



Research Paper

A Study on Tortious Liability and Remedies

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ABSTRACT

The essential remedy for a tort is an action for damages but there are other remedies also for example injunction may be obtained in addition to damages in certain cases of wrongs or an action by the plaintiff himself without going to the court ie, self help

KEY WORDS – Tort, injunction, damages, breach of duty, remedies, law reforms, appropriate cases, National Commission.

I. INTRODUCTION

The provision governing state liability for tortious acts of its employees is based on Article 300 of the Constitution of India. Article 300 allows for actions to be brought by and against the Government of India or the state in the name of the Union or State respectively. This provision expressly permits the imposition of civil liability on the Government of India and the Government of every state. But ultimately, these do not provide any substantive guidance as to the scope of liability, so hence reference must be made to certain relevant judgments.

As there exists an absence of codified statutes in the subjects of 'Tort', it leads to a situation where a common man has to approach the judiciary to get his rights enforced. State liability and the remedies available is been discussed in this assignment. It throws light into both private law remedies under statutes as well as the Constitutional or the public law remedies.

TORTIOUS LIABILITY OF THE STATE

The State Liability for the acts of omission committed by its servants, not being a static concept, has been governed by written or unwritten laws. Liability of the state for the tortious acts of its servants is known to be the Tortious Liability. It makes the state liable for the acts of omission or commission, voluntary or involuntary and brings it before Court of law in a claim for non liquidated damages for such acts. This liability is also a branch of Law of Torts. Law of Torts like various other laws has travelled to India through the British in India and now stands varied due to being regulated by certain local law or statutes and also specific Constitutional provisions.

But to what extend the executives would be liable for the torts committed by its servants is a complex problem. The liability of the government focuses on the recognition of liability as well as to provide compensation to the citizens especially by the event of legal injury.¹

REMEDY IN PRIVATE LAW FOR BREACH OF DUTY

In Private Law, the plaintiff can seek any of the remedies like injunction, declaration of right or ordinary action for non-performance of duties. In case any of the above remedies is not available to the victim, it is necessary to protect the rights of the aggrieved with monetary compensation. Generally the wrong doer alone will be liable for the act but in certain circumstances a person will be liable for wrong of another, turned as vicarious liability.

At present, if a wrong is committed by the state, the aggrieved party can institute a suit against the state in the civil court. Similarly civil court suits may be resorted to in case of violation of fundamental rights. Elaborate trial is conducted and after taking evidence if the damage or wrong is established money compensation for the damage suffered by the plaintiff is ordered. The compensation will be equivalent to the harm suffered by

¹ K.Indumathi Liability of the State in Tort, 120 IJOPAM 1974 (2018).

the injured party. It will be decided by the court and is left to the discretion of the court. This procedure is followed in the private remedy under law of torts.

REMEDY IN PUBLIC LAW FOR BREACH OF DUTY

State being an artificial person, can act only through its agents and servants. Question may arise as to whether the act of the servant or agent should be treated as that of the state, for the purpose of liability.

If the wrong is committed by the officers of the state, the aggrieved can file a suit against the wrong doer for getting compensation from him.

Even during vedic period, duties of the king and liability arising out of the breach was dealt with in the Hindu Dharma Shastras. Duties of the king included the protection of his subject and their property. If failed king had to compensate the subject from the treasury. With the advent of the British rule, the principles of common law to be followed in India, the applicability of the prerogative of the king also came up. The crown was not liable in tort even though there was social necessity for a remedy against the crown as employer. So the crown enjoyed certain privileges. The liability of the state in India relating to tort claims is governed by public law principles inherited from British Common Law and the provisions of the Constitution of India. However during the period when the governance of India was being carried on by East India Company, doubts were raised as to how far, it could claim immunities, enjoyed by the Crown in England. British government took over the administrative control of India from the East India Company in 1858. This Act transferred the power to rule the country to her majesty and also made the Secretary of state in Council liable for tortious acts of their servants committed in the course of employment.

PRE-CONSTITUTIONAL JUDGEMENTS

The very first important judgment, which considered state liability for tortious acts of public servants was *P & O Steam Navigation Co v. Secretary of State*.² This case involved a claim for damages for injury caused to the appellant's horse due to the negligence of workers in a government dockyard. The issue was whether the Secretary of State would be liable for negligence. Peacock C.J recognized a crucial distinction between sovereign and non-sovereign functions. Thus if a tort was committed by a public servant in the exercise of sovereign functions, no state liability would arise.³

This distinction between sovereign and non-sovereign function was followed in *Nobin Chunder Dey v. Secretary of State*.⁴ In this case, a claim for damages was brought in connection with the issuance of a government licence. The claim was ultimately rejected by the court as it related to exercise of a sovereign function. Subsequently, this distinction was relied on to repel state liability for tortious acts of public servants where injury was caused in connection with the maintenance of military roads,⁵ wrongful conviction,⁶ wrongful confinement⁷, maintenance of public hospitals⁸ etc.

In contrast to the above trend, a few High Courts adopted a much narrower view of the ambit of sovereign functions. The most significant example of this can be seen in the decision in *Secretary of State v. Hari Bhanji*.⁹ In this case, Turner, C.J. rejected the plain distinction between sovereign and non-sovereign functions, and held that immunity from liability for tortious acts of public servants would only be available in respect of acts done in exercise of sovereign power and without sanction of a statute i.e. acts of state. For acts done pursuant to a statute or in exercise of powers conferred on a public servant by a statute, no immunity would be available, even though such acts might be in exercise of sovereign powers. This decision seems to be one of the earliest indications of the distinction between executive acts done under a statute, a distinction which seemed to have been glossed over in later judgment in *Kasturilal Ralia Ram Jain v. State of Uttar Pradesh*.¹⁰

POST-CONSTITUTIONAL JUDGEMENTS

In the case of *State of Rajasthan v. Vidhyawati* ¹¹ a government servant negligently drove a government vehicle and injured a pedestrian who later succumbed to his injuries. The Supreme Court followed the decision of

² Bom HCR App.P.1

³ Mahendra Pal Singh, *Constitution Law Of India* 905 (12th Ed.2015)

⁴ (1876) ILR 1 Cal .12

⁵ *Secretary of State v Cockraft* , AIR 1915 Mad 993

⁶ *Mata v Secretary of state* AIR 1931 Oudh 993

⁷ *Gurucharan v State of Madras* AIR 1942 Mad 539

⁸ *Etti v Secretary of State* AIR 1939 Mad 663

⁹ (1882) ILR 5 Mad 273

¹⁰ AIR 1965 SC 1039

¹¹ AIR 1962 SC 933

Peacock C.J in P & O Steam Navigation Co. to hold that the Government of Rajasthan would be liable for the tortious acts of its servants like any other private employer.

The decision in Vidhyawati was analysed by the Supreme Court in a subsequent decision in Kasturilal Ralia Ram Jain v. State of Uttar Pradesh¹². In this case, a quantity of gold seized from the plaintiff by the police and kept in police custody was misappropriated by a police constable. The plaintiff raised a claim against the Government of Uttar Pradesh and argued that the loss was caused due to the negligence of police officers. The Supreme Court rejected the claim raised by the plaintiff and affirmed a more expansive view of sovereign immunity.¹³

Ultimately, the Supreme Court held that state liability for tortious acts of public servants would not arise if the tortious act in question was committed by the public servant while employed in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the state. This broad formulation of the definition of sovereign functions remitted in substantial expansion in the scope of sovereign immunity.¹⁴ In Shyam Sunder v. State of Rajasthan¹⁵, the Government of Rajasthan has held vicariously liable for the death of a person sent on famine relief work. It was held that famine relief work could not be considered as a sovereign function as it could be carried out by private individuals also.

Similarly, in, Chairman, Railway Board v. Chandrima Das¹⁶ the establishment of guest houses at railway station was not considered as a sovereign function.

Hence distinction between sovereign and non-sovereign function remained rather difficult.

CONSTITUTIONAL REMEDIES

Supreme Court, in certain landmark decisions such as Rudul Shah v. State of Bihar¹⁷, and State of Andhra Pradesh v. Challa Ramkrishna Reddy,¹⁸ recognised state liability for sets of public servants that infringed Fundamental Rights, including tortious acts of public servants. The appropriate remedy in such circumstances was to file a petition under Article 32 or Article 226 of the Constitution.

In Nilabati Behera v. State of Orissa,¹⁹ the Supreme Court imposed liability on the State of Orissa and awarded damages pursuant to a petition for relief against the infringement of fundamental rights. The Supreme Court observed that such a remedy was 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 in private law in an action based on tort.

This decision was recently followed in Sanjay Gupta v. State of Uttar Pradesh,²⁰ where Supreme Court ordered the state to pay interim compensation to the victims or their legal representatives for a fire accident that occurred at a brand show area. It was held that the state was *prima facie* liable to pay compensation as its servants gave the organisers of the show, permission to hold the exhibition without ensuring that proper fire safety arrangements had been made.

PRIVATE ACTION UNDER STATUTES

A number of statutes impose liability to pay compensation for the tortious acts of persons which cause death or injury to the person or property of others. Such actions in private law are permitted by the Fatal Accidents Act of 1855, Motor Vehicles Act of 1988, Consumer Protection Act of 1980 etc.

The state, like any other private person can be sued under these statutes. Thus vicarious liability of the state can arise under these statutes for tortious act or omissions of its employees in the course of their employment. In the case of State of Maharashtra v. Kanchanmala Vijaysing Shrike²¹ claim was brought under section 92A of the Motor Vehicles Act for compensation caused due to negligence of the driver of a State Government vehicle, the State Government was held vicariously liable as negligence of driver was in the course of their employment.

However, the contours of vicarious liability of the state under these statutes are determined in accordance with Article 300 and the case law thereon. Thus cases under these statutes also relied on the distinction between sovereign and non-sovereign functions of the state to determine whether the state was vicariously liable in tort.

¹² AIR 1965 SC 1039

¹³ Ramaswamy Iyer The Law of Torts, 853- 854 (10th edition 2007)

¹⁴ Kasturilal, n 17 Para 23

¹⁵ AIR 1974 SC 890

¹⁶ AIR 2000 SC 988

¹⁷ (1983) 4 SCC 141

¹⁸ (2000) 5 SCC 712

¹⁹ (1993) 2 SCC 373

²⁰ 2022 INSC 420

²¹ AIR 1995 SC 2499

The Supreme Court in *Pushpa Thakur v. Union of India*²², was required to consider the question of whether sovereign immunity was available as a defence to claims against the state under the Motor Vehicles Act. But, the court left the position ambiguous, while the plea of sovereign immunity of the state was not allowed on the specific facts and circumstances of the case, the court did not expressly rule out the applicability of the sovereign immunity to claims arising against the state under the Motor Vehicles Act.

Similarly, in medical negligence case under the Consumer Protection Act, 1986, the State was held vicariously liable to pay compensation on the ground that maintaining and running a hospital was not a sovereign function²³. This has been followed in *State of Haryana v. Smt. Santra*²⁴ to hold the state vicariously liable for the negligence of the doctors in a government hospital in performing a sterilization operation. Thus, even when relief is sought under these statutes, it seems clear that the individual seeking relief would be left without any remedy against the state where the negligent act or omission of its servant is identified as being done in the performance of a sovereign function.

LAW REFORMS IN INDIA

Reform of the laws relating to vicarious liability of the state in tort was taken up as early as 1956. First Law Commission Report 1956.

Law Commission of India in its first report acknowledged the uncertainty that existed with regard to liability of the state for tortious acts of its servants. The decision of the Madras High Court in *Hari Bhanji* was approved by the Commission as laying down the correct position on the extent of state liability. Acknowledging, the increased participation of the state in commercial activities and its public welfare initiatives, the commission recommended that the extent of liability of the state should be the same as that of a private employer, subject to certain limitation. Though a draft Bill was introduced in the Lok Sabha in 1967, but this was lapsed by the dissolution of the Lok Sabha in 1971.

National Commission to Review the Work of the Constitution

Commission in 2001 surveyed the decisions from the Pre-Constitution era and judicial developments post 1950,. The paper noted that the Post-Constitution decisions on the extent of state liability in tort have adopted conflicting stances in applying the distinction between sovereign and non-sovereign functions.

DOCTRINE OF APPROPRIATE CASES

This doctrine is popular under the head of Constitutional tort remedies²⁵. This doctrine was propounded by the Honourable court in the case of *Bhim Singh v. State of Jammu and Kashmir*²⁶. In this case, the question was with regard to the detention of a Member of Legislative Assembly from attending the session of the House. His wife filed a Habeas Corpus under Article 32. Here the court choose to award monetary compensation by way of exemplary costs. The supreme restricted the Doctrine of 'Appropriate Cases' in *M.C. Mehta v Union of India*²⁷. Here court held that jurisdiction under Article 32 is both preventive and remedial and hence has the power to grant compensation to the appropriate cases. In *Saheli v. Police Commissioner, Delhi*²⁸ also compensation was awarded by the Supreme Court for violation of fundamental rights considering it to be an appropriate case. Though it seems that compensation as a remedy both in private law and public law, court laid down the difference between the two in the case of *Nilabati Behera*²⁹, where court quoted the following proposition.

"It may be mentioned straight way that award of compensation in a proceeding under Article 32 by this court or under Article 226 by the High Court is a remedy available in public law, based on strict liability, where there is contravention of fundamental rights, principle of sovereign immunity does not apply, even though it is a defence in private law in an action based on tort."

So there lies a clear distinction as to the compensation awarded by the courts in public and private law remedies.

²² AIR 1986 SC 1199

²³ *Achutrao Harihau Khodwa v State of Maharashtra* AIR 1996 SC 2377

²⁴ AIR 2000 SC 1888

²⁵ Durga Das Basu, *Constitutional Law of India* 354 (7th ed 1998)

²⁶ AIR 1986 SC 494

²⁷ AIR 1987 SC 1086

²⁸ AIR 1990 SC 513

²⁹ (1993) 2 SCC 373

II. CONCLUSION

Award of compensation at the hands of the courts for constitutional violation is a creative jurisprudence evolved by our courts. But however, the criteria adopted by the courts in quantifying the compensation is been subjected to varied criticisms; as it failed to lay down a definite criterion in determining the compensation. But it has also to be understood that the quantum of compensation will depend upon the peculiar facts of each case and there exists no straight jacket formula in that behalf.

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BIBLIOGRAPHY

- [1]. DURGA DAS BABU, CONSTITUTIONAL LAW OF INDIA, 7thed 2003,
- [2]. WADHWA AND COMPANY NAGPUR.
- [3]. RAMASWAMY IYER, THE LAW OF TORTS, 10thed 2007, LEAS NEXIS BUTTERWORTHS.
- [4]. V.N.SHUKLA, CONSTITUTION OF INDIA, 12thed 2015, EASTERN BOOK COMPANY.
- [5]. K.INDUMATHI, LIABILITY OF THE STATE IN TORT ,120 IJOPAM 1974 (2018).