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TORT LAW IN INDIA 1996

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I. INTRODUCTION

The exponential rise of vehicular accidents is liberally represented in the cases under survey. Cases of riot, which have been dealt with in the section on culpable inaction, are reported from four High Courts, illustrating the wide spread of its occurrence. The plight of the victim of rape has occupied the judicial mind for some time now, and 1996 has seen a range of judicial responses. Constitutional tort and negligence have essentially followed the patterns of judicial treatment already established.

II. CONSTITUTIONAL TORT

Deaths in custody

Courts have reiterated the dictum that convict and undertrial prisoners have rights under Article 21 of the Constitution, and have visited the state with the penalty of damages where violations have occurred.[1] In *Rajen Gogoi v. Union of India*[2] Manik Gogoi, allegedly an active member of the ULFA, was apprehended by the army. He died in their custody. The army authorities said he had succumbed to injuries sustained while attempting to escape. The enquiry report of the District and Sessions Judge controverted this claim. The court, concluding that it was a case of death in custody, found that Manik Gogoi was 28 years of age, employed in Duliajan and earning Rs 3831.38. The Ministry was directed to pay Rs 2,50,000 to his father.[3]

In *Ratlavat Chandi v. Government of A.P.*,[4] the court ordered Rs 1 lakh as compensation, and Rs 10,000 as costs, be paid to the family of a rickshaw puller who had been tortured, and who died in custody.

In *Ghotovi Sema's* case,[5] "exemplary damages" of Rs 2 lakhs was directed to be paid as a palliative where nine wardens in jail beat a detenu, who succumbed to the injuries caused.

The state appealed against the Single Judge's order in *Suramalla Ramulu v. State of A.P.*,[6] a case of death in prison of a convict undergoing life imprisonment. A Division Bench of the Andhra Pradesh High Court upheld the order to the extent that it denied compensation to the father, since the deceased convict had suspected his wife of having illicit relations with his father, and compensation had been awarded on the basis of dependancy. It altered the Single Judge's order in disallowing compensation to the wife, for the same reason that the father was denied compensation, while it raised the monthly amount to be paid to the mother from Rs 500 to Rs 750.[7] This order constitutes a departure from the practice of awarding a lump sum.

Encounter deaths

Recognising the continuing trauma of violence in Andhra Pradesh, a Division Bench in *Shakamuri Apparao v. Government of A.P.*[8] suggested the setting up of a "peace commission, with a representative character inspiring confidence in all sections of the society including the Naxalites and the police and backed by the state power and consent" to "bring about immediate cessation of police encounters and violence by Naxalites". The "police personnel killed by the Naxalites and the Naxalites perished in police encounters," said the court, "disclose a shocking state

1 See *Ghotovi Sema v. State of Nagaland* 1996 ACJ 996 at 998 and *State of Andhra Pradesh v. Suramalla Ramulu* (1996) 2 Andh LT 504 at 508. See also *Manjeet Singh v. State of UP* 1996 All LJ 1574, where a TADA undertrial was awarded Rs 5,000 for illegally putting him in bar fetters. The Jail Superintendent was held liable for violating the rules.
2 1996 ACJ 310.
3 The Union of India and the State of Assam were directed to inquire and fix responsibility within six months, id. at 316.
4 (1996) 2 Andh LT 850.
5 Supra note 1.
6 (1995) 2 Andh LT 399. See 1995 ASIL at p.451, FN 37.
7 Supra note 1.
8 (1996) 3 Andh LT 432.

of affairs".[9] "Between 1981 and May 1996, 242 police personnel had lost their lives at the hands of the Naxalites while the casualties among the civilian population attributed to Naxalite attacks as on May 9, 1996 is 1805. By May 1996, a total of 1140 Naxalites died at the hands of the police."[10]

Disappearances

The years of insurgency brought with it draconian laws like the TADA, and manifestations of state violence as is seen in the numerous allegations of disappearances. Almost invariably, the state police was accused of having wielded unconstitutional power, and the CBI was called in to investigate.[11] Almost without exception, even where the CBI was able to reconstruct the facts, the disappeared persons were not traced. The courts may thereafter act on the presumption that they had been killed.[12] Once presumed dead, the court may consider compensating the families of disappeared persons. In *Vinod Kumar's* case, Rs 2 lakhs was directed to paid as ex gratia to the families of two persons whose disappearance was found to have been effected by the state police.[13]

Illegal detention

Illegal detention recurred in a range of context in the year under survey. In *Javid Ahmad Basmati v. State*,[14] it was an order of detention, made on the same grounds as had been set aside by a court, which prompted the court to award Rs 50,000 to the detenu. In *Daulat Ram v. State of Haryana*,[15] a false case foisted on the appellant by two Head Constables led to his being detained in custody for a few days; the state was directed to pay him Rs 5,000 as compensation. The amount was to be recovered from the two policemen in equal shares.

Mrs Iqbal Kaur Kwatra v. Director General of Police, Jaipur,[16] was a case where police from Jaipur travelled to Hyderabad to effect an arrest. The detenu was not produced before a Magistrate in Hyderabad but was transported to Jaipur. The court found the act to be "malicious", and directed the policemen, including the Director General of Police, Jaipur, to deposit Rs 10,000 towards interim compensation for illegal detention.[17]

The facts, as set out in *Vasanthi v. Jaya Prakasha Rao*,[18] constitute a narrative of harassment and intimidation, as also illegal detention. A woman lawyer, a divorcee with two children, alleged that she was threatened by the then Public Prosecutor to withdraw a habeas corpus case. When she refused, he had her arrested and detained for over 26 hours before she was set at liberty on bail by the Magistrate. Finding that there was no doubt that "serious damage in reputation and prestige, both as a woman and a lawyer" was caused to her, the court ordered that she be paid exemplary damages. Since the court did not find her wholly in the clear, it confined the quantum to Rs 50,000 to be paid by the state.

There has been a noticeable decline in the regularity with which the state is directed by the court to identify errant officials and the compensation amounts recovered from them. In the process, the vicarious liability of the state has been reinforced.

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9 Id. at 441.

10 Id. at 439. Citing writings on the Naxalite movement, and the state response to it, the court has neither condemned the politics nor condoned the violence. See also *P.Narayana Swami v. S.I. of Police, Adilabad* (1996) 4 Andh LT 241 where the court directed that a case be registered relating to an alleged encounter death where one Sammireddy was shot in the back.

11 See for e.g., *Paramjit Kaur v. State of Punjab* (1996) 7 SCC 20, where Jaswant Singh Khalra, a human rights defender, was allegedly abducted by the state police because his investigations had revealed that there were several unclaimed bodies, and other police excesses. See also, *Nain Kaur v. State of J&K* (1996) 3 SCC 72.

12 *Vinod Kumar v.State of Punjab* 1996 Cri LJ 1037 (P&H HC).

13 Ibid.

14 1996 Cri LJ 1770 (J&K).

15 (1996) 11 SCC 711.

16 (1996) 2 Andh LT 138.

17 Also see, *Mrs Parvathi v. Commissioner of Police*, 1996 Cri LJ 281 (AP), where the court declined to award compensation since the material before the court was inadequate to consider the appropriateness of the remedy.

18 (1996) 4 Andh LT 535.

III. CULPABLE INACTION

In the year under survey, victims of violence approached the courts in the writ jurisdiction asking to be compensated for the losses they had suffered as a consequence of police inaction.[19] The 1984 riots in Delhi following the assassination of Mrs Gandhi, where it was not merely inaction but even officially recorded complicity of the law and order forces of the state,[20] presented few problems to the Delhi High Court when it increased the amounts paid by the state to the families of the victims from Rs 20,000 to Rs 3,50,000.[21]

The Kerala High Court too was in little difficulty in directing compensation to be paid to a hotelier whose fundamental right to trade and business was disrupted when his property was destroyed in riots.[22] That the murder of a priest of a mosque had led the police to apprehend communal disturbances; that a conference of top officers had been convened to consider preventive steps; that requests to the police to render help when the destruction had begun had received no response, led the Single Judge to conclude that there had indeed been inaction, and the state had to be make good the damage sustained.[23]

The case before the Orissa High Court[24] arose out of the destruction of the stock of cloth merchants during a communal riot in March 1991. The Revenue Divisional Commissioner, in his administrative report, had stated that: "(a) measures taken to tackle the law and order situation at the initial stage were utterly inadequate, (b) there was no preparedness nor any planning, although the circumstances demanded utmost care and precaution, (c) there was practically no administration for hours in the evening and early part of the night at Bhadrak town on 24 March, 1991."[25] However, even while the court discussed the concept of the rule of law, vicarious liability and compensation and its cognates, it declined to interfere; primarily, because those sustaining the loss had been indemnified by insurance.

The Orissa High Court expressed an unwillingness to undertake assessment of loss in its writ jurisdiction, since "[s]uch assessment necessarily requires materials to be placed by the parties, their acceptability and many connected factual aspects".[26] The Kerala High Court, on the other hand, appears to have accepted the submission that "it is not possible to resort to a civil suit since the loss was sustained at the hands of a mob and the principles of law of evidence which had to be followed in a civil suit will stand against the petitioners getting any relief in such proceeding".[27]

The question of state culpability has been variously handled by the High Courts of Delhi, Kerala and Jammu and Kashmir. The Delhi High Court reasoned that it is the state's "duty and responsibility …. to secure and safeguard life and liberty of an individual from mob violence" and that "[i]t is not open to the state to say that violations are being committed by private persons for which it cannot be held accountable".[28] "Here we are concerned with illegal extinction of life by mobs which put into execution their plans openly in public places and in full gaze of the authorities. It was not something done clandestinely for which the state could plead ignorance," it said.[29]

The Kerala High Court held that there had been laches on the part of the police, and "inaction on their part had violated the petitioners' fundamental right to carry on trade and business".

The Jammu and Kashmir High Court saw the question of state culpability somewhat differently. In 1991, in *Inder Puri General Store v. Union of India*,[30] a Single Judge had directed the state to pay the victims of a communal riot, which had occurred on January 13, 1989, compensation to the extent of the loss suffered by them as assessed by

19 The one exception was *Commander N.P.Kulshreshtha v. State of UttarPradesh* 1996 All LJ 1914, where the court, in a writ petition, awarded Rs 25,000 to persons who were victims of land grabbing, and there had been failure of the state machinery to provide protection.
20 Report of the Ranganath Misra Commission of Inquiry cited in *Smt Bhajan Kaur v. Delhi Administration* 1996 AIHC 5644 at 5649.
21 which included interest on a compensation amount of Rs 2 lakhs.
22 *P. Gangadharan Pillai v. State of Kerala* AIR 1996 Ker 71.
23 Based on an assessment of the respondents themselves, an amount of Rs 35,000 was ordered to be paid.
24 *Banwarilal Agarwal v. State of Orissa* (1996) 81 Cutt LT 610.
25 Id. at 613.
26 Id. at 619.
27 Supra note 22 at 73.
28 Supra note 20 at 5645.
29 Id. at 5649.
30 AIR 1992 J & K 11.

a committee constituted by the government. The *Inder Puri* decision was followed in a subsequent petition filed by other affected persons. It was against this later decision that the state appealed.

The question, as the Division Bench formulated it, was whether the respondent-victims "should be entitled to any compensation *as a matter of right*".[31] And, "[i]s the obligation of the state absolute?" Grappling with state responsibility for protecting the property of its citizens, the court preferred that a "balance … be struck", and suggested that what could be expected of the state was "reasonable care"; and that negligence was necessary to make the state culpable.[32] It was suggested that:[33]

> "Whenever a communal riot or a disturbance takes place all of a sudden, without any notice or warning and without any preparation or premeditation and if as a result, the disturbances take place in a very very short spell of time, and if consequently some property is damaged, surely the state cannot be squarely blamed for not protecting citizens' property."

The court said that the writ petitioners had not stated in what manner the state had been negligent, whether the state had prior knowledge of the plans of miscreants and antisocial elements, whether the state had made any arrangements based on that knowledge, and whether the arrangements were adequate or not.[34] The liability fastened on the state by the Single Judge was therefore held to be unwarranted.[35]

Though this decision does not overrule *Inder Puri*, it may be seen to be a departure in the direction of cautiousness in acknowledging state culpability.

A further question of whether the payment of *ex gratia* amounted to an admission of culpability or negligence was answered in the negative. Interpreting this as a gesture of a welfare state, the court's opinion was that[36]

> "By its very nature, payment of ex gratia relief is such that it does not cast any obligation upon the state paying the relief."

Traditional tort law is a seeking of remedies in the case of private wrongs. Riots, and situations of militancy, invariably result in loss, to life or property or both. The perpetrator often remains unidentified. The growing body of law on constitutional tort has had its influence on this aspect of liability, and of the right to compensation. Compensation for denial of fundamental rights is no longer an exceptional circumstance. There is also a emerging context in law where compensating the victim is dissociated from questions of culpability and liability; the introduction of the no-fault principle into motor vehicle legislation, or in dealing with 'accidents' arising out of hazardous processes or substances are instances. These may be factors that determine the course of the law regarding culpable inaction.[37]

IV. FINE IN CRIMINAL LAW

The provision for ordering compensation either from fine imposed as part of a sentence, or otherwise, which is in Section 357, Code of Criminal Procedure, continues to be underutilised.

In *Delhi Domestic Working Women's Forum v. Union of India*,[38] the Supreme Court had directed the National Commission for Women to evolve a scheme for assistance, including compensation, to victims of rape. The failure

31 *State of Jammu and Kashmir v. M/s Jeet General Store* AIR 1996 J&K 51.
32 The petitioners had alleged inaction of the law-enforcing agencies. See id. at 55.
33 Id. at 56.
34 Id. at 55.
35 *R.Gandhi v. Union of India* AIR 1989 Mad 205 was distinguished on the ground that the petitioners there had depended upon specific, categorical and unambiguous facts. It may be noticed that the case in *R.Gandhi* was based on the report of an advocate who had visited Coimbatore after the riots.In Inder Puri, it was a government committee that assessed the extent of loss.
36 Supra note 31at 56. Compare this with the treatment of ex gratia in *Smt Bhajan Kaur* supra note 20.
37 See also, *Sneh Sharma v. Sewa Ram* 1996 ACJ 902 at 910 (J&K), where liability was brought within the Motor Vehicles Act when a bomb exploded killing passengers. That it was "well known that militant activities were gaining ground" and that "strict vigilance" should have been exercised seems to have tilted the scales in the court fixing liability. In this case, it was brought within the tort of negligence.
38 (1995) 1 SCC 14.

to formulate a scheme was cited by the court, in *State of Punjab v. Gurmit Singh*,[39] as a reason for not providing compensation in addition to the fine imposed, to a victim of abduction and rape. The court had, while reversing a judgment of acquittal, sentenced three persons to undergo 5 years' RI, and a fine of Rs 5,000 each for the rape of a girl under 16 years of age, and to 3 years' RI under Section 363, IPC, the substantive sentences to run concurrently.[40]

However, the hazards of a scheme for paying Rs 10,000 (later raised to Rs 50,000) where a scheduled caste woman is allegedly raped is found in *Mohanlal Amarji Marwadi v. State of Gujarat*.[41] The State of Gujarat had such a scheme in place. A woman belonging to a scheduled caste alleged that she had been gang-raped. The Sessions Court convected the accused, but the High Court, re-examining and re-interpreting the evidence, was left unconvinced. The accused were acquitted. The court then embarked on a lenghty expression of anxiety that paying immediate compensation to an alleged victim of rape may result in the "public exchequer filled up with the taxes from the honest tax payers" may be "undermin(ed)", for this may tempt people to "level false, baseless allegations and then make good their escape, irrespective of clean acquittal".[42] One line of questioning was directed at challenging the veracity of her complaint by casting doubt about possible greed and temptation. The trials of the victim of rape during the proces sof investigation and trial have been acknowledged by the courts themselves. In this case, ex gratia "that too such huge astronomical amount" as the court phrases it,[43] seems to be an added burden that the woman was called upon to bear. Incidentally, the High Court more than just hints that the conviction by the Sessions Court was perhaps a case of trial by the press.

The circumstances in *Bodhisattwa Gautam v. Subhra Chakraborty*[44] are strange. A woman lodged a complaint of causing miscarriage, cheating, cohabitation with a man who deceitfully induced a belief of lawful marriage, going through a fraudulent marriage ceremony and cruelty under Section 498-A, IPC. The accused-man moved the courts to have the prosecution quashed. The Supreme Court, for some reason that remains unexplained, introduced the offence of rape into its decision and set out some of the signpost rulings in the context of rape, including *Delhi Domestic Working Women's Forum v. Union of India*,[45] where the framing of a scheme for compensating the victim of rape had been mooted. Having done which, the court observed: "If the court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the court the right to award interim compensation which should also be provided in the scheme". Invoking its inherent powers under Article 142, the court ordered the accused to pay Rs 1,000 every month as interim compensation during the pendency of the criminal case, and also made him liable to pay arrears of compensation from the date when the complaint was filed.

In *Namdeo Kisan Bhakare v. State of Maharashtra*,[46] the court altered the sentence of fine from Rs 1,000 to Rs 15,000 under Section 304 Part II, so that the 75 year old father of the child-victim of negligent driving can "in his old age … be saved from financial miseries, though no amount can compensate the loss of the young child and sentence to be effective must not only be reformatory but also retributory, deterrent and preventive".[47]

Tulsi Devi v. State of U.P.[48] was a case, under Section 313 IPC, of causing abortion by kicking the pregnant woman in the abdomen. Delay in the proceedings—it was two decades since the occurrence—that the accused was a lady and, as the court said in mitigation, "she might not have assaulted her with an intention to abort" (though it is doubtful whether it would then fall within the definition of the offence under Section 313), the court reduced the sentence from 4 years to 2 years' RI while increasing the fine from Rs 250 to Rs 2,000 of which Rs 1,500 was directed to be paid to the victim by way of compensation.

39 (1996) 2 SCC 384.
40 See also *Semiyar v. State of U.P.* 1996 All LJ 1992, where a 9/10 year old girl was the victim of rape. The accused was sentenced to 5 years'RI and a fine of Rs 3,000, and Rs 2,000 of the fine recovered was directed to be paid to the victim-girl.
41 (1996) 1 Guj LH 1059. For the NHRC's endorsement of such compensation, see infra.
42 Id. at 1076.
43 Id. at 1075.
44 (1996) 1 SCC 490.
45 (1995) 1 SCC 14.
46 1996 Cri LJ 562.
47 Id. at 564.
48 1996 Cri LJ 940.

While releasing on probation a convicted person of about 21 years, the court in *Sitaram v. State of Rajasthan*[49] directed that he pay Rs 5,000 as compensation to the widow of the deceased victim.

When a former Chief Minister of Haryana was shot at and injured on the right side of the chest in broad daylight when he was attending a function as a Chief Guest, the Designated Court while sentencing him under Section 307 IPC, TADA and the Arms Act 1950, also imposed a fine of Rs 50, 000, Rs 1,000 and Rs 1,000 respectively. He further directed that the fine, if recovered, be paid to the injured as compensation. While affirming the substantive sentences, and directing that the sentences run concurrently and not consecutively as had been ordered by the Designated Court, the Supreme Court held[50] that the sentence of fine be reduced from Rs 50,000 to Rs 2,000. In addition, the court merely said: "We are not satisfied with the direction for payment of the fine … by way of compensation is warranted. We set aside that direction."[51]

Compensating victims of offences out of the fine realised is, under the law, a discretion that rests with the court; it is not provided to the victim as a matter of right.

V. NEGLIGENCE

Medical negligence, and death and disability caused by electrocution, came under the scrutiny of courts. The cases concerning failure of family planning operations or death during, or arising out of, such operations assume a relevance particularly in the context of the population control policies that the state has adopted. Apart from the personal consequences of a failed operation, the civil consequences of a third child are, increasingly, significant.[52] That one of the cases concerned a death in a sterilisation camp, and an inquiry found that inadequate resuscitative equipment and the absence of an anaesthetist had led to the victim incurring avoidable risk,[53] gives this genre of cases an added dimension.

In *Bharuch District Panchayat v. Kanubhai Raijibhai Patel*,[54] plaintiffs alleged negligence of doctors in that, in each of ten suits filed, a child was born in spite of having undergone the family planning operation. They submitted that, in the circumstances, the doctrine of *res ipsa loquitur* applied. The trial courts decreed the suits for amounts ranging from Rs 40,000 to Rs 89, 000. A Division Bench of the Gujarat High Court reversed the decision of the trial courts. "[T]he doctor himself has given evidence that there is a possibility of the operation failing in 4 to 5 cases out of 1000 …; in this country of overpopulation these operations are performed in millions every year and there will be hundreds of cases where these operations fail in spite of having taken all care … The percentage might be less than one per cent; and it would not be possible to say that it is necessarily due to negligence of the doctor."[55]

The court in *Rajmal v. State of Rajasthan*,[56] confronted with the death of a woman during a tubectomy operation, also took the line of acknowledging the possibility of failure of an operation not necessarily due to the doctor's negligence. An inquiry report had, inter alia, found that neither adequate resuscitative facilities nor a trained anaesthetist had been available, and if they had been available, death may have been averted. The court directed that "henceforth whenever laparoscopic tubectomy operation is conducted whether in major hospitals or smaller hospitals of the government or in the camps organised for such purposes, a trained anaesthetist with M.S. degree in anaesthesiology and adequate resuscitative facilities … should be compulsorily made available at the time of such operation. This should be mandatory…[57]

On the principle of vicarious liability of the state, since the doctor who conducted the operation was an employee of the state government and acting as such, and invoking the doctrine of *res ipsa loquitur*, the court awarded Rs

49 1996 Cri LJ 1055.

50 *Rajbir v. State of Haryana* (1996) 7 SCC 86.

51 Id. at 89.

52 To cite one instance, a third child is a disqualification for standing for election to the legislative assembly or to panchayats in some states.

53 *Rajmal v. State of Rajasthan* 1996 ACJ 1166.

54 1996 AIHC 3163: (1996) 1 Guj LH 584.

55 Id. at 3164. See also *State of Gujarat v. Shahenazbanu Ashrafali* AIR 1996 Guj 136, where a child developed poliomyelitis after administration of the vaccine. Negligence was negatived, while the amounts already received in compensation were not rewuired to be returned.

56 Supra note 53.

57 Id. at 1169.

one lakh as compensation along with interest at 12 per cent per annum from the date of the incident till the date of actual payment. An amount of Rs 10,000 paid by the Collector, Sawaimadhopur on the spot as interim compensation was ordered not to be deducted from the compensation amount.[58]

The issue of vicarious liability of the state for medical negligence came up for resolution again in *Achutrao Haribhau Khodwa v. State of Maharashtra*.[59] A mop left inside the abdomen during a sterilisation operation resulted in peritonitis and, subsequently, death of the woman. The High Court had been of the opinion that the government cannot be held liable in tort for acts committed in a hospital maintained by it because considered the maintaining and running of a hospital as an exercise of the sovereign power of the state. The Supreme Court, however, thought differently. "Running a hospital is a welfare activity undertaken by the government but it is not an exclusive function or activity of the government so as to be classified as one which could be regarded as being in exercise of its sovereign power," it said, and added: "Just as running of passenger buses for the benefit of general public is not a sovereign function, similarly the running of a hospital, where the members of the general public can come for treatment, cannot also be regarded as being an activity having a sovereign character."[60]

On the skill expected of a doctor, the court held that as long as a 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 to be guilty of negligence".[61] In this case, the court found that negligence was writ large. That it had not been conclusively proved as to which of the doctors or other staff had acted negligently would not defeat the claim. Death by negligence having been established, the state was held to be liable in damages.

An aspect of the case is the appalling delay in the proceedings. The death occurred in July 1963. The Civil Judge awarded Rs 36,000 about 1968. The Bombay High Court gave its decision in 1977, reversing the order of the Civil Judge. In February 1996, the Supreme Court restored the order of the Civil Judge. *Poonam Verma v. Ashwin Patel*,[62] a case that was instituted under the Consumer Protection Act 1986, offers a contrast. The patient in this later case died in July 1992. The National Consumer Disputes Redressal Commission dismissed the petition for compensation for medical negligence in November 1994. The decision of the Supreme Court was delivered in May 1996.

In *Poonam Verma's* case, a medical practitioner who had qualified in homoeopathy but had practised allopathy was held by the Supreme Court to be "negligent per se". Exploring the terrain of negligence, the court identified the following constituents to be part of the definition of negligence:

(1) a legal duty to exercise due care;

(2) breach of the duty;

(3) consequential damages.

Relying on *Bolam v. Friern Hospital Management Committee*,[63] the court said: "It is true that a doctor or a surgeon does not undertake that he will positively cure a patient nor does he undertake to use the highest degree of skill, as there may be persons more learned and skilled than himself, but he definitely undertakes to use a fair, reasonable and competent degree of skill." Referring to *Dr.Laxman Balkrishna Joshi v. Dr.Trimbak Bapu Godbole*,[64] where it was laid down that a doctor owed to his patient (a) a duty of care in deciding whether to undertake the case; (b) a duty of care in deciding what treatment to give; and (c) a duty of acre in administering the treatment, the Supreme Court said that "[a] breach of any of these duties gives a cause of action for negligence."[65] And, where a person is guilty of negligence per se, no further proof is needed. Citing the maxim *sic utere tuo ut alienum non loedas* (a person is held liable at law for the consequences of his negligence), the court awarded Rs 3,00,000 as compensation, while awarding costs at Rs 36,000.[66]

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58 Ibid.
59 (1996) 2 SCC 634.
60 Id. at 643-644.
61 Id. at 645-646.
62 (1996) 4 SCC 332.
63 (1957) 2 All ER 118.
64 AIR 1969 SC 128.
65 Supra note 62 at 348.
66 Compare this with the Rs 36,000 which was resurrected as compensation in *Achutrao's* case, supra note 59, to be paid 23 years after the death of the patient.

A Single Judge of the Delhi High Court in *M.L.Singhal v. Dr Pradeep Mathur*[67] rejected a contention that the plaintiff could claim damages for death due to medical negligence under the general law of tort on the somewhat strange reasoning that "even a case based on tort has to be under one or other provision of some Act".[68] Locating the claim within the Fatal Accidents Act 1855, the loss on account of the death of the plaintiff's wife was held barred by limitation. For, the "mental torture suffered by him on seeing his wife being not properly nursed", however, the court awarded a sum of Rs 10,000 as "just compensation". This case saw the doctor make a counterclaim for defamation. "Filing of a case or raising a bona fide controversy regarding treatment given would not constitute defamation," the court said.[69]

Death in this case occurred in 1978. The suit was filed in 1981. The Single Judge's decision is of October 1995.

The negligence of electricity boards resulting in death and disability have invariably had courts awarding compensation. In *Chairman, APSEB v. Bollikonda Sukkamma,*[70] compensation of Rs 40,000 awarded by the lower court was held to be not excessive. In *Rajani Dei v. Chairman, OSEB,*[71] considering the avocation of the victim and other circumstances like his age and income at the time of death, compensation of Rs 50,000 was directed to be paid, while the petitioner's counsel agreed not to make any further claims. In *M.P.Vidyut Mandal v. Geetabai,*[72] considering factors of dependancy and income replacement, a sum of Rs 25,000 was ordered to be paid.

It was in *Master Kartik v. APSEB,*[73] that a Single Judge of the Andhra Pradesh High Court ordered "tentative compensation" of Rs 2,00,000 be paid for a schoolgoing boy who had been disabled by electrocution. and Rs 1,00,000 towards medical expenses incurred. This was seen as an interim measure as "the civil suit takes a few years" and as the victim-boy "has to be educated, assisted in attending to school and also in his normal duties".[74]

The electricity boards almost unvaryingly denied negligence, and sought shelter in the defence of "act of god"[75] or on contributory negligence.[76]

While negativing these defences, courts have adopted the *res ipsa loquitur* doctrine to pin liability on those charged with maintaining electricity lines.

Harvinder Chaudhary Srivastava v. Union of India[77] also dealt with the negligence of a state electricity undertaking (DESU) where a fire destroyed several jhuggies in a colony, causing death and disability to its inhabitants. An enquiry committee set up by the government to investigate the fire which ravaged the Sanjay Amar Colony at the Yamuna Pushta in Delhi found that, inter alia, illegal and unauthorised electricity connections were given by the employees of DESU, and that a short circuit had caused the fire. The Delhi Administration was required, by the court, to pay Rs 10,000 for the deaths caused by the fire. The injured were ordered to be paid sums ranging from Rs 4,000 to Rs 6,000 towards medical expenses incurred, Rs 2,000 to Rs 6,000 where injury and disability was sustained, and Rs 1,000 to Rs 2,000 towards injury and mental agony. While these sums are meagre, this decision represents the court's endorsement of state liability for losses sustained in fires, which are not an uncommon feature in jhuggi clusters.

In *Surinder Kumar Sharma v. State of Himachal Pradesh,*[78] the tenant-state, which was using a premises to house the office of the District Education Officer, was held liable in damages to the landlord when fire destroyed the tenanted premises. Negligence having been established, it is interesting that the court held that it was not the market value of the building, but the replacement value, which would be employed in assessing damage.

67 AIR 1996 Del 261.
68 Id. at 273.
69 Id. at 272.
70 (1996) 1 Andh LT 344.
71 1996 ACJ 1146.
72 1996 ACJ 149.
73 (1996) 1 Andh LT 299.
74 Id. at 305.
75 See, for e.g., *M.P.Vidyut Mandal*, supra note 72 at 150 and *Ranjani Dei* supra note 71 at 1147.
76 See, for e.g., *M.P.Vidyut Mandal* ibid; *Chairman, APSEB* supra note 70 and *Master Kartik* supra note 73.
77 (1996) 8 SCC 80.
78 1996 AIHC 808.

VI. ACCIDENT LAW

Quantum

Determining what constitutes "just" compensation following a motor vehicular accident, particularly where death occurs, is a task which "naturally involves some guesswork, hypothetical considerations, speculations and conjectures by the court"[79] involving "some element of estimation".[80] "[J]ust compensation is reasonable compensation and has to be determined keeping in mind the fact that the compensation payable is not to be assessed on the estimated gross income of the deceased but on the amount lost by the claimants," said the court in *Kumudini Das*, adding, "which again depends on … whether the claimants are the widow and children or parents … of the deceased". The visible costs of the accident would, then, be circumscribed by the factor of dependancy. This computation, it must be observed, is at variance with the income replacement principle as it has been adopted in the Second Schedule to the Motor Vehicles Act 1988.[81]

The problem of computing compensation persists where a non-earning person is the victim. In *Laxmi Ram*,[82] a Division Bench of the Allahabad High Court, stating that the income replacement principle was "only appropriate where the deceased was a breadwinner of the family", held that Rs 25,000 was reasonable compensation for the death of a 16 year old student of class X. "The damages in such a case," it said, "are to be based on reasonable expectation of pecuniary benefit or benefit reducible to money value".[83]

While the court in *Laxmi Ram* held that "no compensation is payable to the parents of the deceased for mental agony suffered by them",[84] a Single Judge of the Delhi High Court thought differently. "It is not possible to equate money with human suffering as a result of the tragic loss as no amount can restore the mental state and happiness of the appellants (parents). The courts can only award compensation for such loss as far as money can compensate. This is the least that can be done when the parents are shattered by the unfortunate death of their only son," he said[85] while determining the compensation at Rs 1 lakh.

The amounts have varied, between Rs 10,000 for the death of a child of 4 1/2 years[86] to Rs 1 lakh where the child-victim was 10 years old.[87] Where a child of 7 years suffered permanent injury, the Division Bench of the Gujarat High Court reduced the compensation from Rs 1,99,000 to Rs 1,44,600 while accepting the argument that future income should be computed only from the age of 18 years.[88]

The Second Schedule to the Motor Vehicles Act 1988 sets down Rs 50,000 as a minimum compensation where death results from the accident. It also accounts for non-earning members, including the child victim. Yet, except in *Kamta Prasad*[89] — even where it was not considered since the claim petition was not amended — there is no reference to the standard set by the Second Schedule, or its relevance in assisting the determining of compensation.

Computing compensation upon the death of a non-earning woman too presents difficulties. Finding relevant parameters for assessing the loss has often resulted in reducing women into stereotypes with little in terms of value that can be monetised.[90]

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79 *Kumudini Das v. Rajat Kumar Bahar Singh* AIR 1996 Ori 32.
80 *Laxmi Ram v. Chairman, UPSRTC* 1996 ACJ 1139.
81 The Second Schedule is however beset with errors, which have been detailed in the decision of the Supreme Court in *UPSRTC v. Trilok Chandra* (1996) 4 SCC 362.
82 Supra note 80.
83 Id. at 1143.
84 Ibid.
85 *Milan Chaudhuri v. Surinder Singh* (1996) 61 DLT 131 at 135.
86 *Mohan Devi v. Mam Raj* 1996 ACJ 605 at 608 (Del).
87 *Executive Engineer v. Harish Chander* 1996 ACJ 1348 (P&H). See also *Kamta Prasad v. Jaggan & Co.* 1996 ACJ 57 at 62, Rs 30,150, as claimed, for death of a 6 year old; *Gouranga Katual v. Govinda Mohapatra* 1996 ACJ 93 at 98 (Ori), Rs 15,000 for death of 13 year old who, it was claimed, was earning Rs 4 -5 per day: "In case of a non-earning person, fixation of compensation is a delicate and difficult issue," the court said.
88 *Kantilal Valabhai Patel v. Minor Pravin Nathubhai* (1996) 1 Guj LH 83: AIR 1996 Guj 130.
89 Supra note 87.
90 See *Madan Lal v. Janardhan* AIR 1996 Del 143. The provision in the Second Schedule for presuming a notional income for the non-earning spouse to be one-third that of the earning spouse may be a starting point for resolving these tensions. See U.Ramanathan, "Law of Torts" in 1994 *ASIL* 485 at 501-02.

It is the rare case which recognises the double burden of work of the earning woman. In *Rakesh Kumar v. Prem Lal*,[91] a Division Bench of the Himachal Pradesh High Court discussed case law to hold that "the children and husband of the deceased woman are entitled to compensation on the ground of the loss of the services of the deceased which were no doubt gratuitous, for the reason that the members of the family can replace such gratuitous services only by incurring expenditure and while estimating the `services' of the deceased housewife, a narrow meaning should not be given to the meaning of the word `services' but should be construed broadly".[92] The court then went on to say that "it cannot be presumed that working ladies would neglect their families in bringing up children and looking after their husbands in their day-to-day needs",[93] and assessed her services in the home to be worth Rs 660 per month. The court proceeded to assess her income from her employment as a maidservant at Rs 240 per month. Using a multiplier of 20, adding a conventional sum of Rs 3,000 and Rs 5,000 for the loss of the child she was pregnant with, the court awarded Rs 1,47,000 in compensation.

The disparity in the awarding of compensation is evident where Rs 14,55,000 was awarded to the dependants of a man of 30 years, working as a financial advisor in a private company,[94] while a Tribunal found Rs 10,000 to be reasonable compensation" considering the status of the family", a sum that was later revised by the High Court to the Rs 50,000 claimed.[95] The Tribunal's comment in the latter case that "considering that by the acceleration of the succession due to the death of the deceased the petitioners have (been) benefitted"[96] drew the ire of the High Court, which castigated the Tribunal for being "cynical and unsocialistic and inhuman" in its approach. Yet, when one considers that a workman's death in 1977 was compensated, after a protracted legal battle, with Rs 16,800 at 12 per cent interest in 1996,[97] the problem of assessing the worth of human life becomes evident.

In *KSRTC v. R.Sethuram*,[98] a Division Bench of the Karnataka High Court upheld the compensation award of Rs 23,32,900 where a green card holder was permanently disabled. Rs 21,32,900 was awarded for medical expenses, conveyance, nutrition and nourishment and Rs 2,00,000 towards general damages. This becomes significant given that the Second Schedule now places a ceiling of Rs 15,000 on medical expenses that may be recovered. The rightness, and fairness, of this ceiling may need to be reviewed.[99]

In *New India Assurance Co. Ltd. v. G.Lakshmi*,[100] a Single Judge of the Andhra Pradesh High Court held that "there is no embargo imposed by the legislature on Tribunals to grant compensation over and above the amount claimed by the parties in a given case".[101] This was followed in *Shivaram Chowdary v. APSRTC*[102] while awarding compensation of Rs 98,835 where the amount claimed was Rs 88,000.

The courts have held that compassionate appointment following the death of a victim could not be considered to reduce compensation.[103]

No fault

Compensation on the basis of no fault has been in the Motor Vehicles Act since October 1, 1982. It provided for compensation to the extent of Rs 15,000 where death occurred, and Rs 7,500 where permanent disablement resulted from a motor vehicle accident. In 1988, when the 1939 Act was replaced by a revamped, new Motor Vehicles Act which came into effect on July 1, 1989, these amounts were revised and raised to Rs 25,000 and Rs 12,500. From November 14, 1994, they were enhanced further to Rs 50,000 and Rs 25,000. No fault liability is intended to provide interim relief to the victim or the dependants. To this effect, the law does not require anything

91 1996 ACJ 980.
92 Ibid. at 986.
93 Ibid.
94 *Rajasthan SRTC v. Niranjanlal Yadav* 1996 AIHC 5354.
95 *A.Hanumanth Reddy v. B.Jaswanth Singh* (1996) 4 Andh LT 1079.
96 Id. at 1081.
97 *Hyderabad Steel Tubes Pvt. Ltd. v. Aktar Begum* (1996) 1 Andh LT 628.
98 1996 ACJ 1022.
99 See also *State of Punjab v. Parminder Singh* 1996 ACJ 1007.
100 1996 ACJ 1068.
101 Id. at 1074.
102 (1996) 1 Andh LT 252.
103 *ONGC, Mehsana Project v. Vinakapur* (1996) 2 Guj LH 927 and *Alagammai v. MD, Marudupandian Tpt. Corpn.* (1996) 2 Mad LJ 517.

further than the fact of the accident, and of death or disablement, to be demonstrated before these amounts become payable. Delay, however, is endemic, and the payment of compensation on a no fault basis may itself be contested, rendering the immediacy of relief impossible to achieve. Retrospectivity in terms of the changing amounts prescribed in the law has, therefore, become a recurrent theme while determining the amount to be paid as interim compensation on a no fault basis.[104]

One question that has come up for determination, repeatedly and in various High Courts, is whether the enhanced compensation in the provision for no fault liability is substantive or procedural. A Full Bench of the Kerala High Court, overruling two earlier decisions of that court[105] while approving the decision in another[106] was of the definite opinion that the provision for no fault liability is indeed substantive law.[107] A Single Judge of the Allahabad High Court in *Kamta Prasad v. Jaggan & Co.*[108] has also held this view while yet differing on whether the increased amounts would have to be paid to the victim.

It was the opinion of the Single Judge in *Kamta Prasad,*[109] however, that the no fault provisions were "a blend of prospective as well as retrospective enactment … and in the absence of any expression therein to indicate that the section shall apply to an accident taking place only after its introduction the provision has to be applied *in praesenti* in respect of matters pending before Tribunals or courts of appeal as well as in respect of all claims subsisting on the date of coming into force of the provisions but preferred thereafter".[110]

The Full Bench negatived the plea of retrospectivity, referring, inter alia, to Section 217 of the Motor Vehicles Act 1988, Section 6 of the General Clauses Act and the Supreme Court's reading of the latter provision.[111] This view finds its echo in a Division Bench judgment of the Andhra Pradesh High Court,[112] a Single Judge of the Gujarat High Court,[113] a Division Bench of the Madhya Pradesh High Court,[114] a Single Judge of the Orissa High Court[115] and a Division Bench of the Bombay High Court.[116]

The case before the Allahabad High Court was of 1977; and the view of the court that a beneficial legislation should be given a construction which advances the beneficent purpose[117] may have determined its interpretation.

With retrospectivity having been rejected by most High Courts, they were in agreement that the date of the accident, and not the date of consideration of the claim, would be the relevant date in deciding the amount to be paid as interim compensation.[118]

That one limb of litigation in motor vehicle cases turns on the question of retrospectivity is evident. The conflict between an interpretation which limits compensation received on a no fault basis and the beneficial nature of the legislation cannot be wished away. The Kerala High Court has an explanation that the "delay in payment is being compensated by awarding interest at an appropriate rate".[119] The issue requires the attention of the Supreme Court to consider and decide on competing concerns.

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104 For an example of inordinate delay, see, *K.Surappa v. V.Venkatesha Reddy* AIR 1996 Kar 258.
105 *United India Insurance Co. Ltd. v. Padmavathy* 1990 ACJ 751 (Ker) and *New India Assurance Co Ltd. v. Thankam* 1995 ACJ 440 (Ker); see U.Ramanathan, "Law of Torts" in 1995 *ASIL* 447 at 461.
106 *General Insurance Co. Ltd. v. Murugan* 1995 ACJ 164 (Ker).
107 *Oriental Insurance Co. Ltd. v. Sheela Ratnan* 1996 ACJ 1298.
108 1996 ACJ 57 at 61.
109 Ibid.
110 Id. at 62.
111 Supra note 107.
112 *New India Assurance Co. Ltd. v. Salapuriappa* (1996) 2 Andh LT 330. This decision, and *Sheela Ratnan* supra note 107 drew support from *R.L.Gupta v. Jupiter General Insurance Co.* (1990) 1 SCC 356.
113 *United India Insurance Co. Ltd. v. Girish Devprasad Trivedi* 1996 Guj LH 170.
114 *Govind Das v. Yaqub Khan* 1996 ACJ 414.
115 *Divisional Manager, New India Assurance Co. Ltd. v. Nandara Bawa* AIR 1996 Ori 54.
116 *Anand Ramakrishna Raikar v. Raghunath V. Keny* 1996 ACJ 697.
117 Supra note 87 at 61 quoting *Shivaji Dayanu Patil v. Vatschala Uttam More* AIR 1991 SC 1769.
118 See, for e.g., *Sheela Ratnan* supra note 107 at 1306 and *United India Insurance Co.* supra note 113 at 171 where it was expressly so held. In any event, in all the cases which negatived retrospectivity, the courts awarded no fault compensation as prescribed on the date of the accident.
119 *Sheela Ratnan* supra note 107 at 1310.

Courts have reiterated the dictum that negligence or fault is not relevant to a determination of compensation payable on a no fault basis. In *Raphik Mehbub Pakhali v. Anantkumar Pravinkumar Jajal*,[120] a Single Judge of the Bombay High Court, citing inter alia *Shivaji Dahanu Patil's* case,[121] said:[122]

> One has to only ascertain as to whether (i) the accident has arisen out of the use of the motor vehicle, (ii) the said accident has resulted in a permanent disablement of the person who is making the claim or the death of a person whose legal representatives are making the claim and (iii) the claim is made against the owner and insurer of the motor vehicle involved in the accident. Once these three factors are established, prima facie, … the claimant is entitled to succeed in an application under Section 140 of the Motor Vehicles Act."

In this, they expressly disagreed with the view of the Madras High Court in *K.Nandakumar v. Managing Director, Thanthai Periyar Tpt. Corporation.*[123]

A Division Bench of the Kerala High Court, also relying on *Shivaji Dahanu Patil* and differing from *K.Nandakumar*, held:[124] "By a mere reading of the section it can be seen that an enquiry into the question as to who was responsible for the accident or on whose negligence the accident happened is not contemplated at all."

This is a reading that has found favour with the Supreme Court when it reversed the decision of the Madras High Court in *K.Nandakumar v. Managing Director, Thanthai Periyar Tpt. Corporation*.[125] Setting out the import of Section 92-A of the Motor Vehicle Act 1939, which preceded Section 140 of the 1988 Act, the court found that the section casts an "absolute liability" on the owner of the vehicle. The claimant, the court said, is not required to plead or establish that the death or disablement was caused by any wrongful act, neglect or default of the victim. And "the quantum of compensation is not to be diminished even if the person who had died or suffered permanent disablement bore some responsibility for his death or disablement."[126] While so holding, the court distinguished *Gujarat SRTC v. Ramanbhai Prabhatbhai*[127] and *Minu B.Mehta v. Balkrishna Ramchandra Nayan*[128] the last of which was rendered even before the no fault provision was introduced into the statute.

In *Munshiram D.Anand v. Pravinsinh Prabhatsinh,*[129] it was held that the dismissal of a claim petition — in this case, it was barred by limitation — would not disentitle the claimant from receiving the interim compensation based on the no fault principle.

Disbursement

The guidelines for disbursement as set out in *General Manager, Kerala SRTC v. Susamma Thomas*[130] is now well entrenched in accident compensation law.[131]

In *Lilaben Udesing Gohel*,[132] the Supreme Court was called upon to resolve the conflict that had arisen when a Full Bench of the Gujarat High Court, in *New India Assurance Co. Ltd. v. Kamlaben*,[133] answered a reference, rephrasing the question to ask: "whether compensation amount should be paid in lump sum or by periodical instalments." After referring to *Muljibhai Ajarambhai Harijan v. United India Insurance Co. Ltd.*,[134] the Full Bench had given a set of directions which were somewhat at variance with *Muljibhai*. This included a clause that

120 1996 ACJ 356.
121 Supra note 117 .
122 Supra note 120 at 360.
123 1992 ACJ 1095 (Mad).
124 *New India Assurance Co. Ltd. v. Leela* 1996 ACJ 1246 at 1249 (Ker). See also *Ramachandran Nair v. Vimala* 1996 ACJ 308 (Ker).
125 (1996) 2 SCC 736.
126 Id. at 737.
127 (1987) 3 SCC 234.
128 (1977) 2 SCC 441.
129 (1996) 1 Guj LH 513.
130 (1994) 2 SCC 176.
131 See, for e.g., *Lilaben Udesing Gohel v. Oriental Insurance Co. Ltd.* (1996) 3 SCC 608 and *New India Assurance Co. Ltd. v. Pedada Prabhavathi* (1996) 4 Andh LT 449.
132 Ibid.
133 (1993) 1 Guj LH 961.
134 (1982) 1 Guj LR 756.

periodical payments of compensation be entrusted to the insurance company which could, in turn, make arrangements with the General Insurance Company of India for the payment of annuities or periodical instalments.

When the matter was in the Supreme Court, a Five Judge Bench of the Gujarat High Court in *Jayant Ambalal Parmar v. Gujarat SRTC*[135] had found that there were irreconcilable conflicts between the guidelines in *UCC v. Union of India*,[136] which had adopted the *Muljibhai* guidelines except for the clause regarding compensation to literate persons, as also *Susamma Thomas* which reiterated the *UCC* guidelines, and the *Kamlaben* decision,[137] and concluded that the Supreme Court decision held the field.

Apart from endorsing the *Jayantilal* decision, the Supreme Court also found that there were "many operational difficulties" which would anyway make involvement of the insurance companies unworkable.[138] Restating its approval of the *Muljibhai* guidelines, the Supreme Court observed that if any loopholes were to appear while implementing these guidelines, "they can be plugged consistently with the guidelines".[139] The court to the guidelines to the effect that "when the amount is invested in a fixed deposit, the bank must invariable be directed to affix a note on the fixed deposit receipt that no loan or advance should be granted on the strength of the said FDR without the express permission of the court/tribunal which ordered the deposit. This will eliminate the practice of taking loans which may be up to 80 per cent of the amount invested and thereby defeating the very purpose of the order."[140]

In parting, the Supreme Court observed, while the *Muljibhai* decision had been approved and applied by the court in *UCC* and *Susamma Thomas*, in many MACTS, some High Courts, and Lok Adalats or Lok Nyayalayas where the matter was settled out of court, these guidelines were being overlooked. "We would like to make it absolutely clear that in all cases in which compensation is awarded for injury caused in a motor accident, whether by way of adjudication or agreement between the parties, the court/tribunal must apply these guidelines."[141]

The court's endorsement of the guidelines was again witnessed in *Legal Aid and Advice Centre v. State of Tamil Nadu*.[142] Rule 20 of the Motor Vehicles Tamil Nadu Rules 1989 framed by the Government of Tamil Nadu, the Supreme Court found, "contains certain very salutary provisions designed to ensure that the compensation paid in motor vehicle accidents claims really reaches the claimants". It was also in consonance with the guidelines in *Muljibhai* and *Susamma Thomas*. Yet, the government had published a draft amendment proposing to omit certain of the clauses in Rule 20 which would be "ill-advised and militate against the laudable object uderlying Rule 20 as originally framed".[143] In an unusual, preemptive order, the Supreme Court said: "Since the rule as originally framed is in consonance with the guidelines approved by this court, we are sure that the Tamil Nadu government will not finalise the said "(proposed) amendments …." And went further to suggest: "In case the said amendments are already effected, the Tamil Nadu Government shall consider their repeal and restoration of the original Rule 20."[144] This unusual intervention stands testimony to the court's commitment to the *Susamma Thomas* guidelines.

Though *Susamma Thomas* and, more recently, *Lilaben*, were about motor vehicle accident cases, *New India Assurance Co. Ltd. v. Gangaiah*[145] provides an instance of the cross-fertilisation between motor vehicle and workmen's compensation law. In this case, a Single Judge of the Andhra Pradesh High Court considered the *Susamma Thomas* guidelines "equally applicable to the cases of compensation awarded under the Workmen's Compensation Act."[146]

While the guidelines, generally, do not encourage withdrawal of the lump sum but only of the interest, there is a discretion vested with the court or tribunal to exercise its discretion to permit such withdrawal. As the Single Judge of the Andhra Pradesh High Court said in *A.Munuswamy Naidu v. J.Ananda*,[147] "[h[ad the apex court

135 (1994) 2 SCC 176.
136 (1991) 4 SCC 584.
137 Supra note 133.
138 See also, infra, in the section on Insurance.
139 Supra note 131 at 618.
140 Ibid.
141 Id. at 619.
142 (1996) 7 SCC 137.
143 Id. at 138.
144 Ibid.
145 (1996) 3 Andh LT 699.
146 Id. at 701.
147 (1996) 1 Andh LT 973: 1996 AIHC 3752.

desired that money to be paid to the claimants only on completion of certain period, it would have said so".[148] In this case, an injured person of about 64 years had made an application for withdrawing the entire amount for undergoing major treatment. "The life expectancy of a person is uncertain," said the court. "The petitioner who is aged 64 years sought permission to withdraw the entire amount for medical treatment. In such a situation, the Tribunal ought to have permitted the petitioner to withdraw the money." And added: "Any amount of delay on the part of the courts in granting such relief may lead to causing further anxiety in the minds of the persons who are already victims of circumstances."[149]

A possible explanation for such delay was hazarded in *Pachari Eswaramma v. APSRTC*,[150] where a Single Judge adverted to a practice where, "whenever amounts are deposited by the insurance companies concerned, pursuant to awards passed by the Tribunals, when an application is filed by the claimants seeking to withdraw certain amounts from out of the said deposits, the Tribunals are issuing notices to the counsel for the insurance companies though no appeal is preferred by the insurance companies against the said awards."[151] Acknowledging the frustration that this cause to persons in genuine need, the court directed that the Tribunal "shall take upon itself the task of examining the genuineness of such claim and pass appropriate orders on merits".[152]

Interest

The interest awarded has ranged from 12 per cent[153] to 15 per cent,[154] generally from the date of filing of the petition.

In *New India Assurance Co. Ltd. v. Chand Rani*,[155] a Single Judge of the Patna High Court reduced the interest from 18 per cent to 15 per cent where the Tribunal had ordered penal interest at 18 per cent in case the compensation was paid within two months of the order. The High Court held that such penal interest was beyond the provisions of the Motor Vehicles Act.[156] But in *Yogendra Pal Singh v. MACT, Bijnor*,[157] the Rajasthan High Court not merely reduced the rate of interest on the compensation amount from 14 per cent to 10 per cent but was also "inclined to give some benefit to him by reducing the interest to six per cent" in case the appellant deposited the amount to the Tribunal within three months. If he did not, the interest of 10 per cent would be resurrected.[158] Generally, courts have awarded interest from the date of application for compensation.[159]

Insurance

Among the guidelines set out by the Gujarat High Court in *New India Assurance Co. Ltd. v. Kamlaben*[160] was a direction that the Claims Tribunal should normally direct the insurance company to pay the amount of compensation periodically at the rate of 15 per cent interest per annum, and the principal amount should be directed to be paid to the claimants at the end of 10 to 20 years. The court said:[161]

148 Id. at 976.
149 Ibid.
150 (1996) 1 Andh LT 364.
151 Id. at 365.
152 Ibid.
153 See, for e.g., *K.Nandakumar* supra note 125; *Thangamma Mathew Musariparabil v. Mummidivarapu Venkata Narasimha Rao* 1996 AIHC 732 (AP); *New India Assurance Co. Ltd. v. G.Laxmi* supra note 100. In *Divisional Manager, New India Assurance Co. Ltd. v. Nandana Bawa* AIR 1996 Ori 54, interest was reduced from 18 per cent to 12 per cent.
154 See, for e.g., *Adarsh Pal Singh v. Didar Singh* (1996) 61 Andh LT 75; *Mohan Devi v. Mam Raj* 1996 ACJ 605 (Del); *Manubhai Punamchand Upadhay v. Indian Railways* (1996) 1 Guj LH 347 and *Madan Lal v. Janardan* AIR 1996 Del 143.
155 1996 ACJ 911.
156 Id. at 914. See also, *Oriental Insurance Co. Ltd. v. Sk. Nasiruddin* 1996 ACJ 1220 (Ori).
157 1996 ACJ 625.
158 Id. at 627.
159 See cases at supra notes 153 and 154. See also, *Kamta Prasad* supra note 87 where, having interpreted the provision regarding no fault liability to give the benefit to the victim, interest was awarded at six per cent. See also *Sheela Ratnan* supra note 107 on the part that interest plays in compensating for delay.
160 Supra note 133.
161 Quoted at id. 612.

(ii-a) It would be open to the insurance company to make the necessary arrangements through the GIC of India for making payment of annuity or periodical instalments as per the directions of the MACT.

(iii) If the insurance company concerned or the GIC of India is not ready or willing to pay the amount in the aforesaid manner, it may be directed to deposit the amount of compensation with the LIC of India.

The claimants, aggrieved by the directions, challenged these directions contending inter alia that, in the first palce, insurance companies having contested the claim petition were likely to have lost the confidence of the claimants. Secondly, "the nationalised status of the insurance company may or may not continue in future when it may become difficult to assume that the corpus can be safely left with them."[162]

Though the High Court had recorded that the counsel for the LIC had agreed that the large network of the LIC could be employed in disbursing annuities,[163] before the Supreme Court "both the GIC and the LIC expressed their inability to work out and operate the annuity scheme proposed" by the High Court, or to grant the interest rate of 15 per cent. They also pleaded "various operational difficulties" and said that they found the "scheme is unworkable and fraught with insurmountable difficulties".[164]

This reliance on insurance companies to perform the task of operating as a part of the social welfare apparatus calls to be recognised. Their expression of the inability is a statement appears to be an assertion of the industry's business concerns.[165] The part that nationalisation of the insurance industry has played in making it an welfare arm of the state, and secured by the state, is evident in the concern of the claimants that de-nationalisation may erode the certainty of returns on investments.

The onus that is placed on insurance companies not act like any other private litigant is also seen in *Oriental Insurance Co. Ltd. v. Hansi*,[166] where a Single Judge of the Rajasthan High Court upbraided the insurance company for dragging the claimants, who were the widow and minor son of the victim, "by way of this frivolous revision petition", and directed that the insurance company pay Rs 2500 as "special cost"to the claimants.

On the other hand, while the Motor Vehicles Act relies on insurance to take care of the victim of accidents, courts have also taken positions where they have refused to fasten liability on insurance companies unless the statute or the insurance contract specifically requires the company to pay;[167] or have denied the existence of liability while holding that a person with a learner's licence cannot be regarded as a duly authorised driver.[168]

Heads of damages

In *Rattan Lal Mehta v. Rajinder* Kapoor,[169] a Division Bench of the Delhi High Court has, after an extensive discussion of the law in India and in other jurisdictions, worked out principles to be followed in determining compensation. They are summarised as follows:[170]

(i) Full and fair compensation has to be paid for non-pecuniary damages and not as a matter of solace.

(ii) Victims who are unconcious be awarded for loss of amenities and loss of expectation of life.

(iii) Victims who are unconscious be also awarded for pain and suffering ….

162 Id. at 615.
163 See id. at 613.
164 Id. at 618.
165 See also, for another instance of the refusal by insurance companies to take risk that may threaten their business, the Statement of Objects and Reasons of the Public Liability Insurance (Amendment) Act 1992.
166 1996 ACJ 571.
167 *Pradeep Rao v. Manoj Kumar Aggarwal* 1996 ACJ 898 (MP) where the insurance company was not required to pay under the provision for no fault liability. See also, *Divisional Manager, Oriental Insurance Co. Ltd. v. Zarina Bee* (1996) 4 Andh LT 1088 which was a case under the Workmen's Compensation Act.
168 *New India Assurance Co. Ltd. v. Mandan MadhavTamb* (1996) 2 SCC 328. See also *Sohan Lal Passi v. P.Sesh Reddy* (1996) 5 SCC 21, where the court held that the act had been authorised but was performed in a mode which was not proper; this would not absolve the insurance company of liability.
169 1996 ACJ 372.
170 Id. at 372-73, headnote. See also *Chander Kumar Pahwa v. State of Haryana* 1996 AIHC 1668 at 1669.

(iv) Awards already made for similar injuries may be taken into consideration but it would be necessary to increase the figure keeping in mind the effect of inflation …

(v) Both positive and negative factors may be taken into account — extent to which the good things of life were taken away (loss of amenities) and the positive infliction of unpleasant things (pain and suffering).

(vi) Cases of injuries be classified into four major categories:

(a) total wreck,

(b) partial wreck,

(c) where limbs or eyes and other specific parts of the body are lost, and

(d) small injuries.

Brackets or range for non-pecuniary damages may be mde in conventional figues keeping pace with the times and taking into account inflation, advances in science, medicine and rehabilitation.

(vii) Compensation higher under one subhead or lower under another, than claimed, may be granted so long as the award does not exceed the total amount claimed.

(viii) Separate itemisation under various subheads, like pain and suffering, loss of amenities of life, disfigurement and discomfort or inconvenience is necessary.

(ix) Non-pecuniary damages cannot be kept low because pecuniary damages are high.

(x) There can generally be no discrimination between rich and poor victims for evaluating non-pecuniary damages.

Dependancy

While the income replacement principle is used to quantify the compensation payable, the factor of dependancy is introduced into the calculation, invariably to limit the quantum. Dependancy may be reflected, for, instance, in the mulitiplier selected by the court.[171] The court may take into account actual dependancy,[172] or it may ntoionally accept dependancy of, for instance, the parents of the victim while apportioning compensation.[173]

In computing compensation, when a young, unmarried victim dies, courts may presume a reduced contribution after the marriage of the victim to the claimants.In *Rajasthan SRTC v. Niranjanlal Yadav*,[174] the court accepted the argument that dependancy of the parents ceases on the marriage of a Hindu girl, and said:[175]

> The normal presumption is that a Hindu girl gets married at the appropriate age about 20 or thereafter and the parents are not recipients of the dependency allowance. Hence, it can be said that generally after a daughter is married and sent to her matrimonial home, she did not contribute anything towards the expenses of her parents. On the other hand, the parents are required to spend on their daughter."

171 See, for e.g., *D.Nagappa v. General Manager, KSRTC* 1996 ACJ 921 at 922 (Kar).

172 See, for e.g., *Jeeva Transport Corporation Ltd. v. N.Subramani* 1996 ACJ 152 where a married daughter who was actually dependent on her father was held to be entitled to receive compensation. See also, *Divisional Manager, New India Assurance Co. Ltd. v. Sankar Tarai* 1996 ACJ 579 under the Workmen's Compensation Act, where a minor sister, actually dependent, was held entitled to compensation. Contrast *State of Punjab v. Parminder Singh* 1996 ACJ 1007 where the excluded a claimant stating that she was "entitled to get any compensation as she is a married daughter".

173 *MPSRTC v. Audesh Kumari* 1996 ACJ 4 at 6 where it was held that even if they were not wholly dependent, the parents who had lost their only son could not be deprived of compensation.

174 1996 AIHC 5354.

175 Id. at 5360.

With that, the compensation amount was reduced from Rs 1,92,000 to Rs 80,000.

Courts have held variously on whether brothers and sisters are[176] or are not[177] dependants or legal representatives of the victim.

The factor of dependancy may also manifest in the apportionment of compensation. In *Manubhai Punamchand Upadhay*[178] the court directed that 30 per cent be paid to the victim's father and 70 per cent to his mother.

VII. NHRC

The statewise statement of category of cases admitted for disposal in the National Human Rights Commission (NHRC) from April 1, 1995 to March 31, 1996 records 444 cases of death in custody, including 136 in police custody and 308 in judicial custody; 39 cases of disappearances; 112 cases of illegal detention; 1,115 cases of "other police excesses" which includes torture; 19 cases of terrorist/naxalite violations and 35 cases of atrocities on scheduled castes and scheduled tribes by others.[179] Punjab still leads in disappearances, with 14 cases including the cases of Jhirmal Singh[180] and Jaswant Singh Kalra,[181] a human rights defender who was himself investigating unidentified bodies when he was abducted. The record of Bihar (8+67[182]), Andhra Pradesh (10+45), West Bengal (14+37, Uttar Pradesh (13+24), Maharashtra (9+25) and Delhi (7+33) in the matter of custodial deaths is devastating. The figure of 443 from UP, 107 in Delhi, 92 in Assam, 90 in Rajasthan and 65 in Punjab of "other police excesses" which benign phrase includes custodial violence short of death, is a revealing statistic.

The NHRC appears to have altered its strategy in dealing with deterring custodial violence. From its earlier emphasis on compensating the victim, and in the process giving the state a ticking-off, it has proposed the use of recovery of the compensation amount from the errant police personnel to effect a "quick and appropriate" sensitisation of police personnel and others".[183] In three separate incidents of custodial death in Tamil Nadu, Orissa and Rajasthan, the NHRC suggested such recovery from the offending officials. Tamil Nadu reported that action had been initiated for compensating the next of kin and subsequent recovery from the guilty officials. Orissa was silent on recovery, while the Rajasthan government had agreed to it in principle. "The Commission has applied this principle subsequently in a number of similar cases that were brought before it," it is reported.[184]

The NHRC's attitude to the question of compensation to victims of rape is different from that of the court in *Mohanlal Amarji Marwadi*[185]. After the District and Sessions Judge had acquitted persons accused of having raped Bhanwari Devi, a *saathin* in Rajasthan, the National Commission for Women (NCW) wrote to the NHRC indicating that "they had taken up the case with the State Government and the Government of India, and that their intervention had resulted in the sanction by the Prime Minister of a "token amount of Rs 10,000 as relief to the victim", and the investigation had been entrusted to the CBI. (Interestingly, the NCW also informed the NHRC that it had provided financial support to the women's organisation which took up the litigation on behalf of Bhanwari Devi.) This the NHRC recounts while reporting that it had recommended to the Rajasthan Government to file an appeal from the acquittal, since the NHRC was of the view that the "acquittal was wrong and against the facts and settled position of law".[186]

In a departure from the rule of paying compensation in a lump sum, the NHRC reports that it had recommended that compensation of Rs 1 lakh be paid to the widow of Harjinder Singh, "and also a subsistence allowance of Rs 1,500 per month during her lifetime".[187] Harjinder Singh was killed when a constable fired in the air to disperse

176 See, for e.g., *Mulgiri v. Bhagwan Singh* 1996 ACJ 828 at 830 (MP) and *Kumudini Das* supra note 79at 34.
177 See, for e.g., *D.Nagappa v. G.M., KSRTC* 1996 ACJ 921 at 922 and *Laxmi Ram* supra note 80.
178 Supra note 154.
179 *Annual Report 1995-96 National Human Rights Commission* at 91.
180 Id. at 65.
181 Id. at 9.
182 Police custody+ Judicial custody.
183 Supra note 179 at 50.
184 Ibid.
185 Supra note 41.
186 Supra note 179 at 54-55.
187 Id. at 61.

an unruly mob during panchayat elections. “Since the firing was intended to be in air, the Commission observed thatbthe killing of Harjinder Singh was a clear case of gross negligence.”[188]

The Chakma refugees in Arunachal Pradesh,[189] riot victims in Gujarat,[190] seven teenagers stripped in police lock-up in Kerala[191] constitute some illustrations of the NHRC’s concern. There are indications in this report of aspirations to bring Indian law and practice in conformity with international standards as exist in international treaties and conventions. It will be instructive to observe the impact the NHRC has on accountability of offenders and the rights of victims in matters of constitutional tort.

VIII. MISCELLANEOUS

In *Shiv Sagar Tiwari v. Union of India*,[192] exemplary damages of Rs 60 lakhs was imposed on a Minister for allotting shops and stalls to her relatives, employees and domestic servant, without following any policy or criteria. Her exercise of discretion was held to be wholly arbitrary, mala fide and unconstitutional. Tn this, the court followed its own decision in *Common Cause v. Union of India*,[193] where a Minister was directed to pay Rs 50 lakhs in exemplary damages for arbitrary allotment of petrol pumps. In both cases, the court saw the government “by the people”had to be compensated for the losses sustained by the arbitrariness displayed.

Dr.H.Mukherjee v. S.K.Bhargava[194] was a case of harassment of a subordinate by his superior. Affirming the order of the Bombay High Court,[195] the Supreme Court said: “This is a pure action for damages for deliberately harassing the plaintiff by passing several vindictive and mala fide orders and proceedings and also by fabricating official records.” This, the court said, would not be a matter within the jurisdiction of the Administrative Tribunal, as was the contention, and a suit for damages would lie in the civil court being as it was in the realm of tort.

Finding a lack of bona fides where a man had been compulsorily retired, the Supreme Court awarded him Rs 10,000, recoverable by the state from the officer who had made the offending remarks, which had led to the compulsory retirement, without due diligence.[196]

The right to speedy trial was cited in a case where there was a period of 21 years before the accused was discharged, in proceedings which was characterised by “total inaction and casual approach” resulting in “mental, physical and financial harassment” for no fault of the accused. Costs of Rs 15,000 was ordered to be paid.[197]

Allegations of adultery in a divorce petition led a court to award Rs 10,000 as ëxemplary costs” to the woman.[198]

Where a Training Instructor assaulted a trainee in military service, and he died of the injury caused, the principle of vicarious liability was applied to make the Union of India pay compensation.[199]

When a forest/plantation was razed to the ground as being located in a reserved forest, and this was done even while a stay order was in existence, the Calcutta High Court ordered compensation of Rs 1 lakh.[200]

Nanik Sewa v. State of Orissa[201] was a letter petition seeking a direction from the court that the death of a boy who died while agitating against the implementation of the Mandal Commission’s recommendations be adequately compensated. While some families had received Rs 25,000, the letter said, others had received Rs 1 lakh. The case

188 Ibid.
189 Ibid.
190 Id. at 67.
191 Id. at 56.
192 (1996) 6 SCC 599.
193 (1996) 6 SCC 593.
194 (1996) 4 SCC 542.
195 See, *Dr.H.Mukherjee v. Swadesh Kumar Bhargava* 1994 Mah LJ 1212 and U.Ramanathan, “Law of Torts” in 1994 *ASIL* 485 at 512.
196 *Sukhdeo v. Commissioner, Amravati Division* (1996) 5 SCC 103.
197 *Smita Amabalal Patel v. Additional Director of Enforcement Directorate* 1996 Cri LJ 32.
198 *Rajee v. Baburao* AIR 1996 Mad 262.
199 *Ammukutty Amma v. Union of India* 1996 ACJ 1239 (Bom).
200 *Sushil Dhali v. Andaman & Nicobar Administration* 1996 AIHC 794.
201 AIR 1996 Ori 131.

was resolved with the government submitting that it had made a decision on principle to maintain parity, and the family of each person who had lost his life would be paid Rs 1 lakh.

At issue in *Darshan Lal v. Union of India*[202] was the stoppage of payment of relief assistance of Rs 1,000 per month to a migrant from Punjab who had had to relocate because of extremist violence. Finding that the fact of the petitioner having so migrated from Punjab to Delhi stood unrebutted, the court affirmed his right to receive assistance.

IX. CONCLUSION

Delay in the determination, and disbursement, of compensation continues to undermine its capacity to reduce the secondary costs of accidents and loss, as also its rehabilitative potential.

There have been a large number of cases, from many High Courts, where the relevant date for determining the amount that should be paid as no fault liability has been questioned: whether it should be the date of accident or the date when the compensation is ordered. The issue has been framed in terms of retrospectivity and prospectivity of amendments which have enhanced the amounts. It might be time for the Supreme Court to consider the various views and decide the law.

The law on culpable inaction continues to be unravelled by the courts. While *Inder Puri*[203] has been qualified by the Jammu and Kashmir High Court in *State of Jammu and Kashmir v. M/s Jeet General Store*,[204] even this court has not negatived the relevance of this jurisdiction. The relationship between ex gratia and right to be compensated where involuntary victims are concerned is not yet identifiable as principles that may be applied generally. It may be expected that judicial principle will indeed emerge with continued engagement with these issues.

202 AIR 1996 Del 53.
203 Supra note 30.
204 Supra note 31.