s award of Rs. 20,000 to an “appropriate” sum of Rs. 70,000. In *Smt. Suguna v. State of Karnataka*,<sup>31</sup> the Karnataka High Court was confronted with the death of an auto driver, whose dependants were his wife, mother and a minor daughter. In “public law”, the court held the state “obliged to pay compensation to the petitioners which is quantified at Rs. 3 lakhs.”<sup>32</sup> In *Mst. Madina*,<sup>33</sup> the Rajasthan High Court held the petitioner “entitled to at least Rs. 3 lakhs by way of interim relief.” These cases do not indicate the basis for determining the quantum. Where a court has ventured to explain it has, at best, been a sketchy exercise. So, in *Govt. of NCT of Delhi v. Nasiruddin*,<sup>34</sup> the court held: “Taking into account the decisions of the apex court in the matter of Motor Vehicles statute, and the cases noted above, and also the fact that loss of dependencies, if any, is that of parents and their age....” But *Iqbal Begum*,<sup>35</sup> also decided in the Delhi High Court adopts a contrary approach: “The reason for my drawing attention to the judgments and various pronouncements of the Supreme Court is to show that it is not necessary that the criteria laid down in fatal accident cases and allied matters for awarding compensation should be followed by courts in awarding *ex gratia* compensation in custodial death cases. Such an interpretation would lead to treating citizens differently based on their economic strength when rights are violated by the state.”

In an earlier survey, the problem of applying principles of motor vehicle compensation to cases of custodial death was noticed.<sup>36</sup> That was a case of a convict undergoing life imprisonment where, since the income replacement principle could not be applied, the court worked on a factor of dependency, unrelated to the convict’s contribution to his dependants at the time of his death.<sup>37</sup>

Generally, income replacement, where it has been invoked, has been referred to in passing, and an “appropriate” lump sum awarded in cases of custodial violence. That compensation in this jurisdiction has been viewed as an

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22 *Id.* at 726.

23 (1994) 6 SCC 205.

24 (1999) 6 SCC 667.

25 *Supra* n.1.

26 1995 Supp 4 SCC 450.

27 *Supra* n.4.

28 *Supra* n. 17 at 727.

29 *Ibid*, emphasis added.

30 (2000) 9 SCC 404.

31 (2000) Cri LJ 4408.

32 *Id.* at 4414. The court directed that Rs. 2,50,000 be deposited in the daughter’s name, and the money used “only for the purpose of her education and marriage”.

33 *Supra* n.7 at 270.

34 *Supra* n.10

35 *Supra* n.7 at 2035.

36 Usha Ramanathan, “Law of Torts” 1995 *ASIL* 447 at 451.

37 *Suramalla Ranulu v. State of AP* (1995) 2 Andh LJ 399.

“interim” measure could be seen to have influenced this development, as also the immediate liability to pay resting with the state. The protection of the right to pursue other remedies<sup>38</sup> even while *Challa Ramkrishna Reddy* stands testimony to the dilatory nature of the civil remedy. There is also evidence that the compensation recommended by the NHRC is usually much lower than that awarded by courts.<sup>39</sup>

A feature of these cases is the petty nature of the crime of which those killed in custody were often accused. In *Mst. Madina*,<sup>40</sup> the victim had allegations of “theft of a guar gum bag” levelled against him. In *Narayani Sharma v. State of Tripura*,<sup>41</sup> a schoolboy of 16 years was a victim of custodial violence after he was picked up in connection with a case of theft.<sup>42</sup> In *Gopal Ch. Sarmah v. State of Assam*,<sup>43</sup> there is no indication that the victim was in police lock up in connection with any offence; only he was a member of a political party.<sup>44</sup> This disproportionate use of force, even to the causing of death, seen in conjunction with the abuse of power that custodial violence represents, indisputably points to a deep malaise harming the system of criminal justice.<sup>45</sup> The four aspects of compensation to the victim, recovering the compensation amount from the erring officers, disciplinary proceedings and criminal action against the accused will each have to be developed to produce a deterrent effect. The firming up of the links between liability and compensation could in this context, be viewed as an imperative.

## Police Atrocity

Excessive, or unwarranted, use of force by the police constitutes a ground for seeking relief – both compensatory and asking for investigation and prosecution – from the court. In the two cases reported in the period under survey, the Andhra Pradesh High Court and the Bombay High Court at Aurangabad have deflected the issue from that of deterring culpability and compensation to recognizing the imperative of investigation.<sup>46</sup> In the Maharashtra case, the court declined to act since a commission of inquiry had been appointed into the alleged incidents of police violence, and it considered any intervention at that stage premature.

Where it was established that a constable had assaulted a person in the course of his duty, and that resulted in amputation of a limb, the state was held vicariously liable, and the doctrine of sovereign immunity was expressly rejected.<sup>47</sup> Interestingly, the court was called upon to address a reversal of the contention that where an alternative remedy exists in civil law, public law remedy, in writ, should not be allowed — a position that has been negated many times over. And it held: “The fact that a public law remedy lies under Articles 32 and 226 of the Constitution before the superior courts in respect of torts committed by police.... would not take away the power of civil court to grant relief of damages for violation of fundamental rights by the state agency committing such tort.”<sup>48</sup>

The death of a woman who was assaulted by a constable during a prohibition raid while she pleaded that her nephew was on his way to buy medicines for her child and should not therefore be apprehended, is another instance of excessive use of force that has been brought to court. That enquiry into the incident was deliberately allowed to drag acted in aggravation. The court therefore directed initiation of “criminal proceedings against the police constable concerned for his rude behavior in his pushing her to the ground which subsequently ended in her death apart from expediting the departmental enquiry pending against him.” The state was directed to pay Rs.2 lakhs to her family with the “right to be indemnified by and take such action as may be available to them against the wrongdoer....”<sup>49</sup>

38 *Mst. Madina*, *supra* n.7 at 270; *Ajab Singh v. State of U.P.* *supra* n.6 at 525; *Phoolwati v. NCT of Delhi* *supra* n.6 at 1617; *Smt. Kamla Devi* *supra* n.9 at 4874.

39 *Amitadyuti Kumar v. State of West Bengal*, *supra* n.30 : Calcutta High Court in lieu of amount suggested by NHRC – Rs. 20,000; SC – Rs. 70, 000; *Iqbal Begum* *supra* n.7 : NHRC – Rs. 50,000, SC Rs. 3,50,000; *Smt. Kamla Devi* *supra* n.9 at 4874 : High Court – Rs. 2 lakhs, “aforesaid amount shall be over and above the one which has been awarded by the NHRC.”

40 *Supra* n.7

41 2000 ACJ 869.

42 The court records that his complaint to a magistrate of torture while in police custody went unheeded : *id* at 870.

43 (2000)1 Gau LJ 643.

44 See also, *Tarulata Devi*, *supra* n.2.

45 See also, *Surendra v. State of Maharashtra* (2001) 4 Mah LJ 601 at 612, torture of journalist through misuse of chapter VIII powers “so that he should learn a lesson not to expose police officers of the region within whose jurisdiction he was residing.”

46 *APCLC v. SHO, Saifabad Police Station, Hyderabad* (2000) 1 Andh LT 201, police firing during agitation against enhancement in electricity tariff; *Council for Protection of Human Rights v. State of Maharashtra* (2000) 2 Mah LJ 242.

47 *State of Gujarat v. Govindbhai Jakhubhai* 2000 ACJ 1305.

48 *Id* at 1314.

49 *Mariyappan v. State of Tamil Nadu* 2000 Cri LJ 4459, the incident was of November 1990.

## Encounter killing

The labelling of a person as a member of an extremist organization has provided a shield to the police and armed forces in cases of encounter killings or in fake encounters. The obstacles to enabling investigation in cases of alleged encounters was set out in an earlier survey.<sup>50</sup> An attempt to cover up a death in custody as an encounter killing of a member of ULFA has since been reported in *Gopal Ch. Sarmah v. State of Assam*.<sup>51</sup> A single judge of the Gauhati High Court, basing his judgment on a judicial enquiry instituted by the court, gave a lie to the assertion of death in an encounter, and directed that Rs. 2,50,000 be paid in compensation.

A reaction to extremist violence, where a heightened tolerance of state violence is seen, is found in the decision of a Division Bench of the Gauhati High Court in *Siba Nath Gogoi v. Union of India*.<sup>52</sup> Dealing with a challenge to the identity of a person who was killed, allegedly in an encounter, Sarma, J. in his separate but concurring judgment added, as in a postscript: "... the question is whether one who distances from the societies, departs from the society and adopts gun culture, should receive equal treatment at the hand of the instrumentalities of the society... The society cannot be asked to cough up compensation for the death of a terrorist in encounter, because that will mean putting a premium on wrongdoings."<sup>53</sup> The court did make an exception when it said: "Fake encounter, cold blooded killings apart, for the death of a terrorist no compensation can be/should be granted by the court."<sup>54</sup>

The judicial dictum adds an imperative to the registering, and investigation of alleged encounter deaths, to determine the veracity or otherwise of charges that the encounter was staged, or fake.

## Illegal detention

The casual treatment meted out in matters of liberty has led courts to direct that compensation be paid to these detained beyond the prescription of the law. *Free Legal Aid Committee, Jamshedpur v. State of Bihar*<sup>55</sup> is a glaring instance of the short shift accorded to both the law, and liberty. In an agitation by villagers in April 1991 against Icha Kharakai Bandh Yojna, a large number of agitators were detained under S.107 CrPC. Among them was a girl of about 13 years. It was over a month later that she was released. In explanation to the High Court, the Executive Magistrate who had acted on behalf of the SDM said that there had been a power failure and he had had to work by candlelight. In that meagre light he had not been able to see the faces and features of the arrested persons and, with the police report not mentioning the ages, he had remanded all those produced before him. A fortnight later, when the SDM held court, the girl was remanded without being physically produced, he said. The Juvenile Justice Act 1986, in S.23, expressly forbade proceedings under Chapter VIII being taken against a juvenile; and S.107 lies within the territory of that chapter. Asserting that the remand, being contrary to the express provisions of the law, was illegal and that it had been in violation of her fundamental right, the court directed that Rs.10,000 be paid to the girl while holding her "entitled to compensation under the public law in addition to the remedy available under the private law for the damages for tortious action of the government servant."<sup>56</sup>

The poignant case of Ajay Ghosh who, declared unfit to stand trial, was in a state of incarceration from 1962 to 1996 with scant care and no discernible treatment within the Presidency Jail, Calcutta speaks both of constitutional neglect and of the irrelevance of compensation.<sup>57</sup> "We could have directed some interim compensation to be paid to Ajay Gosh," the court said, "but considering his present state of mental and physical health, that would not be of any avail. He has no known relatives either. We are conscious of the fact that money award can be calculated only to make good financial loss. It is not an award for the sufferings already undergone which are incapable of calculation in terms of money..... All that the courts can do in such cases is to award such sums of money, which may appear to be giving of some reasonable compensation, assessed with moderation, to express the court's

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50 Usha Ramanathan, "Tort Law", 1997-98 ASIL 595 at 600-602, esp. *K.G.Kannabiran v. Chief Secy., Government of AP* (1997) 4 Andh LT 541.

51 (2000) 1 Gau LT 643.

52 (2001) 2 Gau LJ 280.

53 *Id.* at 283.

54 *Ibid.*

55 (2000)1 Bih LJR 20.

56 *Id.* at 23. The court negated a challenge to the locus of the public interest petitioner. The time taken to arrive at this finding was nearly 8 years.

57 *R.D. Upadhyay v. State of A.P.* (2001) 1 SCC 437.



condemnation of the tortious act committed by the state.”<sup>58</sup> As an interim measure, therefore, the court directed that Rs.2 lakhs be paid by the State of West Bengal to the Missionaries of Charity (Brothers), Howrah, “by way of donation”, not by way of expenses for taking care of Ajay Ghosh but to assist them in their work. The saga of callous detention first highlighted by *Rudul Sah*<sup>59</sup> seems not yet to be at a close.

In *Virendra v. State of U.P.*,<sup>60</sup> a single judge recommended that the government pay an amount not below Rs. 40,000 as compensation to “a young man... subjected to incarceration for a long period of five years” where the investigating agency “deliberately, by design” kept a dying declaration secret and prosecuted the accused on a “wholly false version”. The court so ordered while recording his acquittal. However, where a person was arrested and detained on suspicion of having committed murder, and was later discharged when the real culprits were apprehended, the court held that the only restriction on the power of the arresting authority was that “this power should not be exercised in bad faith or in an arbitrary manner or for collateral purpose”. And these will have to be proved.<sup>61</sup> The court held that, in the instant case, it was at most only an error of judgment, and relief was denied. The court, however, went further to record the plaintive cry of the police officers that “if a person is charged with a crime and subsequently discharged or acquitted (and) is enabled to file a writ petition of this nature, no police officer or law enforcement agency can function effectively in this country.”<sup>62</sup> The court advocated that “such tendency deserves not merely to be condemned but also curbed by passing appropriate orders by imposing exemplary costs for filing petitions with the main objective of harassing the officers of investigating agency.”<sup>63</sup> This discouragement to those who see themselves as victims in an unequal power equation, where those affected by the operation of the law, and often by its excessive or arbitrary use, approach the court is, it may be said, not quite fair on those accused who may carry a sense of having been wronged even where a court may not agree with them. The compensation jurisdiction of the court has been developed to provide a sense of justice, as also some redress, to persons affected by the abuse, or negligent use, or non-use of law. Deterring access to this jurisdiction may run counter to this purpose. And, as *C.D. Manjunath’s* case witnesses, court are equipped to ensure that the police is not penalised unfairly or unjustly.

The “sheer negligence in implementing the court orders” resulted in continued, illegal incarceration of an acquittee for 42 days. The court, in *Trimbak Waluba Sonwane v. State of Maharashtra*,<sup>64</sup> directed the state to pay Rs.10,000 as compensation for ‘false imprisonment’ which, as the court observed, “is a type of trespass to the person and ... is actionable without proof of special damage”.<sup>65</sup>

In *Hussain v. State of Kerala*<sup>66</sup> a person was accused of an offence under the NDPS Act 1985 and, due to the ineptitude of his counsel, he was wrongfully convicted and sentenced to 10 years in prison and a fine of Rs.1 lakh. By the time the Supreme Court heard his appeal, aided by an *amicus curiae*, he had served five years in jail. Acquitting the appellant, the court however, said: “In this case, we are not considering the question of awarding compensation to the appellant but he is free to resort to his remedies under law for that purpose.”<sup>67</sup>

The directions issued by a single judge of the Punjab and Haryana High Court to Sessions Judges to prevent violations of Article 22 of the Constitution and S.57 CrPC followed “several petitions... alleging detention of the arrested person in the police lock-up beyond 24 hours, in some cases for days and months together in police lock-ups”.<sup>68</sup>

This cavalier attitude to the law’s prescriptions have fostered a climate of unconstitutional conduct which the law that has developed around constitutional tort seeks to allay. In the cases under survey, courts have commonly acknowledged a link between the delinquent and the recovery of compensation. In *Durgalal Vijay v. Govt. of MP*,<sup>69</sup> the state and the SDM were held jointly and severally liable to pay damages quantified at Rs. 25,000 where illegal detention resulted from manipulation of records. In *Trimbak Waluba Sonwane v. State of Maharashtra*,<sup>70</sup>

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58 *Id* at 439.

59 *Supra* n. 5.

60 2000 All LJ 1914 : 2000 Cri LJ 3917.

61 *Dr. C.T.Manjunath v. State of Karnataka* (2001) 3 Kar LJ 58 at 68.

62 *Id* at 74.

63 *Ibid*.

64 (2000) 2 Mah LJ 498 at 502.

65 *Id.* at 501. The court adopted a Minimum Wages formula.

66 (2000) 8 SCC 139.

67 *Id.* at 142.

68 *Amrik Singh v. State of Punjab* 2000 Cri LJ 4305. The court followed the dictum of the Supreme Court in *Sheela Barse v. State of Maharashtra* AIR 1983 SC 378.

69 (2001) 2 Jab LJ 114.

70 (2000) 2 Mah LJ 498.



the court directed the state to pay, recover the amount from the officials concerned and institute departmental proceedings against them.<sup>71</sup> Constitutional tort is, however, essentially viewed as a matter of state liability for infringement of fundamental rights, and it is not an unvarying direction to pass the liability on to the delinquent, even where such officer has been identified.<sup>72</sup>

## Disappearances

Cases of disappearances continue to crop up in the courtroom, coming from the strife torn years in the Punjab, and from the north eastern states. The disappearance of persons picked up by the armed forces has raised presumptions of the disappeared being dead, unless the armed forces produce the person. It has also led to presumptions of the armed forces having disappeared the person. Yet, in constitutional tort, the remedy has been limited to directing the payment of compensation as an interim measure.<sup>73</sup> The Supreme Court, in *State of Punjab v. Vinod Kumar*<sup>74</sup> merely paused to explain that no trial court would take a cue about liability of delinquent officers from the interim compensation award passed, thus emphasising the distance between liability in the realm of civil remedy of compensation and criminal trial, and the influence the former may have on the latter.

## III. CULPABLE INACTION

The disturbances and destruction of properties following the assassination of Rajiv Gandhi on May 20, 1991 has brought culpable inaction into focus in *J.K.Traders of Ramakrishna 70MM Theatre v. State of A.P.*<sup>75</sup> The proprietor of a theatre in Hyderabad city petitioned the court seeking a declaration that the state, and its police, had failed to protect their property, and for consequent compensatory monetary relief. It was alleged that the NTR estate, where the damage was done belonged to the TDP leader NTRama Rao, the government in power was the Congress and it was an act of political vengeance; the state, it was alleged, had been complicitous (“the police was only a mere spectator”) when the violence erupted.

This case has many of the ‘classical’ features of culpable inaction: the petitioners had apprehended attack and asked for police protection; the police did not react immediately, and, when they did turn up at the scene of destruction, they allegedly watched while the vandals wreaked havoc. Further, an enquiry by an Additional Commissioner of Police found police officers guilty of dereliction of duty, but no action was taken on the report.

The Government of Andhra Pradesh appointed a Commission of Inquiry to inquire into the incidents of violence and destruction. The Commissioner reported that there had been large scale damage to private properties, especially those belonging to TDP leaders. He faulted the police with inaction, and dereliction of duty.

Recognised surveyors assessed the loss sustained by the petitioner at Rs.1,51,50,000 and the Insurance Loss Assessor assessed it at Rs.1.35 crores. The Collector, it appears, certified the estimated loss.

In response to the petition, the state contended, *inter alia*, that:<sup>76</sup>

- Every citizen is responsible for the protection of their lives and property. “The state cannot give guaranteed protection to every citizen in respect of these in all circumstances as such a guarantee is not feasible practically.” In this case, the state averred, all steps had been taken to prevent, and later control, the violence.
- “In an economy like ours where risk can be covered under insurance, the very fact that insurance is available would indicate that the state would not be responsible for hundred per cent protection for individual life and property ... In view of the vast size of the country and the different fissiparous

71 See also, *Virendra v. State of UP supra* n.60 at 1917.

72 See, *Free Legal Aid Society v. State of Bihar, supra* n.55.

73 See *Smt. T.Joicy v. UOI* 2000 Cr.LJ 764: (2000) 1 Gau LT 120, compensation of Rs.2,50,000; *Smt. Kiron Devi v. UOI* (2000)1 Gau LT 446, Rs. 2 lakhs for the disappearance of a 19 year old boy.

74 (2000) 9 SCC 742 at 744.

75 (2000) 5 Andh LT 726.

76 *Id.* at 731-32.

forces, it is not a practical proposition to expect the state to maintain a man to man cover to watch the life and property of every citizen.”<sup>77</sup>

- If the state is rendered liable for loss suffered by an individual, the burden on the rest of the community would be enormous, and this would be iniquitous.
- *Ex gratia* is paid “‘out of grace’ on a humanitarian consideration to tide over the immediate crisis” and is not in the nature of compensation.<sup>78</sup>

It was argued that “there must be established positive inaction on the part of the government resulting in direct violation of the right to life”, and that the evidence did not lead to this conclusion.

The single judge considered the catena of decisions dealing with state liability for compensation and set out the principles deduced, which included:<sup>79</sup>

- “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 pay the damages to the victims”.
- “The failures or inactions on the part of the state which led to the violation of the fundamental right more especially under Articles 14, 19 and 21 ..... should have direct nexus to the damage caused/suffered.”
- The defence of sovereign immunity stands severely restricted in its discharge of sovereign functions, and while undertaking commercial activity.
- The High Courts and the Supreme Court may award monetary compensation for injury – mental, physical, fiscal – suffered where it is conclusively established that the state failed to take any positive action in protecting the fundamental rights of citizens.<sup>80</sup>
- Both public law and private law remedies are available while claiming damages for violation of fundamental rights.
- Quantum may vary from case to case “depending upon nature of loss suffered by the victim.”

The state relied on *M/s Sri Lakshmi Agencies v. Govt. of A.P.*<sup>81</sup> where a single judge of the High Court had not accepted the claim for damages on an argument of foreseeability. The Judge in *J.K. Traders* found that the *Sri Lakshmi* court had, “in principle accepted the theory of compensatory justice”<sup>82</sup> only that “in each and every case of action or inaction on the part of its state or officers, it must be conclusively established that there is positive action on the part of the officer or state... in discharging their sovereign duties”.<sup>83</sup>

Relying on the report of the Commission of Inquiry, and the report of the Addl. DCP, the court found that “it can be conclusively said that there was *positive inaction* on the part of the police in preventing the mob from gaining access into the estate... [N]o preventive action whatsoever was pressed into service, much less, no post event precautions were also taken.... The recommendations (in the two reports) are very categorical that the police people are mere spectators to the incident and they are responsible for not arresting the damage”.<sup>84</sup> “Thus, it is,” it was held, “conclusively established in the instant case that there is any amount of *inaction on the part of the police in protecting the person and property of the citizens*. In the instant case, ..... the property belonging to a political

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<sup>77</sup> *Id.* at 732.

<sup>78</sup> For other cases re *ex gratia*, see, *Dipali Mandal v. State of Orissa* (2000) 90 Cutt LT 570, Rs.75,000 for death of husband in Orissa supercyclone on October 29/30 1999; *Raj Bala v. State of Haryana* (2001) 1 Punj LR 521, Rs.10 lakhs for martyr’s family at the time of Operation Vijay in 1999; *Dr. Sharanjit Kaur v. State of Punjab* (2001) 3 Punj LR 109, Rs.2 lakhs as *ex gratia* by extension of a scheme covering the armed forces; *Maya Devi v. State of Bihar* (2000) 2 BLJR 1245, Rs. 1 lakh based on government resolution, to family of presiding officer in polling booth shot while on duty.

<sup>79</sup> *Id.* at 746.

<sup>80</sup> In *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465, as the single judge noticed earlier, the Supreme Court held that a Bangladeshi national was entitled to compensation where it was an Article 21 violation, which article extends to ‘every person’.

<sup>81</sup> (1994) 1 Andh LT 341. See also, Usha Ramanathan, “Law of Torts”, 1994 *ASIL* 485 at 491.

<sup>82</sup> *Supra* n. 75 at 745.

<sup>83</sup> *Id.* at 745-46.

<sup>84</sup> *Id.* at 750, emphasis added.

rival (was) made target by workers of the party in power. Therefore, I hold that the state failed to discharge its sovereign functions in protecting the property of the petitioner and the essential functions viz., the police exhibited complete inaction and slackness in dealing with the situation.”<sup>85</sup>

The court proceeded to issue a series of directions on compensation and rehabilitation measures. The question also arose whether compensation can be claimed on “actuals”, and it was held that “since this is a case where the petitioner had admittedly suffered huge loss on account of the positive inaction on the part of the state machinery, which resulted in gross violation of fundamental rights under Articles 19 and 21 of the constitution of India, he is entitled for reasonable and appropriate compensation”.<sup>86</sup> The court awarded Rs.1 crore as damages with the postscript that “the petitioner shall refund the claim amount to the government as and when received from the insurance company”.<sup>87</sup>

The relationship between “positive inaction”, foreseeability (including where the agencies of state have been forewarned) and culpability of the state has been categorically stated in *J.K.Traders*. The complicity of state agencies has also been recognised as an aspect that may constitute the context of culpable inaction.

The anti-Sikh riots following the assassination of Mrs. Gandhi in 1984 have also been laden with inferences, and evidence, of state complicity. The compensation worked out to be paid to the families of the victims of the riots has been re-asserted and, following the decision of the Delhi High Court in *Bhajan Kaur v. Delhi Administration*,<sup>88</sup> a single judge of the Punjab and Haryana High Court directed the payment of Rs.3.5 crores, minus the Rs.20,000 which was all that had been paid ex gratia to the family of a victim of the anti-Sikh riots in 1984.<sup>89</sup> Explaining, the court said: “Article 21 of the Constitution of India mandates an obligation upon the state to enforce law and order to maintain public order and public peace so that all sections of the society, irrespective of their religion, caste, creed, colour and language, can live peacefully within the state. In the riots following the assassination of Smt. Indira Gandhi, the state failed in its duty to protect the lives of its citizens resulting in the barbaric killings of numerous persons belonging to one community. The state cannot escape its liability to pay adequate compensation to the family of the person killing during 1984 riots.”<sup>90</sup>

Culpable inaction, it appears, continues to develop around instances where foreseeability, complicity and positive inaction are discernible.

## IV. FINE AND COMPENSATION IN CRIMINAL LAW

The imposition of fine, and the payment of compensation out of the amount recovered, continues to be one of the ways in which the victimological aspects are balanced against the logic of punishment when inordinate delay occurs.<sup>91</sup> Delay, and the changes that may have intervened in the lives of the two accused and of the victim have not uniformly been considered relevant while determining sentence. This explains why the Supreme Court was critical of the Himachal Pradesh High Court when the High Court, in a case of rape of a minor reversing an acquittal, held: “Though the facts and circumstances proved on record suggest that the respondent deserves the severest punishment, yet in view of the fact that the occurrence is of May 21, 1989 (i.e., 10 years ago) when he was 25 years of age and he might have settled in life, we sentence him to undergo rigorous imprisonment for three years and to pay a fine of Rs.10,000. The fine was to be paid to the prosecution as compensation.”<sup>92</sup> The Supreme

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<sup>85</sup> *Id.* at 750-51.

<sup>86</sup> *Id.* at 753.

<sup>87</sup> *Id.* at 754. At 753, the court recorded the government’s strange protest that “the certificate issued by the Collector cannot be made basis for assessing the damages, it is only with a view to enable the petitioner to claim the insurance amount from the insurance such a certificate was issued and, therefore, it cannot be treated as actual damage suffered...”.

<sup>88</sup> 1996 AIHC 5644. See also, Usha Ramanathan, “Tort Law” 1996 *ASIL* 423 at 426.

<sup>89</sup> *Mohinder Kaur v. State of Haryana* (2000) 1 Punj LR 87. The FIR filed in 1984, and the ex gratia given by the State of MP, were recognised by the court as contradicting the plea of the state that the victim had not died at the hands of a mob.

<sup>90</sup> *Id.* at 88-89.

<sup>91</sup> *State of Karnataka v. Peter Prank* 2000 All LJ 3516, delay of 7 years; *Balraj v. State of Haryana* 2000 Cri LJ 2496, 12 years; *Salim v. State of U.P.* 2000 All LJ 2919, 22 years; *Ganga Singh v. State of U.P.* 2000 Cri LJ 1695:2000 All LJ 651, 21 years; *State of Karnataka v. B.Venkatareddy* (2001) 6 Kar LJ 46, 11 years; *Rashid v. State* 2000 Cri LJ 3751, 18 years, and age of accused 83 years; *Balram Singh v. State of M.P.* (2000) 2 Jab LJ 291, 15 years; *Kuldip Sharma v. State* (2000) 84 DLT 358, 30 years in a case of cheating.

<sup>92</sup> *State of Himachal Pradesh v. Kamal Kishore* 2000 Cri LJ 2661 at 2667.

Court,<sup>93</sup> unhappy with this disjunctive understanding of ‘adequate and special reasons’ which could lead the court to award less than the minimum sentence, as had happened in this case, did not agree with the High Court that the respective conditions of the prosecution and the accused provided a reason for imposing a sentence of imprisonment less than the statutory minimum.<sup>94</sup> It enhanced the sentence to 7 years. There is, however, no mention of the fine and compensation ordered by the High Court. The limits of negotiation were adjusted by the Supreme Court in this instance.

Courts also continue to find the device of fine and compensation useful when altering the sentence of imprisonment in response to the facts of the case before them. In *Sativir Singh v. State of Punjab*,<sup>95</sup> for instance, the court was dealing with a case under S.498A, IPC, where cruelty in her matrimonial home drove a woman to attempt suicide, an attempt that failed and left her a paraplegic. The court was inclined to the view that giving the woman a substantial sum in compensation was of importance. Two of the accused were also found to have crossed the age of 70. So, the substantive sentence of imprisonment was limited to the period undergone which, the court was informed, was a substantial period, and each of the three accused were to pay Rs.1 lakh to be made over in its entirety to the victim-woman.

A Division Bench of the Karnataka High Court, acting on the reasoning of the Supreme Court in *Sunder Singh v. State of Rajasthan*<sup>96</sup> that if the accused has spent a reasonable time in jail, even in a conviction under S. 304 Part II, IPC, the court may confine the sentence to the period undergone, proceeded accordingly. However, “having regard to the seriousness of the incidents” the court ordered the two accused to pay Rs.10,000 each which was to be handed over to the wife of the dead man.<sup>97</sup>

In *Kulwant Singh v. Amarjit Singh*,<sup>98</sup> the Supreme Court was critical of the High Court’s decision to reduce the sentence for an offence under S.307 from 5 years to the 3 1/2 years already undergone. “[o]nce the High Court held Amarjit Singh guilty of an offence under S.307 IPC it should not have interfered with the sentence of imprisonment,” the court said, while adding: “In the circumstances of the present case though we do not wish to interfere with the sentence of imprisonment as reduced by the High Court, we will, however enhance the sentence of time an Amarjit Singh to Rs.25,000 ....”<sup>99</sup> The court concluded with a comment that the way in which the High Court had disposed of the appeal had “certainly led to a miscarriage of justice”. Fine disbursed as compensation appears to have served only as a partial pathway towards justice.

It is not an invariable rule that compensation is ordered out of the fine imposed.<sup>100</sup> It has also been observed that when, for instance, the law employs the phrase “and shall also be liable to fine”, as it does in S.302 IPC, it is “not to be understood as a legislative mandate that the court must invariably award a sentence of fine also in addition to imprisonment for life.”<sup>101</sup>

While this is so, the victimological approach<sup>102</sup> has taken root. Where the “deceased family are persons of modest means and... it would be in the interests of justice to impose a fine that is in consonance with the status and financial capacity of the accused”, fine, and compensation out of the fine, have been directed.<sup>103</sup>

The “economic condition of the accused and... having regard to his poverty conditions that no useful purpose would be served by imposing a sentence of fine which could only be meagre” may on the other hand, make the court veer away from imposing a fine.<sup>104</sup> But, where fine is in fact a part of the sentence, and S.357 is not invoked,

93 *Kamal Kishore v. State of H.P.* (2000) 4 SCC 502.

94 *Id.* at 510. The court observed that these factors may be considered by the executive or constitutional authorities if the question of remission were to arise.

95 (2001) 8 SCC 633.

96 1989 Cri LJ 122; AIR 1988 SC 2136.

97 *State of Karnataka v. Adivappa Yallappa Gainal* 2000 Cri LJ 2148. See also *Avinash Ramesh Mandape v. State of Maharashtra* (2000) 1 Mah LJ 833; *State by Sub-Inspector of Police, Hosahalli v. Prakashaiah* (2000) 3 Kar LJ 352; *Surendra Chauhan v. State of M.P.* (2000) 4 SCC110; *Chellappa v. State* 2000 Cri LJ 1276.

98 (2000) 3 SCC 290.

99 *Id.* at 294.

100 See, for e.g., *Sandeep v. State of Haryana* (2001) 9 SCC 41.

101 *Bidhan Nath v. State of Assam* 2000 Cri LJ 1144.

102 See, *Gurmit Singh v. State of Punjab* 2000 CriLJ 3210, the appellants must compensate the surviving victims of their crime”, and two accused were each directed to pay Rs.2 lakhs to the widow of one of the deceased; *State of M.P. v. Ganesh* (2000) 2 Jab LJ 137 at 142.

103 *Rafeek Husensab Korti v. State of Karnataka* (2001) 3 Kar LJ 258 at 262. See also, *Avinash Ramesh Madape v. State of Maharashtra* (2000) 1 Mah LJ 833 at 837.

104 *State by Kasthur Police v. Appajigowda* (2001) 3 Kar LJ 356 at 357.

the court has said: “This is high time when the court should take into consideration that if some fine is imposed on the accused then a sufferer must be properly compensated”.<sup>105</sup>

The practice is to provide for a default clause in case the fine is not paid. This sentence could in some instances even be rather heavy,<sup>106</sup> although the default sentence may vary. The Karnataka High Court has, however, delivered a series of decisions where it has dispensed with the default clause, and directed recovery proceedings instead.<sup>107</sup>

The use of S.357(3), which allows a court to order compensation where fine is not a part of the sentence, has not been put to much use. *Balram Singh v. State of M.P.*<sup>108</sup> constitutes an exception, where the court directed Rs.50,000 to be paid by a police officer to the victim of his rape. The relationship between S.357(1) and S.357(3) appears clouded in confusion where a court ordered that Rs.5000 be paid to the legal heirs of the deceased as “compensation..... over and above the amount of fine already imposed upon him”.<sup>109</sup> This is impermissible for, under the law, compensation may either be paid from the fine imposed, or it may be directed to be paid where fine is not part of the sentence.

It is in cases under S.138 of the Negotiable Instruments Act., 1881 that courts have been provoked to resort to a liberal use of the compensation provision, delinked from fine. This is a pragmatic use of the provision to surmount the problem of equating the amount due to the complainant with the amount awarded by the court. With Magistrates of the First Class having jurisdiction over S.138 cases, and the limit of their powers to impose fine being limited to Rs.5,000, the Supreme Court, in *Pankajbhai Nagibhai Patel v. State of Gujarat*<sup>110</sup> has neatly sidestepped the issue by “delet(ing) the fine portion from the sentence and direct(ing) the appellant to pay compensation of Rs.83,000 to the respondent-complainant.” This approach follows naturally from an earlier decision of the Supreme Court in *K. Bhaskaran v. Sankara Vaidhya Bala*.<sup>111</sup>

A single judge of the Andhra Pradesh High Court has, however, found it “unreasonable” that large sums awarded as compensation from fine of Rs.3,25,000 even while an appeal was pending.<sup>112</sup> The Supreme Court, however, had little hesitation in affirming a direction that a huge amount of Rs.4 lakhs, out of a total fine of Rs.20 lakhs, be deposited as a condition to suspend the sentence during the pendency of an appeal.<sup>113</sup> This distinct approach in matters arising out of S138 is in keeping with the changes being proposed in the law to “fast track” these categories of cases. These developments in compensation law are unlikely to impact on the law of fine and compensation generally.

The connection between criminal and civil proceedings in the matter of compensation has been re-emphasised in *N.J.Varghese v. P.V. Varghese*.<sup>114</sup> “A plain reading of the section (S.357) shows that the power of the two courts are concurrent and not mutually exclusive albeit while granting relief one would certainly take note of the relief granted by the counterpart and ensure that double benefit or double burden does not result ...,” the court said, adding: “No provision of law is brought to my notice which excludes the jurisdiction of a civil court to proceed with a suit for damages even where S.357 might be invoked by a criminal court.”<sup>115</sup>

The presence of compensation in criminal law occasionally prods a court to compensate an “aggrieved” person, even where, strictly, the law does not provide for it. It *Smt. Tararani v. BN Rajashekar*<sup>116</sup> an allegation of bigamy failed for want of proof of second marriage, and yet there was evidence of cohabitation with another woman, and desertion. A single judge, acknowledging that the wife was “seriously aggrieved”, culled out the Supreme Court’s remedy of monetary compensation in *Laxmi Devi v. Satya Narayan*<sup>117</sup> to direct that compensation of Rs.10,000

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105 *Manoj Kumar v. State of M.P.* (2000) 2 Jab LJ 52 at 55. See also, *State of H.P. v. Lekh Raj* (2000) 1 SCC 247.

106 *Gurmit Singh v. State of Punjab* 2000 CriLJ 3210 at 3218, 5 years R.I. beyond the sentence if the Rs.2 lakhs each remained unpaid.

107 See, for e.g., *Rafeek Husensab Korti v. State of Karnataka supra* n.103; *State of Karnataka v. V.B. Venkatarreddy supra* n. 91; *State of Karnataka v. Peter Prank supra* n.91; *State of Karnataka v. Adivappa Yallappa Gainal supra* n.97.

108 (2000) 2 Jab LJ 291.

109 *Balraj v. State of Haryana* 2000 CriLJ 2496 at 2499.

110 (2001) 2 SCC 595 at 601.

111 (1999) 7 SCC 510. See also, Usha Ramanathan, “Tort Law” 1999 *ASIL* 535 at 554.

112 *M/s AMI Sarag Micromation Ltd. v. State of A.P.* 2000 Cri LJ 5043.

113 *Stanny Felix Pinto v. Jangid Builders Pvt. Ltd.* (2001) 2 SCC 416.

114 2001 AIHC 1161 (Ker).

115 *Id.* at 1163-64.

116 (2000) 3 Kar LJ 188.

117 (1994) 5 SCC 545.

be paid to her. It is difficult to attribute a principle in law to this decision, except that the court thought it “necessary to compensate the complainant”,<sup>118</sup> and the court found support from the capacity given to a criminal court, under S.357(3), to award compensation to one who has been wronged. An elasticity in application of statutory law has been essayed by the court, which may well not pass closer scrutiny. The vacuum in the law when dealing with matters such as bigamy, however, calls to be noticed.

## V. NEGLIGENCE

Electrocution and medical negligence constitute a sizeable segment of the cases on negligence. The defence of ‘act of god’ and ‘accident’ as differently from negligence have found audience with the court, and duty of care has been applied in cases, especially where the victims have been children.

The Uphaar theatre fire tragedy, which occurred on 13 June, 1997 grinds slowly on through the judicial system. The preliminary point of jurisdiction of a court in its writ jurisdiction was decided by a Division Bench of the Delhi High Court on 29 February, 2000. Observing that “(t)his appears to be a matter in which facts could be ascertained very easily”, the court held that the writ petition was maintainable.<sup>119</sup> It said : “Prima facie it appears that under the doctrine of strict liability in public law..... the liability would be there even if there is no negligence on their part. The government and its agencies would also be liable for not having ensured strict compliance with rules and regulations which have been created to ensure safety”.<sup>120</sup> The principle of strict liability stands emphasised in this preliminary decision. On the potential for disaster which needs guarding against in a cinema house, the court said: “It cannot be seriously disputed that a theatre is one place where a large number of people have to sit in an enclosed area for a fairly long period of time. There is a potential threat to life and safety if fire, leakages of gas, etc. take place. At this stage, therefore, it cannot be said that the cinema owners/employees (past/present) cannot be held to be under an obligation to provide and maintain all standards of safety and/or that they are not liable to compensate for loss of fundamental right guaranteed under Article 21 if harm has arisen by virtue of their not guarding against such hazard.”<sup>121</sup> The question of the issuance of writ against persons other than the state for a violation of Article 21, which held the court in its thrall in *M.C. Mehta v. Union of India*<sup>122</sup> stands thus answered by the Uphaar court.

The death of 60 persons and injury to 113 persons in the fire that engulfed the VIP *pandal* at the site of the celebrations of the 150<sup>th</sup> birth anniversary of J.R.D. Tata occurred in Jamshedpur on 3<sup>rd</sup> March, 1989. Here, too, the jurisdiction of the court—in this case, the Supreme Court—was invoked under Articles 21 and 32.<sup>123</sup> The dead and the injured were employees, or relatives of employees, of TISCO, and some others unconnected with the company. The dead included 26 children, 25 women and 9 men. Counsel for the company, Mr. F.S.Nariman, represented to the court that the company did not desire to treat the litigation as adversarial, and left it to the court to decide on what monetary compensation should be paid. The contrast with the hard-contested Bhopal Gas Disaster case is difficult to miss, although it may have to find another arena for being studied. In *Lata Wadhwa*, therefore, the only question that engaged the court was the quantum of compensation to be paid. Justice Y.V.Chandrachud, former Chief Justice of India, was requested to enquire into the matter and determine the quantum payable. The principles enunciated by the Andhra Pradesh High Court in *Chairman, APSRTC v. Shafiya Khatoon*,<sup>124</sup> *Bhagawan Das v. Mohd. Arif*<sup>125</sup> and *APSRTC v. G.Ramanaiah*<sup>126</sup> were to be considered while arriving at the quantum.

The focus of the decision, therefore, was almost entirely on the quantum of compensation Both Justice Chandrachud and the Supreme Court were agreed on the use of the multiplier, which asserts the income replacement principle. “Damages,” the Supreme Court said, “are awarded on the basis of financial loss and the financial loss is assessed in the same way and prospective loss of earnings.”<sup>127</sup> Reiterating the norm of dependency, the court continued: “The basic figure, instead of being the net earnings, is the net contribution to the support of the dependants, which

118 *Supra* n.116 at 195.

119 *Association of Victims of Uphaar Tragedy v. Union of India* (2000) 86 DLT 246 at 325.

120 *Ibid.*

121 *Ibid.*

122 (1987) 1 SCC 395.

123 *Lata Wadhwa v. State of Bihar* (2001) 8 SCC 197.

124 1985 ACJ 212 (AP).

125 1987 ACJ 1052 (AP).

126 1988 ACJ 223 (AP).

127 *Supra* n.123at 209.



would have been derived from the future income of the deceased....”<sup>128</sup> Reliance on *Davies v. Powell Duffryn Associated Collieries Ltd.*,<sup>129</sup> where Lord Wright explained the formula for calculating loss, the “starting point (being) the amount of wages which the deceased was earning” only entrenches income replacement.

The difficulties encountered in attributing value to a non-income earning person is met in *Lata Wadhwa* too. It is telling that the statutory prescription of a notional income for a non-income earning spouse at one-third the income of the surviving (and, one may add, earning) spouse has not been imported into this decision. The Second Schedule to the Motor Vehicles Act, 1988, as amended in 1994, provisions thus, and, while courts have tended to borrow liberally from motor vehicle accident compensation norms, the *Lata Wadhwa* court has given it the go-by. Instead, the court upped to Rs.36,000 per annum the value of “the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation”. This was to apply in the cases of death of housewives in the age group 34 to 59. For “elderly ladies... in the age group of 62 to 72”, their value was raised to Rs.20,000 per annum with a multiplier of 8. Justice Chandrachud had fixed the figures at between Rs.10,000 and Rs.12,000. A conventional sum of Rs.50,000 was added to constitute the total.<sup>130</sup>

The principle that is derived from law and economics of “reasonable expectation of pecuniary benefit”<sup>131</sup> was iterated by the court. But Justice Chandrachud had not been provided with information that could have assisted him in determining the “pecuniary advantage” of each child to the parent. He had, therefore, categorized the children into groups—between 5 and 10 years and 10 and 15 years. In regard to the first group of 14 children he had awarded Rs.50,000 with a conventional sum of Rs.25,000. The court, “(h)aving regard to the environment from which these children were brought, their parents being reasonably well placed officials of TISCO”, and considering the submission of Mr. Nariman that the sums were grossly inadequate and could be doubled, the court revised the compensation amount by three times to Rs.1.5 lakhs and a conventional sum of Rs.50,000. Considering that TISCO had a tradition of employing the children of its employees, the court raised the compensation for the 10 children in the 10-15 age group to Rs.24,000 per annum, the appropriate multiplier being 15, taking the amount to Rs.4.10 lakhs.

The injured persons in this case of negligence had suffered a range of harm, including severe burns. Compensation ranging from Rs.5 lakhs to Rs.38 lakhs was awarded by Justice Chandrachud, including within it

- the percentage of burns
- daily expenses
- cost of medical treatment
- expenses for psychotherapy
- effect on marriage prospects
- non-pecuniary losses, and
- punitive damages.

The material provided by the victims appears to have been scanty but that, as the court observed, neither deterred the Commissioner in giving a sympathetic consideration nor did the company object. In fact, the court further records: “(I)f any burn victim produces the advice of a burn-expert doctor for any further medical or surgical treatment in India, TISCO is prepared to bear the expenses of the said treatment”.<sup>132</sup> The “anxiety” of the company to make available the services of doctors from Delhi, Bombay, the UK, USA and Italy and the referral of the patients to a rape of institutions, including for cosmetic surgery at the company’s expense is recorded in the decision. The contrast that this rendition poses with the experience of the Bhopal victim calls to be studied in this context in terms of mitigation of damage, proof of harm and causation, punitive damages, the valuing of life and survival capacity, the many losses that could go unaccounted and the significance of the process of determination of compensation. In understanding the meaning of multinational tort and liability, it would also be relevant to investigate the difference between tort committed by an Indian, and a multinational, enterprise.

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<sup>128</sup> *Ibid.*

<sup>129</sup> (1942) 1 All ER 657 (HL).

<sup>130</sup> *Id* at 210.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Id* at 212.



## Duty of care

Matters of liability are intricately connected with the duty of care. In *Deep Chand Sood v. State of H.P.*,<sup>133</sup> the Himachal Pradesh High Court had held the school liable in negligence for the death by drowning of 14 children while on a school picnic. In *M.S.Grewal v. Deep Chand Sood*,<sup>134</sup> in appeal before the Supreme Court, the court reiterated the principle of vicarious liability of the school for the negligence of its teachers and located it within the grid of “implied authority” and the master-and-servant relationship where the employee was seen to be acting in the “course of employment” and not on a “frolic of his own”.<sup>135</sup>

Expanding on the duty of care, the court said: “While the parent owes his child a duty of care in relation to the child’s physical security, a teacher in a school is expected to show such care towards a child under his charge as would be exercised by a reasonably careful parent.”<sup>136</sup> Duty of care, the court explained, “varies from situation to situation”. Differently from students moving around within school premises, “if the students are taken out to a playground near a river for fun and a swim, the degree of care required stands at a much *higher degree* and no deviation therefrom can be had on any count whatsoever.... As a matter of fact the degree of care required to be taken, especially against the minor children, *stands at a much higher level than adults*: children need much stricter care.”<sup>137</sup> This *degree of care* was reinforced by the attribution of absolute liability where the charges were children: “(N)egligence is as independent tort and has its own strict element especially in the matter of children – the liability is thus absolute vis-à-vis the children”.<sup>138</sup>

It is interesting that the decision in *Lata Wadhwa*<sup>139</sup> has begun, even in *Deep Chand Sood*, to exercise precedential influence in the matter of quantum of compensation. The relatable affluence and social status of the families involved could, from the reasoning in the two decisions, be seen as an explanation for the easy transmigration of the spirit of the one decision into the other.<sup>140</sup>

Where duty of care is found to lie, the court may find that the next step is to see if the principle of *res ipsa loquitur* applies. In *Abhilasha v. HP State Forest Corporation*,<sup>141</sup> a resin contractor died when a shed collapsed on him, and the Forest Corporation disclaimed liability because the shed had been temporarily constructed by the labourers without its permission. The court declined to agree: “it was the duty of the officials of the respondent Corporation not to have allowed putting up a temporary shed by stacking sleepers...” And : “In a case like this, *res ipsa loquitur* clearly applies.”<sup>142</sup>

In *Matsa Gandhi v. TN Slum Clearance Board*,<sup>143</sup> the court was empathetic to the risks undertaken routinely by women drawing water from inadequately protected draw holes, due to which a young girl died. The representations made by the Residents’ Association to the Board testified to awareness about the perils. Implicitly recognising the duty of care, the court pinned liability for Rs. 75,000 on the Board.<sup>144</sup>

The influence that the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 has had on the notion of duty of care as extended to those disabled within the reckoning of the Act is seen

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133 1997 ACJ 831. See also, Usha Ramanathan, “Tort Law” (1997-98) *ASIL* 595 at 619.

134 (2001) 8 SCC 151.

135 *Id* at 163-65.

136 *Id.* at 162.

137 *Id.* at 163, emphasis added.

138 *Ibid.*

139 *Supra* n.123.

140 The endorsement of the Motor Vehicles Act 1988 and its Second Schedule as “a guide in the matter of award of compensation and there cannot possibly be any doubt in regard thereto” is made *id.* at 165, although *Lata Wadhwa* did not, in fact, apply the second schedule during computation. See also, *C.Chinnathambi v. State of Tamil Nadu* AIR 2001 Mad 35, Rs.1,50,000 to be paid to the parents of two children studying in a government school by falling into a water tank during school hours; *Nitin Walia v. Union of India* (2001) 89 DLT 223, Rs.5,00,000 to be paid by zoo authorities where 3 year old child lost his arm to a tigress. Both cases recognised duty of care in the authorities, and consequent liability for negligence.

141 2000 ACJ 666.

142 *Id.* at 678. Compensation quantified at Rs. 50,000. See also, *Pillulata Savitri v. Gogineni Kamalendra Kumar* AIR 2000 AP 467, where advocate died due to unauthorised construction by defendant.

143 (2000) 2 Mad LJ 830 : AIR 2000 Mad 443.

144 But see, *H.D.Shetty v. Secretary and Finance Controller, Windsor Manor Hotel* (2000) 3 Kar LJ (ShN) 14 where the hotel was held to be under no duty of care to a visitor to the hotel to attend a conference, but not as guest of the hotel.

in *C.V.L.Narasimha Rao v. Principal Secretary, Medical and Health Department*.<sup>145</sup> The case arose out of the death of a visually handicapped boy who fell off a hostel roof while playing kabadi. It was not in dispute that the hostel was maintained by the state, nor that it was run pursuant to a scheme adopted by the state to equip blind students with education and working skills. The death of the student by falling off the roof, the court maintained, could not be countenanced, and “we are at a loss to understand as to how the blind students were allowed to play kabadi on the terrace.”<sup>146</sup> An investigation further revealed irregularities in the running of the hostel, which the court directed be set right with involvement of the civil administration. The court directed that, as an interim measure, the state pay Rs.50,000 as *ex gratia* to the boy’s mother. In toning up the hostel, the court required that Rs. 13,000 be given ad hoc, apart from the grant, towards bed and clothing of the students, Rs. 6500 for cosmetic consumables and the state was to constitute a Committee under the 1995 Act within six weeks of the order. Surprise inspections were suggested. The usefulness of the 1995 Act in recognising the responsibility of the state is writ large in this judgment.<sup>147</sup>

The duty of care is an important principle of liability. Moderating between duty of care and the *res ipsa loquitur* principle is a role allotted to the law of torts, which has been developing in fits and starts.

## Act of god and accident

In *Glenmorgan Tea Estates Co. v. Philip Mathew*,<sup>148</sup> a single judge of the Madras High Court found that cargo had been damaged by seepage due to rainwater rising from below while it had been securely protected by tarpauline from above. The flash flood on the highway had stranded hundreds of lorries including that of the defendant, and water level on the highway rose above the tyres and up to the level of the platform which resulted in the seepage. In the circumstances, the court accepted the plea of act of god and found neither negligence nor want of due care.

In the context of the changing meaning attributed to “accident” in the Public Liability Insurance Act, 1991, for instance, it is instructive to see how the term has been understood in *Assam State Co-operative Marketing and Consumer Federation Ltd. v. Smt. Anubha Saha*.<sup>149</sup> “The accident means an unexpected incident. The idea of something fortuitous and unexpected is involved in the word accident. It is understood for mishap or untoward incident, which is not expected or designed. Accident means inevitable or vis majeure act of god and not as a result of negligence or misconduct...” Given the evolving relationship between an ‘accident’ and ‘no fault liability’, the meanings of accident deserve attention.

## Electrocution

*Chairman, Grid Corporation of Orissa Ltd. v. Sukamani Das*<sup>150</sup> took a giant step back while dislodging the *res ipsa loquitur* principle in cases of electrocution.<sup>151</sup> In *TN Electricity Board v. Sumathi*,<sup>152</sup> the court tempered the rigorous *Sukamani Das* exclusion of *res ipsa loquitur*. When a disputed question of fact arises and there is clear denial of any tortious liability, the Supreme Court said, *Sukamani Das* has laid down the clear proposition that a remedy under Article 226 would not be proper. “However, it cannot be understood as laying a law that in every case of tortious liability recourse must be had to a suit. When there is negligence on the face of it and infringement of Article 21 is there it cannot be said that there will be any bar to proceed under Article 226 of the Constitution,” the court observed.<sup>153</sup>

It was, perhaps, this understanding of the law which led another bench of the Supreme Court to hold that “[o]nce it is established that the death occurred on account of electrocution while walking on the road, necessarily the authorities concerned must be held to be negligent.”<sup>154</sup>

145 (2000) 6 Andh LT 1.

146 *Id.* at 9.

147 See also, *Pradip Kr. Ghosh v. State of Tripura* (2000) 1 Gau LT 488 where breach of statutory duty or obligation leading to fire due to fault in electric supply led the court to award damages.

148 (2001) 3 Mad LJ 131.

149 AIR 2001 Gau 18 at 20; (2000) 3 Gau LT 43.

150 (1999) 7 SCC 298.

151 See Usha Ramanathan, “Tort Law” 1999 ASIL 535 at 555.

152 (2000) 4 SCC 543.

153 *Id.* at 551. In the case under consideration, the court found that the High Court had acknowledged that there were disputed questions of fact when it referred the case for arbitration. The referral to arbitration was struck down.

154 *Parvati Devi v. Commissioner of Police, Delhi* (2000) 3 SCC 754.

The efficacy of a civil suit in cases of electrocution is suspect. The potential for passers-by, or their dependants, to prove negligence of a corporation is unlikely to be high, and requiring them identify and pursue persons who are alleged to have tampered with the system is unrealistic. The responsibility while dealing with a risk-laden activity such as transmission of electricity is necessarily with the corporation which has sole control over the activity. *Sumathi's* case, which places the onus on the Corporation to show disputed questions of fact before it is taken out of the ambit of an expeditious remedy, would appear to be a reasonable approach. This would acknowledge the harm suffered because of negligence while yet excluding cases where there are clearly disputed matters of fact.<sup>155</sup>

The test of the “reasonable person” was applied by the court in *Sagar Chand v. State of J&K*.<sup>156</sup> “Negligence,” the court explained, “is defined as a breach of duty caused by the omission to do something which a reasonable man, guided by those considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes duty of observing ordinary care by which neglect the plaintiff has suffered injury to his person or property.”<sup>157</sup> Finding that the lineman had failed to take ordinary care by ensuring that the line under repairs did not remain unattended, the court exercised its power to award compensation.<sup>158</sup>

It was the implication of *res ipsa loquitur* which engaged the court in *U.P.Rajya Vidyut Parishad v. Chandra Pal*.<sup>159</sup> The principle of *res ipsa loquitur*, the court said, is an exception to the rule that it is for the plaintiff to prove negligence. “It is based on the principle that the plaintiff can prove accident but may not be able to prove that it could have been avoided but for the negligence of the defendant.”<sup>160</sup> Two factors necessary for the application of *res ipsa loquitur* were identified as, “one, that the thing or object by which the accident took place must have been in the management or control of the defendants or his servants and second, that the accident in ordinary course would not have happened if those who were in management and control had taken proper care.”<sup>161</sup>

## Medical negligence

Reasonable skill, care and diligence about sums up the law’s expectation of doctors. Where hospitals host patients who are subjected to the surgeon’s scalpel resulting in harm and injury arising out of negligence, they (the hospitals) have been held vicariously liable given the privity between the patient and the hospital; the relative deep pocket of the hospital may be implicit, but is not often mentioned. The range of issues that have arisen from the negligent performance, or failure, of sterilisation operations recurs with uncanny frequency in the period under survey.

*State of Haryana v. Santra*<sup>162</sup> is a case in its own class, dealing with the court-recognised trauma of a “poor lady who already had seven children. She was already under considerable monetary burden. The unwanted child (girl) born to her has created additional burden for her on account of the negligence of the doctor who performed the sterilisation operation upon her and, therefore, she is clearly entitled to claim full damages from the state government to enable her to bring up the child at least till she attains puberty.”<sup>163</sup> *Santra* constitutes a manner of break from

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155 See also *Sarla Sahu v. State of Orissa* AIR 2001 Ori. 106, where *Sumathi* was referred to, and *ex gratia* Rs. 50,000 paid, without going into disputed facts; *Fakir Chand v. State of Assam* (2001) 1 Gau LT 670 at 671: “once the learned single judge has entertained the writ petition and asked for the report from the Chief Electrical Inspector and once a finding of negligence has been recorded, there is no obstacle in the way of the writ court to determine proper compensation”; *Rahimuddin Laskar v. ASEB* (2000) 2 Gau LT 81, Rs.20,000 as ‘interim compensation’, and petitioner advised to approach civil court. See further, *Afroza v. State of J&K* 2001 ACJ 2081 at 2086: AIR 2000 J&K 103, where duty of care with the fact of burn injuries sustained led the court to hold that “it cannot be contended that the petitioner should be relegated to the ordinary remedy of a civil suit”; *ASEB v. Sanjoy Agarwala* (2000) 3 Gau. LT 571 at 574 where, absent a provision in the Electricity Act 1910 providing a forum for determining compensation, it was held that in cases of negligence arising under the law of torts “it is only the civil court and civil court alone which would have jurisdiction to determine compensation.”

156 2001 ACJ 420

157 *Id.* at 422.

158 See also, *Sarat Chandra Rout v. Hrusi Patra* (2000) 90 Cutt LT 378, a case under the Workmen’s Compensation Act 1923; *Santosh Devi v. Haryana Vidut Prasaran Nigam* (2001) 3 Punj LR 75.

159 2000 All LJ 2512.

160 *Id.* at 2513.

161 *Ibid.* See also, for the use of this principle, *Saraswati Parabhai v. Grid Corporation of Orissa*, AIR 2000 Ori 13 at 17; *Executive Engineer v. Mohammad Ashraf Bhat* 2000 ACJ 1199 (J&K); *Karnataka Electricity Board v. Smt. Basavva* (2001) 3 Kar LJ 532 at 540.

162 (2000) 5 SCC 182.

163 *Id.* at 197.

the past. Other than *State of M.P. v. Asharam*,<sup>164</sup> there was no other case where the court could cite compensation having been awarded for failure of a family planning operation. (That *Asharam* too was about the birth of a daughter and the “burden of maintenance and marriage” could be more than mere coincidence.)

*Santra* was an endorsement of family planning as an imperative. The interests of the state and that of those “who live below the poverty line or who belong to the labour class” in holding the number of children down overlaps in the treatment of the court.<sup>165</sup> What swung the court to its decision is stated succinctly : “[W]e are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the government had taken up family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, the doctor as also the state must be held responsible in damages if the sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilisation.”<sup>166</sup> Referring to the statutory, and moral, duty of the parents to care for the child, the court held the mother entitled to recompense, affirmed the vicarious liability of the state, and upheld the award for damages passed by the civil court of Rs. 54,000 at 12% interest.

*Shakuntala Sharma v. State of U.P.*<sup>167</sup> came in a different fact situation. The husband having undergone a tubectomy operation, the subsequent pregnancy of the wife gave rise to suspicions of chastity, adultery and strained relationships within the matrimonial home. “If the honour and dignity of the woman is jeopardised it is the duty of the court to interfere,” the court said, while directing that Rs. 1 lakh be paid to her (who had suffered because of the failed operation on her husband) for “mental agony and torture, insult and humiliation, which she had faced as well as for the expenses she has incurred in bringing up the child.”<sup>168</sup>

At one with *Santra*, the court reinforced the notion of the ‘unwanted child’. “As (she) never wanted another child, “the court said, “who was born due to the callous and negligent attitude of the surgeon who is an officer of the state, it is the duty of the state to maintain the child.”<sup>169</sup> A further Rs. 50,000 was directed to be paid to the child, with interest to be drawn only for his food, clothes and education till he attains majority.

In *Punjab State v. Surinder Kaur*,<sup>170</sup> the state’s attempt to disengage itself from liability on the ground that it was a case of negligence of the doctor did not find acceptance with the court. The court found the state vicariously liable and left it to the state to initiate departmental action to fix liability on erring doctors. In this case of a failed family planning operation, the state contention that the woman could have terminated her pregnancy and implicitly, have mitigated the perceived harm, the District Judge appears to have partially accepted this argument when it said: “but it is also a fact that she did not go for abortion due to her own personal reasons and if there is any burden now for bringing up the unwanted child, then she has to share a part of the burden.”<sup>171</sup> This logic has survived, unquestioned since there was no appeal by the affected woman.<sup>172</sup>

The risk in family planning operations, it must be clarified, has not been confined to the birth of the “unwanted child” – a category of person who has entered tort law. *Dr. M.K.Gourikutty v. M.K.Raghavan*<sup>173</sup> and *Joint Director of Health Services, Sivagangai v. Sonai*.<sup>174</sup> Death due to negligence,<sup>175</sup> and the descent into a vegetative state,<sup>176</sup> both arising out of tubectomy operations indicate the risk that cannot be wished away in this surgical procedure. That *M.K.Raghavan*’s case, where compensation of Rs. 3,80,944 was awarded, was decided by a Division Bench of the Kerala High Court 30 years after the event, and in as original suit that, from the judgement, appears to have been filed almost 20 years before the decision, speaks volumes about whether the civil suit actually constitutes a remedy.

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164 1997 ACJ 1224.

165 *Supra* n. 162 at 195.

166 *Id.* at 196.

167 2001 ACJ 620: 2000 AIHC 3519.

168 *Id.* at 626. This was in addition to Rs.25,000 which had earlier been paid to her.

169 *Ibid.*

170 2001 ACJ 1266: (2000) 3 Punj LR 411.

171 *Id.* at 1267.

172 For a further case of vicarious liability, where a foreign object was found 7 years after operation, and the doctors were untraceable, see *Saraswathi v. State of TN* (2001) 2 Mad LJ 148.

173 AIR 2001 Ker 398.

174 AIR 2000 Mad 305: (2000) 2 Mad LJ 414.

175 *Supra* n.174.

176 *Supra* n. 173.

In a case reminiscent of *Pushpaleela v. State of Karnataka*,<sup>177</sup> two persons who contracted infection in the eye after a cataract operation and consequently lost their eyesight, were directed to be paid compensation in *Haripada Saha v. State of Tripura*.<sup>178</sup> Medical negligence occurred in a government hospital, and two enquiries instituted by the state found that carelessness and negligence were much in evidence. It was, for instance, found that the infection resulted from contamination in the operation theatre. Improvement of public health, the court said, is among the primary duties of the state. "If people go to such government hospital and public health centres for improvement of their health but instead return with further damage to their health on account of infection at such government hospital or public health centre, their fundamental right to life under Article 21 of the Constitution would stand infringed."<sup>179</sup> Further, the affected persons "all belong to low income families (and) should not be driven to the civil courts for pursuing their remedy for damages..."<sup>180</sup> While the low income status of the affected persons got them access to an expeditious remedy, it kept their compensation low, at Rs.60,000 since they "do not have high income earning capacity".<sup>181</sup>

Blood transfusions, carried out carelessly, have invited the court to recognise liability. In a significant decision in a case brought by a woman who found herself HIV+ following blood transfusion in a hospital, five judges of the Andhra Pradesh High Court have spanned the range of issues that the AIDS epidemic has raised in law.<sup>182</sup> While not embarking on fixing special and general damages in tort, the court held that the affected woman was entitled, as a public law remedy, to "some reasonable amount of compensation" to meet the medical expenses she had incurred. Importantly, the court held: "Doctrine of constitutional tort should be recognised even for prevention and control of AIDS and state should be made liable for any negligence on the part of the health service system subject to (law) laid down by Supreme Court in *Indian Medical Association v. V.P.Shanta*."<sup>183,184</sup>

It has been generally recognised, following *Achutrao Haribhau Khodwa v. State of Maharashtra*<sup>185</sup> that "as long as the doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence... it would be difficult to hold the doctor guilty of negligence."<sup>186</sup> This dictum was restated by the Supreme Court in *Vinitha Ashok v. Lakshmi Hospital*<sup>187</sup> when it said on the legal position of standard of care : "A doctor will not be guilty of negligence if he has 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." Yet, a body of law that has developed shows that a doctor will be found liable for negligence in respect of diagnosis and treatment "in spite of a body of professional opinion approving his conduct where it has not been established to the court's satisfaction that such opinion relied on is reasonable or responsible. If it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the court would be entitled to hold that the body of opinion is not reasonable or responsible."<sup>188</sup>

The legal standard of reasonable care and the medical standard thus stand disjuncted.<sup>189</sup>

177 AIR 1999 Kar 119. See also, Usha Ramanathan, "Tort Law" 1999 *ASIL* 535 at 559.

178 (2000) 3 Gau LT 512; 2001 AIHC 738.

179 *Id.* at 517.

180 *Ibid.*

181 *Id.* at 518.

182 *Smt. M.Vijaya v. CMD, Singareni Collieries Co. Ltd.* AIR 2001 AP 502.

183 (1995) 6 SCC 651.

184 *Supra* n.182 at 518. See also, *Jan Sangharsh Manch v. State of Gujarat* 2000 ACJ 1523, transfusion of blood of wrong group resulting in death; state directed to pay Rs. 50,000.

185 (1996) 2 SCC 634.

186 *Id.* at 645-46, cited in *Dr. U.K.Kini v. K.Vasudeva Pai* (2000) 2 Kar LJ 598 and *Adoration Convent v. Cicily* (2000) 1 Ker LJ 84.

187 (2001) 8 SCC 731 at 743.

188 *Id.* at 747.

189 See further, *Dr. Lakshmanan Prakash v. State* 2001 ACJ 1204 at 1209: "For civil liability, the simple lack of care is enough. But, in criminal law, a very high degree of negligence is required to be proved"; *Charan Singh v. Healing Touch Hospital* (2000) 7 SCC 668 at 672, harbouring the allegation that "his one kidney had been illegally removed"; case sent back to consumer forum which had refused to entertain the case because the compensation claim was "exaggerated" and "unrealistic"; *Mrs. Arpana Dutta v. Apollo Hospitals Enterprises Ltd.* AIR 2000 Mad 340; (2000) 2 Mad LJ 772, re vicarious liability of a hospital; costs of corrective surgery computed for compensation; *State of Gujarat v. Laxmiben Jayantilal Sikligar* AIR 2000 Guj. 180 : (2000) 1 Guj. LH 590.



Courts may apply the principle of *res ipsa loquitur* on occasion,<sup>190</sup> but they might be inclined to send the affected person to seek remedy in a civil court where the facts about reasonable care are in dispute.<sup>191</sup>

## Nuisance and pre-emptive action in tort

In a case averring nuisance, the setting up of a *bhatti* (over) was sought to be enjoined by recognising a preventable tort.. The Supreme Court, set out the distinction between “a nuisance actually in existence” from “a possibility of nuisance or a future nuisance.”<sup>192</sup> “In case of a future nuisance,” the court said, “a mere possibility of injury will not provide the plaintiff with a cause of action unless the threat be so certain or imminent that an injury actionable in law will arise unless prevented by an injunction.”<sup>193</sup> The court may not require “proof of absolute certainty or proof beyond reasonable doubt”, but “a strong case of probability that the apprehended mischief will in fact arise” must stand demonstrated. The remedies for private nuisance, the court enumerated, are abatement, damages and injunction. “In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as, by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages.”<sup>194</sup> On this statement of the law, and the facts of the case, the suit was held to be premature.

The development of this branch of law of pre-emptive action in tort could, if imaginatively applied, find wider application in attempts to prevent damage.

## VI. ACCIDENT LAW

### Quantum

There is a steep escalation in the quantum of compensation that courts have been awarding in fatal accident cases under the Motor Vehicles Act 1988. It is not immediately evident if the rise in earning potential that the opening up of the economy has effected in some classes of the employed has a direct connection with this increase. It is not plain either whether the removal of the ceiling on compensation payable by insurance companies under the Motor Vehicles Act 1988<sup>195</sup> has anything to do with it. What is, however, evident is the widening gap between the medical practitioner, for instance, and the daily wage labourer; the income replacement principle ensures this difference. However, it is the death of parents who were employed as a taxi driver and in a departmental store, that had the court awarding Rs. 38,40,000. This was reacted by calculating income replacement upon conversion of the income they had been earning in Canada.<sup>196</sup> The Punjab and Haryana High Court, which delivered this decision, also enhanced the compensation to be paid for the death of a medical student/intern citing prospects of career advancement, from Rs.2,70,000 awarded by the Tribunal, to Rs.11,97,000.<sup>197</sup> The death of a bank employee aged about 35 years was compensated with Rs. 15,46,000.<sup>198</sup>

The Gujarat High Court has awarded amounts of Rs.6,79,000<sup>199</sup> enhanced from Rs.2,47,000 awarded by the Tribunal; Rs.5,26,264, where the court recast the income replacement principle in terms of “annual utility of the deceased to the family”;<sup>200</sup> Rs.5,44,000;<sup>201</sup> Rs.5,40,000;<sup>202</sup> and Rs.6,87,300, where the court took judicial notice of the post-retiral possibilities before a judicial officer given the imperatives of “clearance of backlog which is astronomical” to deal with which “various alternative district forums have started functioning and many more are

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190 *Adoration Convent supra* n.186.

191 *Kamolini Biswal v. State of Orissa* (2001) 92 Cutt LT 141.

192 *Kuldip Singh v. Subhash Chander Jain* (2000) 4 SCC 50 at 55.

193 *Ibid.*

194 *Id.* at 56.

195 S.147, Motor Vehicles Act 1988 .

196 *Jasdeep Singh v. Nafe Singh* (2001) 2 Punj LR 130.

197 *Dr. B.D.Gupta v. R.Rani Manoranjitham* 2001 AIHC 1625 (P&H).

198 *State of Haryana v. Naresh Kumari* 2000 AIHC 1309 (P&H).

199 *Sariyaben Harisinghbhai Bilwal v. Ataullahkhan Mehtabkhan Lalkhan* 2001 AIHC 2661.

200 *GSRTC v. Sandhyaben Arvindbhai Sinda* 2001 AIHC 1050 at 1051.

201 *Oriental Insurance Co. Ltd. v. Muliben* 2001 AIHC 1214 (Guj).

202 *Oriental Insurance Co. Ltd. v. Rashiklal Ambalal Patel* 2001 AIHC 1104 (Guj), 24 years, construction work.

contemplated.”<sup>203</sup> The victim was a retired District and Sessions Judge who was functioning as a Labour Court judge, of 62 years, and the court was expatiating on his prospective earnings in computing compensation.

Other comparable sums in compensation have been awarded by the High Courts of Madhya Pradesh,<sup>204</sup> Allahabad,<sup>205</sup> Delhi,<sup>206</sup> Madras,<sup>207</sup> Andhra Pradesh,<sup>208</sup> Rajasthan,<sup>209</sup> and Karnataka.<sup>210</sup>

The disparity between this range of sums in compensation and that which is determined as compensation for the death of the poorer person is a telling comment on the gap that exists, and is judicially perceived as likely to continue, between two classes of persons susceptible to harm, injury and loss. In *Bina Rani Saha v. Sunil Das*,<sup>211</sup> the victim was a day labourer. There is evidence that he was earning about Rs. 3000 per month. “That claim may be on the higher side,” the court was inclined to consider, “but that does not mean that there is no value for the life of a man in the country. For the ends of social justice it should be our endeavour to give proper value to the life of a man whether he be a man in the street or a man of affluence. No doubt in the case of affluent man, the amount of compensation should be on the higher side but we must make an honest endeavour to properly value the life of a man.”<sup>212</sup> The court then raised the sum of Rs.75,000 which had been awarded by the Tribunal to Rs.1,25,000.

There are at least three aspects that the income replacement principles relegate beyond the boundaries of consideration. The first, which the *Bina Rani* court mentions, is the value of life itself. The second, is the process of immiseration that is likely to be more pronounced when the victim is already economically depressed. The third, is the presence or paucity of support systems which may make loss easier to bear. While courts have established that a victim’s provisioning for distress, for instance, by investing in insurance, cannot be deducted from the quantum of compensation that is determined arises out of the accident, courts have not accounted for the increased incapacities that visit a person who has not been able to provide for a contingency.

Labouring children and housewives have had their worth evaluated. *Shakuntalabai v. Naresh Kumar Punjab*<sup>213</sup> concerned the death of a 14 year old boy. “Apart from studying in class VI”, the court remarked, “he was doing part time work in limestone and hotel.” It was assessed that he may have been earning Rs. 7-8 per day from the hotel and Rs. 334 per month from the lime business “at this age and stage of life.”<sup>214</sup> It was income replacement that dominated the court’s computation. of compensation at Rs.88,280, with no expectation of ‘future prospects’ which might improve his lot. And this was an accident that occurred in 1984.<sup>215</sup>

Where the child is not a labouring child, the approach to future prospects has a status quoist orientation. In *Sujan Pal Singh v. Chandan Singh Patel*,<sup>216</sup> for instance, the court reasoned : “How the minor child would have turned out in later life is at best a guess only. Nothing has come on the record to indicate that his parents were well placed in life and could afford him a good education helping him thereby to further his prospects in life, which in turn

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203 *GSRTC v. Suryakantaben D.Acharya* 2001 AIHC 2092 (Guj).

204 *Prema v. MPSRTC* (2001) 1 Jab LJ 28, Rs.5,42,000 for death of 20 year old, in the NCC, with pilot’s licence, of good family.

205 *United India Insurance Co. Ltd. v. Manish Porwar* 2000 ACJ 30, Rs. 8,79,000 for 50 year old Junior Engineer taking revision of pay scales into reckoning.

206 *Dr. Nagendra Gosh Gupta v. Lekhi Ram* 2001 ACJ 593, Rs. 21,60,000, taking future prospects of a woman doctor into account. It is interesting that the “common knowledge that health care provided by the state leaves much to be desired” and that “patients are constrained to throng private clinics” explained growing potential that the court anticipated.

207 *Managing Director, State Express Transport Corporation v. Shanthi Manoharan* 2000 AIHC 3584 (Mad), Rs. 26,85,000 for death of 42 year old in a good position in a firm; *P.Anwar Batcha v. Tamilarasi* 2001 AIHC 1963, Rs.5,80,000 for death of 50 year old man.

208 *APSRTC v. G.Jana Bai* 2001 AIHC 3532 (AP), Rs.6,24,000 for death of 37 year old bank employee; *Shoba Rani v. New India Assurance Co.* (2000) 3 Andh LT 739, Rs.7,62,897 for death of 40 year old Agricultural Officer.

209 *United India Insurance Co. v. Smt. Pura* 2001 AIHC 3681 (Raj), Rs.12 lakhs, 26 year old engineering contractor; salary not being ascertainable, “sum commensurate to the standard of living of the claimants at the time of the deceased (*sic*)” taken as the basis; *Niranjanlal Yadav v. RSRTC* 2001 AIHC 2405, Rs.18,15,000 32 year old financial advisor in a company.

210 *Patel Roadways v. Manish Chhotalal Thakkar* (2000) 6 KarLJ 216, Rs.8,78,750, 27 year old businessman.

211 (2000) 3 Gau LT 307.

212 *Id.* at 308, emphasis added.

213 2001 AIHC 2445 (MP).

214 *Id.* at 2446.

215 See also, *United India Insurance Co. Ltd. v. Deram Ram* 2000 AIHC 3869, 15 year old working boy, Rs.1,03,840; *Kishan Lal v. Mehndi Hasan* 2001 ACJ 332 (All), 17 year old labouring boy, Rs.45,000, accident in 1984.

216 2000 ACJ 339 at 342 (MP).



would have enabled him to provide them financial assistance when the need arose.” The compensation was quantified at Rs.48,000.<sup>217</sup>

Drawing upon the law and economics logic which is often invoked to provide a basis for computing the loss on the death of a child, the court in *Santoshkumar v. State of Maharashtra*<sup>218</sup> said: “If there is reasonable prospect of pecuniary benefit from the deceased for support of the family in the near future, the same can be taken into account. However, as a general rule, parents are entitled to recover the present cash value of the prospective service and pecuniary benefits of the deceased but when the prospect is very uncertain and the nature and quality of assistance is also uncertain, the court must exclude all the considerations of matter which rest in speculation of fancy though conjecture to some extent is inevitable.” In this case, the death of a boy of a little over 2 years in 1982 was compensated by a single judge of the High Court at Nagpur in 1999 with Rs.35,000. While so deciding, the court observed that the “parents of the child remain in trauma throughout their life. This cannot be compensated in any manner except by monetary compensation which has to be just and fair.”<sup>219</sup>

A single judge of the Karnataka High Court has attempted to draw a distinction between “reasonable” and “just” compensation<sup>220</sup> which gives an injury-related rather than income loss-related understanding of compensation. Dealing with a case of “very minor and trivial” injury, the court said : “[I]t is a totally misconceived notion that in every accident case an appropriate, reasonable compensation should be awarded irrespective of the granting of the injury. The compensation should be, the statute (Motor Vehicles Act) contemplates, ‘just’ compensation and it is not ‘reasonable’ compensation as claimed. A ‘reasonable’ compensation may vary from claimant to claimant and from counsel to counsel, whereas ‘just’ compensation is fixed with respect to the nature of injuries sustained.”<sup>221</sup> This distinction, however, does not appear to recognise the difference that has statutorily been introduced between the income-replacement principle in motor vehicle accident cases, and the injury and disablement related index in the law relating to railway accident compensation. The relevance of negligence in the former jurisdiction, and its irrelevance in railway accidents as also symptomatic of the diverse ways in which accident law has developed may be noticed; so, too, the non-mention of a maximum quantum in compensation in motor accident cases, and the ceiling that is a part of compensation law in railway accidents. It may, therefore, be observed that the sole criterion of the nature, and gravity, of the injury may not be the deciding factor to determine either ‘just’ or ‘reasonable’ compensation.

The Karnataka High Court was faced with a challenge to the differing ranges of compensation that are prescribed in the various statutes; more particularly the Railways Act 1989 read with the Railway Accidents and Untoward Accidents and Untoward Incidents (Compensation) Rules 1990, the Motor Vehicles Act 1988 and the Carriage by Air Act 1972. The Railways Act 1989, which was in the eye of the storm, was attacked as limiting the liability of the railway administration. Interestingly, the court interpreted the provision for compensation in the Act as “an alternative remedy apart from what he can claim under the law of torts or any other enactment.”<sup>222</sup> This however is disputable. The court further likened the scheme of compensation under the Railways Act to “a contract of insurance in the widest term, whereby one person called insurer undertakes in return for the agreed consideration on the premium to pay another person called the assured the sum of money on the happening of a specified event. In such cases the person insured cannot claim more than what has been insured. *Similarly, a passenger in a train holding a valid ticket or a pass cannot claim more than what is specifically provided.*”<sup>223</sup> This analogy, of course, glosses over the differences between a statutory scheme of compensation and that based on contract.

The single judge in *Sridhar* also categorically shot down the objection that there was “hostile discrimination” in the setting of norms in the divers legislations. It held that the Article 14 challenge would fail since “(i)t does not guarantee the equal protection to the persons who are not placed similarly and who are covered by two different enactments.”<sup>224</sup> Yet, it must be said that the Supreme Court had indeed, even in 1977, characterised these differences as constituting an “invidious distinction”.<sup>225</sup> It is instructive that the court has accepted the argument, *inter alia*,

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217 See also, *Kusumkali v. Shankh Mani* 2001 AIHC 2938, 4 year old girl, Rs.64,500.

218 (2000) 2 Mah LJ 42 at 46.

219 *Id.* at 45.

220 *B.H.Rangaiah v. H.R.V.Basavaraju* 2001 ACJ 348: (2000) 4 Kar LJ 262.

221 *Id.* at 349, emphasis added.

222 *L.Sridhar v. Union of India* 2001 ACJ 691 at 695: (2000) 6 Kar LJ 208.

223 Emphasis added.

224 *Id.* at 696.

225 *Manjushri Raha v. R.L.Gupta* (1977) 2 SCC 174 at 175, extracted and reiterated in *Motor Owners' Insurance Co. Ltd. v. Jadavji Keshavji Modi* (1981) 4 SCC 660 at 674-75.

that “since the Indian Railways have a low fare structure than that of Indian Airlines and the magnitude of traffic is much more ... by no stretch of imagination... can ... (one) compare the persons travelling in trains with that of air carriers.”<sup>226</sup>

The question of awarding compensation beyond the amount claimed continues to engage courts, and the Jharkhand High Court has held that there is no power in the tribunal to so award.<sup>227</sup> In contrast, the Madras High Court held that the court had the power to enhance compensation even where there was no cross-appeal, in the interests of providing ‘just’ compensation.<sup>228</sup>

While the Motor Vehicles Act 1988 has set no ceiling on the quantum of compensation, it has set a floor. After the 1994 amendment, compensation awarded for death is not to be lower than Rs. 50,000. Yet, in *Mati Bai v. South Eastern Coalfields Ltd.*,<sup>229</sup> the death of a girl aged 18, earning Rs.300 per month, was compensated with Rs.28,500. Perhaps this is explained by the date of the accident, which was in 1979. The absurdities into which the law is plunged by delay stands illustrated. That the Karnataka High Court has held that the enhanced amounts which are brought in by statutory amendment to keep pace with the changing value of the rupee deal with a substantive right, and that the enhanced amounts on the date of the award would not be relevant in determining compensation, does not seem to have accounted for the problem of delay. There has been no overt statement either that an order on interest is expected to take care of the factor of delay.<sup>230</sup>

The losses that may be left to be borne by the victim or the dependants was starkly represented in *United India Insurance Co. Ltd. v. Ralugathanga*<sup>231</sup> where, the Tribunal not having been able to arrive at a finding of negligence, the High Court reduced the quantum from the Rs. 2,65,644 that the tribunal had ordered, to Rs. 25,000 which was the amount payable as no-fault liability on the date of the accident.

Amounts as low as Rs.60,000<sup>232</sup> and Rs.60,840<sup>233</sup> have been awarded even as Rs.1,58,500 computed for the death of a 10 year old was reduced to Rs.75,000 on accepting the argument that the tribunal award was “absolutely exorbitant and without any reason.”<sup>234</sup> In *North West Karnataka RTC v. Ramayya*,<sup>235</sup> the income replacement principle was applied with a literality which led the court to disallow compensation of Rs. 50,000 that had been directed to be paid as loss of income. The injured being a politician, he claimed not to have any income other than that derived from sugarcane. And, since he did not work the field himself, and there was no evidence of “loss of product of sugarcane”, loss of income was excluded altogether while computing compensation. The anomalies that often crop up in negotiating the relationship between injury, harm, loss and compensation through the income replacement principle is represented in this set of cases.

The Madras High Court has, in the meantime, held that “there can generally be no discrimination between rich and poor victims for evaluating *non-pecuniary damages* and we can add that there can be no discrimination between the sexes either”.<sup>236</sup>

## Structured formula

The introduction of the Second Schedule into the Motor Vehicles Act 1988, in 1994, has necessarily altered the approach of courts in computing compensation. The application of the Second Schedule is a recurring theme

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<sup>226</sup> *Supra* n. 222 at 696.

<sup>227</sup> *Mst. Suga Bibi v. Sundar Mural Singh* 2001 AIHC 3950 (Jhar). See also *Dr. Urmila S.Sangani v. P.M.Luvana* (2000) 2 Guj. LH 458; 2000 AIHC 4125 : AIR 2000 Guj 211; *Gouripala Manemma v. APSRTC* (2000) 3 Andh LT 456.

<sup>228</sup> *Commandant, TN Special Police v. S.Sarath* (2001) 2 Mad LJ 243. But see, *Sridevi v. Mastak Ahamad* 2001 ACJ 479 (Kar), appeal for enhancement for pain and suffering *et al*, held, abates on the death of the claimant.

<sup>229</sup> 2001 ACJ 209 (MP).

<sup>230</sup> *D.B.Avalakki v. Union of India* 2001 ACJ 1258 (Kar.): AIR 2000 Kar 269.

<sup>231</sup> (2000) 2 Gau LT 19.

<sup>232</sup> *Minaketah Samal v. Prasanta Kr. Routray* 2001 AIHC 1773 (Ori), using “notional income” for victim-wife for “minimum liability”.

<sup>233</sup> *Marudhu Pandiyan Tpt. Corporation v. Arul Kulandhai* AIR 2000 Mad 232, woman of 27 years.

<sup>234</sup> *Oriental Insurance Co. Ltd. v. Mst. Samsunessa* (2000) 1 Guj LT 477.

<sup>235</sup> (2001) 4 Kar LJ 534.

<sup>236</sup> *Vanitha B.Mehta v. TTC* (2000) 3 Mad LJ 643 at 645, emphasis added. See further, *Sri Balaji Road Lines v. Devasundari* (2000) 3 Mad LJ 607, held that amounts awarded towards marriage expenses cannot be supported. But see, *Shankuntala Garg v. Megh Raj* (2000) 86 DLT 423 where High Court directed Rs.50,000 for marriage of daughter. The income replacement principle is not evident in this calculus.

through the period under survey. The inconsistencies which were commented upon by the *Trilok Chandra* court in 1996<sup>237</sup> have not impeded the increased use of the structured formula or the elements present in it. A body of case law is developing especially around the uncertain premises of the law.

High Courts have differed on whether the compensation payable under S.163A and the Second Schedule constitutes a 'final' or an 'interim' award. While the Karnataka<sup>238</sup> and Rajasthan<sup>239</sup> High Courts have held that an award under S.163A is final, the Punjab and Haryana<sup>240</sup> and Gujarat<sup>241</sup> High Courts have read the provision of compensation under S.163A as interim. The connection between no fault in S.140 and S.163A, which also does not require the establishing of fault or negligence, appears to have influenced the latter position.

The three tier provision in the Motor Vehicles Act 1988 (as amended in 1994) of S.140, S.163A and S.166, has brought with it a degree of confusion. The *RSRTC v. Chandra* Court<sup>242</sup> has considered S.163A to be "an extended version of S.140", with the difference that, while one is final, the other is interim. As for the difference between S.163A and S.166, the court observed that claimants may choose to invoke S.163A where they are unsure of proving negligence, to avoid the risk of losing all if they were to move under S.166, which requires proof of negligence. Courts have applied the Second Schedule in computing compensation,<sup>243</sup> and have advanced the view that the limits of statutory liability are deemed to have been extended by S.163A.<sup>244</sup> An application under S.163A, the Madhya Pradesh High Court has held, has to be decided according to the Second Schedule, and even an insurer may appeal if this is not done.

The Karnataka High Court, in *KSRTC v. Anja Devi*<sup>245</sup> has understood no fault in S.163A differently. Despite an application under S.163A, the court entertained the contention of the transport corporation that there had been no negligence, and since a dispute had been raised, the no fault provision for arriving at a final determination could not be deployed. This, it must be said, is not how no fault has been accorded treatment elsewhere in accident law. On the contrary, courts have moved towards adoption of the rationalised standards set in the Second Schedule, holding that it leaves no room for discretion<sup>246</sup> or that even a tortfeasor may apply since fault is not a relevant criterion.<sup>247</sup> In holding that S.163A provides a substantive right, a Full Bench of the Karnataka High Court has also found ground for not allowing it retrospectivity.<sup>248</sup> Yet, the Supreme Court has held that though the structured formula was worked out for the purpose of S.163A, "we find it a safer guidance for arriving at the amount of compensation than any other method so far as the present case is concerned", while applying it to a 1986 accident.<sup>249</sup>

The table in the Second Schedule stops at Rs.40,000. There is no explanation in the law whether the figure is meant to be extrapolated, whether this is indicative of a ceiling for the purposes of this provision. Courts have been near unanimous in holding that S.163A and the Second Schedule apply only to the extent of Rs. 40,000 and that anything above that figure cannot be claimed on the basis of no fault.<sup>250</sup> A person with a higher income than Rs. 40,000 per annum may, however, notionally bring down his Rs. 40,000 in order to present his claim under S.163A.<sup>251</sup> The Punjab and Haryana High Court has adopted a different stance, where it has read the Second Schedule as specifying various multiplier which may apply to those earning beyond Rs. 50,000 too.<sup>252</sup>

The Supreme Court has endorsed the view of the majority of the courts. In *Oriental Insurance Co. Ltd. v. Hansrajbhai V.Kodala*,<sup>253</sup> a two judge bench of the court has held that:

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237 *UPSRTC v. Trilok Chandra* (1996) 4 SCC 362.

238 *Guruanna Vadi v. G.M., KSRTC* 2001 ACJ 1528.

239 *RSRTC v. Smt. Chandra* AIR 2001 Raj 168.

240 *National Insurance Co. Ltd. v. Indu Sharma* 2000 ACJ 808.

241 *New India Assurance Co. Ltd. v. Surtaji Panchaji Sodha* 2001 ACJ 609.

242 *Supra* n. 239.

243 *Dalu Ram v. Lukman* (2001) 3 Raj LW 1440; *United India Insurance Co. v. Ramdas Patil* (2000) 1 Jab LJ 255; *United India Insurance Co. v. Smt. Sushila Bai* (2001) 2 Jab LJ 228; *United India Insurance Co. v. Keshavji Mulji Danicha* 2001 AIHC 2381, a case of grievous injury; *Kanak Lata v. Ranjit Singh* (2000) 84 DLT 266, application of multiplier.

244 *New India Assurance Co. v. Muna Maya Basant* AIR 2001 Guj 304.

245 2000 ACJ 1214.

246 *RSRTC v. Smt. Chandra supra* n.239.

247 *New India Assurance v. Muna Maya Basant* AIR 2001 Guj 304.

248 *Guruanna Vadi v. GM, KSRTC supra* n. 238.

249 *Kaushnuma Begum v. New India Assurance Co.*(2001) 2 SCC 9.

250 *RSRTC v. Smt. Chandra supra* n. 239; *Oriental Insurance Co. Ltd. v. Sushilaben Manubhai Valand* (2001) 1 GujLH 260; *New India Assurance Co. Ltd. v. Bidyut Kumar Mukherjee* 20001 ACJ 1891 (Cal).

251 *Guruanna Vadi v. G.M.,KSRTC supra* n. 238 at 1546.

252 *National Insurance Co. Ltd. v. Indu Sharma* 2000 ACJ 808.

253 (2001) 5 SCC 175.

- compensation on the structured formula basis under S.163A is an alternative to, and not in addition to, compensation on the principle of fault, and
- Rs. 40,000 per annum is the highest slab in the Second Schedule which indicates the limit set by the legislature for no fault liability.

The court has, recognising the absurdly low income level represented by the figure of Rs.40,000 per annum, and the anomalies in the schedule that have been pointed out more than once, asked that the schedule be revised and corrected.

“Notional income” of non-income earning persons has been set out in the Second Schedule, and it has found its application in cases in the Madhya Pradesh, Rajasthan and Karnataka High Courts. The schedule draws a distinction between “non-earning persons” and “spouse”. The former is notionally presumed to be earning Rs.15,000 per annum, while the loss occasioned by non-income earning spouse is to be monetarily computed at “1/3<sup>rd</sup> of income of surviving spouse.” The finding of a Single Judge of the Karnataka High Court that “notional income” in the Second Schedule is not applicable to a 10 year old student is contestable, and does not seem to be borne out by the statute.<sup>254</sup> The use of Rs. 15,000 as the notional income where the victim is a non-income earning spouse, without considering the income of the surviving spouse, is also of doubtful validity.<sup>255</sup>

It is significant that the Second Schedule provides for a multiplier based only on the age of the victim of the accident; it does not account for the factor of dependency which has acquired a place in compensation law. *Guruanna Vadi*<sup>256</sup> squarely addressed this shift in compensation when it held: “The age of the claimants and their earning capacity are not relevant factors for determining compensation under Second Schedule.”

The impact that aspects of the Second Schedule – including the provision of multiplier, ‘notional income’ and the marginalising of dependency as a factor – will have on the quantum of compensation is only just beginning to be experienced.

## Interest

There has been a range of responses on the awarding of interest, and the quantum of interest, on compensation amounts. From holding that it is not obligatory to award interest;<sup>257</sup> that it cannot be refused when the statute provides for it;<sup>258</sup> and that the award of interest being a matter of judicial discretion, no pleading is needed,<sup>259</sup> courts have taken different positions on the question of interest.<sup>260</sup> Where the Delhi High Court has not awarded interest on enhanced amounts upon appeal,<sup>261</sup> the Supreme Court has held that such interest should be allowed “unless there was any cogent reason for denying them the benefit”.<sup>262</sup>

In holding that there was no statutory limit on interest, the Gujarat High Court affirmed the rate of 15% per annum decided upon by the Tribunal.<sup>263</sup> The Karnataka High Court, on the other hand, settled for 6%, observing that, while the Supreme Court may have allowed interest at 12% in several decisions, there was no binding law to that effect that was placed before it.<sup>264</sup> In *Smt. Kaushnuma Begum v. New India Assurance Co. Ltd.*,<sup>265</sup> the Supreme Court has essayed a general rule. “Earlier, 12% was found to be the reasonable rate of simple interest. With a

<sup>254</sup> *North West KRTC v. Kumar Anand Irappa* 2001 AIHC 4094 at 4095.

<sup>255</sup> *Prabhu Lal v. Shaheed Khan* 2000 ACJ 1102 (MP); *Major M.V.Thapliyal v. Shyam Bala* (2001) 3 Raj LW 1504.

<sup>256</sup> *Supra* n.238 at 1547.

<sup>257</sup> *Subhadra Devi Shivhare v. Mukhtiar Singh* 2001 ACJ 1229 (MP).

<sup>258</sup> *Kundanbhai Mohanlal Budhdev v. Harijan Marga Danabhai* (2000) 2 Guj LH (UJ) 1, explaining the logic of interest.

<sup>259</sup> *Union of India v. K.S.Lakshmi Kumar* 2001 ACJ 134 (Kar.) where interest was reduced.

<sup>260</sup> Also see, *HPTC v. Smt. Sneh Dutt* 2000 AIHC 1755 where interest above the amount earned by a deposit of compensation was refused.

<sup>261</sup> *Santosh Kumar v. Ram Swaroop* (2000) 88 DLT 42.

<sup>262</sup> *Devi Dayal Kansal v. Raj Roop* (2000) 10 SCC 314. *Gopal Chandra Saha v. United India Insurance Co. Ltd.* 2000 ACJ 1001 (Gau) may be distinguished, as the appeal was delayed beyond limitation. See also, *Oriental Insurance Co. Ltd. v. Kamla Bai* (2001) 3 Raj. LW 1888, where penal interest for delayed payment was set aside. See also *V.Mangaleswari v. V.Balakrishna Reddy* (2000) 9 SCC 224.

<sup>263</sup> *New India Assurance Co. Ltd. v. Surtaji Panchaji Sodha* 2001 ACJ 609.

<sup>264</sup> *Puttanna v. Lakshmana* 2001 ACJ 113.

<sup>265</sup> *Supra* n. 249.

change in economy and the policy of Reserve Bank of India the interest rate has been lowered. The nationalised banks are now granting interest at the rate of 9% on fixed deposits for one year,” the court said, while pegging interest rate at 9%.<sup>266</sup>

A Division Bench of the Karnataka High Court is also seen to have grappled with the vagaries in deciding upon a rate of interest. As the court said, although interest is within judicial discretion, “consistency, uniformity and non-arbitrariness are the hallmarks of all judicial decisions.”<sup>267</sup> “Many a time,” the court went on to observe, “interest forms a big chunk of the amount received by the claimants,” offering a partial explanation of the significance of the component of interest. Drawing upon precedent, the High Court held: “In the absence of reasons, interest awarded should be 6% per annum in fatal accident cases and 9% per annum in personal injury cases. Any increase beyond these rates should be supported by reasons.”<sup>268</sup>

In another significant pronouncement on the subject of interest, the Karnataka High Court, again, has categorically countered the contention that loss of future earnings and loss of dependancy, being amounts that are related to what would have been income in the future, ought not to have interest appended.<sup>269</sup> As the court explained: “The interest is not awarded for the damage done”.<sup>270</sup> But: “Loss of future earnings and loss of dependency is the amount which has become payable on the date of the award and it is not an expenditure to be incurred in the future.”<sup>271</sup> This understanding of the award of compensation and interest thereon provides a fresh perspective on one-time, lump sum awards which will bear further analysis.

## Forum

The overlap in the jurisdiction of tribunals dealing with accidents has had its impact on the law of compensation. The Motor Vehicles Act 1988, in S.167, gives an option to the affected person to move in the matter of compensation under the Motor Vehicles Act 1988, or the Workmen’s Compensation Act 1923, (WC Act 1923) where both apply. The consequences are both substantive and procedural. The principles of compensation differed drastically under the two Acts, as the court in *National Insurance Co. Ltd. v. Rajesh Holmandge*<sup>272</sup> said it. Further, under the WC Act 1923, the question of negligence on the part of the workmen is irrelevant and immaterial.<sup>273</sup> The theory of notional extension has been judicially crafted only to fit workmen-related accidents. The difference between ‘loss of income’ and ‘loss of earning capacity’ distinguishes the two legislations, while in the WC Act 1923, non-pecuniary damages are excluded.<sup>274</sup> The insurance company, which has limited defences provided to it in the Motor Vehicles Act 1988, which does not restrict its right to question the quantum under WC Act 1923.<sup>275</sup>

A single judge of the Gujarat High Court was moved to recommend the merger of these jurisdictions in one judicial forum, which he preferred should be vested with powers under the WC Act 1923 “rather than allowing the victims of the accident to suffer by not getting compensation for a few more years”.<sup>276</sup> He directed that the attention of the State of Gujarat and of the High Court in its administrative side have their attention drawn to this issue.<sup>277</sup>

In *New India Assurance Co. Ltd. v. Nalini Boro*,<sup>278</sup> the link between the Public Liability Insurance Act 1991 (PLIA) and the Motor Vehicles Act 1988 was in question. It was a case where vehicles carrying LPG were left

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<sup>266</sup> *Id.* at 16. See also, *Manoj Rambhai Gandhvi v. Vaghasia Balubhai Khodabhai* (2000) 1 Guj LH 440 at 442 : “interest awardable ... though discretionary, must have some relationship to the interest rate prevalent in the economy...”

<sup>267</sup> *Union of India v. K.S.Lakshmi Kumar* (2001) 1 Kar LJ 91 at 106.

<sup>268</sup> *Id.* at 107.

<sup>269</sup> *Bhaskar v. R.K.Srinivasan* (2000) 6 Kar LJ 531.

<sup>270</sup> *Id.* at 536.

<sup>271</sup> *Id.* at 537.

<sup>272</sup> (2001)3 Andh LT 251 at 260.

<sup>273</sup> Since the Second Schedule was introduced in 1994 into the Motor Vehicles Act 1988, the relevance of fault in that Act too has been minimised.

<sup>274</sup> *Id.* at 262.

<sup>275</sup> *Ibid.* See also, *New India Assurance Co. v. Kartika Jena* 2000 ACJ 1421; *Rita Devi v. New India Assurance Co. Ltd.* (2000) 5 SCC 113.

<sup>276</sup> *Oriental Insurance Co. v. Heirs and LRs of Kishorabhai Popatbhai Parsana* 2001 ACJ 1268 at 1271.

<sup>277</sup> *Id.* at 1272. See, *G.M., N.F.Railway v. Jitendra Shah* (2000) 9 SCC 58, compensation not to be denied “solely” because they should have approached different venue.

<sup>278</sup> (2001) 2 Gau LT 484.



unattended, there was a leakage of gas, and a blast ensued. The owners had not insured themselves under the PLIA. The court, however, recognised the interim nature of the relief provided under PLIA which did not preclude further civil action, and allowed that this incident would be covered by motor vehicle accident law.<sup>279</sup>

Some problems have surfaced in the use of the Lok Adalat as a forum for settling claims of compensation. In *Satya Bham Devi v. Satwinder Singh*,<sup>280</sup> an unknown advocate was found to have filed a compromise which was recorded at a Lok Adalat. “It seems that it was a ceremonial Lok Adalat and in a zeal to get the matter decided, the learned Tribunal without verifying... whether the petitioner herself was present or not accepted the compromise and passed the award of Rs. 1 lakh,” the court recorded, while restoring the petition.<sup>281</sup>

The logic of delay and uncertainty which drives the Lok Adalat (along with the expense of litigation) has been invoked by the Orissa High Court while settling appeals in the ‘spirit of Lok Adalat’. In *Oriental Insurance Co. v. Kri.Chhabi Sahu*,<sup>282</sup> a claim petition filed in 1988, and the appeal pending since 1992, was decided in 1999 in that ‘spirit’ with a diminution of the quantum and the interest on it. So, too, in *Divl. Manager, New India Assurance Co. v. Gopal Ch. Das*,<sup>283</sup> where the quantum was reduced from Rs.11,16,616 to Rs.10,50,000, and the interest waived if the amount was paid within a little less than a month and a half. The harassment of delay to the claimants, and the potential build up of interest payable by the insurance company, were suggested as reasons for encouraging the spirit of Lok Adalat.

The Punjab and Haryana High Court is seen to adopt a distinctive practice, where it refers a matter to the Lok Adalat, which then proposes an amount as compensation, and the High Court thereafter determines what the award should be.<sup>284</sup>

The existence of a measure of relief in the Motor Vehicles Act 1988 has spurred a single judge of the Gauhati High Court to extend its reach to instances of death due to extremist activity. The interpretation of the words “arising out of the use of a motor vehicle” in S.140 has, for instance, brought passengers killed en route by extremists within the provision of the law and into the motor accident forum.<sup>285</sup> Another Single Judge of the same court has, however, differed with this view but in a fact situation which was very different. In *Oriental Insurance Co. v. Jharna Sarkar*,<sup>286</sup> extremists kidnapped the passengers of a bus, leaving the bus where it was. The bodies of two passengers was found eleven days later. The court, unable to accept the use of the motor vehicle as the proximate cause of the deaths, reversed the application of the Motor Vehicles Act 1988 to the case.

## Vicarious Liability

The doctrine of vicarious liability, as applied in motor vehicles accident law, holds the owner as vicariously liable for the negligence of his servant-driver. However, the law has evolved to hold that the driver has not necessarily to be made a party to proceedings for determining compensation. In *Patel Roadways v. M.Chhotalal Thakkar*,<sup>287</sup> for instance, a Division Bench of the Karnataka High Court explained that, neither the Motor Vehicles Act nor Rules made under the Act require the driver to be impleaded as a party in a claim petition. The owner and the driver may, under the law of torts, be jointly and severally found liable but, whether a driver is impleaded or not, an owner (master) can be made vicariously liable only where negligence on the part of the driver is established.<sup>288</sup>

A driver, challenging the recovery of loss occasioned to the state by damage to the bus, was supported by the court holding that he “could not have been burdened with this liability by the State of Haryana when he was in the

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<sup>279</sup> The status of this decision once the National Environment Tribunals Act 1995 is notified is moot.

<sup>280</sup> (2001) 1 Raj LW 177.

<sup>281</sup> *Id.* at 179. See also, *New India Assurance Co. Ltd. v. Boda Hari Singh* 2000 ACJ 1580 (AP); *Gangi v. Second Addl. District Judge* 2000 ACJ 1327 (All). But see, *United India Insurance Co. v. Mohammed* 2000 ACJ 158.

<sup>282</sup> (2000) 89 Cutt LT 413.

<sup>283</sup> (2000) 90 Cutt LT 667.

<sup>284</sup> *Harjinder Kaur v. State of Haryana* (2001) 2 Punj. LR 374; *Balvinder Kaur v. Ram Kumar* (2001)2 Punj. LR 283; *Reshma v. State of Haryana* (2001) 2 Punj LR 708. In each case, the amount stood reduced.

<sup>285</sup> *National Insurance Co. Ltd. v. Monoharan Shil* (2000) 2 Gau LT 438; 2001 ACJ 1255. See also, *North Goalpara Motor Workers' Cooperative Society v. New India Assurance Co.* 2000 ACJ 1051 (Gau).

<sup>286</sup> (2000) 2 Gau LT 579.

<sup>287</sup> (2000) 6 Kar LJ 216.

<sup>288</sup> *Id.* at 228. See also, *KSRTC v. Smt. Biyabi* AIR 2000 Kar 165 at 168.

performance of his duty and during the course of performance of his duty, some damage happened to be caused to the bus.”<sup>289</sup>

In non-accident related cases, courts have variously asserted the place of vicarious liability in tort and compensation law. In the celebrated case of *Chairman, Railway Board v. Chandrima Das*,<sup>290</sup> while affirming compensation of Rs.10 lakhs to be paid to a foreign national who had been subjected to rape by railway employees on railway premises, the court said: “The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the railway stations and the Yatri Niwas, are essential components of the government machinery which carries on the commercial activity. 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 damages...”<sup>291</sup>

This development in the law may be seen as emerging from within the arena of constitutional tort, which has its basis in state liability.

## Child Labour

Attempts to deny compensation under the Workmen’s Compensation Act 1923 on the specious reasoning that the injured was a ‘child’ under the Child Labour (Prohibition and Regulation) Act 1986 and therefore prohibited from being employed have had to be shot down by the Karnataka High Court. In *Oriental Insurance Co. v. Rathnamma*,<sup>292</sup> it was argued that the employment of a child (of 12) being prohibited by the 1986 Act – and the Workmen’s Compensation Act 1923 providing in Schedule IV for persons from the age of 16 years – compensation would not be payable for injury to a child. In *New India Assurance Co. v. Rachaiah Basaiah Ganachari*,<sup>293</sup> it was a child of 13 years whose right hand had to be amputated when it got stuck in a harvesting machine, against whom this argument was addressed. The court struck it down in both instances, but that there were these attempts at hiding behind an avowed illegality is revealing.<sup>294</sup>

## Settlement

The unequal capacity to sustain a litigation for compensation is one reason for treating with caution the settling of claims between parties. The infamous ‘BMW’ case, which left five persons dead and two persons seriously injured, has been dogged by controversy, especially in the class composition of the rash driver and his companions when contrasted with that of the victims. The incident was of 10 January, 1999. By order dated 9 December, 1999, the court recorded a “settlement”, by which the owner of the BMW car offered Rs. 10 lakhs for the death of each of the five persons, and Rs. 5 lakhs to each of the injured. This “shall not” the court added, “be taken as acceptance of any of the averments and contentions of the parties and shall not have any bearing or effect on the criminal proceedings...”<sup>295</sup>

## Delay

The problem of delay that dogs the system, despite tribunalisation and statutory rationalisation, is in evidence in accident compensation law. The Supreme Court in *National Insurance Co. v. Chinto Devi*<sup>296</sup> was confronted,

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289 *Amar Nath v. State of Punjab* (2001) 1 Punj LR 241 at 243.

290 (2000) 2 SCC 465. Vicarious liability is, however, not to be extended to criminal liability, where *mens rea* must exist:

*Saroj J.Kamble v. Smt Latha Mohan* (2001) 2 Mah LJ 874.

291 *Id.* at 486.

292 2001 ACJ 231.

293 2001 ACJ 2113: (2001) 3 Kar LJ 135.

294 See, in another context, *Niroti v. Gopal Singh* 2001 AIHC 1836 (Raj), where a child widow was denied compensation because she was 12, ‘nata’ ceremony had not yet been performed, and she had not yet been sent to her husband’s home when he died.

295 *Smt. Phulawati v. Ravi Khurana* 2000 AIHC 1195 at 1198. See, *Madhavan v. M.D., Marudhu Pandiyar Tpt. Corporation* (2001) 1 Mad LJ 95, compromise that on receiving Rs.2300 for medical expenses no further claim for compensation would be made, was discredited.

296 (2000) 7 SCC 50.



again, with an instance of this endemic phenomenon. The accident occurred in 1987, and the insurer took it all the way to the Supreme Court. The dispute was about the time during the day when the policy would be deemed to have been issued. It was a good 13 years after the accident that the Supreme Court finished with the case. The meaning that compensation has for the victim/dependants is not visible in case law, and calls to be elicited. The growing centrality of no fault, and interim, compensation may, perhaps be understood as a response to the long period of waiting, and the uncertainty, before compensation is realised.

### Third party risk

In two related decisions of the Supreme Court, the court has addressed the question of third party risk in the context of the changing text of the Motor Vehicles Act. It has been held that:

- the liability of the insurer to pay compensation, under Ss. 95(1)(b) proviso (ii) and 2(8), for third party does not extend to cases of death of, or bodily injury to, the owner of goods or his representative or to gratuitous passengers travelling in a goods vehicle.
- after amendment in 1994 of the 1988 Act, liability of an insurer for third party risk does extend to cases of death of, or bodily injury to, owner of goods or his authorised representative travelling in a goods carriage.<sup>297</sup>

The liability of an insurer to pay compensation, in third party risk cover, after the 1994 amendment for cases of death of, or injury to, gratuitous passengers including the owner of goods or his representative, travelling in a goods carriage has been discussed in *New India Assurance Co. v. Satpal Singh*<sup>298</sup> subjected to doubt, and the matter referred, by a two judge bench, to a larger bench for reconsideration.<sup>299</sup>

### Quantum: “Untoward Incident”

The Supreme Court has emphatically asserted that the quantum of compensation has to be determined on the basis of that which is statutorily prescribed “at the time of making the order for payment of the compensation”.<sup>300</sup> The law itself requires the Railway Administration to “pay compensation to such extent as may be prescribed”, the court observed.<sup>301</sup> A claim may be made either in a civil suit, or by speedier recourse through the Claims Tribunal. If a person opts for the expeditious remedy, that does not make the entitlement a lesser figure. Further, the purpose of altering the figures of compensation is only to update the money value of compensation. “In other words, what you were to pay ten years ago to one person cannot be the same if it is paid today in the same figure of currently notes.”<sup>302</sup>

The court did not see the need to delve into retrospectivity while arriving at its decision.

## VII. BHOPAL

Two orders of 1996, reported in 2000 and 2001, testify to the continuing travails of the victims of the Bhopal Gas Disaster. In *Krishna Mohan Shukla v. Union of India*,<sup>303</sup> the administrative orders issued by the Welfare Commissioner directing that the Deputy Commissioner shall not alter the categorisation unless the Welfare Commissioner approved it was struck down as a fetter on judicial powers not justified by the Bhopal Claims Scheme. In *Khalida Sultana v. Welfare Commissioner*,<sup>304</sup> the wife of a victim had to battle all the way to the

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<sup>297</sup> *Ramesh Kumar v. National Insurance Co. Ltd.* (2001) 6 SCC 713.

<sup>298</sup> (2000)1 SCC 237.

<sup>299</sup> *New India Assurance Co. v. Asha Rani* (2001) 6 SCC 724.

<sup>300</sup> *Rathi Menon v. Union of India* (2001) 3 SCC 714 at 723.

<sup>301</sup> *Id.* at 722.

<sup>302</sup> *Id.* at 723.

<sup>303</sup> (2000)10 SCC 507.

<sup>304</sup> (2001) 9 SCC 177.

Supreme Court when the Additional Welfare Commissioner overturned the Deputy Commissioner's acceptance of evidence that death had resulted, in 1988, from inhalation of MIC in 1984. The Supreme Court held that the possibility of two views would not entitle the displacing of the Deputy Commissioner's decision.

In January 2000, 15 years after the disaster, the functioning of the Tribunal was being challenged, *inter alia*, for defective medical categorisation, preparation of allegedly illegal compensation and categorisation list, holding of Lok Adalats which were charged with being illegal and arbitrary.<sup>305</sup> The pre-determined, proposed amounts of compensation (e.g. Rs. 35,000 for chronic conjunctivitis) was explained away as being merely a guideline. It must be said that the court did not actually test the application of this guideline against compensation as determined, to understand the implications it had had for the way the Tribunal worked. Further, the court's confidence in the process for determining compensation was bolstered because the Welfare Commissioner is a sitting judge of the Madhya Pradesh High Court and "normally, therefore, the claimant should have no cause of grievance after the decision by the Welfare Commissioner."<sup>306</sup> If there was a grievance, the High Court should be approached. As for setting aside the decisions of Lok Adalats, which, it was contended, were sham, a 1997 order which provided for a review of the award within two months of a public notice setting out the possibility of review, was considered adequate.<sup>307</sup>

## VIII. MISCELLANEOUS

The Wildlife (Protection) Act 1972 prohibits the killing of certain scheduled animals. Persons living in or frequenting forests are necessarily vulnerable to attacks, and consequent injury, perhaps death. Provision is often made by the state for granting gratuitous relief to victims. In *State of Himachal Pradesh v. Halli Devi*,<sup>308</sup> the court held that attack by a wild animal would not give rise to an action for damages for an action done in good faith by the state or its officers. "The mere fact that killing such wild animals is prohibited under the law and protection is provided to them would not mean that the state is the owner of such wild animals so as to make it liable for the damage caused by such wild animals," it was said.<sup>309</sup>

The unjustified detention of a part of the trees sold to a person by the state was held to give him the right to recover damages in tort. The state could not have taken the sale proceeds of the 171 trees and still appropriated a part of the trees sold, the Supreme Court said while restoring the compensation order of the trial court.<sup>310</sup>

## IX. CONCLUSION

The vast disparities in valuing human life on the income replacement principle have become manifest, especially with the unstated ceiling on compensation having been at least partially dislodged. Figures such as Rs38,40,000, Rs11,97,000 and Rs15,46,000 nestle cheek by jowl with Rs75,000, Rs48,000 and Rs35,000 where the victims are persons on the downside of the economic and social scale.<sup>311</sup> These sums could provide a key to unravelling the role of the law as an instrument in maintaining the status quo. The many losses that are not reflected in income replacement, and the absences (such as the absence of a support system, or a previously provisioned insurance cover, which may aggravate the loss) are not accounted for in income replacement. If impoverishment is to be averted, then these losses and absences may have to be taken into the reckoning. Tort law may have to be moulded to accommodate these.

The unfolding use of the Second schedule that this period witnessed is indicative of the search for rationalisation that has engaged the judiciary in years past. The application of the Second Schedule still in its nascence, but it is already evident that having a statutory prescription has given a ledge on which to rest the uncertainties of computation.

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305 *Krishna Mohan Shukla v. Union of India* (2000) 2 SCC 690.

306 *Id.* at 692.

307 *Id.* at 693.

308 AIR 2000 HP 113.

309 *Id.* at 116.

310 *Haji Mumtaz Hussain v. State of U.P.* (2000) 9 SCC 38.

311 See 'Quantum' under 'Accident law', *supra*.

Prioritising population control, sympathetic understanding of social rejection of the girl child and medical negligence in the context of the 'family planning' programme stand graphically illustrated, revealing a tangible link with the law of compensation.

Culpable inaction has moved a veritable mile, taking deliberate inaction further towards conduct that can be placed within the range of vicarious liability of the state.

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