

Tortious Liability Of State: A New Judicial Trend In India

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Abstracts: The objective of this paper is to trace the journey of tortious liability of state in India. It evaluates current trends in recognizing liability and awarding compensation to the citizens especially by the judiciary in the event of legal injury. The scope of the paper is limited to assessing the extent of tortious liability before the Constitution and the gradual changes in judicial approach in post Constitutional era. The author proceeds with the hypotheses that the concept of tortious liability has undergone a major change and new dimensions of liability have been explored by the courts to afford remedies and compensate the victims of state action. The issues examined in the paper are what was the nature of State liability before the Constitution came into force? What are the requirements of liability in a modern Welfare State? What was the nature of liability after Constitution came into force? What is the nature of liability in case of violation of Fundamental Rights? What are the new techniques developed by the Courts in granting Remedies etc.

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I. Introduction:

Tortious Liability arises from the breach of a duty primarily fixed by the law: this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.¹ The torts committed by individuals against another were recognized in common law and the maxim '*Ubi Jus Ibi Remedium*' propelled the growth of the Law of Torts like never before. Under the Roman law, the state was not liable in torts towards its subjects, because it was a Sovereign. It was regarded as an attribute of Sovereignty that a State could not be sued in its own courts without its consent. Similarly, in England, the Crown enjoyed immunity from tortious liability and the maxim '*The King can do no Wrong*' prevailed. Neither a wrong could be imputed to the King or the Government nor could it authorize any wrong. In the post constitutional era, the advent of Welfare State philosophy led to the all pervading State intervention, reducing the distinction between public and private functions. The welfare measures and directives multiplied and the potentiality to individual injury increased. The State was for all intents and purposes a corporation aggregate thus making it a juristic person acting through its officials and agents suable under law. The courts created a new public law remedy which made the State liable for wrongs inflicted in the course of exercise of non-sovereign functions. The immunity was restricted to the traditional functions of

the State like legislation, administration of justice, war, making of treaties and crime prevention.

The question of State Liability in torts has assumed great importance today. The very concept of welfare state envisages that state takes care of the citizens and establishes a just relation between the rights of the individual and the responsibilities of the State. While these responsibilities have increased, the increase in State activities has led to a greater impact on the citizens. Article 12 of the Indian Constitution defines 'State'. According to this article, State means the Union, the State government and the Local Authorities. Thus the state is both the provider and protector. The vicarious liability of state for the acts of its employees, misuse of power by them or their negligence assumes significance particularly in the context of expanding scope of fundamental and legal rights. This situation requires an adequate mechanism for determination of State liability and awarding compensation to the victim in the instances of wrongs committed against them. The liberalization of the law in England through the Crown Proceedings Act 1947 and in U.S.A. concretization of liability by the Tort Claims Act, 1946 could not be ignored in this regard.²

II. Tortious Liability of State in India:

Article 300 of the Constitution lays down the tortious liability of Indian government. It reads: "The government of India may sue or be sued by the name of Union of India and the Government of a State may

¹ Rogers, W. V. H.: Winfield and Jolowicz on Tort.: 16th Ed. Sweet and Maxwell, London, 2002 p.4

² It is however submitted that the liability of State in USA is more restricted than that of United Kingdom.

sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.” This is however subject to any law made by the Parliament or a State Legislature.

Thus this article makes the liability co-terminus with that of East India Company because the liability of the Dominion of India before the Constitution was same as that of Secretary of State for India under section 176 of Government of India Act 1935 and the Government of India Act 1915 made the liability of the Secretary of State for India same as that of East India Company prior to Government of India Act 1858. Thus the position of the tortious liability was frozen at 1858³. The company ruled in a dual capacity- Commercial and Sovereign. When it began operations in India, the company was purely a mercantile body. Gradually, it acquired territories and also the sovereign powers to make war and peace and raise armies. Since it was an autonomous corporation not being the servant or agent of the British Crown, the immunity enjoyed by the Crown was never extended to it.⁴ In its sovereign capacity, it was exempt from any tortious liability. In line with this principle after independence, the immunity of the State continued in some respects i.e. **sovereign powers**.

The classic case of *Peninsular and Oriental Steam Navigation Company V. Secretary of State*⁵ decided in pre-independence India highlights this aspect. In this case the P & O Company made a claim for damages for injuries caused to its horse by the negligence of some workmen at the Government Kidarpur Dockyard. The Bombay High Court ruled that the Secretary of State would be liable for damages if the negligence of the servants was such as would render an ordinary employer liable. The liability of the Company could arise only in respect of its trading functions in exercise of non- sovereign powers. The maintenance of dockyard could be done by a private person also and hence was a non- sovereign function. The learned judges opined that since the benefits of the Crown never extended to the Company, it could not avail sovereign immunity, though it exercised some sovereign functions.

³ Jain, M.P., ‘Indian Constitutional Law’, Wadhwa Publications, Nagpur 5th ed. 2004 pp. 1783

⁴ Supra, note 3

⁵ 5 Bom HCR App. 1

The rule perpetrated by this case was that in exercise of sovereign powers, the State shall not be liable. Sovereign functions meant those activities which only the State could undertake; private parties could not take up those activities. e.g Railways, Armed Forces, Law and Order and the like. This rule has been subject to various interpretations and in some cases the courts have followed it literally while in some the judges have declined to include certain functions as sovereign, even though only the State could perform them.

In *Secretary of State V. Moment*⁶ the Privy Council held that a suit would lie against the government for wrongful interference with plaintiff’s property as such a suit would have lain against the East India Company under the ruling of P & O case.

In the case of *Secretary of State V. Hari Bhanji*⁷, salt was being transported from Bombay to Madras ports. During transit the duty payable on salt was raised and the merchant was asked to pay the enhanced duty at destination. The amount was paid under protest and later on a suit was filed to recover the amount. The Madras High Court had two issues to consider.

1) Whether the State i.e. the defendant was a sovereign and could be sued in its own courts

2) What was the nature of the act against which the relief was being claimed.

The Court held that since the immunity enjoyed by the Crown did not extend to East India Company, the company was liable. Second the immunity existed only for the ‘Acts of State’ strictly so called. It was also said that the distinction between sovereign and non- sovereign functions was not a well founded one.

There is a difference in defence of “Act of State” and the defence of “Sovereign Immunity”. The former flows from the nature of power exercised by the State for which no action lies in civil court whereas the latter was developed on the divine right of Kings.⁸

The changes in the sovereign immunity in England via the Crown Proceedings Act 1947 were not extended to India. During the framing of the Indian Constitution, the question of to what extent, if any, was the Union of India or the State Governments liable in tort was left for future legislation. *The Indian Law Commission in its 1st Report on Liability of State in Tort in 1956* had suggested such a law due to the changed scenario and Constitutional provisions. But such legislation has not been enacted by the Parliament till now. It is wondered why the Parliament has not enacted such a legislation of public

⁶ 40 IA 48

⁷ 1882 5 Mad 273

⁸ De D. J.: *The Constitution of India*, Vol.2 Asian Law House, Hyderabad 2002 pp 2106

interest. The other line of cases has proceeded on the lines of distinction between sovereign and non-sovereign functions.

In *Union of India V. Harbans Singh*⁹ it was held that no damages could be recovered when a person was killed by rash and negligent driving of a military truck by a military driver on duty because it was a sovereign function.

In *Secretary of State V. Cockraft*¹⁰ the plaintiff was injured by the negligent leaving of a heap of gravel on a military road over which he was walking. The suit against the government was not maintainable because military and the maintenance of military roads were a sovereign and not a private function.

III. The Doctrine of Sovereign Immunity:

The distinction between sovereign and non-sovereign functions was made by Barnes Peacock C.J. in P & O case. The latter are those which might be carried on by the private individuals too, not having sovereign power. Thus following the P & O case, the State was not made liable for torts committed by its servants in exercise of sovereign functions.

Vidyawati Case

However, there was a different stand of the court in *State of Rajasthan V. Vidyawati*¹¹. It was the first major case coming before the Supreme Court after independence.

A pedestrian, the husband of Vidyawati, was fatally knocked down by a government jeep owned and controlled by the State of Rajasthan for the official use of the Collector. The driver was returning to the residence of the Collector after having the jeep repaired from the workshop. It was found that the driver was rash and negligent in driving. The respondent sued the government for compensation. The State claimed immunity on the ground that the act was committed in exercise of sovereign functions. The court however took the view that the negligent act in question was not connected to sovereign functions at all. The liability of State existed for damages in respect of tortious acts of its employees within the course of employment was the same as any other employer. The court also said that when the employment was referable to sovereign functions, the area must be strictly determined. Before such a plea is upheld, the court must always find that the impugned act was committed in the course of an undertaking which is referable to exercise of sovereign power.

The court supported its decision that the immunity of the Crown from liability was based on

the feudalistic principle that 'The King can do no Wrong'. It said "Now that we have, by our Constitution, established a Republican form of government and one of the objectives is to establish a socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification in principle, or public interest that the State should not be held liable vicariously for the tortious acts of its servant."

A careful reading of the decision in Vidyawati case suggests that though the court did make some observations broadening the scope of tortious liability of the State from the position in P & O case, but it did not altogether overrule the test of sovereign functions nor did it specifically say that the function in the present case was non-sovereign.

*Kasturilal V. State of Uttar Pradesh*¹²

In this case, there was a U turn taken by the Court in holding the State not liable instead of taking the thread further from Vidyawati case. The Court regarded maintenance of law and order as a sovereign function and no remedy would lie against the police powers. The facts of the case were: one Kasturilal was apprehended with some gold and silver believed by the police to be acquired illegally. After inquiry, the integrity of Kasturilal was established. The police kept the gold in the malkhana at the police station, because the government treasury was closed. The Head Constable at the police station made away with the booty and fled to Pakistan. On release, he requested his property be returned. The State returned his silver but not gold, and gross negligence was found on the part of State authorities in keeping gold in safer custody.

The court observed that the power to arrest a person, to conduct search on him and seize property were sovereign functions because they were conferred on by a statute on specific officers. If the claim was based on an act committed by the employee during the course of his employment and if employment was a category which could claim the special characteristic of sovereign power, no relief would be available.

A Critique of Kasturilal Case

The judgement in Kasturilal case is flawed and according to eminent jurist H.M. Seervai, the Court failed to distinguish between an Act of State and an act done or purporting to be done under the authority of Municipal Law, overlooking the distinction made in P and O case in sovereign functions and trading functions; thus the judgement in Kasturilal case is wrong and per incurium. The court said that the remedy in this case lay with the Legislature,

⁹ AIR 1959 Punj 39

¹⁰ AIR 1915 Mad 993

¹¹ AIR 1962 SC933

¹² AIR 1965SC 1039

erroneously taking statutory power as sovereign power and failing to realize that sovereign immunity is available only in case of a bonafide exercise of power and not in wrongful or malafide exercise of power. It disregarded the basic assumption of tort law that whenever there is a legal injury, there has to be a remedy. The malafide act of the constable gave rise to a valid cause of action in the law of torts and court ought to have advanced a remedy. The sovereign power does not include making away with the property of the citizens. The State can under no law be empowered to commit offences against the citizens it is obligated to protect from injuries. This decision ignores the liability arising on account of bailment of the goods with the police, till the guilt of the person is established.¹³ No law says that the property taken in custody becomes the State property because as a rule, the State has to return it, as in the case of deposition of goods with Railways or Airport authorities or even in a Public Sector Bank. The depositor will collect it as soon as the purpose is served. The judgement has been regarded as illogical and self-contradictory and needs to be reconsidered by the court under its powers of **Judicial Review**. In Vidyawati case the courts easily figured out that the activity cannot be said to be “in discharge of statutory functions which are referable to, and ultimately based on the delegation of the sovereign powers of the State to a public servant.”¹⁴

The law had already been settled in respect of distinction between sovereign and non- sovereign functions when the Court decided to reverse the movement of law to give relief to State for an offence of misappropriation. It also said that “the act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in discussing questions of the state’s liability arising from tortious acts committed by public servants.”¹⁵ Thus the court added another qualification to State Liability by referring to statutory powers.

“Had the court pursued the Vidyawati approach, it would have brought the law in tune with the times as has been done in most if the advanced countries and would have also relieved it from the shackles of common law doctrine of sovereign immunity and brought it in line with most of the continental countries where the State is not considered any better than a corporation for the purpose of torts committed

by its servants.”¹⁶ Noted jurist M.P. Jain also considers the between sovereign and non- sovereign functions as extremely outmoded and antiquated and unjust to people. He further says that according to the theory of English law, there can be no ‘act of state’ between the State and its subjects.¹⁷ After the pronouncement, the state liability bill was introduced in the Parliament, but could never become a law, thus a chance to codify the law of torts relating to state liability was lost.

IV. The Doctrine of Strict Liability in Government Torts:

There is strict liability of State in the case of torts injuring the fundamental rights of the citizens. The fundamental rights form the basic structure and the courts cannot shy away in providing relief in case of their infringement. There is a specific remedy under Article 32 by way of Rights against Constitutional Remedies, which is again a fundamental right. The courts have recognized strict liability in these cases and pronounced far reaching judgements. However, they can be more appropriately discussed in a discussion on Fundamental Rights. The writer would restrict herself here to a discussion only on relevant aspects of strict liability in state action. The ever increasing abuse of power by the public authorities and their arbitrary interference with the life and liberty of the individuals which is a fundamental right under Article 21 of the Constitution, coupled with the new social outlook that places emphasis on individual liberty, has resulted in an approach by the Courts where they consider abuse of public power as violative of the constitutional guarantee. In such cases, the courts have directed State to pay compensation to the victim.

In *Nilabati Behra’s case*¹⁸ J.S. Verma J observed: “.....it may be mentioned straightaway that award of compensation in a proceeding under Article 32 by this court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort.....”. In this case, a person was caught by the police and kept in police custody. His dead body was found on the railway track with multiple injuries the next day. The police concocted a story that he tried to run away from the prison and then committed suicide.

¹³ See *State of Gujarat V. Memon Mohd.* AIR 1967 SC 1885

¹⁴ The court’s observation in *Kasturilal Case.* AIR 1965 SC 1039.

¹⁵ *Ibid.*

¹⁶ Shukla, V.N. :*The Constitution of India*, 10th Ed. Eastern Book Company, Lucknow 2001 p. 742

¹⁷ Jain M.P. : *Indian Constitutional Law*, 5th Ed. Wadhwa and Company, Nagpur, 2004 p. 1790

¹⁸ AIR 1993 SC 1960

The court wanted the inquiry to be conducted by the District Magistrate or through some independent agency. In such circumstances, the burden lay on the State to show how death was caused. The State could not prove its innocence and thus was directed to pay compensation to the tune of Rs. 1.5 lacs as per the trend developed through the case law. The Court showed judicial activism and said that new tools could be evolved to advance remedy to the people who are not equal against the State, especially in case of violation of Fundamental Rights.

In another case, the Supreme Court said that the state run hospitals and medical officers employed therein are duty bound to provide medical assistance to preserve human life. Violation of this duty amounts to violation of Article 21 of the Constitution of India.

In *All India Lawyers Union V. Union of India*¹⁹ a child of municipal school was crushed to death by a vehicle when he was crossing the road to drink water because water was not available in school premises. The court regarded as negligence of school authorities and awarded damages on a writ petition filed under Article 226. Thus the defense of sovereign immunity is not available when the officers of the government are guilty of interfering with the life and liberty of citizens not warranted by law. The State is not only constitutionally but also morally and legally liable to indemnify the wronged person.

The Supreme Court has also introduced the notion of Strict and Absolute Liability in case of an enterprise engaged in hazardous activity in *M.C.Mehta V. Union of India*.²⁰ The Court said that this case is not about the officers of the State, but the principle would be applicable to the non-sovereign functions of the State. This liability is not subject to any of the exceptions under the rule in *Rylands V. Fletcher*²¹. If any industry causes any damage, compensation is to be paid to the victims. "The measure of compensation must be correlated to the magnitude and the capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater the amount of compensation payable by it." In the light of above judgment, it is submitted that the rule of sovereign immunity must also be scrapped and the State must also be compelled to pay compensation in certain circumstances.

The Supreme Court in *Union Carbide Corporation V. Union of India*²² has again said that the measure of damages to be paid by the alleged tort-

feasor as per the nature of the tort involved in the suit has to be correlated to the magnitude and the capacity of the enterprise. The distinction between acts of state and sovereign immunity is irrelevant now because the concept of sovereign and non-sovereign actions is itself diluted. Today, the emphasis is on making the State liable for any tort committed by its servants which injure a citizen violating his rights.

V. The New Trends in Judicial Action:

The new trend in compensations and providing relief in cases depicts the new-fangled interpretation of State liability by the Judiciary. Since there was failure of Parliament action, the courts tried to improve the situation through their pronouncements. They have tried to adjust the archaic law to the realities of modern State and have limited State Immunity by holding more and more functions of the State as non-sovereign.²³ But, still the courts regarded maintenance of law and order as a Sovereign function. The use of lathicharge on an unruly procession by the police was in the ambit of immunity and not justiciable.²⁴ This position needs redress.

In *Satyawati Devi V. Union of India*²⁵ the court held the state liable and said that carrying hockey and basketball teams in an Air Force vehicle cannot be a sovereign function. The test applied by the courts was 'whether it was necessary for the State for the proper discharge of sovereign functions to act through its employees rather than a private agency.'

In *State of M.P. V. Ram Pratap*²⁶ also, the State was held liable for an injury caused by a truck of Public Works Department because the activities of the department were such as could be carried out by a private person also.

Moreover, the banking business run by the State was a non-sovereign function as upheld in *State of U.P. V. Hindustan Lever*²⁷

The court departed from *Kasturilal* case in *N. Nagendra Rao and Co. V. State of A.P.*²⁸ by holding the government of Andhra Pradesh liable for loss caused to appellant by negligent exercise of powers by the State officials under the Essential Commodities Act, 1955. The court retraced the history of state liability in torts in England and India and differentiated between 'acts of state' and 'sovereign acts'. It also clarified that the concept of sovereignty

¹⁹ AIR 1999 Del 120, also see *Khatri V. State of Bihar*, AIR 1981 SC 928 at 1068.

²⁰ 1987 1 SCC 395

²¹ 1868 LR 3 HL 330

²² AIR 1990 SC 273

²³ Ashwin Abhinav: Government Liability in Torts in the 21st Century, AIR Journal, Vol.90 Feb. 2003 p. 28

²⁴ *State of Madhya Pradesh V. Chironjilal* AIR 1981 MP 65

²⁵ AIR 1960 SC 610

²⁶ AIR 1972 MP 219

²⁷ AIR 1972 All 488

²⁸ AIR 1994 SC 2663

has undergone many changes in the last centuries. Sovereignty now vests in the people and not a ruler or invisible state.

The facts of the case were that Nagendra Rao carried on the business of fertilizers and food grains. Huge stocks of his were seized by government authorities. The appellant represented to the State time and again that fertilizers be sold, otherwise they shall become useless. But the authorities did not do so. When the stock was finally released to the appellant, he refused to take delivery because the quality had deteriorated and filed a suit for compensation to recover the price of the stock. Here again, the state had caused loss to the appellant in exercise of statutory authority as in *Kasturilal* case, but the court gave a different decision. It held that the defence of 'acts of state' was not available when there is negligence in discharging duties by the State officials. Incidentally, the court also said that the State is not liable for loss caused by exercise of legislative or executive powers. In some countries, however, like France, sometimes the State is held so liable for loss even during exercise of legislative powers.

"The modern social thinking of progressive society and the judicial approach is to do away with archaic state protection and place the state at par with any other juristic legal entity.....in a welfare state functions of the state are not only the defence of the country or administration of justice for maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non- sovereign powers for which no rational basis survives has largely disappeared."²⁹

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

Two important propositions were given by the court:

1. In modern state, the distinction between sovereign and non sovereign functions does not exist.
2. Barring such functions as administration of justice, and repression of crime etc which are "primary and inalienable" functions of a constitutional government the state cannot claim any immunity.

In *Common Cause, a Registered Society V. Union of India*³⁰ relying heavily on the *Nagendra Rao Case*, the court held that allotment of petrol pumps by a minister could not be treated as 'act of state' and there can be no immunity from action. The court stated that "much of the efficacy of" *Kasturilal* case as a "binding precedent has eroded." Prior to the above decision the court also circumvented *Kasturilal* case and held that the state would be liable for the tortious act of a truck driver engaged in famine relief. Furthermore that the sovereign function of the state must be narrowly and strictly construed. Such a work can be undertaken by private individuals as well, there is nothing peculiar about it so that it might be predicated that the state alone can legitimately undertake such a work.³¹

After the codification of liability in torts under the Consumer Protection Act 1986, Motor Vehicles Act, the Public Insurance Act 1990, Prevention of Food Adulteration Act 1954, Drugs and Cosmetics Act 1940 etc. the liability has been fixed on the violator, be it State or private individuals. Thus the locus of State Liability can be more easily determined in such cases. Aside this, new dimensions of State liability are evolved by the courts from time to time.

VI. A Remarkable Approach in *Chandrima Das* Case:

In *Chairman Railway Board V. Chandrima Das*³² In this case the establishment of Yatri Niwas to provide boarding and lodging to passengers on payment of charges was regarded as a commercial activity of the Union of India and cannot be equated with the exercise of sovereign power. The employees who run the Railways, manage railway stations and Yatri Niwas constitute the government machinery and if they commit tortious act, the government can, subject to satisfaction of other legal requirements be vicariously liable. In the instant case, rape was committed on a foreigner by railway employees while she was staying at the railway Yatri Niwas.

The Supreme Court observed:- "the theory of sovereign power which was propounded in *Kasturilal* case has yielded to new theories and is no longer available in a welfare state. It may be pointed out that the functions of the government in a welfare state is manifold." The distinction between public and private law and the remedies under the two was emphasised. It was held that "where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public

³⁰ AIR 1999 SC 2979

³¹ *Shyam Sunder V. State of Rajasthan* AIR 1974 SC 890

³² AIR 2000 SC 988

²⁹ *Ibid.*

duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law." Thus the scope of tortious liability has been extended to even the cases of rape, which ordinarily is an act of individual volition. It opens up the possibility of development of public law torts which requires different considerations than the private law torts and which is more suitable for State liability in torts. The sovereign area is shrinking and the non sovereign area is expanding through judicial activism. It also leads to the emerging concept of constitutional liability of the State.

VII. Exemplary Damages:

In keeping with the new approach, the courts have granted exemplary damages in certain cases to highlight the abuse of power and holding that the duty of the State was greater and admits no exception as well as to set an example. The trend began with *Rudal Shah case*,³³ where a person was held in jail for a period of fourteen years even after his acquittal. He was deprived of his life and liberty in violation of a procedure established by law. He demanded relief like rehabilitation, reimbursement of expenses which he might incur on medical treatment and compensation for illegal confinement. The Supreme Court gave compensation of Rs. 35,000 as an interim measure without restraining his remedy to recover damages under private law. Justice Y.V Chandrachud categorically said "the State must repair the damage done by its officials to the petitioner. This right to compensation is in the nature of palliative for the unlawful acts of instrumentalities that act in public interest and put the State's sovereign power as their shield." It has been observed by the Court that the object of public law is not only 'to civilize public power', but also to assure citizens that they live under a legal system which aims to protect their rights and interests. This remedy is not in derogation of any other remedy under private law or criminal law.³⁴ It shows that the emphasis was laid on his injury in keeping with the rules of law of torts instead of being on the power that caused it. In a recent case the court has gone to the extent of providing relief for negligence of Public Health Officials.³⁵ A poor lady having a number of children got herself operated at a government hospital for complete sterilization but she gave birth to a child later. The court awarded damages to the lady equal to the cost of bringing up the unwanted child upto the age of eighteen. This establishes the principle of vicarious liability of the

state for negligence of the medical officials. The court regards running of hospitals as a non- sovereign function.

In *Sebastian M. Hongray V. Union of India*³⁶, the scope of the remedy in *Rudal Shah* was extended to cases where the army takes people into custody and fails to explain his whereabouts when asked to produce him. The damages given by the court were upto Rs. 1,00, 000 to each of the wives of the two persons.

In *Bhim Singh V. State of Jammu and Kashmir*³⁷ cases of unlawful and malicious detention were also covered. The court granted damages of Rs. 50,000 and opined that police torture and custodial violence if not effectively controlled, are abuse of every legal system.

An important case deserving mention is *Saheli V. Commissioner of Police*³⁸. The illegal acts of Delhi policemen were brought to notice by a women's organization. A lady tenant was harassed by the landlord in conspiracy with the police so that she may vacate the house. She was attacked and molested with the help of police officials, implicated in a false case, and called to the police station where her nine year old son was slapped and beaten. After a few days, the boy died, for which exemplary damages were claimed by 'Saheli'. The court ordered compensation of Rs. 75,000 to the mother of the deceased. The court also held that there will be no distinction between the case violating fundamental rights and legal rights.³⁹

The courts have thus departed from the proposition in *Kasturi Lal case*, though they did not openly denunciate it. In *Nilabati's case*, the court made it clear that it would not hesitate, in deserving cases, to go a step further and create a new relief to check abuse of power and preserve rule of law.

In *Peoples' Union for Democratic Rights V. State of Bihar*⁴⁰, twenty one persons died as a result of police firing at a peaceful meeting. The court gave compensation of Rs. 20,000 for each death, without prejudice to any just claim of compensation which could be filed by their legal representatives.

*D.K. Basu V. State of West Bengal*⁴¹ is an important case wherein the Supreme Court considered a petition under public interest litigation to deal with case of custodial violence and deaths in police lock-ups. The Supreme Court held that if the functionaries

³⁶ AIR 1984 SC 1026

³⁷ AIR 1986 SC 494

³⁸ AIR 1990 SC 513

³⁹ Also see *C. R. Reddy V. State AIR 1989 A.P. 235* where the rights of undertrial prisoners were involved. The police officials were held to have not guarded the prison properly to ensure safety of the prisoners.

⁴⁰ AIR 1987 SC 355

⁴¹ AIR 1997 SC 610

³³ *Rudal Shah V. State of Bihar* (1983) 4 SCC 141

³⁴ *Supra*, note 23, p. 30

³⁵ *State Of Haryana V Santra AIR 2000 SC 1888*

of government become law breakers, it is bound to breed contempt for law and encourage lawlessness. In its effort to set a human rights trend, the court said that right to life cannot be denied to convicts, undertrials, detainees and others in custody, except according to procedure established by law. It was also stated by the court that pecuniary compensation is an effective remedy for redressal of infringement of right under Article 21 by public servants. The objective was to apply balm to the wounds and not punish the offender. The court also gave some directions to all states regarding arrest and detention. The above view is now followed and monetary compensation can be awarded for custodial death or torture in civil proceedings too. The nature of liability would remain same, irrespective of the forum.⁴² Indeed, the human rights angle is very important in assessing the accountability of the State in its unjustified actions.

Conclusion:

The hypotheses thus stands proved that the notion of state liability has undergone a transition from being state- centric to becoming individual-centric. Various trends like the exemplary damages trend, human rights trend and checking the abuse of power by the officials can be noticed. In a welfare State, it is essential to establish a just relationship between the rights of individuals and the responsibilities of the State. No democratic system guaranteeing elected representatives to run the government can permit an executive as a sovereign. The common law doctrine of absolute immunity of the crown was never applied in India in toto. The National Environment Tribunal Act, 1995 prescribes the 'no fault liability' or the strict liability of the State. The Law Commission has rightly observed in its First Report that there is no reason why the Government should not place itself in the same position as private employer, subject to the same rights and duties as imposed by the Statute. In fact, this is what the doctrine of Rule of Law commands; and this doctrine is the part of basic feature of the Constitution. Thus, not only legally, the State becomes constitutionally liable to compensate for injuries generated by its officials. The above discussion also highlights the role of the courts as guardians of the fundamental as well as legal rights of the people. However, in the present changing conceptions of State Liability, a more vigorous approach is desirable to safeguard the civil liberties so that the employees of the State do not commit tortious actions in the garb of sovereignty. There are many cases of this genre which do not get

determined, even after lapse of considerable time. The rights of these citizens remain violated. The enforcement agencies, therefore, have to be strengthened besides the active interest taken by the courts in awarding effective remedies. It is only by such rule that justice can be rendered to the helpless victims against the monolithic institution of the State and its atrocities to keep pace with the growth of jurisprudence in this area.

References:

1. Jain M.P. : Indian Constitutional Law, 5th Ed. Wadhwa and Company, Nagpur, 2004
2. De D. J.: The Constitution of India, Vol.2 Asian Law House, Hyderabad 2002
3. Shukla, V.N. :The Constitution of India, 10th Ed. Eastern Book Company, Lucknow 2001
4. Seervai H.M.: Constitutional Law of India, A Critical Commentary, 3rd Ed., N.M. Tripathi Pvt. Ltd. Bombay 1984
5. Rogers, W.V.H.: Winfield and Jolowicz on Torts, 12th Ed. Sweet and Maxwell, London 1984
6. Bangia, R.K.: Law of Torts, 10th Ed. Allahabad Law Agency, Allahabad, 1991
7. Ashwin Abhinav: Government Liability in Torts in the 21st Century, AIR Journal, Vol.90 Feb. 2003
8. Yadav Surendra: Changing Dimensions of State Liability in India, Indian Socio-Legal Journal, Vol.29, 2003
9. Peninsular and Oriental Steam Navigation Company V. Secretary of State 5 Bom HCR App. 1
10. Secretary of State V. Moment 40 IA 48
11. Secretary of State V. Hari Bhanji 1882 5 Mad 273
12. Union of India V. Harbans Singh AIR 1959 Punj 39
13. Secretary of State V.Cockraft AIR 1915 Mad 993
14. State of Rajasthan V. Vidyawati AIR 1962 SC933
15. Kasturilal Rallia Ram V. State of Uttar Pradesh AIR 1965SC 1039
16. State of Gujarat V. Memon Mohd. AIR 1967 SC 1885
17. Nilabati Behra V. State of Orissa AIR 1993 SC 1960
18. All India Lawyers Union V. Union of India AIR 1999 Del 120
19. M.C.Mehta V. Union of India 1987 1 SCC 395
20. Rylands V.Fletcher 1868 LR 3 HL 330
21. Union Carbide Corporation V. Union of India AIR 1990 SC 273
22. State of Madhya Pradesh V. Chironjilal AIR 1981 MP 65

⁴² Yadav Surendra: Changing Dimensions of State Liability in India, Indian Socio-legal Journal, Vol.29, 2003

23. Satyawati Devi V. Union of India AIR 1960 SC 610
24. State of Madhya Pradesh V. Ram Pratap AIR 1972 MP 219
25. State of Uttar Pradesh V. Hindustan Lever AIR 1972 All 488
26. N. Nagendra Rao and Co. V. State of Andhra Pradesh AIR 1994 SC 2663
27. Common Cause, a Registered Society V. Union of India AIR 1999 SC 2979
28. Shyam Sunder V. State of Rajasthan AIR 1974 SC 890
29. Chairman, Railway Board V. Chandrima Das AIR 2000 SC 988
30. Rudal Shah V. State of Bihar (1983) 4 SCC 141
31. State of Haryana V. Santra AIR 2000 SC1888
32. Sebastian M. Hongray V. Union of India AIR 1984 SC1029
33. Bhim Singh V. State of Jammu and Kashmir AIR 1986 SC 494
34. Saheli V. Commissioner of Police AIR 1990 SC 513
35. C.R. Reddy V. State AIR 1989 AP 235
36. PUDR V. State of Bihar AIR 1987 S C 355
37. D.K. Basu V. State of West Bengal AIR 1997 SC 610.

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